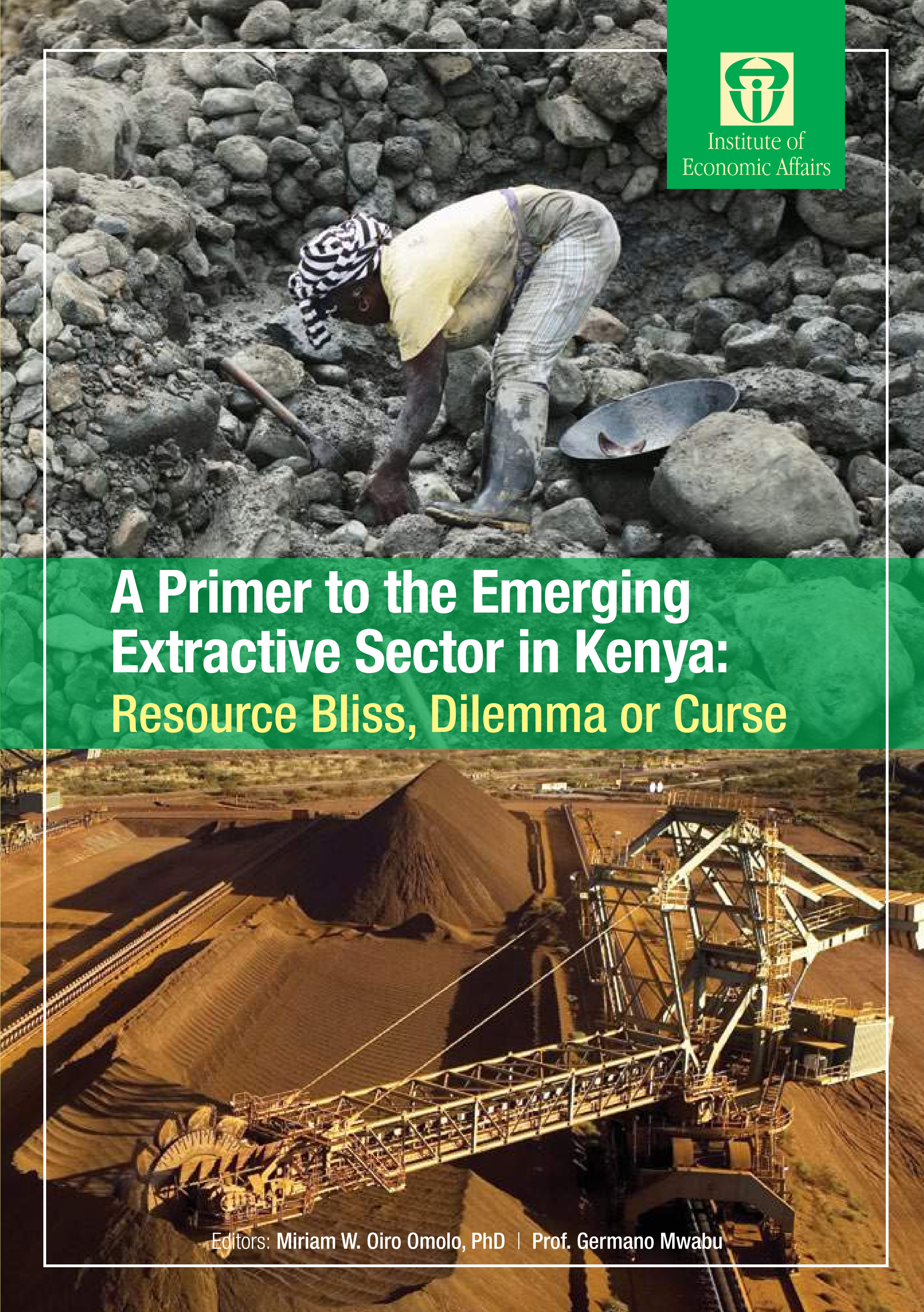
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Institute of Economic Affairs

November 2014

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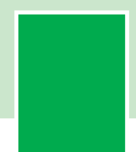
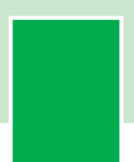


Acronyms and Abbreviations

AERC	African Economic Research Consortium
AfDB	African Development Bank
AG	Attorney General
AHSG	Africa's Heads of State and Government
AMV	African Mining Vision
ASAL	Arid and Semi-Arid Land
ASB	Accounting Standards Board
ASM	Artisanal and Small-scale Mining
AU	African Union
CANCO	Community Action for Nature Conservation
CBN	Cost of basic needs
CBO	Community Based Organization
CBROP	County Budget Review & Outlook Papers
CFSP	County Fiscal Strategy Papers
CGS	Council for Geosciences
CIC	Commission for Implementation of the Constitution
CRA	Commission on Revenue Allocation
CS	Cabinet Secretary
CSO	Civil Society Organization
DCT	Direct Cash Transfers
DFID	Department for International Development
DROP	Daily Rate of Production
EA	Environmental Audit
EAC	East African Community
EI	Extractive Industries
ES	Extractives Sector
EIA	Environmental Impact Assessment
EIS	Environmental Impact Strategic Study
EITI	Extractive Industry Transparency Initiative
EMCA	Environmental Management and Coordination Act
ERC	Energy Regulatory Commission
ESAMI	Eastern and Southern African Management Institute

ESIAs	Environmental and Social Impact Assessments
FDI	Foreign Direct Investment
FoLT	Friends of Lake Turkana
GAPP	Generally Accepted Principles and Practices
GDP	Gross Domestic Product
GHG	Green House Gases
GOK	Government of Kenya
HDI	Human Development Index
ICT	Information, Communication and Technology
IEA	Institute of Economic Affairs
IEBC	Independent Electoral and Boundaries Commission
IFC	International Finance Corporation
IWG	International Working Group
JSE	Johannesburg Stock Exchange
KCSPOG	Kenya Civil Society Platform on Oil and Gas
KEFRI	Kenya Forest Research Institute
KENGEN	Kenya Electricity Generation Company
KFS	Kenya Forest Service
KIHBS	Kenya Integrated Household Budget Survey
KIPPRA	Kenya Institute for Public Policy Research and Analysis
KOGA	Kenya Oil and Gas Association
KRA	Kenya Revenue Authority
KWS	Kenya Wildlife Service
LAPPSET	Lamu Port Southern Sudan-Ethiopia Transport Corridor
MDG	Millennium Development Goals
MEMR	Ministry of Environment and Mineral Resources
MENA	Middle East and North Africa
MNC	Multinational Companies
MoU	Memorandum of Understanding
MPE	Ministry of Petroleum and Energy (Norway)
MPRD	Mineral and Petroleum Resources Development
MTEF	Medium Term Expenditure Framework
MTP	Medium Term Plan
NAFFAC	National Fossil Fuels Advisory Committee
NCCAP	National Climate Change Action Plan
NEAPC	National Environmental Action Plan Committee
NEC	National Environmental Council
NEFT	National Environment Trust Fund

NEMA	National Environment Management Authority
NET	National Environment Tribunal
NGO	Non Governmental Organization
NMK	National Museums of Kenya
NOCK	National Oil Company of Kenya
NPEP	National Poverty Eradication Plan
NRC	Natural Resource Charter
NUPAC	National Upstream Petroleum Advisory Committee
NWA	National Water Authority
PBO	Public Benefit Organization
PCC	Public Complaint Committee
PDMO	Public Debt Management Office
PEA	Political Economy Analysis
PFM	Public Finance Management
PIEA	Petroleum Institute of East Africa
PIPs	Public Investment Programmes
PRSP	Poverty Reduction Strategies Paper
PSA	Petroleum Safety Authority (Norway)
PSC	Production Sharing Agreement
SAGCA	Strategic Governance and Corruption Analysis
SAMREC	South African Code for Reporting of Mineral Resources & Mineral Reserves
SEA	Strategic Environmental Assessment
SEC	Securities Exchange Commission
SERC	Standards and Enforcement Review Committee
SWF	Sovereign Wealth Fund
TAC	Environmental Impact Assessment Technical Advisory Committee
UN	United Nations
UNCITRAL	United Nations Convention on International Trade Law
UNCLOS	United Nations Convention on Law of the Sea
UPA	Upstream Petroleum Authority
V2030	Kenya Vision 2030
WHO	World Health Organization
WRMA	Water Resources Management Authority
WSRB	Water Service Regulatory Board



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This year marks the 20th anniversary of the Institute of Economic Affairs (IEA). Founded in 1994, IEA has grown in size and influence from a tentative beginning to become a leading think-tank in Kenya, providing a platform for informed discussions to promote good public policy. We are grateful for the ever- growing support.

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IEA formed a technical committee during the course of its research. The committee met periodically to review the five thematic areas of research. The research team provided progress of their analysis to the committee for sharpening. The contributions and constructive criticism of the technical committee to the research made it necessary to achieve the levels of prosperity for this project. The members of the technical committee were: Kwame Owino, Prof. Germano

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THE EXTRACTIVE SECTOR ANALYSIS AND POLICY ENGAGEMENT PROJECT

Miriam W. O. Omolo | Germano Mwabu

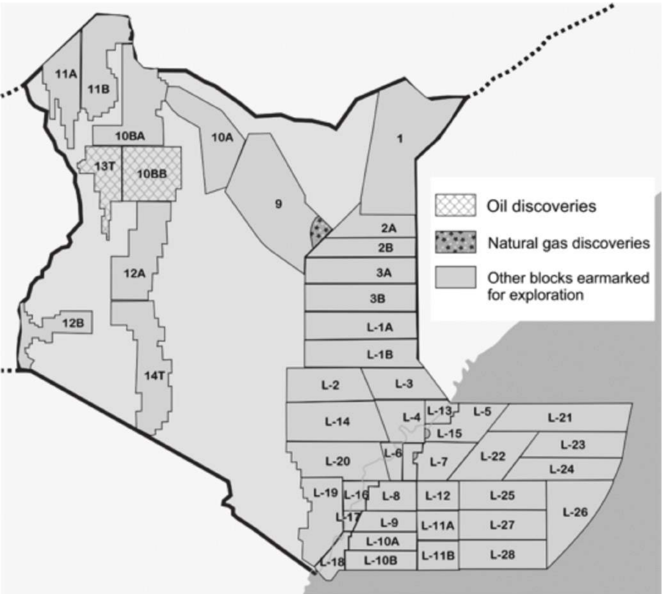
1 Introduction

In any economy, the extractive sector (ES) consists mainly of oil, gas and mining activities. This is a sector with great potential to enhance an economy. Indeed, experience in countries such as Norway, Canada, Botswana and Ghana suggests that extractives can be effectively managed to contribute to sustainable economic growth. Experience, however, in other parts of the world including Nigeria, the Democratic Republic of Congo (DRC), South Sudan, and the Central African Republic (CAR), suggest that extractives if not well managed can be a curse leading to conflict.

Presently, extractives in Kenya contribute approximately one per cent to gross domestic product (GDP). The sector is however emerging. In the recent past, there have been oil and more mining discoveries in Kenya. For instance, oil has been discovered in Turkana County, and there are new discoveries in the mining sectors for minerals such as titanium in Kilifi County and coal in Kitui County. In addition, Kenya is actively undertaking off shore explorations with the aim of making gas discoveries.

The growing extractive sector in Kenya means that there is need to give more attention to the social and economic dynamics of the sector. For instance, when Kenya discovered oil in Turkana County in March 2012, the Government was faced with emergent issues such as environmental implications, community obligations and rights, a suitable governance framework, and effective utilisation of resources generated from the sector.

Figure 1-1: Oil and Natural Gas Discoveries in Kenya



Source: NOCK and Ministry of Energy & Petroleum

There is little experience, expertise, knowledge, dialogue and public information on the extractive sector in Kenya. This comes against a background of high poverty incidence, where 48 per cent of citizens live below the poverty line. Poverty is more severe in some of the regions where oil, gas and minerals have been discovered. In areas like Turkana, conflict incidences are high and women and children are often the main casualties.

The extractive sector provides an opportunity to significantly contribute to poverty reduction and improve the well-being not only of a region, but an entire country. This will only happen if there is good resource utilisation and management, equitable sharing, effective policy dialogue, appropriate legislation, strong oversight by institutions such as Parliament and the Office of the Auditor General, and communities feeling the benefits of the extractives sector.

There are several risks if the discoveries in the extractive sector are not handled well. Some of the risks include:

- The risk of Kenya having the 'oil curse' and the 'Dutch disease'.
- Inadequate legislation that does not reflect Kenya's priorities.
- Incoherent and overlapping policies that do not harness the benefits that accrue from the extractive sector (ES).
- Social unrest related to misinformation on the benefits of oil, gas and mining.
- Misallocation of oil and gas revenues, such that communities and more specifically women, do not benefit.
- Illicit financial flows emanating from the ES operations.
- Lack of transparency and accountability mechanisms resulting in government negotiations with companies rather than direct bidding.

Mitigating these risks requires the involvement of key stakeholders such as the national and devolved levels of government, oversight institutions such as Parliament, private sector, and communities. Towards this, the Institute of Economic Affairs (IEA) Kenya has undertaken a series of research papers on the extractive sector. The aim is to provide more information on the sector, as well legislative and policy recommendations for action.

This research directly contributes to the country's overarching national vision and in particular, the Vision 2030 Second Medium Term Plan which is titled "Transforming Kenya: The Pathway to Devolution, Socio Economic Development, Equity and National Unity." The research examines the legal and institutional framework against the benchmarks for entrenching the rule of law in governance as envisaged under the Constitution of Kenya 2010. It tackles issues relating to the extractives sector from a perspective that entails democracy and public service delivery, transparency and accountability, equity as well as security, peace-building and conflict management. The research also examines the extent to which the legal, policy and institutional architecture fosters the social pillar of the country's vision, the countervailing relationships between these laws and institutions and how they promote or limit equity in the access, control and participation in the distribution of resources for better livelihoods. Further, it elucidates the extent to which education, training, health and environment are addressed in these laws and how they affect the ability of women, youth and other vulnerable groups to benefit from the extractives sector. Finally, the research also examines the extent to which

the laws and institutions advance the economic pillar of the vision through promoting local industries' participation and investment in key sectors including manufacturing and services, while ensuring that sectors such as agriculture are not neglected as the country's profile in the extractives sector becomes widened. The IEA has worked with the Vision 2030 Delivery Unit to conduct this research, as the unit seeks amongst other things, to position extractives as a driver of economic growth.

The report is organized into five major sections following this introduction, namely, chapters on the legal and institutional framework to promote good governance in extractive sector (ES); fiscal implications of a vibrant ES; gender and participation in ES; legislation on environment; and the political economy of the ES. The report concludes with recommendations for further research.

2 Overview of the Chapters

There are five focus areas of this research on the extractive sector in Kenya. These are: the legal and regulatory landscape, fiscal policy, the environment, gender, and the political economy.

The Legal, Policy and Institutional Framework of the Extractive Resources Sector in Kenya

In this foundational chapter, Edgar Odari reviews the major laws that affect the extractive sector operations in Kenya. He categorizes the laws into regional initiatives and national legislation that govern Kenya's extractive sector. The author then explains each law and how they affect operations in the sector. Some of the laws he reviews are: the Constitution of Kenya, the Mining Act, the Petroleum (Exploration and Production) Act, the Income Tax Act, the Environmental Management and Coordination Act, the Land Act and the Public Finance Management Act as well as draft legislation including the Petroleum (Exploration and Production) bill 2014, the Mining bill 2014, the Sovereign Wealth Fund bill 2014 and the Finance bill 2014, The author highlights areas that have not been addressed adequately in legislation, and potential areas of conflict as extractive sector operations take place. He also brings out the challenges of incoherence and overlaps in the laws, and how institutions interact within the legal framework amidst these challenges.

This review proceeds to make comparisons with legal frameworks adopted by countries like South Africa and Norway. The author provides an analysis of the fiscal implications of Kenya's legal structure and the risks of having the extractive sector laws operate outside the Public Finance Management Act. This chapter also includes recommendations on how to address gender imbalance in the legal framework using South Africa as an example. In addition, the review recommends that value addition laws go beyond licensing operations, to ensuring that downstream industries undertake value addition as well as supply of goods and services to upstream industries.

This review forms the backbone of this research project. Readers will find that it lays the foundation for revenue collection, gender empowerment and value addition, environmental management, national cohesion, and equitable development as envisioned in Kenya's Vision 2030. It is thus the basis for designing and implementing both short- and long-term policies to facilitate robust growth of an extractive sector that promotes gender equity and national cohesion.

Fiscal Implications of an Expanding Extractive Sector

Davis Osoro estimates the revenues that Kenya is likely to obtain from the extractive sector by undertaking preliminary calculations on revenues from oil, gas and mining operations. They build several revenue scenarios by comparing Kenya's oil reserves to those of Ghana and Gabon. They show that if Kenya has similar reserves to Ghana, the country is likely to produce 98,000 barrels of oil per day. However, if Kenya has similar reserves to Gabon, the country is likely to produce 237,000 barrels of oil per day. The authors go further and provide concrete estimates of Kenya's expected revenue by using a simple product sharing model to estimate how much the Kenya Government is likely to get from a barrel of oil under some plausible assumptions. Readers will be able to understand the realities of what we should be expecting from the extractive sector in terms of revenue from the oil, gas and mining sub sectors.

The authors also examine the possibility of increased government spending in light of anticipated oil revenues. The research includes key informant interviews on the implications of the oil revenues on total spending.

The research finds that both expenditure and debt are expected to rise and that private sector over subscription to the Eurobond is a good indicator of investor confidence in the country even with the rising debt. This research provides information on the expected revenues, expenditure and debt in the extractive sector.

Gender, Value Chain and Women Participation in the Emerging Extractive Sector

Miriam Omolo examines women's participation in the extractive sector from a gender perspective. She defines gender as a social construct which determines the roles, relations, and activities that are considered appropriate for men and women. The author highlights some of the roles society defines for men and women and how these roles play out in women's participation in the labour markets across sectors. This research also brings out the factors that determine women's participation within the extractive sector including the value chain, and other sectors such as Information, Communication and Technology (ICT) where women are likely to gain if strong linkages are created.

An innovative aspect of this chapter is the attempt to establish the proportion of Kenyan nationals employed in the mining sector vis-à-vis expatriates on the basis of data collected during the fieldwork for this project. Although the data is admittedly from a non-representative case study, the evidence it reveals about participation inequalities in the extractive sector is worth noting. In addition, the research brings out the quality and inequality of employment in the extractive sector particularly in the oil and gas sector. Reading through the chapter, the question of local content in outsourcing of services by extractive sector companies arises strongly. Readers should be able to judge for themselves whether from the case study, local companies are likely to gain from the extractive sector, specifically, is the country likely to develop the local micro, small and medium enterprises from the emerging extractive sector that

can support livelihoods of low-income persons? The chapter provides policy recommendations and action points that different players in the extractive sector should implement to ensure that women in particular gain from this emerging sector given their already low level of participation in it, and their dominance presence in micro and medium enterprises in the industry.

Managing the Extractive Sector: The Role of Legislation and Environmental Impact Assessment

Robert Chira reviews legislation that address various environmental concerns such as public health, soil erosion, endangered species, water rights and quality, air quality, noise and vibration, energy, cultural, historical, scientific and archaeological sites, land use and resettlement. He identifies the overarching environmental law in Kenya as the Environmental Coordination and Management Act of 1999 (EMCA, 1999). The purpose of the law is to establish institutions and mechanisms for supervising and coordinating all matters relating to the environment. The most powerful institution established by this law is the National Environmental Management Authority (NEMA) whose mandate is to coordinate all environmental activities in Kenya. The author reviews sector specific environmental laws such as the Water Act 2002, the Wildlife (Conservation and Management) Act, 2013, the Mining Bill 2014, the Forest Act 2005 and the Energy Bill 2014.

The chapter brings out the coherences and overlaps in the mandates of the various sectoral laws and policies with EMCA (1999), given that these sectoral laws and policies each address a component of environmental conservation. It is shown that the existing environmental laws and policies are inadequate in addressing the issues confronting the extractive sector, particularly the matters pertaining to environmental impact assessment, given that the laws were enacted before the oil, gas, and other natural resources were discovered. It is shown that although NEMA has properly laid emphasis on reviewing the environmental impact assessment documents prepared by investors, there should be increased focus on regulating the impacts associated with licensed projects that are already underway. The chapter points out overlaps in the environmental management laws and institutions and argues for the need to change them in view of recent natural resource discoveries that are bound to introduce new activities and operations in the extractive sector. The important issue of how to improve environmental management through the participation of the public in environmental impact assessment is brought out. The new approach is contrasted with current assessment practice as it happens under fragmented environmental laws.

The Political Economy of the Extractive Sector in Kenya

In this chapter, Chrispine Oduor, Leon Ong'onge, Miriam Omolo and Katindi Sivi-Njonjo analyze the political economy of Kenya's extractive sector. The extractive sector comprises a wide range of stakeholders who must interact through a political process in order to serve their competing interests. As the authors of the chapter point out, the stakeholders have varying degrees of

influence on the extractive sector that they exert in their attempts to achieve their interests. An important but often overlooked stakeholder in the extractive sector is the community in which a natural resource exists. The local community must provide a social license to private or public companies before they can begin exploitation of minerals. Oduor et al provide socio-economic profiles of the communities where new extractive resources have been found. The aim of the profiles is to establish perceptions of the communities about levels of their wellbeing in relation to natural resources and the extent to which they trust government authorities, and the resource extracting companies. The potential conflict between the community and outsiders in exploitation of natural resources is explored.

The authors create three hypothetical situations in which stakeholders pursue their conflicting interests through a political process and then examine the outcome in each scenario. The three scenarios are: resource dilemma, resource curse and resource bliss. In the resource bliss scenario, the Government has implemented the right policies for effective functioning of the extractive sector and the communities have given the extractive-sector companies the social licenses to operate. Consequently, the development objectives set out in the Kenya Vision 2030 are able to be achieved by 2024, six years earlier than intended. It is possible to tell from the chapter whether the country is on a dilemma, curse or bliss. The authors explain the types of policy measures that lead to each of the scenarios. The scenarios are useful in that they can help the stakeholders agree on policies that are appropriate for good governance of the extractive sector.

3 Further Research

This preliminary report does not provide all the answers to issues that are likely to confront the extractive sector in Kenya. The report is but a primer to understanding a few facets of the extractive sector. Given the 8-month time frame within which the research was completed, it was not possible to meet all key stakeholders for a detailed study of the sector. Even so, the key informant interviews that were conducted with a few stakeholders together with statistical analysis carried out on the existing data made it possible to generate tentative evidence as to what can be done to improve the performance of the extractive sector in Kenya, particularly with regard to its contributions to achieving the development objectives of Kenya Vision 2030. The report suggests that it is worth conducting an in-depth analysis of the five issues that it has explored, namely: (a) legal and institutional framework for promoting the growth of the extractive sector; (b) fiscal implications of a strong extractive sector; (c) gender equality within the extractive sector; (d) legal instruments for preserving and protecting the environment in an economy with an expanding extractive sector; and (e) analysis of political and economic processes and institutions through which the various stakeholders in the extractive sector interact to achieve their competing interests. There is need to undertake further research in these five focus areas by undertaking field research on representative numbers of stakeholders, and over a relatively longer time period.

THE LEGAL, POLICY AND INSTITUTIONAL FRAMEWORK TO PROMOTE GOOD STEWARDSHIP OF THE EXTRACTIVE RESOURCES SECTOR

Edgar Odari

1 Introduction and Background

Kenya's extractives sector is characterized by a wide range of minerals including soda ash, limestone, barite, fluorspar, gypsum, carbon dioxide, salt, manganese, soapstone, graphite, copper, gold, chromite, and nickel, among others. The country has also recently discovered a range of extractive resources, including niobium and rare earths, mineral sand deposits (including titanium ores such as retile, ilementine and zircon), coal, as well as oil and gas deposits. However, the sector has traditionally contributed marginally to the country's economic growth, accounting for about one per cent of the country's Gross Domestic Product (GDP) and three percent of total export earnings.

The recent discoveries of significant deposits of mineral resources have seen increased flows of investments into the extractives sector. The government has gazetted 46 blocks with five new exploration blocks available to investors. It has also put concessions for coal exploration, with about 400 million tonnes already proven reserves. Coal exploration is also taking place in the Taru Basin within Kwale and Kilifi counties. The country also has an ongoing project in Kwale County with resource tonnage of about 200 million tonnes of mineral sands as well as 140 million tonnes of ore reserves.

These developments have forced a rethinking of the sector's ability to be a key driver for growth and development. As a result, Kenya's Vision 2030 has included oil and other mineral resources as the seventh priority sector with a high potential of spurring the country's economic growth and development. In so doing, a number of emerging issues and challenges have been identified as impeding the ability of the sector to contribute to the country's growth. In the vision's Medium Term Plan (MTP), covering the period 2013-2017, key flagship projects include the review of the legal and regulatory frameworks and restructuring of institutions within the sector.

1.1 Statement of the Problem

The emergence of the extractive sector presents both an opportunity and a challenge for development and governance in the country. As an opportunity, the emergence of the sector offers Kenya an opportunity to potentially transform its economy. If well-managed, extractive resources exploitation could be key in addressing the infrastructural deficits in the country and the region, accelerate industrial growth and development, increase trade and investment, transform the agricultural sector, and upscale fiscal allocation in key aspects of human capital such as education and health. This would accelerate growth and development in the country and accelerate job creation. In contrast, when managed poorly, extractive sector resources could result to economic instability, social conflicts and lasting environmental damage.

There can be no doubt that the convergence of factors with mixed impacts in the country endemic rural poverty, insecurity and the rise of religious radicalism, nascent governance systems at the devolved level, climate change and its impact on ecosystem services and infrastructure, ongoing mineral exploration activities and existing biodiversity hotspotsÐwill define how best the country is able to harness these resources for economic transformation. The downside of the convergence and the emerging extractives sector would be a process that leads to the 'paradox of plenty' or what has come to be known as the 'resource curse', where the abundance in resources cannot be translated to tangible benefits for the country. This is a challenge that could result into the country being unable to meet its development goals as envisaged under Vision 2030.

The second MTP notes the existence of weakness of the legal and regulatory framework and proposes a number of flagship programmes and projects including restructuring of institutions within the sector. There are also ongoing efforts to review the legislative framework in the sector to reflect the principles of the Constitution of Kenya 2010 on governance of natural resources. To develop a transformative extractive sector, the country will need to anchor the governance of these resources within proper legal, policy, and institutional mechanisms which promote good stewardship in light of their finite nature.

Currently, there are several laws that govern the extractives sector. These include the Constitution of Kenya 2010, the Mining Act Cap 306, the Petroleum Exploration and Production Act Cap 309, the Income Tax Act Cap 470, the Land Act No. 6 of 2012, the Environmental and Land Court Act, the Environmental Management and Coordination Act No. 8 of 1999, and the Public Finance Management Act No. 18 of 2012. Legislation that is pending at various stages includes the Mining Bill 2014, the Petroleum Exploration and Production Bill 2014, the Energy Bill 2014, the EMCA Bill, the Access to Information Bill, the Sovereign Wealth Fund Bill, and the Community Lands Bill 2013. These legal instruments have various existing and proposed institutional frameworks to steer the extractives sector. It is important to establish the adequacy of the legal and institutional framework in steering the extractives sector. This study will, therefore, examine existing and proposed legal and institutional frameworks for the extractive sector, their coherences and overlaps and implications on Kenya's development objectives.

1.2 Objectives of the Study

The overall goal of the study is to generate information that can be used to establish legal, policy, and institutional frameworks for effectively managing Kenya's emerging extractive sector. The study is designed to achieve at least five interrelated specific objectives:

1. Review the laws and policies that govern extractive sector in Kenya and establish their coherences/ overlaps.
2. Review the institutional framework that govern extractive sector in Kenya and establish their coherences/ overlaps.
3. Review the new policy and law creation initiatives taking place on the extractive sector, their potential coherences and overlaps.

4. Establish the implications of the coherences and overlaps in the legal and institutional framework governing extractive sectors on:
   i. Fiscal management of extractive sector revenues with focus on contracts between government and private sector companies;
   ii. Conflict and lack of national cohesion;
   iii. Gender, economic empowerment, and local content value addition; and
   iv. Environmental protection and conservation sustainable resource use.

5. A comparative analysis of case studies involving international best practice and worst practice and the implications for Kenya's extractive sector.

1.3 Significance of the Study

This research study directly contributes to the country's overarching national vision, and particularly the Second MTP, under the thematic title "Transforming Kenya: The Pathway to Devolution, Socioeconomic Development, Equity and National Unity." It examines the legal and institutional framework against the benchmarks for entrenching the rule of law in governance as envisaged under the Constitution of Kenya 2010. It tackles issues relating to the extractives sector from a perspective that entails democracy and public service delivery, transparency and accountability, equity as well as security, peace-building and conflict management.

The study also examines the extent to which the legal, policy, and institutional architecture furthers the social pillar of the country's vision. In particular, the study looks at the countervailing relationships between these laws and institutions and how they promote or limit equity in the access, control and participation in the distribution of resources for better livelihoods. Further, it elucidates the extent to which education and training, health and environment are addressed in these laws and how they affect the ability of women, youth and other vulnerable groups to benefit from the extractives sector. Finally, the study will also examine the extent to which the laws and institutions further the economic pillar of the vision through promoting local industries' participation and investment in key sectors, including manufacturing and services, while ensuring that key sectors such as agriculture are not neglected as the country's profile in the extractives sector becomes widened.

1.4 Review of Literature

The new discoveries in the extractives sector in Kenya have sparked renewed interest by the state, industry, and members of the public, based on the assumption that the sector will generate revenues, create jobs and boost economic growth. This has sparked debate on measures the country needs to undertake to benefit from the natural resources and develop its economy.

However, a seminal critique of the enclave nature of production in the commodities sector (Singer, 1950), which addressed the complexion of hard commodities production in low-income economies argued that, as a general rule, the extraction of hard commodities occurred in isolation from the local economies in which the mines were based. As a result of the high capital-intensive nature of the process, few jobs were created, and there were weak linkages

to local suppliers. Singer contended that the beneficial spill overs from commodity production were largely reaped in the high-income countries, where the large foreign-owned mining companies were based. He further argued that specialization in the export of raw materials diverted scarce entrepreneurial activity and domestic investment away from manufacturing. This is in spite of the fact that manufacturing provided greater scope for skills development, technological progress, creation of new demand, and for the demonstration effect which was the promotion of diversified economic development.

According to Sachs and Warner (1997), resource abundance, when measured as the ratio of primary commodities exports to GDP, has a negative correlation with GDP growth. In their estimate, a doubling of the share of primary products in total exports between 1970 and 1990 resulted to a reduction in the annual GDP growth rate of between 0.62 and 1.51 per cent. Jourdan (2008) and Morris et al. (2011a) have concluded that abundant endowment of natural resources may speed economic transformation, economic diversification and poverty alleviation, depending on a country's industrial policy and broader economic policies. Industrial policies are particularly important as they help develop the linkages of the extractive sectors and the local economy, and they also establish measures for using resource rents and revenues to generate growth and employment in agriculture, manufacturing, and services sectors.

The current thinking on fostering linkages between commodity production and industrialization is shifting back to Staples Theory of between 1920 and 1930. The theory argues that, the development of the manufacturing sector in Canada is a result of linkages to the export-oriented fish and fur commodities sector (Innis, 1957). Wright and Czelusta (2004) have also concluded that, the development of manufacturing sectors in the United States between the nineteenth and twentieth centuries, as well as the recent development of industry in Australia and Norway, can directly be attributed to the synergies arising between commodities and production industry.

African literature regarding linkages and spill overs from Foreign Direct Investments (FDI) in Africa paints a gloomy picture. According to Morrissey (2012), the contribution of FDI to African economic growth has been limited. This is as a result of its being concentrated in the extractive sector which tends to foster few linkages. Furthermore, where these linkages are formed, they will tend to produce few spill overs on the wider local economy. African countries have thus only been able to secure direct employment, a share of export earnings, and some revenues from the extractives sector.

In their econometric studies, Bwalya (2006) and Akinlo (2004) indeed confirm that linkages in African extractives are few and shallow and that spill overs on the broader economy are miniscule. There is limited linkage between the extractive sector and other value chains within the country. United Nations Conference on Trade and Development (UNCTAD) (2013) concludes that, lack of linkages and limited absorptive capacity in local industries has combined to render FDI in extractives of limited use to host countries' development. This is confirmed in Fessehaie (2011) in a case study of copper mining in Zambia where it was established that, while mining companies in Zambia directed a significant share of their expenditures to the local procurement, the depth of local linkages through the element of value addition was low.

In the case of Tanzania's gold mining sector, Mjimba (2011) concluded that local goods and service linkages remained limited and restricted to low complexity and low criticality goods and services (mainly food and beverages and security). Critical supplies which are important to the buyer were largely imported, with virtually no local value addition. According to him, two main factors contributed to this phenomenon: skills deficit in Tanzanian industry; and the incoherent policy measures adopted by the Tanzanian government. In a case study of Ghana's gold mining sector, Larsen et al. (2009) established that liberalization of FDI in the extractive sector led to insourcing of previously outsourced activities, causing a reduction in local linkages. Furthermore, it established that, in areas where outsourcing was maintained, it mainly took place to foreign suppliers represented in Ghana. Moreover, all advanced inputs such as machinery and equipment were imported.

The issue of linkages can be viewed from three perspectives. These were developed in the linkages theory by Albert Hirschman in the 1960s. According to him, there are three major types of linkages from the commodities sector. First are the fiscal linkages. This entails the resource rents which the government is able to harvest from the commodities sectors in the form of corporate taxes, royalties and taxes on the incomes of employees. These rents can be reinvested in other sectors unrelated to commodities to promote industrial development. Second are the consumption linkages which entail the demand for the output of other sectors arising from the incomes earned in the commodities sector. The third forms of linkages are production linkages, both forward (processing commodities) and backward (producing inputs to be utilized in commodity production).

In developing an appropriate regulatory framework for the extractive sector, Hunter (2010) argues that the regulatory regime should go beyond the central element of regulating the granting of licenses and concessions for the resources. A proper regulatory regime should also incorporate policy factors and an appropriate taxation system in order to provide economic return to the state. It should also achieve good governance and transparency in the management of natural resources, in order to contribute to the national and regional economic development. Such framework must also consider issues of intergenerational equity. The framework must also balance between the interests of the investors and those of the state.

1.5 Methodology

The study will be carried out in two phases. The first phase will entail desk research involving the review and assessment of existing legal, policy and institutional frameworks. In this phase, academic literature will also be reviewed to determine the theoretical foundations for appropriate legal, policy and institutional frameworks governing the extractives sector.

The second phase will involve consultations with stakeholders through an administered questionnaire. Key informants will be identified through purposive sampling method both at the national and county level. Purposive sampling is most appropriate as it gives the study an advantage in selecting respondents who are familiar with the subject of inquiry, while also allowing for representation of the various groups with interests in policy formulation in the

sector. The key data types will be qualitative from secondary data sources, complimented by select primary sources.

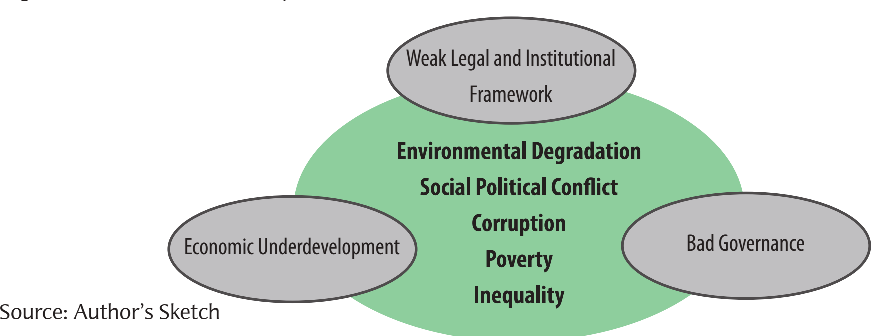
1.6 Conceptual Framework

The legal and institutional framework governing the extractives sector determines the extent to which an economy will achieve meaningful economic development from the exploitation of its natural resources. If a legal framework is inappropriate, it can lead to economic underdevelopment and in some extreme cases very easily result in 'Dutch disease', an economic situation where the predominant export commodity is from oil and gas sector leading to less than optimal utilization of other non-mineral resource sectors such as agriculture, manufacturing and services sectors. This study uses a framework that analyses the interaction between the legal and institutional environment, its impact on the state of governance and the resultant impact on level of economic development. This is a cyclic relationship that is hereby referred to as the vicious cycle of extractives governance.

If the three main factors that determine the economic and social outcomes of the extractives sector include the legal and institutional environment; the state of governance; and the level of economic development, constantly interacting and influencing each other, one can reasonably observe a vicious cycle. Many resource-rich countries in Africa are trapped in a never-ending cycle of bad laws leading to poor governance and subsequently resulting in economic underdevelopment, which entrenches the culture of corruption and bad rent-seeking. Such economies, because of the inappropriate laws at the start, find it difficult to achieve the desired legal and institutional reforms necessary to avoid the 'resource curse' and the 'Dutch disease'.

The vicious cycle works in the following way: weak or inappropriate policy, legal and institutional framework in the extractives sector leads to an environment of bad governance and corruption as the government elites and special interest groups exploit the weak system in order to gain private rents. This then leads to economic underdevelopment and even regression, characterized by environmental degradation, social and political conflict, corruption, poverty, and inequality. The resulting economic underdevelopment reinforces bad governance as there develops a critical group which benefits from the weak institutional frameworks thereby inhibiting legal reforms and instead feeding the informal systems which emerge. This is illustrated in Figure 2-1.

Figure 2-1: The Vicious Cycle of Extractives Governance



Source: Author's Sketch

In order to achieve a transformative extractives sector, there is need to turn this vicious cycle into a virtuous cycle through the development of sound and appropriate legal and institutional frameworks governing the extractives sector. This will result to good governance in the extractive sector and lead to economic transformation, social stability and development, and political cohesion resulting to inclusive growth through poverty alleviation and fair income distribution. The study will, therefore, review and critically assess whether the existing legal and institutional framework is appropriate for the transformation of the extractives sector in Kenya with a view to providing policy suggestions for enhancing the legal and institutional framework of the sector.

1.7 Data Sources and Description

The study will be conducted through desk research, key informant interviews and fieldwork in regions with extractive resources. The desk research will involve a review of the laws and policies on the extractives sector, as well as related literature on the subject matter. This will be complemented by one-on-one interviews with industry stakeholders, including relevant government ministries and agencies including Ministry of Energy and Petroleum, Ministry Mining, Ministry Planning and Devolution as well as Ministry of Finance. Agencies such as the Commission on Revenue Allocation, the National Environmental Management Authority and the Kenya Revenue Authority will also be included. Private sector players, including associations on oil, gas, and mining, investors and suppliers will also be interviewed. Finally, interviews with local governments in resource-rich regions will be conducted to better understand the extent to which county-level legislation has addressed the issue of governance of resources and whether it is complementary to or conflicts with national legislation.

2 The Legal, Policy and Institutional Frameworks Governing The Extractive Sector In Kenya

2.1 Background

Kenya's legal architecture on the extractive sector is found in a number of legal instruments. For the purposes of this study, focus will be given to the petroleum sector laws, mining sector laws and cross-cutting laws. Particularly, attention will be paid to the Constitution of Kenya 2010, the Petroleum (Exploration and Production) Act, the Income Tax Act, the Mining Act, the Environmental Management and Coordination Act, the Public Finance Management Act, and the Land Act. Further attention will be given to ongoing legislative processes to reform laws for the sector, including the Petroleum Exploration and Production Bill 2014, the Mining Bill 2014, the Energy Bill 2014, and the Sovereign Wealth Fund Bill 2014. These are the main instruments that regulate the sector, although there are other laws that directly affect it.

2.2 National Policy Frameworks on the Extractives Sector

The overarching policy direction on the extractives sector is contained in the second Medium Term Plan (MTP) of Kenya's Vision 2030. Under this framework, oil and other mineral resources are identified as falling under the seventh priority sector. The plan notes that, even though the sector has traditionally accounted for only one per cent of GDP and three per cent of total export earnings, recent discoveries of oil, gas, and other mineral resources point to an increasing importance of the sector to contribute to increased export earnings, higher GDP growth, broader social development, and a major spur for infrastructure development and job creation.

The second MTP goes on to list the emerging issues and challenges in the sector as well as propose programmes and projects for the sector. Among the listed challenges include huge financial outlays for exploration and production of oil, gas, and other mineral resources; the need to attract capital for exploration and production activities; limited technical capacity and shortage of specialized local manpower in mining, petroleum, geology, geophysics and reservoir and production engineering; and inadequate development of infrastructure, as well as a weak legal and regulatory framework.

It goes on to list programmes and projects of establishing commercial viability, developing the requisite infrastructure and production in the extractives sector. Flagship projects include restructuring of the institutions within the sector, enhancing primary data acquisition, analysis and interpretation in the open blocks so as to make them attractive to investors, establishment

of an internationally accredited mineral certification laboratory and audit agency, and creation of special mineral processing economic zones, among others. Other programmes and projects are enumerated in the MTP as well as the policy, legal, and institutional reforms to be undertaken in the sector.

2.2.1 The Draft National Minerals and Mining Policy

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

The policy objectives set out in the draft are stated to include ensuring that Kenya's mineral endowment is managed on a sustainable economic, social and environmental basis and that there is an equitable sharing of the financial and developmental benefits; encouraging local and foreign private sector participation in the exploration for, and commercial exploitation of, mineral resources; achieve a socially acceptable balance between mining and the physical and human environment and ensure that all participants in the mining sector observe internationally accepted standards of health, mining safety, and environmental protection, among others.

The policy proceeds to develop strategies for the implementation of the policy on a number of key thematic issues, including regulating the mining sector; mineral licensing; geological and mineral data and information; access to land mineral operations; health, safety and environmental regulation in mining, fiscal policy for mining, marketing, mineral potential and value addition; securing the maximum benefits for mining, mineral benefit-sharing, local participation and artisanal and small-scale mining operations. The draft policy proceeds to set out an institutional framework and implementation plan for the stated objectives.

2.2.2 The Draft National Energy Policy

The draft national energy policy deals with many aspects in the energy sector. With regards to extractive resources, the policy specifically addresses petroleum and coal. It notes that Kenya had no known commercial reserves of petroleum until March 2012 when oil was discovered

in Northern Kenya, leading to a lot of interest in the sector. In order to fast-track petroleum discovery in other exploration blocks in the country, the policy notes that the government shall intensify primary data acquisition to make the available blocks more attractive to investors.

The draft energy policy states that there is, therefore, need to develop adequate petroleum production capacity as well as supply infrastructure to meet market requirements and match the increasing demand for petroleum products, locally and in the region. These are stated to include setting up a new refinery at Lamu bearing in mind its strategic location. It is contended that this will make oil and gas products more competitive in the region, enable creation of wealth, ensure supply security and stability of prices.

With regard to coal resources, the draft policy notes that this is an affordable, competitive, reliable and easily accessible source of energy, especially for electricity generation. It notes the extensive coal exploration undertaken in the Mui Basin of Kitui County as well as other parts of the country. These resources are expected to provide about 1,900MW of electricity generation by 2016 and 4,500MW by 2030.

The draft policy commits the government to promote an intensive coal exploration programme and efficient utilization of coal resources while minimizing the environmental impacts associated with its use. It is to establish data and information on coal resources, intensify promotional campaigns in local and international conferences and exhibitions, as well as create conducive investment environment for exploration and exploitation of coal by providing fiscal incentives to attract investment in this sector. The national government is also to establish a coal development corporation as a special purpose vehicle to be the lead agency in the development of the coal industry in the country.

It proposes the establishment of an institutional framework comprising of the National Upstream Petroleum Advisory Committee (NUPAC), responsible for upstream petroleum exploration and development matters as well as the National Coal Advisory Committee (NCAC), responsible for coal exploration and development matters. It commits the government to develop mechanisms for sharing of benefits between the national and county governments as well the local communities in accordance with Article 69 of the Constitution, as well as undertake the requisite process leading to compliance with the Extractive Industries Transparency Initiative (EITI).

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

It proposes several policies and strategies for intervention on addressing land, environment, health, and safety issues.

2.3 National Legislations on the Extractive Sector

2.3.1 The Constitution of Kenya

The Constitution of Kenya 2010 is the overarching law that governs natural resources in Kenya. It was revised to replace the previous independence Constitution which had been amended severally over time. Article 60 requires that land be held, used and managed in a manner that is equitable, efficient, productive and sustainable, and in accordance with a set of principles including security of land rights; sustainable and productive management of land resources; sound conservation and protection of ecologically sensitive areas; and the elimination of gender discrimination in law, customs and practices related to land and property in land. Public land is defined to include all minerals and mineral oils as defined by law.

Article 69 (1) (a) of the Constitution bestows on the State the responsibility to ensure sustainable exploitation, utilization, management and conservation of the environment and natural resources, and ensure the equitable sharing of the accruing benefits. The State is required to utilize the environment and natural resources for the benefit of the people of Kenya. The Constitution further requires equitable sharing of revenues raised nationally among national and county governments, as well as equitable sharing of the burdens and benefits of the use of resources between present and future generations.

It stipulates, under Article 42, that all people have the right to benefit equally from the use of natural resources as well as an equal entitlement to a clean and healthy environment. Transactions entailing 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 are subject to ratification by Parliament under Article 71 of the Constitution. The Constitution further entrenches a devolved system of governance under Article 174 by outlining its salient principles, providing for participatory decision making, and also providing for the equitable sharing of both national and local resources.

The allocation of roles between the national and county governments is provided for under Schedule IV of the Constitution of Kenya 2010. The national government, with regard to the extractives sector, is allocated roles including international trade, national economic policy and planning, energy policy, transportation including pipelines, as well as protection of the environment and natural resources with a view to establishing a durable and sustainable system of development. These roles are buttressed by Article 69 of the Constitution on the responsibility of the state with regard to environment and natural resources. The county governments, on the other hand, deal with county planning and development which includes electricity and gas reticulation and energy regulation. While some counties may insist on imposition of tax on extractive resources within their jurisdictions, Article 209 (5) of the Constitution provides that taxation and other revenue-raising powers of a county shall not be exercised in a way that

prejudices national economic policies, economic activities across county boundaries or the national mobility of goods, services, capital or labour. This could be interpreted to mean that levying of taxes on extractive resources goes against national economic policies.

2.3.2 The Petroleum (Exploration and Production) Act

The petroleum sector is regulated by the Petroleum (Exploration and Production) Act which was first passed in 1984 and has been revised twice in 1986 and 2012. The Act vests ownership of hydrocarbons in the Kenyan Government and grants the cabinet secretary powers to authorize petroleum operations through developed regulations. Such permission must as such be obtained prior to conducting any petroleum operations. This is the overall law that regulates the negotiation and conclusion by the Government of Kenya petroleum agreements relating to the exploration for, development, extraction, production, treatment, storage, transportation, sale or disposal of oil and gas. The Act provides that petroleum operations may be carried out through the National Oil Company of Kenya (NOCK) or through contractors.

Pursuant to this, the Petroleum (Exploration and Production) Regulations give powers to the CS to give notice to the effect that oil blocks are open for applications from contractors for entering into petroleum agreement negotiations. This is done on a first-come-first-served basis. Negotiations are conducted on the basis of the model Production Sharing Agreement (PSC) that is made available by the Minister to potential contactors. State participation can be done through an oil company established for such purpose or through contractors. The Ministry has established an ad hoc Committee named the National Fossil Fuels Advisory Committee (NAFFAC) with a negotiation mandate to be carried out by which comprises of the Ministry of Energy which chairs it, the Office of the Attorney General, the National Oil Company of Kenya (NOCK), the National Environmental Management Authority, the Kenya Revenue Authority (KRA), and the Petroleum Institute of East Africa (PIEA).

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

Although the Act makes reference to the issue of local content by requiring contractors to give preference to locally available goods, no definition is provided as to what entails local goods. It is also silent on any thresholds regarding local content. The production sharing mechanism established under the PSC provides for the Daily Rate of Production (DROP) method in the sharing of uplifted oil. This method does not factor the price of petroleum or the costs of production in a given area. For Kenya, however, the contractor and Government shares are determined on the basis of the rate of production of profit oil and not total volumes.

The dispute resolution mechanism is not addressed in this Act. However, the model PSC makes provision for the settlement of disputes under the United Nations Convention on International Trade Law (UNCITRAL) rules. This is a mechanism that uses arbitration mechanisms and decisions are binding upon parties. With regard to contract compliance and administration, the CS is authorized by this law to supervise petroleum operations carried out under the PSCs. This role is jointly done with NOCK which is mandated to assist the Minister in terms of legal operations, accounting, budgets, and other matters as well as coordinating and facilitating PSC negotiations.

The Act contains a stabilization regime which states that, in the event of a change in laws or regulations that impacts the economic benefits of a party to the PSC, parties are to agree to make the necessary adjustments to restore the status quo. The law provides for the right of access to private land by contractors with 48 hours' notice and sets out various conditions to be met before access is granted. The terms of the PSC are summarized in Table 2-1.

Table 2-1: Summary of Kenya's Model Production Sharing Contract

Subject	Comment
Contract Area	Specified block size is provided with its coordinates (Appendix A).
Signature Bonus	Approximately $0.3 million signature bonus.
Exploration Period	Phases – Initial Exploration – [2/3] years, First Additional – 2 years, Second Additional 2 years; Total [6/7] years (Clause 2).
Production Period	20 to 30 years (typically at least 25 years).
Surrender	25 per cent of original Contract area at end of initial exploration period. 25 per cent of remaining Contract area after 2nd phase (Negotiable) (Clause 3).
Minimum Work and Expenditure	Includes geological and geochemical surveys, reinterpretation of available data, technical data acquisition and well drilling with a minimum exploratory depth of 3000m and minimum negotiable expenditure (Clause 4).
Training Fees	Based on an agreed lump sum amount payable during exploration, development and production period (Clause 13).
Surface Fees Rental	Based on an agreed amount per km^2 for the block size basis and divided into exploration, development and production (Clause 5).
Taxation	Taxes are paid "'in lieu' for and on behalf of the Contractor" out of the Government share of profit (Clause 27).
Depreciation	Five-year straight-line depreciation for capital costs. Depreciation begins when production starts (Clause 27).
Ring-Fencing	Costs from one block are not allowed to be recovered from another.
Government Participation	Minimum government participation of 10 per cent. The Government share is carried through exploration and paid in full during development and production (Clause 28).
Cost Recovery Limit	Based on negotiated gross revenues (Clause 27). Typically 60 per cent of annual revenues.

Subject	Comment
Profit Oil Split	Based upon a Daily Rate of Production (DROP) of profit on a sliding scale 50/50 at start of production, rising to a maximum of 78 per cent for GoK for profit oil volumes of 100 k bbl/day onshore and 120 k bbl/day offshore (Clause 27).
Natural Gas	Where the contractor considers that it is economical to produce natural gas, the contractor agrees to sell all or part of its share on natural gas to the Government provided that the parties agree on price, volume and terms of sale (Clauses 23, 27 and 29).
Domestic Consumption	The Contractor shall have the obligation to supply in priority crude oil for domestic consumption (Clause 29).
Assignment	The Contractor may assign to a person other than an affiliate part or all of its obligations under this contract with the consent of the Minister (Clause 35).
Audit Rights	The Government shall have the right to audit the joint venture accounts within the 24-month period following the end of the accounting period (Appendix B).
Stabilization	If after the effective date, the economic benefits of a party are substantially affected by new laws and regulations, the parties will make the necessary adjustments to the relevant provisions of this Contract observing the principle of the mutual economic benefit of the parties (Clause 40).

Source: World Bank

The Petroleum Act and the model PSC have a number of shortcomings, including the lack of a compensation regime, licensing rounds, gas sharing terms, provisions of Corporate Social Responsibility, community awareness and participation, rules on transfer of interests in PSCs, criteria for evaluation of applications, as well as terms relating to environmental protection, conservation and management.

2.3.3 The Income Tax Act

This is an Act of Parliament with the objective of making provisions for the charging, assessment and collection of income tax: for the ascertainment of the income to be charged; for the administrative and general provisions relating thereto; and for matters incidental to and connected with the foregoing purposes. The Act has been amended severally since it was first passed. Its implementation is effected by the Kenya Revenue Authority. With regard to petroleum sector operations, the ninth Schedule of the Income Tax Act regulates the taxation of upstream activities with particular details relating to the taxation of subcontractors. The main rules on taxation of companies can be summarized as below.

- *Corporate Income Tax:* All Kenyan companies as well as foreign legal entities are taxed on all income accruing in or derived. The rate for resident companies is 30 per cent while non-resident companies pay a rate of 37.5 per cent on all income accrued.
- *Taxation of Dividends:* Dividends that are paid by resident companies to non-resident shareholders are subject to a withholding tax at a rate of 10 per cent.
- *Capital Gains Tax:* The imposition of this tax was suspended in 1985. It is, however, being reintroduced under the Finance Bill 2014 and will be discussed in more detail at a later stage in this paper.
- *Withholding Tax on Transfer or Assignment of PSC Rights:* The transfer or assignment of

rights under a PSC is taxed as income. The law imposes a 10 per cent tax on the total value of consideration for residents and 20 per cent in the case of non-residents. The gain in this respect is considered to be the difference between proceeds and capital expenditure that has not been depreciated for tax purposes. This Schedule does not make provision for cases where there is a loss. In cases relating to partial disposal or assignment of PSC rights, KRA may apportion tax on the basis of the difference between the sold and retained stake. In the event of farm-out transactions, where full or partial disposal is made in consideration for the undertaking of certain work obligations, the value of the work is excluded from the calculation of the gain.

- *Income Tax on Employment:* Income tax on employment relates to service-related oil and gas contracts and is levied as "Pay As You Earn" (PAYE) tax. The marginal rate is to the threshold of 30 per cent. Employers are further required to collect certain social security contributions.
- *Offsetting of Losses:* Petroleum companies are allowed to carry back losses arising from the final year of production for up to four years. Any loss incurred by operators may be offset in the year in which the same is incurred and any of the following three years.
- *Determination of the Value of Sales for Tax Purposes:* The Schedule establishes rules that are used in determining the total value of sales for the purposes of establishing the taxable income. Transactions between related entities are subject to transfer pricing regulations which are carried out on an "arms-length" scenario. This is also reflected in the model PSC.
- *Depreciation of Capital Expenditure:* For the purposes of taxation, the Schedule provides that capital expenditure is to be depreciated at the rate of 20 per cent per annum (straight-line) with the effective date being the year in which the assets were brought into use or the year in which production commences whichever comes later. Operational costs, such as intangible drilling, are fully deductible in the year in which they are incurred.
- *Thin Capitalization Rules for Petroleum Companies:* With regard to capital formation, the Schedule has rules that apply to both branches and residents. It restricts interest expenses if the loan amount or interest rate exceeds the "arm's-length amount." The rules do not set a specific debt-to-equity ratio as is the case in standard industry practice.

2.3.4 The Mining Act

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

The nature of rights awarded includes prospecting and mining rights. Prospecting licenses are issued for one year and may be renewed at the discretion of the Commissioner for a further period of one year each up to a maximum of five years each. Prospecting rights confer a number of privileges to the holder to prospect for all minerals except diamonds; erect any buildings or machinery; make excavations, sink shafts or wells, drive adits or levels or dig trenches; take for the purposes of prospecting, take water from any lake, river or stream; create a protection area and apply for an exclusive prospecting license among other privileges. Any minerals obtained

during prospecting are the property of the government and may not be disposed. The rights are not transferable without the consent of the Commissioner. Applications are made to the Commissioner of Mines and Geology. The Act sets requirements, which, if met by the applicant, allow the issuance of a prospecting license. The Commissioner has powers to grant, refuse, suspend, cancel or extend prospecting and mining rights. The Act confers a wide discretion upon the Commissioner in making such decisions.

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

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

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

With regard to taxation of mining companies, resident and non-resident corporation in Kenya are liable to pay corporation tax on all income generated within Kenya. The corporate tax rate is currently at 30 per cent of all income, while a subsidiary of a foreign company is taxed at the rate of 37.5 per cent. If a company is recently listed on the Nairobi Stock Exchange, a reduced tax rate applies.[1] The transfer or assignment of shares attracts a withholding tax rate of 20

1 The rate for listed companies under the Capital Markets is 27 per cent for the first three years of listing for companies with 20 per cent shares listed; 25 per cent for the first five years of listing for companies with 30 per cent shares listed; and 20 per cent for the first five years of listing for companies with 40 per cent shares listed.

per cent while local players have a reduced rate of 10 per cent. Mining operations are allowed to make capital deductions in the first year of 40 per cent and this is reduced to 10 per cent between the second and seventh years. Transactions between related entities are subject to the arm's-length principle.

The Mining Act has a number of weaknesses. Key among them is the lack of a single fiscal regime to regulate the sector. Taxes are usually paid in the form of corporate income tax as well as royalties payable depending on the mineral in question. Furthermore, provisions relating to compensation mechanisms, community engagement and participation, defined criteria for evaluating applications and local content regulations are lacking within this law. These challenges have made the sector contribute marginally in the nation's economy. Furthermore, the Constitution of Kenya 2010 has necessitated an overhaul of the law to reflect the new principles enshrined in it, including equity and environmental sustainability. The law is undergoing review and key features of the proposed law will be discussed at a later stage in this report.

2.3.5 The Environmental Management and Coordination Act

This is an Act of Parliament passed in 1999, twenty-seven years after the Stockholm Conference. The aim of the Act is to 'provide for the establishment of an appropriate legal and institutional framework for the management of the environment' and "improve the legal and administrative coordination of the diverse sectoral initiatives…..necessary in order to improve the national capacity for the management of the environment". It is the primary law for environmental management and supersedes any other law on the same.

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

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

- Environmental (Impact Assessment and Audit) Regulations, 2003, Legal Notice No. 101.
- The Environmental (Prevention of Pollution in the Coastal Zone and Other Segments of the Environment) Regulation, 2003.
- Environmental Management and Coordination (Water Quality) Regulations, 2006 Legal Notice No.120.
- Environmental Management and Coordination (Waste Management) Regulations, 2006 Legal Notice No. 121.
- Environmental Management and Coordination (Conservation of Biological Diversity and Resources, Access to Genetic Resources and Benefit Sharing) Regulations, 2006 Legal Notice No. 160.
- The Environmental Management Coordination (Fossil Fuel Emission Control) Regulations, 2006 Legal Notice No. 65.
- The Environmental Management and Coordination (Wetlands, River Banks, Lake Shores and Sea Shore Management) Regulations, 2009 Legal Notice No. 19.
- The Environmental Management and Coordination (Noise and Excessive Vibration Pollution Control) Regulations, 2009 Legal Notice No. 61.
- The Environmental (Impact Assessment and Audit) (Amendment) Regulations, 2009.

One of the fundamental weaknesses regarding this law is the lack of rules on the decommissioning of sites and the fact that environmental licenses are not a precondition for the obtaining of a mining license. This situation has seen the abandonment of sites without proper sealing and the carrying out of mining activities without fully appreciating the potential impact to the environment. Furthermore, the requirement that the proponent of a project hire an EIA expert limits the operational independence of such an audit given the pecuniary relationship between a proponent and the person tasked with conducting the audit. It also limits the public participation element in the carrying out of ESIAs.

2.3.6 The Land Acts

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

The National Land Commission has authority under the Land Act in the management and administration of public, private and community land. It also has powers to reserve public land located within the surface of the earth and the subsurface rock; marine waters in the territorial sea and exclusive economic zone; and natural resources completely contained on or under the surface. This is to be done in consultation with the national government and the county governments, by order in the Gazette. The Commission is required to undertake an inventory of all land-based natural resources. It is also required to make rules and regulations for the

sustainable conservation of land-based natural resources, and put in place measures to ensure benefit-sharing to the affected communities.

Issues relating to the alienation of land, as well as compensation mechanisms are set out in the Land Act. In cases of compulsory acquisition, the respective CS is required to submit a request for acquisition of public land to the Commission to acquire the land on its behalf. The law provides for compensation to be paid promptly in full to all persons whose interests in the land have been determined. The Land Act law also makes provision for settlement programmes for persons displaced by development projects, conservation, or other such causes that may lead to movement and displacement. Any disputes arising that are related to land and environmental matters are determined by the Environment and Land Court Act.

2.3.7 The Public Finance Management Act

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

Revenues from the extractives sector are collected in an account at treasury and such payments are regulated by the Kenya Revenue Authority which assesses the amounts due to the exchequer. Such revenues are considered as public funds and are therefore regulated under the mechanism established by the PFM Act as well as the principles of public finance under the Constitution.

The PFM Act has as its objectives the need to ensure that public finances are managed at both the national and the county levels of government in accordance with the principles set out in the Constitution, and public officers who are given responsibility for managing the finances are accountable to the public for the management of those finances through Parliament and County Assemblies. It seeks to promote good financial management at the national and county levels to facilitate effective and efficient use of resources. The core areas addressed under the Act include macro-fiscal policy making, budgeting, treasury management, and budget execution as well as accounting, reporting and audit issues.

The Act takes precedence over any other law on matters relating to preparation and submission of budget estimates, preparation and submission of accounts for audit, borrowing, lending and loan guarantees, raising of revenue and making of expenditures, banking arrangements, including opening of bank accounts and investment of moneys, establishment and dissolution of state corporations as well as establishment and management of public funds.

The PFM law assigns roles to various entities charged with the management of public funds. Parliament is responsible for the general oversight of national finances. At the national level, these institutions include Parliament (which entails the National Assembly, Senate and the

Public Budget Office), the Cabinet, the National Treasury, the Cabinet Secretary in charge of finance, accounting officers of the national government, receivers and collectors of revenue for the national government, the Public Debt Management Office (PDMO), the Accounting Standards Board (ASB), the Controller of Budget, the Auditor General and the Commission for Revenue Allocation. At the county level, the institutional architecture for public finance management includes County Assemblies, the County Executive Committee, County Treasuries, the County Executive Member in charge of finance, accounting officers of the county government, receivers and collectors of revenue and the County Budget and Economic Forum.

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

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

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

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

2.3.8 The Finance Act 2014: Amendment to Schedule 9 of the Income Tax Act

Under the budget of Kenya 2014/15, the Ministry of Finance, through the Finance Act has amended Schedule 9 of the Income Tax Act which relates to the taxation of petroleum companies. This is a complete overhaul of the Schedule and brings a number of things to the fore. The summary of proposed amendments includes:

- *Taxation of Farm-Out Transactions:* In the current setup, the assignment of rights through farm-out transactions is taxed at 10 per cent or 20 per cent of gross consideration for resident and non-resident companies. However, from 1st January 2015, such transactions will be taxed on the gain where the net gain will form part of the taxable income of the transferor and will be taxed at the corporation tax rate.
- *Direct or Indirect Disposal of Equity Interest:* This has been unclear in the current framework. In the proposed Schedule, the net gain in such transactions will be subject to tax in a manner similar to assignment of rights. Where the interest derived directly or indirectly from immovable property is below 20 per cent of the total value of the interest, the net gain will not be taxable. However, where the interest disposed is 20-50 per cent, the net gain will be taxable using a prescribed formula. In cases where the interest disposed is above 50 per cent, the net gain will be fully taxable.
- *Taxes Paid to Form Part of Government Share in PSC*: It is now recognized under the Schedule that the Government's share of production is inclusive of the taxes of the petroleum company. This, however, is only with respect to the income arising from petroleum operations undertaken by the contractor.
- *Tax Deductions by Permanent Establishments:* The payment of interest, royalties and management fees by a branch of a petroleum company to its head office is no longer tax deductible.
- *Ring-Fencing:* Petroleum blocks are now ring-fenced, and any expenditure incurred in a particular block can only be offset against income derived from that block. This is also contained in the model PSC.
- *Tax Losses Carried Forward Indefinitely:* Losses by petroleum companies can now be carried forward indefinitely. The carry-back of tax losses also apply for a maximum of three years. Losses that arose before the Schedule comes into effect are not clearly canvassed in the Schedule.

- *Threshold for Thin Capitalization Reduced:* Presently, an entity is considered to be thinly capitalized if it is under the control of a non-resident and the amount of debt exceeds three times the share capital of the company. This threshold has now been reduced to 2:1 (debt to equity) and an entity will be considered as thinly capitalized if it is under the control of a non-resident and the amount of debt exceeds two times the share capital of the company.
- *Natural Resource Income:* Payment for a natural resource is subject to withholding tax at 5 per cent or 20 per cent depending on the residence status of the recipient of the consideration for the right to take a mineral or living or non-living resource from land or sea. It does not apply if the recipient of the nature resource income is exempt from income tax.
- *Hedging Transactions:* Where a petroleum company enters into a hedging transaction to manage commodity price risk, this will be treated as a specified source of income, except in cases where the hedging transaction has been approved by the Commissioner and the petroleum Contractor has an annual turnover of less than ten million shillings.
- E*xpenditure on Social Infrastructure:* Any expenditure on social infrastructure such as public schools and hospitals will be tax deductible subject to approval by the Cabinet Secretary for the National Treasury.
- *Decommissioning Expenditure:* Expenditure that is incurred in the abandonment and decommissioning of petroleum operations will be deductible only when it is funded by the Contractor and funds are transferred by the Contractor to an escrow account or when the expenditure is incurred by the Contractor under an approved decommissioning plan.
- *Work Obligations:* Work obligations taken up by a buyer in a farm-out transaction will not be considered to be part of the farm-out consideration and will be excluded from the net gain arising from the transactions.
- *Indirect Transfers of Interest:* Contractors are required to notify the Commissioner through written notification if there is a change of 10 per cent or more in the underlying ownership of the Contractor.
- *Subcontractors:* The definition of subcontractors now includes resident persons who supply services with respect to petroleum operations. Non-resident subcontractors will be subject to a 5.6 per cent withholding tax, while those with a permanent establishment will be subject to 37.5 per cent tax on adjusted profits.

- *Withholding Tax:* Payments that are made to non-residents are subject to withholding tax rates. This is a departure from the old model PSC which exempted dividends from taxation. In the case of residents, the withholding tax rates remain the same although there is a 5 per cent rate on natural resource income payments to resident companies. The table below indicates the withholding tax rates for non-residents.

Table 2-2: Withholding tax rates for non-residents

Payment	Existing (per cent)	Proposed (per cent)
Dividends	0	10
Interest	10	15
Royalties	20	20
Natural Resource Income	-	20
Management or Professional Fees	12.5	12.5

Source: Finance Acts of 2013 and 2014

2.4 Legislative Review Processes on the Extractive Sector

As earlier stated, this section will focus on the Mining Bill 2014, the Petroleum Exploration and Production Bill 2014, the Energy Bill 2014, and the Sovereign Wealth Fund Bill 2014. These are the main instruments that will affect the sector.

2.4.1 The Mining Bill 2014

The Mining Bill seeks to give effect to Articles 60, 62 (1)(f), 66 (2) and 69 of the Constitution in so far as they apply to minerals as well as provide for prospecting, mining, processing, refining, treatment, transportation, and any dealings in minerals and for related purposes. The Bill sets up an administrative structure comprising the Mineral Rights Board, the Cabinet Secretary, the Principal Secretary, the Directorate of Mines, the Mining Tribunal, and the Directorate of Geological Survey.

Mineral rights are categorized between large-scale and small-scale operations and the Bill also addresses the issues relating to artisanal mining. Large-scale operations have a category of rights, including prospecting licenses, retention licenses, and mining licenses. Small-scale operations, on the other hand, have prospecting and mining permits. Institutions proposed to be established under the Bill include the National Mining Corporation, the Minerals and Metals Commodity Exchange, and a Mining Tribunal. It also provides for the setting up of a Minerals Sovereign Wealth Fund.

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

The concept of strategic minerals is introduced in the Bill and the Mineral Rights Board has powers to recommend certain minerals to be categorized as strategic minerals. The state also has a right of pre-emption on all strategic minerals raised, won or obtained within the territory of Kenya before they are sold. The Bill makes provision for local equity participation. The Mineral Rights Board is to prescribe the limits of capital expenditure for the purpose of this section. With regard to the issue of Free Carried Interest, the Bill states that where a mineral right is for a large-scale mining, the State will acquire 10 per cent Free Carried Interest in

the share capital of the right in respect of which financial contribution shall not be paid by the State. This applies to large-scale mining operations and to mining operations relating to strategic minerals.

The Bill creates a sharing formula, where revenues obtained from the sector are to be shared between the national and county governments, as well as communities affected by the mining project. The revenue is to be apportioned with the national government getting 75 per cent of the total government revenue, the county government getting 20 per cent while the local community gets 5 per cent. The Bill precludes the granting of mineral rights over private land, save with the express consent of the owner. It further precludes granting of rights to community land without the consent of the authority obligated by the law relating to administration and management of community land to administer community land or the National Land Commission in the case of un-alienated community land. It also makes provision for compulsory acquisition of land or rights or interests in land to vest the land or area in question, or rights or interests in such land or area, in the government or on behalf of the government, where the consent is required. Consent deemed to include existence of a compensation agreement.

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

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

2.4.2 The Petroleum Exploration and Production Bill 2014

This is a Bill that is proposed to provide a framework for the contracting, exploration, development and production of petroleum; as well as cessation of upstream petroleum operations. It also gives effect to Articles 60, 62 (1) (f), 69 and 71 of the Constitution in so far as they apply to upstream petroleum operations and for connected purposes. The Bill proposes the development and publishing of a national policy on upstream petroleum operations which

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

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

The National Upstream Petroleum Advisory Committee is an inter-ministerial committee comprising of representatives from the Ministry of Energy, the National Oil Company of Kenya, the Attorney General, the National Treasury, NEMA, the Kenya Revenue Authority, and the Ministry of Mining. It can co-opt four other members. Its functions include participating and advising the Cabinet Secretary in the negotiation of petroleum agreements and in the granting and revocation of licenses, submitting reports on the terms negotiated with Contractors, advising on upstream petroleum operations, participating in the evaluation of the bids and applications for awarding petroleum blocks, conducting due diligence and investigating the affairs of Contractors prior to entering into petroleum agreements, and advising on the grant of non-exclusive exploration permits under which a person may enter upon an area to prospect or carry out geological, geochemical and geophysical surveys.

The Upstream Petroleum Authority is tasked with regulating the upstream petroleum operations in Kenya; providing such information and statistics to the Cabinet Secretary as may be required from time to time; collecting, maintaining and managing upstream petroleum data; and doing or performing all other acts for the furtherance of the provisions of this.

On the issue of allocation of petroleum rights and management of petroleum resources, the Bill provides that the negotiation, award and execution of petroleum agreements is the province of the Cabinet Secretary. Applications for a petroleum agreement or a non-exclusive exploration permit are thus to be made to the Cabinet Secretary. This provision precludes the possibility of an open tendering system for petroleum rights. The Bill sets out the financial and technical obligations of the Contractor as well as express obligations to be contained in petroleum agreements such as minimum work obligations, development plans, work programmes and budgets and information and reporting, among other obligations.

It is required of the Cabinet Secretary to submit a petroleum agreement or a non-exclusive exploration permit to Parliament for ratification in accordance with Article 71 of the Constitution, after which approval or rejection is to be given within 90 days. Contractors are

also required to obtain operational permits for drilling of wells; development and production of petroleum; construction of petroleum-gathering systems in the field; building of crude storage facilities; construction, utilization, decommissioning or abandonment of any upstream petroleum facility or plugging or abandonment of any individual well. The Bill also requires that the local community be sensitized before issuance of any permit. To this end, Contractors are required to provide a security for compliance and suspension or termination of the Production Sharing Contract. The Bill further sets out the procedure for the transfer of interest in a petroleum agreement, subject to the fulfilment of a number of obligations.

The Bill proceeds to set out a number of obligations relating to reporting on the discovery of petroleum, notification requirements prior to abandonment, and the surrender of blocks. Where commercial quantities are established, Contractors are required to prepare field development plans. Third party access to infrastructure is guaranteed under reasonable conditions, provided that there are no significant technical challenges posed that prevent the utilization of such infrastructure by third parties. Regarding the cessation of petroleum operations, the Bill requires the Contractors to submit a petroleum field decommissioning plan to the Authority before a production permit is issued to install and operate facilities. It establishes a decommissioning fund which the Contractor must contribute to when petroleum production has reached 50 per cent of the aggregate recoverable reserves or 10 years prior to the expiry of the production permit.

Regarding the question of information and reporting, the Bill sets out a range of information to be disclosed by the contractors including geological, geochemical and geophysical surveys; the rates and volumes of petroleum produced, its composition including test production and the recovery of petroleum in connection with formation testing; the volumes and other results of production monitoring as well as monitoring procedures as well as the use, injection, venting or flaring of natural gas or petroleum. Such information is to be based on metering. Section 81 of the Bill precludes disclosure of information to third parties, save for a number of exceptions including one in furtherance of a right to a person as provided for under the Constitution and other relevant laws. However, the failure to legislate on the Freedom of Access to Information Act may limit the operability of this exception.

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

On the issue of payments and revenues, the Bill sets out various fees and levies to be paid by Contractors. These include annuals fees, such as surface rentals and training fees, signature bonuses, as well as profit oil. The profit oil is to be shared between national and county governments as well as the local communities. It requires that the national government's share of petroleum revenues be deposited into a dedicated petroleum fund, and managed according to the Public Finance Management Act, the Constitution and any other relevant law. The ratios given under the Bill are 75 per cent for the National Government, 20 per cent for the County Government and 5 per cent to the local community which is payable through the County Government. The Bill places a caveat on the County Government share stating that "the amount allocated in accordance to this subsection shall not exceed twice the amount allocated to the County Government by the Commission for Revenue Allocation in the financial year under consideration." This clause may limit the share taken by counties as the CRA allocation has a sliding scale that shifts over time.

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

Transparency and accountability are addressed through a framework for reporting, transparency and accountability. The Cabinet Secretary is required to develop a framework for transparency and accountability in the upstream petroleum sector, which includes the annual publication of all records, accounts, and reports of revenues (royalties, fees, taxes, and other charges), as well as any other relevant data and information that support payments received by the Government of Kenya, county governments, and local communities. Reporting should be disaggregated into each petroleum agreement, non-exclusive permit, drilling permit, production permit, and plug and abandonment permit indicating payment type by each Contractor (i.e., royalties, taxes, fees, and other charges); volumes by each Contractor, measured at the delivery point of sale; transfers of all petroleum sector revenues from national government to county governments and local communities, including royalties; as well as all Contractor contributions (in cash or in kind) to county governments and local communities. Finally, the Bill contains elaborate details setting out community rights including prior information of impending activities, adequate compensation for land, environmental damage, and loss of livelihood, and any injury or illness related to operations.

2.4.3 The Sovereign Wealth Fund Bill

The Sovereign Wealth Fund (SWF) Bill is proposed for the purposes of the extractives sector. The fund is meant to undertake diversified portfolio of medium- and long-term local and foreign investment and build a savings base for purposes of national development, stabilization

of the economy at all times, enhancing intergenerational equity in Kenya, giving effect to the provisions of Article 201 of the Constitution of Kenya 2010, and for connected purposes. The object and purpose of the fund is stated to include: to build a savings base for the country; protect and stabilize the budget and economy from excess volatility in revenues or exports; provide a mechanism for the diversification from non-renewable commodity exports; assist in dissipating unwanted liquidity; fund social and economic development; as well as to support and promote any other strategic objectives of the country. The fund is established as a mixed commodity and non-commodity fund consisting of the following funds:

- *Stabilisation Fund:* Established to facilitate levelling current spending in a sustainable way, insulating the national budget and the economy from the impact of volatility in revenues, including mineral and petroleum revenues. Where moneys stand to the credit of the stabilization fund, withdrawals are only allowed through the national budget and cannot exceed the limit to be determined by the Cabinet Secretary under Investment Guidelines issued by the Cabinet Secretary. Guidelines on deposits to the stabilization fund are issued by the Cabinet Secretary working with the Board established under this law.
- *Infrastructure and Development Fund:* Established to provide definite and ongoing funding for sectors and infrastructure for economic and social development in accordance with national government plans.
- *Future Generations Fund:* Established for the purposes of providing for definite and ongoing funding for future generations of Kenya with a solid savings base from revenue accruing from minerals, petroleum reserves, and exploitation of other exhaustible natural resources; transforming future generations into a different sectoral economy; and environmental protection.

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

The appointment of investment fund managers is to be done through an open, competitive and transparent process. The role of the Cabinet Secretary is to issue and review Investment Guidelines and receive and consider reports from the Board in order to ascertain its compliance with the provisions of this law, and any guidelines issued. This is done with the approval of the Council. It is required that the Investment Guidelines issued have regard to the national interest

and the overall macroeconomic and fiscal stability. The Board is required to prepare estimates of the revenue and expenditure of the Fund three months before the start of the financial year. Such estimates must differentiate between recurrent and development expenditure and also itemize every action the Board intends to undertake. The Board then tables the estimates to the Cabinet Secretary who transmits the same to the National Assembly. The accounts of the fund are audited by the Auditor General. The Board is also required to publish an annual report and submit it to the President and Parliament within three months after the end of the financial year. It must then publish and make public the report, balance sheet and statements that have been submitted.

2.4.4 The Energy Bill

The Energy Bill 2014 is proposed to replace the Energy Act of 2006, as well as consolidate the laws relating to energy and bring the sector laws and institutions in consonance with the Constitution of Kenya 2010. It also provide for national and county government functions in relation to energy, the establishment, powers and functions of the energy sector entities; promotion of renewable energy; exploration, recovery and commercial utilization of coal and geothermal energy; regulation of midstream and downstream petroleum activities; and the production, supply and use of all energy forms; and for connected purposes. With regard to the extractive sector, the Bill specifically provides a mechanism for the exploration of coal resources. The Bill vests all coal resources in the National Government. It gives the Cabinet Secretary the discretion to adopt acceptable international standards in the management of coal resources, provided that such standards are not inconsistent with the laws of Kenya.

The award of rights for exploration and development of coal resources is to be done through issuance of either an exploration and appraisal license or a production and development license. Applications are made to the Cabinet Secretary who then refers the application to the National Coal Advisory Committee. The Bill, however, does not provide clarity on who comprises the Committee. The functions of the Committee include negotiating with a potential investor on the terms of the coal agreement on behalf of the National Government so as to secure the most favourable conditions for the Government, submitting a report to the Cabinet Secretary on the terms negotiated with the investor, advising the Cabinet Secretary on all matters relating to coal operations; and performing such other functions and duties as may be provided under the law.

Upon receipt of the report from the Committee, and after approval by the Cabinet and ratification by Parliament, the Cabinet Secretary may, on behalf of the National Government, enter into and sign coal agreements with a Contractor in the prescribed form. The Bill proceeds to give the Cabinet Secretary wide discretionary, for the sake of obtaining geological information, powers to grant non-exclusive exploration permits, in respect of areas specified therein, under which a person may enter upon an area and prospect and carry out geological and geophysical surveys. In so doing, the Cabinet Secretary is to request for a proposal from potential contractors as a basis for the negotiation for coal block concessions, cause any investigations, due diligence or consultations to be made or carried out as he considers necessary before entering into a coal agreement and may, upon advise from the Committee, reject any application made by

a potential investor if satisfied that the rejection is in the best interest of Government. The Cabinet Secretary also supervises coal operations carried out under a coal concession and may take any action, decision, or give any permission or consent or exercise any other control as may be necessary or desirable for the purposes of this law or the regulations made thereunder. This provision gives wide latitude of authority that may be subjected to abuse.

The exploration, appraisal, production and development license issued under this law is valid for a term of twenty-one years from the date of its issue and may be renewed for another term. If a licensee has complied with the terms of the license, the Cabinet Secretary may extend the term of the license with parliamentary approval for such a period as the Cabinet Secretary may determine. Such application must be made at least twelve months before the license expires.

The constitution of blocks is to be done by the Cabinet Secretary who, by a notice in the Kenya Gazette, may zone the country into numbered blocks. The Cabinet Secretary may reserve blocks to be exploited by the National Government. The Bill further gives power to the Cabinet Secretary to require a Contractor to relinquish portions of a block to which a coal agreement relates in the manner specified in the agreement. The Energy Bill proceeds to set requirements on persons who may enter into coal agreements with the Government, stating that this is to be done only with Contractors who have the financial ability, technical competence, and professional skills necessary to fulfil the obligations under the coal agreement

2.4.5 The Natural Resources (Benefit Sharing) Bill

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

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

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

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

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

2.5 The Institutional Architecture for the Extractive Sector

The institutional framework governing the extractive sector emanates from constitutional as well as legislative provisions that establish a number of institutions. More significantly, there seems to be an increase of institutions under the proposed legislative frameworks proposed under the Bills prepared to replace the existing framework. For the purposes of this study, focus will be given to the institutions already established as well as those proposed for establishment.

2.5.1 Institutions Established to Regulate the Extractives Sector

The Constitution gives various roles in the extractives sector to a number of entities with specific mandates. The roles given are summarized below:

- ***The Inter-Ministerial Committee on the Policy and Legal Framework for Geology, Mining and Minerals:*** This is the Committee tasked with leading the implementation of policy and legal frameworks relating to the extractives sector. It is headed by the Ministry of Finance.
- ***The National Fossil Fuels Advisory Committee (NAFFAC):*** This is the licensing review body for the petroleum sector. It is led by the Ministry of Petroleum and Energy and includes the National Oil Company of Kenya, the Attorney General, NEMA, Kenya Revenue Authority, the Ministry of Finance, and the Petroleum Institute of East Africa (PIEA) as Members.
- ***The National Land Commission:*** This is the body in charge of administration and management of public land in Kenya. It also has the mandate to effect compulsory acquisition of private and community land for public purposes. In the extractive sector, it is tasked with powers to reserve public land which includes natural resources. Issues relating to the acquisition of land rights for the purposes of the extractive sector including setting aside of public land, compulsory acquisition and compensation are therefore addressed by the Commission.

- ***The Auditor General:*** This is an officer that is independent under the Constitution tasked with auditing and reporting, in respect of every financial year the accounts of national and county governments, funds and authorities established by them, courts, independent offices and commissions, parliament, political parties funded by public funds, the public debt, and accounts of any other legislation may require to be audited.
- ***Controller of Budget:*** This is an independent officer under the Constitution tasked with overseeing the implementation of the budgets of the national and county governments by authorizing withdrawals from public funds as set out under the Constitution.
- ***The Legislature:*** The legislature (which includes the National Assembly and the Senate) is tasked with playing an oversight role in the management of natural resources. The National Assembly ratifies transactions involving the grant of a right or concession by or on behalf of any person, including the national government, to another person for the exploitation of any natural resource. The Senate, on the other hand, protects the interests of counties and their governments on matters such as sharing of revenues derived from natural resources.
- ***The Attorney General:*** The Attorney General (AG), by virtue of his role as the chief legal advisor plays a major role in the sector. First, all laws and regulations developed for the sector have to pass through the AG's office. Further, agreements on extractive resources also go through this office before they are ratified by the National Assembly.
- ***The Judiciary:*** The Judiciary is tasked with handling any disputes that may emanate from the extractive sector whether they relate to land rights, mineral rights or any other issues from the sector. This role is only limited where agreements expressly limit dispute resolution to arbitration as is common in many mineral agreements.
- ***County Governments:*** These are the decentralized executive entities at the devolved level. They are important as they directly control the regions where extractive sector activities are being undertaken. They also manage the funds from extractive activities shared from the national government for both the community and themselves. Their assemblies play a role in passing legislation as well as oversight on the use of funds.
- ***The National Environmental Management Authority (NEMA):*** This is the main body tasked with implementation of the Environmental Management and Coordination Act. It is supposed to regulate environmental matters including those affecting the extractives sector.
- ***The National Oil Corporation of Kenya (NOCK):*** This is a State Corporation that participates in the upstream petroleum sector on behalf of the government. It also assists in regulating the sector as it sits in the National Fossil Fuels Advisory Committee.
- ***The Kenya Revenue Authority:*** This is the body tasked with the collection of revenue on behalf of Government. It implements a number of laws including the Income Tax Act which relates to, among other things, the taxation of operations relating to oil, gas and mining activities.

2.5.3 Institutions Proposed to Regulate the Extractives Sector

The following part summarizes the laws and institutions proposed for establishment to regulate the extractives sector.

- ***The Mineral Rights Board:*** This is the overall body tasked with regulating the licensing

procedures as well as other administrative processes under the Mining Bill. It complements the roles allocated to the Minister and is meant to ensure a process where decisions are taken as a collective process as opposed to the existing framework which gives the Minister significant latitude in making decisions on the sector.

- ***The Mining Tribunal:*** This is an independent body proposed under the Mining Bill to act as an arbiter for disputes relating to the minerals sector. It is proposed to be functionally independent from the Ministry to promote fairness in its decisions.
- ***Directorates of Mines and Geological Survey:*** These are directorates proposed under the Mining Bill to provide administrative support in inspection of mines as well as the conducting of geological surveys in the mining sector.
- ***The National Mining Corporation:*** This is an entity proposed to represent the commercial interests of the government through participation in the upstream sector in the mining industry. The entity falls under the control of the Ministry of Mining.
- ***The National Upstream Petroleum Advisory Committee:*** This is an entity to be chaired by the Ministry of Energy and includes membership drawn from NOCK, the AG, the National Treasury, NEMA, KRA, and the Ministry of Mining. The entity is proposed to participate and advise in the negotiation of petroleum agreements, advise on grant of non-exclusive exploration permits, advise on upstream petroleum operations, and conducting due diligence on potential contractors, among other functions.
- ***The Upstream Petroleum Authority:*** This is an entity proposed to regulate upstream petroleum operations, collect and maintain upstream petroleum data and provide such information and statistics to the Cabinet Secretary as may be required.
- ***The Sovereign Wealth Fund Council:*** This is the Council which is tasked with overall administration of the SWF. This is a pivotal role that influences the direction of how revenues from the extractives sector that are deposited into the fund will be used. It comprises Cabinet Secretaries in the Ministry of Mining, Energy and Petroleum, the National Treasury, as well as Ministry of Devolution and Planning.
- ***National Coal Advisory Committee:*** This is an entity proposed to regulate the licensing procedures under the Energy Bill. It is proposed to advise the Cabinet Secretary on issue related to the exploration and development of coal resources.
- ***The Benefit Sharing Authority:*** This is the body proposed under the Natural Resources (Benefit Sharing) Bill, with a mandate to coordinate the sharing of benefits obtained from natural resources in cases where legislation makes no provision to provide for a mechanism of sharing such benefits.

2.6 Coherences, Overlaps and Gaps in Legal and Institutional Mandates

There are a number of conflicts that are indicated in both existing and proposed laws that may hinder the ability of institutions to effectively carry out their respective mandates. The next part of this chapter enumerates some of these conflicts as well as gaps based on the benchmarks that were enumerated earlier.

2.6.1 Legal Coherences and Overlaps of the Frameworks

A number of coherences and overlaps are present in the legal framework for the extractives sector that may hinder effective management of the sector.

- ***Environmental Management:*** While the EMCA law mandates NEMA to regulate environmental matters, the Petroleum (Exploration Production) Act gives powers to the Cabinet Secretary responsible for petroleum to make regulations with respect to measures relating to environmental protection and the avoidance of waste, pollution and accidents among other issues. This clearly conflicts with NEMA's mandate to regulate environmental matters and may hinder the ability of the entity to fulfil its mandate.
- ***Taxation of Petroleum Operations:*** There has been a conflict between Schedule 9 of the Income Tax Act and the model PSC. While the model PSC assumed that the state's share of profit oil was inclusive of income tax, the Income Tax Act on the other hand required Contractors to pay taxes from their profits. The Schedule contained other conflicts which have been addressed in the revised Schedule. In the revised Schedule, some changes have been made. These include the abolition of withholding tax on farm-out transactions and share sale transactions and the inclusion of taxes as part of the government's share of production for income arising from petroleum operations. These changes bring coherence to the identified conflicts. However, the new Schedule does not address the taxation and accounting requirements relating to natural gas.
- ***Public Finance Management:*** There is a conflict between the Public Finance Management Bill and the proposed Sovereign Wealth Fund Bill. While the SWF Bill creates a structure to manage the fund, it ignores the role placed on institutions in the PFM Act. Parliament's oversight role in national finances extends to funds that are generated in the extractives sector. Further, the creation, under the SWF Bill, of an Infrastructure and Development Fund to provide ongoing funding for sectors and infrastructure for economic and social development in accordance with national government plans further conflicts with the PFM Act by bypassing the requirement for the national government to prepare a medium-term fiscal strategy. The expenditure directed towards infrastructure and development would best be directed to the Medium Term Expenditure Framework (MTEF) as envisaged under the PFM Act as it promotes greater transparency, accountability and equity. Beyond the question of coherences and overlaps, there is the question of whether the country needs a SWF. This is because SWFs are usually created when governments have budgetary surpluses with little or no external debt.
- ***Sector Roles and Responsibilities:*** The role of negotiation of PSCs under the Petroleum Bill has been assigned to the Ministry of Energy working closely with the National Upstream Petroleum Advisory Committee (NUPAC). This allocation conflicts with the role assigned to the Ministry under the National Energy Policy which extends to the formulation and articulation of energy policies to provide an enabling environment for all stakeholders. The Energy Bill had proposed the role of negotiation be given to the National Fossil Fuel Advisory Committee (NAFFAC); the predecessor to NUPAC. The contract administration process has been given to the Upstream Petroleum Authority (UPA). This is a welcome move that will ensure efficient regulatory practices. However, care must be exercised to ensure UPA's role does not usurp the powers given to independent entities like NEMA.

- ***The Regulation of the Coal Sub-sector:*** There is a latent conflict between the Mining Bill and the Energy Bill with regard to the regulation of coal. The Mining Bill envisages that its scope extends to coal resources by stating that it doesn't extend to petroleum and hydrocarbon gases. However, the Energy Bill envisages that coal resources are to be managed in accordance with it. The National Coal Advisory Committee, established under the Energy Bill, is not clear in terms of composition and is required to negotiate with potential investors on the terms of the coal agreement on behalf of the national government.

2.6.1 Institutional Coherences and Overlaps of the Frameworks

With regard to the coherences and overlaps in relation to the proposed policy, legal and institutional frameworks, there is duplication of a similar mandate between institutions established to regulate the sector. The Mineral Rights Board, National Upstream Petroleum Advisory Committee and the National Coal Advisory Committee essentially perform the same functions in the negotiation and award of rights processes. The creation of these entities to regulate different facets of the extractives sector in essence creates an unnecessary layer of bureaucracy in a case where one institution would suffice. Furthermore, there is a latent conflict between the proposed mandates of the Mineral Rights Board and the National Coal Advisory Committee with regard to the regulation of the coal subsector.

Furthermore, the proposed establishment and structure of the Sovereign Wealth Fund Council as proposed by the presidential task force report on parastatal reforms and outlines in the proposed law falls short of the Generally Accepted Principles and Practices (GAPP) established by the International Working Group (IWG) on Sovereign Wealthy Funds although the task force report alludes to these principles. In particular, GAPP principle four which requires that there should be clear and publicly disclosed policies, rules, procedures, or arrangements in relation to the SWF's general approach to funding, withdrawal, and spending operations is not met as it introduces a method outside the PFM Act. Beyond the question of meeting the GAPP threshold, the country should interrogate the need of establishing a SWF that includes an infrastructure fund when these can be clearly done under the national budget. Further, the fact that SWFs are largely established by countries that have a surplus should be explored.

The establishment of the Benefit Sharing Authority may also result into a conflict with other entities, especially when viewed from the perspective of the roles set out for both the national and county governments with relation to the governance of the extractives sector. This could further introduce a regulatory burden on the sector especially when it is considered that there are institutional structures already established to handle these issues. A better approach would be to fill these gaps in existing frameworks other than inventing a completely different framework.

3 A Comparative Analysis of Other Jurisdictions

This section analyses country case studies with a view to provide a cursory glance at how policy, legal and regulatory frameworks have been framed in other jurisdictions. In so doing, four countries are briefly analysed. The first two will include Norway and South Africa as they have had a longer history dealing with the extractives sector at both global and continental levels. Further, they have been able to address the risks of the sector and have stable economies.

3.1 Benchmarking from International Initiatives on the Extractive Sector

While a country inevitably needs to develop an organic national legal, policy and institutional frameworks, a range of international initiatives offer an opportunity to benchmark the appropriateness of established mechanisms for the extractive sector. There have been a number of global initiatives that have been formulated to provide overall guidelines on how the policy, legal and institutional framework governing the extractives sector ought to be designed. These initiatives try to address the common challenges that arise in the sector by way of certain broad principles or guidelines for the sector. They cover different aspects of the extractives sector ranging from governance, policy frameworks, performance standards, supply chain, due diligence, codes of practice certification, information and reporting, and knowledge networks and platforms, among others. For the purpose of this study, three benchmarks will be considered. They include the Extractive Industry Transparency Initiative (EITI), the Natural Resource Charter, and the African Mining Vision.

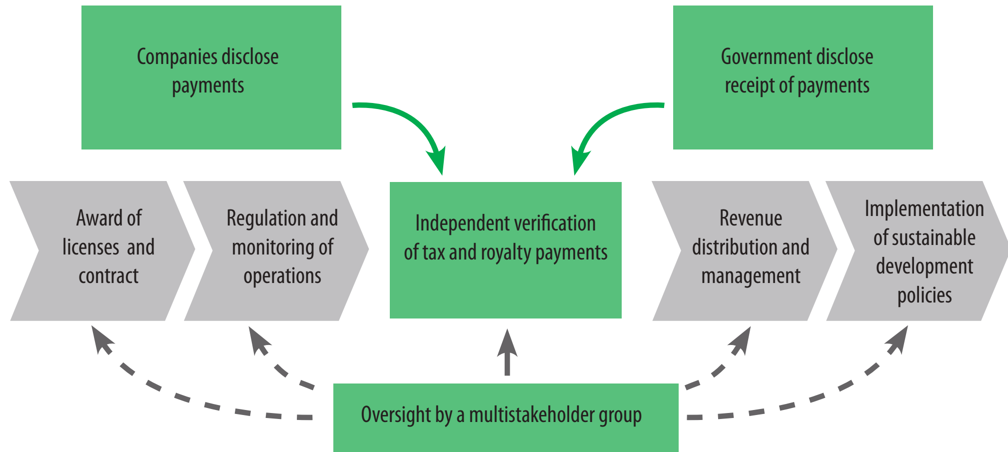
3.1.1 The Extractive Industry Transparency Initiative

The Extractive Industry Transparency Initiative (EITI) is a global standard for the governance of a country's oil, gas and mineral resources. The standard is implemented by a global coalition bringing together governments, companies and civil society working together to improve openness and accountable management of revenues from natural resources. Countries that participate in the EITI process usually disclose information on tax payments, licenses, contracts, production, and other key elements around resource extraction.

The idea behind this process is that availing information to the public improves the debate about the management and use of a country's natural resources. Therefore, leaders can be held accountable for their decisions relating to the management of natural resources as there is an informed constituency of actors involved in the process. The EITI standard applies to the chain process that extends to licenses and contracts, monitoring production, tax collection, revenue distribution and expenditure management.

The EITI process currently covers dividends which are paid to a government in lieu of production entitlements or royalties; signature, discovery and production bonuses; various fees including license fees, rental fees and entry fees and other payments for license; and concessions as well as payments for infrastructure improvements. As of 15th October 2014, the EITI process was being implemented by 48 countries. Of these, 31 are fully compliant with EITI requirements. The following figure indicates how EITI describes its process.

Figure 2-2: How EITI Describes its Process



Source: EITI Board Paper

3.1.2 The Natural Resource Charter

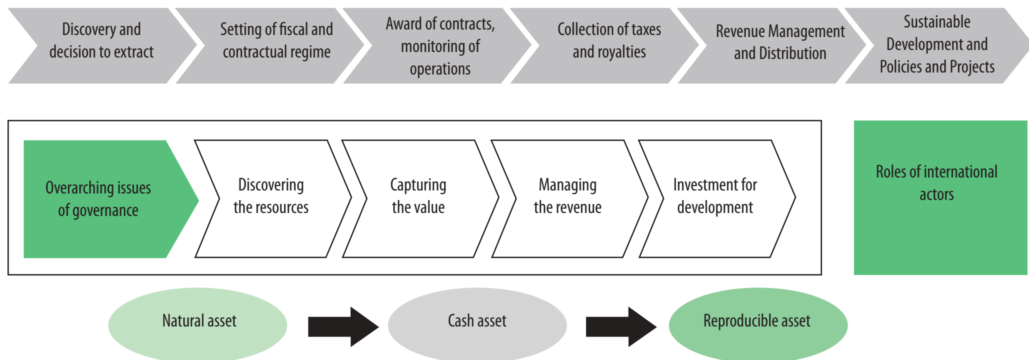
The Natural Resource Charter (NRC) was developed by independent scholars, activists, former government officials and practitioners through an independent approach. The technical team was led by an oversight Board with a membership drawn from the global south. The purpose of the NRC is to assist natural resource-rich economies in managing those resources in a way that generates economic growth, promotes the welfare of the population, and is environmentally sustainable. The NRC was driven by the challenges and opportunities that resource-rich countries face. On the one hand, if used well these resources can create greater prosperity for current and future generations, and on the other hand, if used poorly, they can cause economic instability, social conflict and lasting environmental damage.

The NRC is based on the premise that exploitation of natural resources should be pursued in the context of a nation's broader social and economic priorities. The task therefore is to fit the vision of the extractives sector into the nation's long-term social and economic plan or priorities. This means that the priorities for the extractives sector may vary between countries.

However in spite of this, there are some common principles or guidelines that can help maximize the opportunities that the extractives sector provides for social and economic development. In principle, the main principles that inspired the NRC are firstly, that mineral resources can be a pathway out of poverty but only if used correctly. Secondly, there is no "one-size-fits-all"

solution. Thirdly, governments could use it with broad guidelines and best practices to help them make crucial decisions for the sector. Fourthly, civil society actors ought to help evaluate government and corporate policies in the sector. Finally, there is need to identify all challenges across the entire extractives sector value chain which is illustrated below.

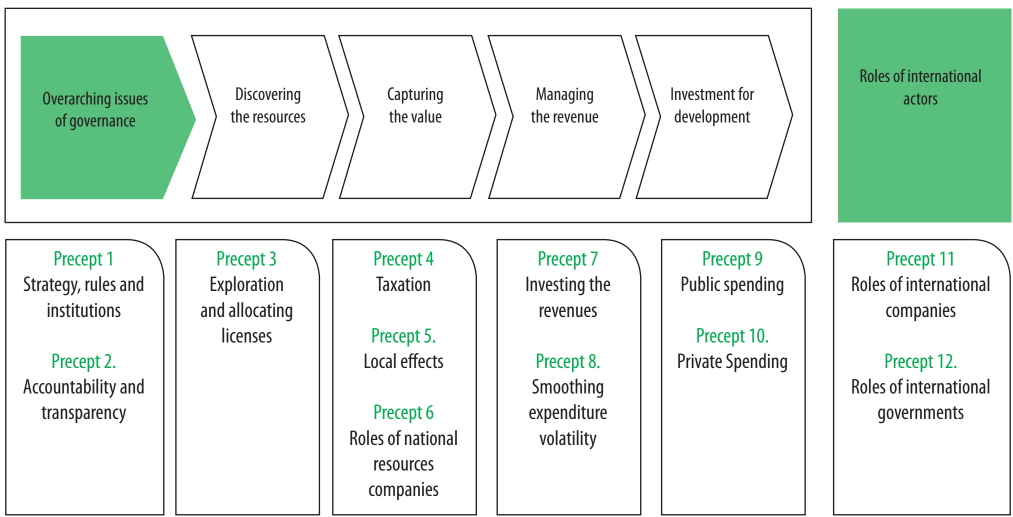
Figure 2-3:Challenges across the extractive sector value chain



Source: Jim Cust, the NRC in Africa: A Tool for National Strategy and Evaluation; Michael Ross, NRC

The team developed 12 precepts of resource governance and economic management incorporating latest research and country experiences. Ten of these precepts offer guidance on core decisions that governments face right from the base of the value chain in making the decision to extract the resources, through to decisions about how to use the revenues generated. The other two remaining precepts are addressed to other relevant actors and their responsibilities. In the following subsection, key issues covered by each precept as per the NRC are highlighted.

Figure 2-4: Precepts of Resource Governance and Economic Management



Source: Jim Cust, the NRC in Africa: A Tool for National Strategy and Evaluation

1) ***Precept One: Strategy, Rules and Institutions:*** The development of a country's natural resources should be designed to secure the greatest social and economic benefit for its people. This requires a comprehensive approach in which every stage of the decision chain is understood and addressed.
2) ***Precept Two: Accountability and Transparency:*** Successful natural resource management requires government accountability to an informed public.
3) ***Precept Three: Exploration and Allocation of Licenses:*** Fiscal policies and contractual terms should ensure that the country gets full benefit from the resource, subject to attracting the investment necessary to realize that benefit. The long-term nature of resource extraction requires policies and contracts that are robust to changing and uncertain circumstances.
4) ***Precept Four: Open Procurement Rules and Taxation:*** Competition in the award of contracts and development rights can be an effective mechanism to secure value and integrity.
5) ***Precept Five: Local Effects:*** Resource projects can have significant positive or negative local economic, environmental and social effects which should be identified, explored, accounted, mitigated or compensated for at all stages of the project cycle. The decision to extract should be considered carefully.
6) ***Precept Six: Roles of National Resource Companies:*** Nationally owned resource companies should operate transparently with the objective of being commercially viable in a competitive environment.
7) ***Precept Seven: Investing the Revenues:*** Resource revenues should be used primarily to promote sustained, inclusive economic development through enabling and maintaining high levels of investment in the country.
8) ***Precept Eight: Smoothing Expenditure Volatility:*** Effective utilization of resource revenues requires that domestic expenditure and investment be built up gradually and be smoothed to take account of revenue volatility.
9) ***Precept Nine: Public Spending:*** Government should use resource wealth as an opportunity to increase the efficiency and equity of public spending and enable the private sector to respond to structural changes in the economy.
10) ***Precept Ten: Private Spending:*** Government should facilitate private sector investments at the national and local levels for the purposes of diversification, as well as for exploiting the opportunities for domestic value added.
11) ***Precept Eleven: Roles of International Companies:*** The home governments of extractive companies and international capital centres should require and enforce best practice.
12) ***Precept Twelve: Roles of International Governments:*** All extraction companies should follow best practice in contracting, operations and payments.

3.1.3 The African Mining Vision

The African Mining Vision (AMV) was adopted by the First African Union (AU) Conference of African Ministers responsible for mineral resources development, in Addis Ababa in October 2008. It was later endorsed by Africa's Heads of State and Government (AHSG) in February 2009 who directed the AU Ministers in charge of Mineral Resources Development to, among other things, "establish appropriate institutional, legal and regulatory frameworks." The primary goal of the AMV is the establishment of an environment that supports "transparent, equitable and optimal exploitation of [Africa's] mineral resources to underpin broad-based

sustainable growth and socioeconomic development". This goal, the vision states, is to be achieved through:

- A knowledge-driven African mining sector that catalyses and contributes to the broad-based growth & development of, and is fully integrated into, a single African market through:

    - Downstream linkages into mineral beneficiation and manufacturing;
    - Upstream linkages into mining capital goods, consumables and services industries;
    - Side-stream linkages into infrastructure (power, logistics; communications, water) and skills and technology development (Human Resource Development and Research and Development);
    - Mutually beneficial partnerships between the state, the private sector, civil society, local communities and other stakeholders; and
    - A comprehensive knowledge of its mineral endowment.

- A sustainable and well-governed mining sector that effectively garners and deploys resource rents and that is safe, healthy, gender and ethnically inclusive, environmentally friendly, socially responsible and appreciated by surrounding communities;
- A mining sector that has become a key component of a diversified, vibrant and globally competitive industrializing African economy;
- A mining sector that has helped establish a competitive African infrastructure platform, through the maximization of its propulsive local and regional economic linkages;
- A mining sector that optimizes and husbands Africa's finite mineral resource endowments and that is diversified, incorporating both high value metals and lower value industrial minerals at both commercial and small-scale levels;
- A mining sector that harnesses the potential of artisanal and small-scale mining to stimulate local/national entrepreneurship, improve livelihoods and advance integrated rural social and economic development; and
- A mining sector that is a major player in vibrant and competitive national, continental and international capital and commodity markets.

The AMV rests on fundamental pillars including optimizing knowledge and benefits of finite mineral resources at all levels of mining and for all minerals; harnessing the potential of small-scale mining to improve livelihoods and integration into the rural and national economy; fostering sustainable development principles based on environmentally and socially responsible mining, which is safe and includes communities and all other stakeholders; building human and institutional capacities towards a knowledge economy that supports innovation, research and development; developing a diversified and globally competitive African mineral industry which contributes to broad economic and social growth through the creation of economic linkages; fostering a transparent and accountable mineral sector in which resource rents are optimized and utilized to promote broad economic and social development; and promoting good governance of the mineral sector in which communities and citizens participate in mineral assets and in which there is equity in the distribution of benefits.

These pillars have been used to develop an action plan for the AMV. For the purposes of this study, the fifth pillar which relates to the question of mineral sector governance. It emphasizes on the need for strong transparent and participatory governance processes. Beyond the question of optimization of revenue returns from the extractive sector, the AMV envisages that policy and law should be concerned with access to information, public participation in decision making processes, building linkages and diversification, promoting local enterprise development and participation across the value chain of the extractive sector and also building local research and development capacity.

3.2 Country Case Studies

3.2.1 The Case of South Africa

South Africa is the continent's largest coal and gold producer and the world's biggest supplier of platinum and chrome. The country's extractive sector is regulated by a number of legislations including the Mineral and Petroleum Resources Development (MPRD) Act 28 of 2002, the National Environmental Management (NEMA) Act 107 of 1998; the National Water Act 36 of 1998; the National Environmental Management: Air Quality Act 39 of 2004; and the National Environmental Management: Waste Act 59 of 2008. Other important laws include the Mining Titles Registration Act, the Promotion of Access to Information Act, the Geoscience Act, the Mine Health and Safety Act, and the Minerals and Petroleum Resources Royalty Act. The South African Code for Reporting of Mineral Resources and Mineral Reserves is the classification system that the mining industry uses for reporting mineral resources and mineral reserves.

The mining industry in South Africa is the biggest employer, with over 510,000 employees directly employed by the sector and another 400,000 employed by suppliers of goods and services to the industry. Given that it is fairly developed even by global standards, it may offer useful lessons for Kenya on what can be adopted locally and what may not work from mistakes that have been made in South Africa's regime. Key highlights include:

- ***Objectives:*** The MPRD Act has a number of objectives including promoting equitable access to the nation's mineral and petroleum resources; substantially and meaningfully expand opportunities for historically disadvantaged persons including women and communities, to enter into and actively participate in the mineral and petroleum industries and to benefit from the exploitation of the nation's mineral and petroleum resources; promote economic growth and mineral and petroleum resources development in the Republic, particularly of downstream industries through provision of feedstock, and development of mining and petroleum input industries; promote employment; provide security of tenure in respect of prospecting, exploration, mining and production operations; and ensure that holders of mining and production rights contribute towards the socioeconomic development of the areas in which they are operating.
- ***Mineral Rights:*** The government is the custodian of mineral rights. Any authorization for the exploitation of mineral resources is granted through the Minister. The custodianship implies that state control takes precedence over what was previously a system that allowed free

transfer of rights and holders were under no obligation to exploit them. The fundamental principle of custodianship is that such minerals must be held for the benefit of all citizens. Persons are therefore entitled to mining, prospecting, exploration and production rights to the extent that they actively exploit these rights. A period of 120 days and a year is given for exploration and mining rights, respectively. Prospecting rights may not be transferred, let, ceded, alienated or otherwise disposed of without the written consent of the Minister of Mineral Resources.

- ***Application Procedures:*** Rights are granted on a first-come-first-served basis. The Minister has powers to grant, refuse, suspend or cancel prospecting and mining rights premised on certain social and labour objectives. Applications are submitted to the regional manager of the Department of Mineral Resources who then submits a complete application to the Minister. This has created an unpredictable and discretionary regulatory environment with consequences to South Africa including a decline in foreign investment in the mining sector. A process that favours competitive bidding would thus be a more suitable alternative.
- ***Local Beneficiation:*** The MPRD Act provides that the Minister may promote beneficiation of minerals in South Africa, subject to such terms and conditions as the Minister may prescribe. To this extent, South Africa has developed an extensive beneficiation policy that aims to translate its comparative advantage into a competitive advantage to develop downstream beneficiation to attract and develop technological excellence in mineral-related industries to support side-stream and downstream value addition. The strategy identifies a number of cross-cutting constrains to beneficiation including limited access to raw material for local beneficiation, research and development, skills sought for expediting local beneficiation and access to international markets for beneficiated products. A number of interventions are identified with roles for both government and local businesses. The MPRD Act (Section 23 (2) and 26), the Mining Charter, the Precious Metals Act (Section 6 and 12), and the Income Tax Act all have provisions to promote local beneficiation. The country also has a Manufacturing Investment Programme, industrial funding programmes as well as a plan for state-owned mining companies. This has also been amended to include carried interest in new mining operations.
- ***Transparency, Accountability and Access to Information:*** The registration of all mineral and petroleum titles as well as all other related rights, deeds and documents is regulated by the Mining Titles Registration Act. The documents registered in this office may be accessed upon application under the Promotion of Access to Information Act. Persons requesting public documents do not need to furnish reasons for their disclosure. The country also has a Council for Geosciences established under the Geoscience Act, which is a public entity that collects geoscience data (including geological, geophysical, mineral, geochemical and engineering–geological data) in maps and documents. The information is sourced from mining companies, universities and research institutions globally. It maintains several mineral databases, some of which can be accessed at its library as well as an online database. In fact, the MPRD Act requires that an application for the renewal of a prospecting right must contain a certificate issued by the CGS that all prospecting information as prescribed has been submitted. The country has also developed the South African Code for Reporting of Mineral Resources and Mineral Reserves (SAMREC Code) which is a classification system for reporting mineral resources' and mineral reserves' required minimum standards, recommendations and guidelines for public reporting of exploration results, mineral

resources and mineral reserves in South Africa. It is the benchmark reporting standard for company annual reports, quarterly reports and other reports incorporated in the Johannesburg Stock Exchange (JSE) circulars, or as required by the Companies Act. In some cases, the SAMREC code applies to environmental statements, information memoranda, expert reports, technical papers, website postings and public presentations.

- ***Social and Community Issues:*** The MPRD Act requires that mining companies engage in public consultation with regard to exploration rights, mineral rights and environmental impacts. Companies are required to submit a social and labour plan, detailing their undertaking to invest in various programmes and projects for the general uplift of its employees and the local community. The plan must include a human resources development programme (including plans for skills development; career progression; mentorship; and internships and bursaries); a local economic development programme (including, among other things, infrastructure and poverty eradication projects; measures to address housing; nutrition and living conditions of employees; a procurement plan with a progressing scale for local companies for capital goods, services and consumables; as well as processes for managing downscaling and retrenchment. Ownership can also form part of economic participation.
- ***Health and Safety Issues:*** Health and safety issues are regulated by the Mine Health and Safety Act which establishes mechanisms to ensure responsibility for health and safety through creation of codes of practise, training, identifying potentially hazardous factors, investigating said factors, employing hygienists for the industry, and founding methods of medical attention and recording for the site. It also safeguards the rights of employees to refuse or move away from areas which are unsafe or potentially unsafe. The law creates the Inspectorate of Mining Health and Safety as well as a Mine Health and Safety Council.
- ***Environmental Regulation:*** The Department for Mining Regulation currently regulates environmental management in prospecting, mining and operations. However, the country has made legislative amendments to provide that the Department of Environmental Affairs will become the regulating authority for all environmental matters. Holders of prospecting or mining rights are required under the MPRD Act to give effect to the general principles of integrated environmental management prescribed in Chapter 5 of the NEMA; consider, investigate, assess and communicate the impact of their prospecting or mining on the environment; manage all environmental impacts in accordance with the Environmental Management Plan or approved; and as far as it is reasonably practicable, rehabilitate the environment affected by the prospecting or mining operations to its natural or predetermined state or to a land use which conforms to the generally accepted principle of sustainable development.

3.2.2 The Case of Norway's Oil Sector

The Norwegian petroleum sector is important to the country accounting for about 23 per cent of overall GDP figure by 2012 estimates. The country currently has 76 fields in production, producing 1.9 million barrels of oil per day and 111 billion standard cubic metres (sm3) of gas. In looking at Norway's model, one must remain aware of the unique circumstances of the country as compared to Kenya. Norway is a traditional exporter as internal consumption of oil and gas is very low as domestic energy needs are met by hydroelectric power. The state's

benefit from the sector is largely through taxation with a special petroleum tax rate of 51 per cent, a normal corporate tax rate of 27 per cent as well as indirect taxes including VAT, environmental taxes and area fees. State participation in upstream petroleum activities also forms another form of benefit.

While Norway's legal framework does not currently place a lot of emphasis on local content, the country had a significant interventionist policy for resource-based industrialization involving direct efforts to diversify the economy and support industries associated with the natural resource sector. The legal framework thus emphasized on local content to develop the infant petroleum industry. State participation was also a key factor that was pushed by the Norwegian Government. This was in spite of reluctance from international companies.

These policies have had beneficial effects on Norway by contributing to developing economic activities rather than relying on rents. They have also increased human capital through a learning-by-doing and technological spill over process. In seeking to develop a robust legal framework that supports the country's development vision, using oil and mineral resources as a pillar, care must be exercised to ensure a balanced framework that sets requirements which are not commercially unviable but also do not limit the country's ability to develop linkages through the upstream oil, gas and mining sectors.

The Norwegian petroleum sector is regulated by a number of key legal instruments, including the Petroleum Act of 29 November 1996 No. 72, its related regulations on health, environment and safety; scientific research for natural resources and norm price fixing, the Petroleum Taxation Act, the Working Environment Act, the Ship Safety Act, and the Pollution Control Act, Key highlights of Norway's legal framework include:

- ***Regulatory Structure:*** The country's parliament is responsible for all legislation on the oil and gas sector. All major projects and matters of public importance must be approved by Parliament. The application of policy is done at the Ministry and subordinate directorates and agencies. Specific roles include:
  - *Ministry of Petroleum and Energy:* The Ministry responsible for resource management and the sector in general.
  - *Ministry of Labour:* The entity responsible for health, the working environment and safety.
  - *Ministry of Finance:* The entity responsible for state revenues in the sector.
  - *Ministry of Environment:* The entity responsible for the external environment.
  - *The Norwegian Petroleum Directorate:* This is the advisory body to the MPE and plays a major role in management of resources. It is established under the MPE.
  - *Petroleum Safety Authority Norway:* The PSA is the regulatory authority responsible for safety, emergency preparedness and the working environment in petroleum activities.
  - *Other Entities:* Other entities include Petoro AS, the state-owned company that manages the Norwegian state's direct financial interest on behalf of the state; Statoil ASA in which the state owns a 67 per cent stake; and Gassco, an independent state-owned company which operates the integrated system for transporting natural gas.

- ***The Regulatory Regime:*** The Norwegian Government has rights to the petroleum resources on the continental shelf. The regulatory regime is based on competitive licensing for exploration and production rights. The Petroleum Act provides mechanisms for award of licenses, exploration, field development and infrastructure, joint activities and unitization of fields and discoveries in different licenses, as well as decommissioning and cessation of petroleum activities. It also provides for transfers and mortgages of licenses, insurance requirements and liability for pollution. The Petroleum Regulations of June 1997 provide for issues of health environment and safety, scientific research for natural resources, and norm price fixing.
- ***Nature of Oil and Gas Rights:*** The leases, licenses or concessions are issued and give the holder rights to exploration, exploration drilling and production of petroleum deposits in specified areas. They also confer ownership of the petroleum on the holder. Licenses are awarded through licensing rounds conducted by the Ministry after which production licenses are awarded by the King in Council. The production licenses are awarded on the basis of objective, non-discriminatory and published criteria. These rights can be transferred, subject to the approval of the Ministry.
- ***Taxation of Petroleum:*** Petroleum activities are subject to a corporation tax rate of 27 per cent as well as a special petroleum tax rate of 51 per cent. Investments are depreciated on a straight-line over six years. The regime allows deductions for costs related to exploration, research, development, financing, operations and removal. The country does not have a ring-fencing mechanism for individual oil fields. To cushion returns from the special petroleum tax, an uplift deduction is allowed to the amount of 22 per cent of the investment spread over four years. Companies that are not receiving income and are thus not taxable can carry forward deficits and uplifts with interest. They can also apply for a cash refund of tax value for exploration expenses. Other indirect taxes include VAT on supplies of goods and services made in Norway at 25 per cent, environmental taxes, as well as area fees (surface rentals).
- ***Health, Safety and the Environment:*** The law requires that petroleum activities be conducted in a manner that enables a high level of safety to be maintained and further developed in accordance with technological developments. Detailed provisions are set out in a framework regulation which establishes the basic requirements for organizing and carrying out petroleum activities. The legislation on health, safety and environment specifies what is to be achieved without prescribing a method of fulfilling the requirements. It sets preconditions for licensees to have basic knowledge of the requirements as well as sufficient management systems to define the necessary methods that will be used to achieve the requirements. Non-compliance can attract daily fines or in serious cases revocation of licenses. The country has an elaborate environmental and climate policy which applies at all times in the cycle of petroleum activities. The Pollution Control Act sets obligations for permit requirements for carbon dioxide, produced water discharge, chemical discharge and oil discharge. The law further requires that waste be classified and transported to the correct waste disposal facilities.
- ***Environmental Impact Assessment:*** The law requires the conducting of an EIA before opening up new areas for petroleum. The authorities are required to evaluate the various interests involved in the relevant areas, including the impact on trade, industry and environment; possible risks of pollution; as well as any economic or social impacts from

activities. When developing an oil and gas field, an operator is required to submit an EIA as part of the development plan. Before submitting plans for development, licensees must present to the Ministry a proposed programme for environmental impact assessment with a short description of issues including the development, the relevant development solutions as well as the likely impact on other commercial activities and the environment. The proposals are then forwarded for consultation to the authorities concerned as well as industrial organizations including the Norwegian Oil and Gas Association, the Confederation of Norwegian Enterprises, and the Federation of Norwegian Industries. It is also announced in the Norwegian Gazette.

- ***Third Party Access to Infrastructure:*** The Petroleum Act establishes third party access to pipelines and other infrastructure. The relevant parties are required to agree on the terms. If the parties fail to agree within a reasonable time, the MPE can decide that a third party is entitled to use another licensee's installations and other facilities and provide tariffs and other terms of use. This decision can also be undertaken without a disagreement. Forced access is subject to the requirement that the use of an asset by a third party does not unreasonably restrict the needs of the owner or other users of the infrastructure.
- ***Gas Flaring and Venting:*** The level of gas flaring and venting cannot exceed quantities set by the MPE. Permits are issued for flaring and venting for the start of production in a new field, regular operations and in connection with operational difficulties with the export or injection of gas into the reservoir.
- ***Decommissioning:*** Licensees are required to submit a decommissioning plan before the end of the petroleum activities to the MPE. The Ministry has wide latitude to decide what happens to the installations, facilities and pipelines. They could be used for further petroleum activities, be decommissioned, be completely or partially removed or be used for any other purposes. The state can also take over installations. The costs for decommissioning of installations, facilities and pipelines are borne by licensees. They are also liable for any damage or inconvenience caused by decommissioning. If a participating interest is transferred prior to decommissioning, the seller as well as any other prior seller remain liable on a secondary basis for the decommissioning obligations.

4 Implications of The Legal and Institutional Framework In Kenya

This chapter examines the possible implications of Kenya's legal and institutional framework on a number of key issues. These include fiscal management of the extractive sector revenues, conflict management and national cohesion, gender economic empowerment, and local content value addition, as well as environmental protection and conservation for sustainable resource use. These are analysed with the characteristics of the comparative jurisdictions in mind.

4.1 Fiscal Management of the Extractive Sector Revenues

The policy, legal, and institutional framework relating to the fiscal management of extractive sector revenues is to be found in the financial mechanisms established under the Constitution of Kenya 2010, as well as the financial mechanism that is set out in the PFM Act. The management of revenues is also proposed under the Sovereign Wealth Fund Bill. However, the proposed instrument is structured to be insulated from the mechanisms of the PFM Act.

The best practice in this area is the design of stable and predictable frameworks that promote accountability in decision making and are properly linked to the country's fiscal institutions to be able to regulate the fiscal revenues emanating from the sector. The legal architecture proposed for the public finance management element of the extractive sector risks making the country unable to manage the volatility that comes with the extractive sector. This is because it largely adopts a framework outside structures and laws that have been established under the PFM Act. This, therefore, risks making fiscal management a challenging issue as spending priorities on sectors and infrastructure for economic and social development would fall outside the scope of MTEF and lack the oversight and accountability mechanisms of the PFM Act.

The possibility of the country experiencing the Dutch disease under a management structure outside the PFM Act would likely increase under the proposed scenario. Furthermore, the country has high levels of poverty and infrastructural deficit that warrant a rethinking on the need for a SWF at this point in the country's development given that, traditionally, it is countries with budgetary surpluses with no external debt that establish such funds. Countries like Nigeria and South Africa have for a long time managed resources from extractives without creating a wealth fund. The Constitution in Article 201 requires that the burdens and benefits of use of public resources be shared equitably between present and future generations. This doesn't necessarily have to be monetary in nature as investment in infrastructure as a public good could also benefit future generations.

4.2 Gender Economic Empowerment and Local Content Value Addition

The policy, legal, and institutional framework currently doesn't address specific issues relating to gender and the extractives sector. The only aspect that touches mining on gender issues relates to the proposed law on mining which also covers the artisanal and small-scale mining. Furthermore, the design of these laws at different times may risk addressing the issue of local content development in a piecemeal manner, as the laws on local content development are still at the development stage.

This may have implications on the sector, especially on gender-related extractive sector concerns including issues of employment and income; environment and community consultations, as these sectors significantly affect women in terms of access to employment and income; access to ecosystem services; and the nature of community consultations. The legislation could benefit from a provision similar to the South African law, which provides, as one of its objectives, the expanding opportunities for historically disadvantaged persons, including women, to enter the mineral and petroleum industries and benefit from the exploitation of South Africa's mineral and petroleum resources. Targeted policies could then be put in place to promote gender parity in the sector through promoting employment opportunities, enhancing access to ecosystem services for land that has been awarded within blocks, greater (and gender balanced) consultation at the community level, as well as measures to regulate the ASM sector and promote health and safety within it.

In the case of local content, the sector could play a more prominent role if the country adopts a beneficiation approach that looks at minerals beyond economic rent and miniscule local content. In this context, therefore, the law on local content will be looked at, not from a perspective that enables companies to obtain a social license to operate, but rather one that deliberately fosters value addition through development of downstream industries as well as promoting local participation in supply of goods and services to the upstream industry.

4.3 Environmental Protection and Conservation for Sustainable Resource Use

The policy, legal, and regulatory framework did not envision the extractive sector when it was being crafted. As a result, there are weaknesses and gaps in the regime for environmental protection and conservation as the old law specifically fails to address the peculiarities of the sector and its potential impact on the country's environmental sphere.

It would be prudent to develop a policy, legal, and institutional framework that specifically addresses itself to the unique nature of the upstream extractives sector. Such would include developing laws that leave policy space for the application of international best practices and avoiding stabilization clauses which place a limit on the government's policy space to progressively regulate the extractives sector in an evolving manner consistent with international best practices.

The extractive sector laws conflict with the role of the Ministry of Environment as the regulator in terms of environmental management. While they indeed make mention that the EMCA Act and other environmental laws, regulations, environmental health and safety laws as well as best industry practices will be applied, they place the overall discretion to manage environmental matters outside the scope of NEMA and the parent Ministry. This conflict can result into poor coordination of environmental matters in the absence of clear roles of mandates according to the respective mandates of the relevant agencies.

Furthermore, the country's environmental laws governing the extractives sector are weak as this role is mostly taken up by the respective ministries handing the extractive sector. This is a latent weakness that could make environmental regulation weak in the absence of a strong oversight mandate within the parent ministry. This is because key decisions affecting the environment extend beyond the regulations developed by NEMA and would require a broader mandate.

4.4 Conflict Management and National Cohesion

The proposed policy, legal, and regulatory framework is being realigned to the constitutional requirement that the state manages natural resources in a manner that promotes sustainable exploitation, utilization, management and conservation of the environment and natural resources, and ensures the equitable sharing of the accruing benefits. This is reflected in the proposed sharing formula that is supposed to distribute the benefits between national, county and community levels.

This situation above likely to mitigate the possibilities of conflicts in the mining law is made to also reflect the equitable nature of revenue sharing reflected in both the petroleum law and the Constitution. Beyond the question of equity in the sharing of revenues, the issues of compensation, community resettlement plans and the question of how best to address the phenomenon of community land have not been clarified. This is likely to be a dicey issue, and if not well-managed could undermine cohesion and complicate the aspiration to promote national cohesion.

The other important issue in this respect would be the question of how to address the issue of resources that are found within boundaries shared by different countries. This is likely to be a sticky and contentious issue that may foment animosity between neighbouring communities where these resources lie. It would, therefore, be important for the Independent Electoral and Boundaries Commission (IEBC) to address the question of demarcation of boundaries to settle long-running disputes about resources found in shared boundaries.

5 Conclusions and Recommendations

This work set out to investigate the legal, policy, and institutional frameworks for the management of the extractives sector, their overlaps and coherences as well as their appropriateness in promoting good stewardship of resources in the emerging extractive sector. It also sought to establish the implications of such frameworks on fiscal management of extractive sector revenues, conflict and lack of national cohesion, gender, economic empowerment, and local content value addition, as well as environmental protection and conservation sustainable resource use.

What conclusions and recommendations can we draw from the study? This chapter sets out what emerges as a summary of the conclusions drawn from the entire study, together with the recommendations that will contribute towards promoting debate and possible review of the legal and institutional architecture for the sector. In the final analysis, the recommendations drawn from this study will be shared with policy makers. It is hoped that these recommendations will promote greater understanding and convergence on various governance issues in the sector.

5.1 Summary and Conclusion

Energy Sector Conclusions

The study adduces evidence of the existence of coherences, overlaps and gaps in the legal and institutional architecture of the extractive sector. In following the benchmarks that were used in this study, it is established that the energy sector regime is generally moving towards coherence with the precepts of the Natural Resource Charter regarding management of extractive sector revenues. However, there is need to balance the objective of attracting investments in the sector against the need to capture the rents through taxation. The provision that taxes paid form part of the government's share of production may serve the purpose of attracting investment within the petroleum sector, and yet limit the government's ability to capture rents from production. Furthermore, the failure to specifically address the unique circumstances relating to gas sharing may also limit this ability.

While the proposed framework indeed addresses the issues of investing of revenues and smoothing expenditure volatility, the failure to place the sovereign wealth fund within the confines of the PFM Act risks disarticulating financial discipline in the management of revenues with the consequence that the economy would be susceptible to "Dutch disease" shocks owing to a detached financial mechanism that will inject significant resources into the country's economy without adequate checks.

The introduction of bidding rounds bodes well for the sector as it introduces an element of competition and accountability. However, the failure to legislate on transparency and accountability through the Freedom of Information Act, as required under the Constitution, as well as contract transparency, may undermine the ability of stakeholders to access timely information and undermine governance of the sector. This is because general oversight of the sector will require detailed information and in the absence of a mechanism of accessing the information, the limiting nature of anecdotal information will inevitably limit the quality of all stakeholders to participate in governance.

The establishment of NUPAC and UPA in the petroleum sector is a positive development that promotes efficacy in the governance of the sector. The upstream sector could benefit more if NUPAC plays a more prominent role in the contract award process as it would afford critical stakeholders an opportunity to assess applications and ensure that they meet the required threshold and the country gets the best deals. While this is certainly covered under the parameters set for contractors to achieve, limiting that decision at the ministry level may fail to appreciate the broader perspective shared by other critical stakeholders.

The legal, policy, and institutional framework, for the extractive sector, falls short with regard to the question of using the extractives sector as a catalyst that contributes towards broad-based growth and development. This is within the benchmarks set by the African Mining Vision, which Kenya has endorsed. While it contains provisions for local content development, requiring that contractors submit long-term and annual local content plans which correspond with their work programs, it lacks provisions to promote downstream linkages into beneficiation and manufacturing as well as creating linkages into capital goods, consumables and services industries. While local content is defined to include employment and training, research and development, technology transfer, legal services, and financial services, the exclusion of the ministry of industrialization and enterprise development which has a mandate for private sector development as well as industrial research and development limits the local content scope towards the obtaining of a social license to operate without necessarily feeding into the broader national development goals. It further risks creating policy disarticulation between the mandates of the energy and industrialization ministries.

It is also concluded that, the legal, policy, and institutional framework is moving to provide clear lines of responsibility and accountability regarding the upstream sector through the establishment of UPA, NUPAC and ministry-level decisions. However, the provisions of the Water Act conflict with NEMA's mandate as the regulation of water use is envisaged to be carried out by the Water Resources Management Authority (WRMA). The authority to enforce obligations on contractor work practices and compliance with environmental principles is also unclear as the law proposes powers to the CS yet NEMA also has independent authority in this respect. This falls short of the benchmarks set in the Intergovernmental Forum on Mining, Minerals, Metals and Sustainable Development.

With regard to the regulation of the coal subsector, it is concluded that, the legal framework fails to properly regulate coal mining by placing the legal framework regulating the sector in conflict between the mining and energy Bills. Further, no comprehensive framework is established to

regulate the sector and the weakness of the proposed framework may undermine the ability of the established structures to effectively manage coal exploration and development. The architecture does not provide for proper environmental controls, local content or beneficiation through coal reserves. In summation, the latent weakness of proposed regulation of the coal sector may undermine the ability to promote stewardship of coal resources.

Mining Sector Conclusions

With regard to the mining sector, it is concluded that the sector's amended laws have largely addressed the shortfalls of governance and decision making and largely meet a good threshold in terms of the regulatory process for exploration and allocation of licenses. However, the failure to develop a fiscal mechanism specific to the mining sector is also a limiting factor that may undermine Kenya's ability to capture rents from the extractives sector. This limits the ability of the country to secure greater social and economic benefits. The discretion given for public officials to determine the rates applicable to the mining sector may be susceptible to abuse in some cases.

The establishment of the National Mining Corporation as an investment arm of the government is a step in the right direction as it promotes greater participation by the state. This could, however, be buttressed through giving the entity a greater latitude and functional independence. The establishment of the Mining Tribunal, as presently envisaged, lacks the operational independence to be a fair arbiter in disputes. Revenue management provisions are weak and in conflict with constitutional principles which requires equity in the sharing of resources. The failure to create a sharing formula between the national and county governments, as well as communities, fails to ensure increases in the efficiency and equity of public spending.

The concept of strategic minerals, which are so declared for socioeconomic development and national security reasons, is an attempt towards beneficiation. While this may address issues of beneficiation, the weakness in the local content provisions in the legal framework may undermine the country's ability to promote linkages into capital goods, consumables, and services industries. Further, the failure to include issues of training, research and development, technology transfer, legal services, and financial services limits the scope of what entails local content under the mining regime.

5.2 Recommendations

In light of the foregoing conclusions on Kenya's legal, policy, and institutional framework for extractives, the following specific recommendations are suggested.

5.2.1 Legal Recommendations

1. The legal framework should be calibrated to balance the objective of attracting investments in the sector, capturing rents against the broader objective to promote beneficiation and linkages to the local economy.

2. There should be a deliberate effort to foster competitive bidding in the allocation of licenses to ensure Kenya secures the best value for its natural resources. As such, both the mining and petroleum sector should adopt measures that promote public tendering for minerals. The process of awarding contracts should involve a multi-stakeholder process for all relevant government agencies involved in the sector.

3. The country should address the failure to legislate on the access to information clause contained in Article 35 of the Constitution. This may hinder the ability of various stakeholders to provide effective oversight of the extractive sector and undermine overall transparency requirements which are vital to the sector.

4. Kenya should also make effort to develop the law relating to environmental management to better address the peculiarities of the extractives sector and make it flexible enough to anticipate embracing of international best practices as they develop over time.

5. It will be important to anchor the management of revenues generated from the sector under the PFM Act mechanism. This is important as it gives the sector predictability and stability in terms of the management of generated revenues and offers a more strategic approach that avoids the inherent risks with the management of extractive sector revenues.

6. The taxation regime for the extractives sector should create a certain fiscal regime specific to the mining sector and also address taxation and accounting requirements peculiar to natural gas. This will help build a predictable fiscal regime that is not amenable to discretionary adjustment, especially within the mining sector.

7. The perception of the legal regime should also be viewed from a larger perspective involving the international sphere. Contracts in the sector are usually regulated by international law and disputes are usually settled through arbitration. Therefore, the country should have a careful approach in signing onto trade and investment agreements that result to stringent regulation for the extractives sector and denies policy space.

5.2.2 Policy Recommendations

1. It will be important for the country to consider joining the EITI process and align its laws and institutions with the proposals made under the Natural Resources Charter. Beyond the adoption of these international standards which largely address revenue issues, Kenya should seriously consider domesticating the African Mining Vision, which is a document it has acceded to under the African Union.

2. The country should consider actively pursuing a beneficiation policy that will translate the comparative advantage into a competitive advantage. This will entail recalibrating the policy framework to develop upstream and downstream linkages. Issues relating to limited access to raw material for local beneficiation, research and development, skills sought for expediting local beneficiation, and access to international markets for beneficiated products, should be addressed in such legal framework. In so doing, the involvement of the

Ministry of Industrialization and Enterprise Development, which coordinates research and development, industrial property and technology as well as general private sector activities, is crucial. This will also require the development of local content legislation for both the mining and petroleum sectors.

3. The policy goals set for the extractives sector should balance between the interest of the state, private companies and communities in the extractive sector. This means that, while there is a need to attract investment into the sector, this should not be done without appreciating the overall effect of such investment to the economy. This means that an inward FDI policy should be tempered with an assessment as to its quality and not just the total volume of FDI the country attracts to the sector.

4. The government should design policy measures to promote the transfer of technologies and enable the local private sector to participate more effectively in the sector after acquiring the necessary skills and technology to contribute more effectively to the sector.

5. The policy strategies for the petroleum and mining sectors should also be recalibrated to take advantage of Kenya's position in the East African region. This means that focus should, not only look at export of extractive resources from the region, but rather how these can be harnessed and leverage on Kenya's regional position to spur greater trade, investment, and value addition.

5.2.3 Institutional Recommendations

1. The country should consider merging the negotiating and advisory roles of the petroleum and mining sectors as well as the coal subsector to avoid duplicity and an unnecessary proliferation of institutions which may not necessarily add value to the governance process.

2. The architecture proposed under the National Sovereign Wealth Fund Council should take into account the GAPP principles and establish a framework that would best manage these resources. Beyond the establishment of a better framework for a SWF, the country should have a discussion on whether such fund is necessary at a time when the country has serious development challenges and is also indebted. Traditionally, it is countries with surplus and little or no debt that establish such funds.

3. There is a need to clarify on the nature of relationships between various entities regulating the sector as well as those proposed to do so. This is because the risk of overlaps presents a clear and present danger of weak governance in a sector that could have the most impact to the country.

4. Kenya should restructure the National Oil Corporation of Kenya to be able to better handle its mandate as the upstream arm of the government. This should equally be done with the establishment of the National Mining Corporation. In so doing, these institutions should be given the functional mandate to undertake their work with a certain level of functional independence to insulate them from political actors.

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FISCAL IMPLICATIONS OF AN EMERGING EXTRACTIVE SECTOR IN KENYA

Davis Osoro

1 Introduction

African economies have been riding the crest of a global commodity wave that could transform the continent's prospects. The 2013 Africa Progress Report explains how this unprecedented change could lift millions of people out of poverty and improve the prospects of generations to come. The report sets out an agenda for increasing Africa's natural resource wealth and using it to improve the well-being of the population. African governments should start with a strengthened focus on fiscal policy and equitable public spending on infrastructure, health, education, water and sanitation (Africa Progress Panel, 2013).

Kenya has a wide range of minerals such as Soda Ash, Fluorspar, Limestone, Barite, Gypsum, Salt, Dimension Stones, Silica, Sand, Soapstone, Manganese, Zinc, Wollastonite, Graphite, Kaolin, Copper, Gold, Lead, Nickel, Iron ore, Carbonic Dioxide, Chromite, Pyrite, Various Clays, Niobium and Rare Earths. Major mineral deposits like titanium ores – rutile, ilmenite and zircon – have been discovered along the coast. Significant concentrations of coal deposits exist in the Mui Basin. Recent discoveries of oil in the Tertiary Rift Basin and gas in one of the offshore wells of Lamu Basin indicate the existence of viable quantities of oil and gas and the potential of the country becoming an oil and gas-exporting nation (Figure 3-1).

Figure 3-1: Oil and Natural Gas Discoveries in Kenya

Source: Author's compilation using NOCK and Energy & Petroleum Ministry data

The discoveries and promotions at regional and international gas forums have seen a number of International Oil Companies (IOC) signing production-sharing contracts with the government to carry out oil exploration. Oil discoveries in Uganda and Southern Sudan additionally make Kenya a viable site for oil exploration and processing facilities. The Kenya government has signed agreements with the governments of neighbouring countries to develop regional infrastructure to support the oil and gas industry (V2030, 2013).

The government's main public finance objective is to achieve high and sustained growth of the economy necessary for reducing the levels of poverty (Treasury, 2014). The oil and other mineral resources sector has been identified as one of the priority sectors under the Economic Pillar of Kenya Vision 2030. However, currently the sector accounts for about one per cent of GDP and three per cent of total export earnings. The recent mineral discoveries point to an increasing importance of this sector in export earnings, in stimulating GDP growth and in broadening social development (V2030, 2013).

As the extractive sector in Kenya expands, the country's exchequer is likely to get a large boost in revenues that can be used to support government spending. Although both revenues and expenditure have grown over the years, budget deficits have often forced the government to borrow internally and externally. According to the Institute of Economic Affairs (IEA, 2014), the Kenya budget stood at about KES. 393 billion in the fiscal year 2003/04 but has grown to KES. 1.77 trillion in the fiscal year 2014/15, a 350 per cent increase. Revenue performance improved 90.7 per cent in 2012/13 and 99.5 per cent in half year 2013/14, against respective targets. However, revenue performance in 2014 and in the medium term faces a threat from likely insecurity shocks. Tax performance is closely linked to economic activity. Additionally, the impact of the amendment of VAT may dampen overall revenue performance. On the other hand spending is estimated to increase by 8 per cent from KES. 1.64 trillion in 2013/14 to KES. 1.77 trillion in 2014/15. The National Treasury Budget Summary shows that the overall budget deficit for 2014/15 is estimated at about KES. 342.6 billion amid a slow growth rate (IEA, 2014).

Kenya's proportionately slower growth rates may actually hide a relative strength compared to other African countries, resulting from a more diversified economy rather than one centred on natural resource extraction. Kenya has one of the most diversified economies in Eastern Africa (Vasquez, 2013). However, economic growth is expected to rise to 6.4 per cent in 2015 from a forecast of 5.8 per cent. The extractive sector is poised to play a big role in this growth (Ken Invest, 2014). The extractive sector revenues, consisting of oil and gas revenues are expected to increase significantly. It is important for the country to design instruments and institutions for ensuring a fiscal policy that would best harness these revenues. In particular, there is need to design financial systems that ensure safety and proper use of revenues accruing from the extractive sector. This paper critically analyses the revenue generation potential of the oil, gas, and mining industries, paying particular attention to implications of such revenue on structure of the public budget, expenditure and debt.

1.1 Research Problem

One aim of a fiscal policy is to build a strong revenue base and use the revenue generated from that base to maintain macroeconomic stability, provide basic social services, and ensure that the poor use the services made available. Over the last decade, the pursuit of this broad objective has led to government expenditure outpacing revenue mobilization, culminating in unsustainable budget deficits (Gongera et al, 2013). The new mineral finds can potentially solve the government's budget deficit problem, bring fiscal benefits to all Kenyans in terms of public goods provision and accelerate socio-economic development. The extent to which the extractive sector will contribute to inclusive and sustainable development will depend on how revenue from the natural resource exploitation is managed and allocated. With poor macroeconomic management amidst increasing foreign direct investment in the extractive sector, there is the risk of the country facing the challenge of the "Dutch disease". This is a situation where an increase in the development of natural resources results in a decline in the performance of non-extractive sectors, such as manufacturing and agriculture since they are less competitive due to the appreciation of the local currency. This situation was experienced in the manufacturing sector in Netherlands with the discovery of natural gas in 1959.

Currently, revenue from the extractive sector in Kenya has emanated from mining. There is scant information available on revenue trends from the oil and gas sub-sectors. This research provides revenue projections for the extractive sector, making the assumption that oil and other discoveries are commercially viable. The projections are made cognizant of the fact that the government will face challenges aligning fiscal resources from the emerging extractive industries with other aspects of the public budget such as the sovereign debt, tax rates, and social expenditure.

1.2 Study Objectives

The objectives of the study are to:

1) Establish the structural transformation of the Kenyan economy arising from the emerging extractive sector, in line with Kenya Vision 2030;
2) Review and estimate the revenue projections and trends from the extractive sector;
3) Explore how the projected revenues should be spent;
4) Establish the implications of such expenditure patterns on poverty reduction and economic growth; and
5) Provide policy and legislative recommendations for enhanced generation and management of oil, gas and mining of the attendant revenues and expenditures.

1.3 Justification

As the extractive sector develops, it is likely to have both positive and negative effects on the economy. One of the anticipated positive outcomes is an increase in revenues from the oil and gas extractions. These revenues are expected to come at a time when the fiscal regulatory framework is changing with the implementation of the Public Finance Management Act

2012. In the event that there is a weak regulatory framework and inefficient political system of governance, the country is at risk of experiencing the Dutch disease and/or the "resource curse". Other problems are also likely to occur at collection and appropriation points of the industry. This study is significant in that the information it provides should help policy makers institute sustainable fiscal policies for the extractive sector. Since the extractive sector is at the nascent stages, particularly with the exploration of oil, gas and other minerals such as coal, it is not surprising that there is limited information on the management of the revenue it generates.

The government through the line ministries is designing reforms to respond to the complex needs of the industry. Some of these reforms are to be anchored in new legislations and are anticipated to address most of the issues associated with extractives governance. Revenue management is one area that does not seem to have received much attention right from revenue collection to its spending. This paper contains the views from experts and key informants on how the fiscal affairs of the extractive sector should be handled. Literature is also scanty on systematic studies of the impact of the new natural resource discoveries on taxes, social spending and debt reduction.

2 Literature Review

The main focus of the literature review is on macroeconomic effects and fiscal implications of growth on the extractive sector. There is a relative scarcity of information on this subject in government documents due to the minor contribution of the extractive sector to GDP even though the industry has been in existence for a long time (ICES, 2014). The purpose of the literature review is to provide an understanding of the industry's present situation and to identify areas that need policy interventions for the industry to expand and develop into a major development player in Kenya.

2.1 Tax Administration and Collection Regimes

2.1.1 Contracting Frameworks

Mining is a high risk industry. Government's ability to negotiate and implement tax and related agreements with mining companies is critical for collection of viable revenues from the industry. Usually, the kind of contract a country signs with a mining company will determine the nature of benefits it will get. Mining contracts differ from one country to another, from one company to another, from one mineral to another and from one project site to another. It is upon the government to devise ways of getting good deals from such contracts. Like other profit making entities, mining companies are expected to have strong profit motives and therefore can be expected to minimize the payments they must make to host governments. In contrast, national governments often fail to get full value for their minerals due to lack of mining knowledge, negotiation capacity, or as a result of corruption in public institutions responsible for the management of natural resources.

Mining is a long-term investment and contracts must be clear on how rents will be divided between governments and companies, as well as how costs and risks will be shared. Negotiations in the extractive sector are made even more complex by high levels of uncertainty and incomplete or faulty information at the time of the signing of contract. Neither companies nor governments can fully anticipate the exploration costs, future levels of production, or whether the mineral prices will justify exploration costs (Chene, 2007). As a result, the technical nature and complexity of the negotiation process limits opportunities for full public scrutiny as well as for the establishment of accountability mechanisms. In addition, negotiations often occur in capital cities where affected populations do not have a say or a voice. Political leaders sometimes intervene in the negotiation process and give orders to the signatories of the contract, as described in a Global Witness Report on corruption in Katanga's mines. The leaders usually operate in an unofficial capacity and their names remain anonymous (Global Witness, 2013).

In Kenya, the mining sector predominantly uses taxes and royalties to capture rents from extraction of minerals. Here, contractors pay royalties to the government either as a percentage of gross revenues or in the form of a payment per unit of production as well as taxes on the remaining income of the contractor. In the petroleum sector, a Production Sharing Contract (PSC) is used. The PSC method used in this case is the Daily Rate of Production (DROP) method which has been criticized by some institutions like the World Bank. The Kenyan government should strive to ensure that the current fiscal regime serves its intended objectives and responds to the needs of multinational companies in a fair and equitable way. This means that the government should seek to maximize the wealth from its natural resources and attract foreign direct investments at the same time (Karembu, 2009).

Not only does the government need to look at the right mix of royalties and taxes in contracts, but also factor in their demands in terms of shared infrastructure, and creation of local jobs and provision of economic opportunities. Getting a good balance is essential as both parties to a contract need to know that "an unfair deal is an unstable deal." The contract also forms a framework to determine revenues and ensure that the benefits of mining are shared down to the sub-national level (Open Oil et al. 2013). A number of PSCs have several other fiscal instruments like bonuses, investment credits, tax holidays, income tax and domestic market obligations (Karembu, 2009).

2.2 Revenue Allocation Arrangements

2.2.1 Devolution and Revenue Sharing

The manner in which governments share mineral wealth benefits with the regions in which the minerals are found has been a key factor in determining outcomes such as social conflict and stability of African economies. For instance, Nigeria's woes in the Niger Delta arose because the government failed to institute proper and broadly acceptable revenue sharing mechanisms. Both the devolved system of government and extractive revenues are new phenomena for Kenya. The Government needs to devise good policies to ensure revenues are shared equitably across counties and local communities.

2.2.2 Sovereign Wealth Fund

The country needs to establish a Sovereign Wealth Fund (SWF) in accordance with the provisions of Article 201 of the Constitution of Kenya. The objective and purpose of the Fund shall be the facilitation of sustainable spending levels and insulation of the national Budget and the economy from the impact of volatility in revenues, including mineral and petroleum incomes (CIC, 2014). A non-discretionary rule should be established to dictate the proportion of resource revenues that are saved for future generations. The goal should be to use revenues primarily for investments. Given the volatile nature of petroleum revenues, the Government will need to employ tools to smoothen the rate at which revenues enter the economy. Revenues that are invested in Kenya should be used to increase the efficiency and equity of public spending.

It is important that these funds are not invested in the economy too quickly as this can lead to poor project selection and delivery, as well as to cost inflation (Natural Resource Charter, 2013).

2.3 Case studies

2.3.1 Norway & Botswana – Spending the Money Well

Relative to other oil-exporting countries, Norway has been successful in using its highly consensus-oriented and parliamentary institutions, as well as the involvement of interest groups representing business and labour, to reconcile competing claims for oil revenues with long-term objectives and stabilization goals. This accomplishment is even more remarkable given that Norway has had several changes in government and periods of weak minority government since becoming an oil exporter. However, as a small, trade-dependent nation, Norway also has a strong pro-stabilization constituency in the form of employees, trade unions and business leaders, and voters who are dependent on the non-oil tradable sectors for their well-being and have a good understanding of the need for restraint in public spending and the avoidance of a volatile expenditure pattern. In Norway, in contrast with most other countries, political differences are small and values are egalitarian. The high level of transparency in political and bureaucratic processes reinforces the general trust in the integrity of politicians as well as in the professional skills of the civil service – few Norwegians would question the government's ability to manage Norway's oil rents in an honest and efficient way. Perhaps for this reason, Norway has not moved to distribute oil dividends directly to citizens as is done in more individualistic places such as Alaska.

Reflecting these features, policies are stable in Norway, despite changes in government, and policy formulation has a long-term horizon. However, more recently, the move from deficits to structural budget surpluses and the rapid accumulation of assets in the Government Petroleum Fund have led to mounting political pressures for increased government spending of oil export incomes and made restraint more difficult. Moreover, expenditure commitments will grow in future decades—in particular, as the population ages and pension payments increase—and oil revenues projected to taper off. These considerations have aroused concern about Norway's ability to sustain its past success in managing its oil wealth (Benn et al. 2003).

When Botswana discovered its diamond wealth, the government quickly spread the message, "We're poor and therefore we must carry a heavy load." This message helped the government to justify and win public support for investing more of the money rather than spending it. For instance, the country earmarked mining revenue for specific development purposes such as education and health through its Sustainable Budget Index. Since the 1980s, the Sustainable Budget Index has monitored whether mineral revenue is being used to promote sustainable development and finance "investment expenditure," defined as development and recurrent spending on education and health. As a result, the country has been on a steady economic growth path because of the prudent management of revenues from the mining industry (McKinsey & Company, 2013).

2.3.2 Nigeria – Spending the Money Imprudently

While Norway developed prudent strategies and institutions to avoid injecting oil revenue directly into its economy, Nigeria did the opposite. When it became independent in 1960, Nigeria had a level of development that was often compared to that of Thailand or Malaysia. It was the breadbasket of West Africa with a vibrant manufacturing industry. But an overemphasis on the oil sector, as well as widespread corruption, starved other parts of the economy. Now Nigeria imports food and gasoline, and its manufacturing sector is mostly moribund (John C. 2011). Oil represents an estimated 37 per cent of GDP in Nigeria and 63 per cent of consolidated government revenues. Oil revenues are controlled by the public sector and have traditionally greased the functioning of an extensive machinery of rent seeking and political patronage. Oil has also been used, with some success, to hold together a fragile political coalition of diverse ethnic and religious interests. But economic infrastructure remains underdeveloped, and broad provision of public goods is scarce. Unsurprisingly, public expenditure has always spiralled out of control during oil booms, creating considerable macroeconomic instability. Forced and painful adjustment has typically followed. While the elite have flourished, growth of the economy has been stagnant, and annual per capita income estimated to have fallen from about $800 in the early 1980s to about $300 today (Benn et al. 2003).

Nigeria's socio-economic problems arose when oil came on stream in a big way, generating state revenue of previously unimaginable proportions, but without the public and private institutions necessary to manage it properly. Corruption and rent-seeking took centre stage with deleterious consequences to the state of the economy and the social fabric. Nigeria's economic potential could be unlocked if the country was able to control the prevailing rampant corruption and plan for the oil revenues well under the right policies.

3 Methodology

3.1 Data collection methods

The research relied on several sources of data:

The main sources of budget data were the national economic reports on public finance management. The reports include Economic Surveys, Statistical Abstracts, and Kenya Economic Reports (KIPPRA). Information was also obtained from the databases of the IMF, AfDB, World Bank, Information Centre for Extractives Sector —Kenya (ICES) and from the Extractive Industries and Society Journal (http://www.journals.elsevier.com/the-extractive-industries-and-society).

In-depth interviews with key informants provided qualitative data on fiscal implications of an emerging extractive sector. The informants gave opinions on how revenues from minerals should be collected and spent. A purposive sampling technique was used to select the key informants. They were selected because of their direct involvement in the industry and vast knowledge and experience. These are senior officers in the three relevant ministries of Finance, Mining and Energy and Petroleum. Other informants were drawn from constitutional commissions, private sector and relevant civil society groups. An open-ended questionnaire was administered to these key informants. All interviews were tape-recorded. Additional qualitative information was obtained through consultative peer review meetings organised with other research teams working on the different thematic areas of this study such as the legal and political economy teams.

Since the data collected covered quantitative and qualitative aspects of the extractive sector, both aspects of the analyses were performed, with benchmarking being undertaken in areas where it was appropriate. A benchmarking approach was used to project oil revenues in Kenya by comparing Kenya's oil wealth and projected rate of production with those of other African top producers.

The study devised a simple method for estimating oil revenues for the country. Kenya uses the Production Sharing regime for its oil and gas industry. In this scenario, the government holds a free carried interest in the exploration and production of the project. This carried interest enables the government to have a share in the profits from the oil. An estimate of the annual revenue for the government from oil production was made. (Oil is used here because it is an anchor resource and its prospects in the country are quite encouraging).

3.2 Conceptual Framework

Figure 3-2 illustrates the conceptual framework encompassing the relationships between the elements of the fiscal value chain and how the relationships cut across the value chain. As one of the priority sectors in the Kenya Vision 2030, the extractive sector expansion and investment is one of the mechanisms for realising the Vision.

Figure 3-2: Conceptual framework

Source: Author's compilation

Under the Vision 2030 Second Medium Plan 2013-2017 the oil and other minerals sector is set to undergo a range of activities and projects to align it with the county's structural transformation. These activities are envisaged to run alongside legal and institutional reforms that have already been initiated. Figure 3-2 above captures some of the activities and projects that if implemented would result in the realisation of Vision 2030. Contracts, tax administration and collection frameworks for extractives need to be strengthened and good governance systems implemented backed up by effective human capacities. Revenues obtained should be equitably and sustainably shared among all Kenyans with due consideration to regional needs and future generations.

While in the preceding section we have focused on the ingredients that will achieve the objectives of Vision 2030, there are other undesirable outcomes such as inequality and the "Dutch disease" that are likely to result if the right policies are not put in place. As illustrated in Figure 3-2, the extractive sector generates revenues that can be used to fund revenue sharing arrangements and other benefits such as poverty reduction and economic growth. The framework captures an important objective of this study, which is to determine the fiscal implications of natural resource revenues, while taking into account the various societal

contexts that are existing. This means that fiscal outcomes can vary depending on the societal contexts involved. For instance, Turkana County (where oil was discovered) has a low-income population which expects to benefit from oil extraction and related activities. In this scenario, interventions (such as revenue allocation) have to factor in the contextual elements that Turkana County has. An assumption has been made that the resource revenues employed to improve living conditions will directly come from mineral resources. However, mining resource revenues are usually merged with other revenues into a consolidated fund from which all public expenditures are financed. In this study the revenues used to finance development projects are treated as arising directly from mineral resources.

4 Findings

4.1 Industry Statistics

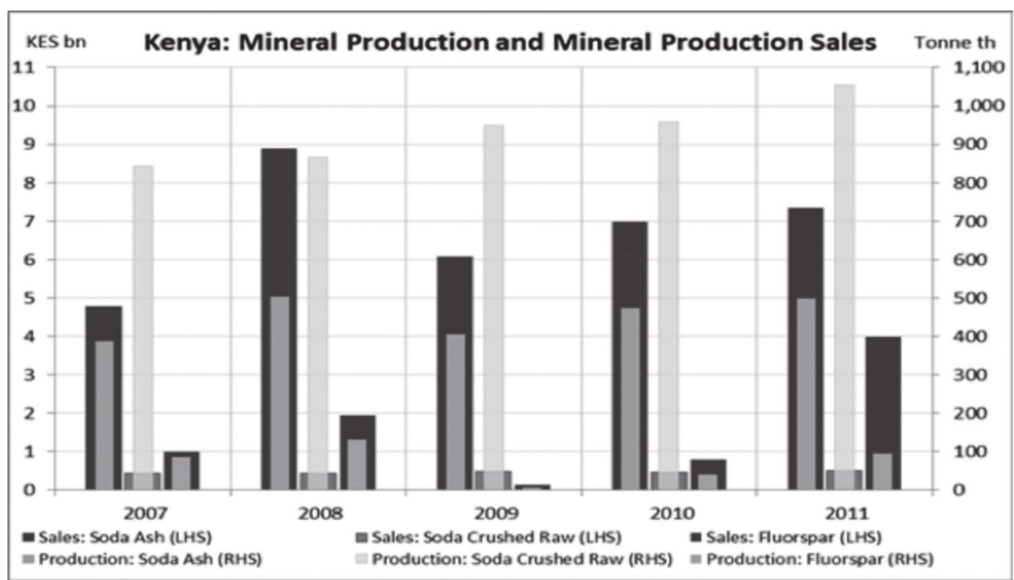
Kenya's mining industry is dominated by the production of non-metallic minerals, including those for industrial use such as soda ash, raw crushed soda, fluorspar, crude and refined salt, gypsum, vermiculite, and gemstones. Chart 3-1 shows the evolution of the mining sector in terms of its output value. However, the graph does not give the size of revenues that go directly to the government as taxes and other fees.

Chart 3-1: Overall production value for the mining sector in Kenya (2003-2013)

Source: Kenya National Bureau of Statistics (KNBS) data

However, based on production from the long-running mining operations, Soda Ash and Fluorspar can give a representative picture of the mineral production trend given that soda ash and raw crushed soda accounted for over 91 per cent of Kenya's minerals total production in 2011. During the same year, the sales of soda ash comprised 40.5 per cent of the total mineral product sales. Overall, mineral production registered a 13 per cent growth in 2011 and the sales grew from KES.15 billion in 2010 to KES.18.2 billion in 2011.

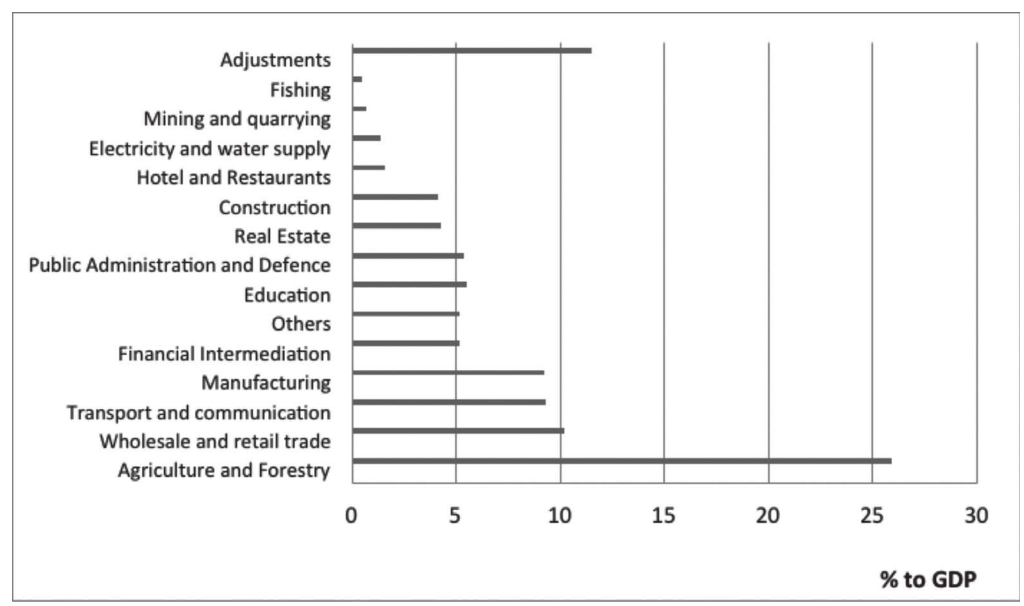
Chart 3-2: Production Trend for Soda Ash and Fluorspar (2007-2011)



Source: CEIC Database

Chart 3-2 gives the production patterns over a five-year period, between 2007 and 2011. Although not consistent there has been a rise in the trend of the quantity of minerals produced and sold. It is evident that the industry has grown ever since because no obstructive factors have been unravelled. Despite this seemingly sizable mineral production, mining contributed less than one per cent of Kenya's annual nominal GDP in 2011.

Chart 3-3: Sector contribution to GDP (%)



Source: KNBS, Economic Survey 2012

However, since 2012, sizable mineral discoveries have been made, a situation expected to completely change the landscape of the sector because of the impending large-scale production of oil, coal, rare earths minerals and gold.

4.2 Fiscal Implications of an Emerging Extractive Sector

4.2.1 Revenue Projections

There is a lot of debate on mineral extraction in Kenya due to the non- renewable nature of these resources. Projection of revenues from the extractive sector remains intricate because of several factors that affect it such as: fluctuating commodity prices, production costs, mine life and politics. The oil and gas industry is poised to be the anchor subsector because production is almost ensuing based on proven reserves. The mining industry is also gaining traction with discoveries of coal, rare earths, titanium and substantial gold deposits. A company at the Kenyan Coast has already made the preliminary shipments of ilmenite and rutile, in an overall venture that promises the government over US$350 million over the 13 year period of the project (Base Titanium, 2013). There are other fringe but significant minerals such as iron ore, copper, manganese and gemstones whose combined revenue potential is fiscally significant.

Overall, the Kenyan extractive sector is currently valued at $400 million per year or about one per cent of the country's annual GDP. Government share of the sector's output (petroleum take, combined rent, royalties, fees and taxes) as a percentage of total estimated production value gives a clear picture of the country's true gain from the extractive sector. It is instructive to note that a country receives a paltry five per cent of the total wholesale market value of the resource. This low take is attributable to poor profitability, tax exemptions, unfavourable leasing agreements and transfer mispricing (GAO 2012). However, the oil industry is expected to take centre stage in the extractive sector because of its potentially high earnings. Exploration is ongoing and just about 600 million barrels have been confirmed. However, industry players estimate that there are up to 2.6 billion barrels worth of oil in the Turkana and Mandera basins (ICES 2014). In the top-down approach we can deduce how much Kenya will receive by looking at what other comparable countries are producing as Table 3-1 below illustrates.

Table 3-1: Oil production statistics of top oil producing countries in Africa

Country	Proven Reserves (billion bbl.)	Production (bbl/day)
Libya	47	210,000
Nigeria	37	2,340,000
Algeria	12	1,460,000
Angola	9	1,740,000
Egypt	4.4	492,000
Gabon	3.0	237,000
Sudan	1.5	122,000
Equatorial Guinea	1.1	311,000

Country	Proven Reserves (billion bbl.)	Production (bbl/day)
Ghana	0.66	98,000
Tunisia	0.45	62,000
Cameroon	0.20	63,000

Source: Author's compilation from EIA and Ycharts data

As seen in the table, Kenya is currently comparable to Ghana at 0.66 billion barrels. Ghana produces about 98,000 barrels per day and has been able to receive (government take) about US$2.1 billion within three years. Therefore, assuming Kenya's reserves remain as they are without further discoveries, the scenario for the country will be the same as that of Ghana. On the other hand if Kenya's estimated reserves of 2.9 billion barrels become recoverable, then the comparison will be with Gabon. According to AfDB (2013), Gabon, which has proven reserves of about 3.0 billion barrels, received US$3.86 billion in oil revenues in 2013 alone. Although Kenya's estimates are slightly lower than Gabon's, it is easy to extrapolate the kind of revenues the country could receive if/once these reserves materialise. Natural gas has not yet been discovered in Kenya in substantial quantities but there was a recent discovery of substantial deposits at Exploration Block 9 in Wajir County. There are high expectations of finding more commercial deposits in the near future because some exploration blocks off the Lamu coast are an extension of the Tanzanian and Mozambican geological belts where significant gas deposits have been discovered.

The following table demonstrates a simple Production Sharing Contract arithmetic to arrive at how much the government would get from one barrel of oil produced. It illustrates benefit for both parties of the PSC; Contractor and the Government, under the assumptions shown in the table. A reference price per barrel has been used to represent average (per barrel) gross revenue over the life of the field (full cycle). Two price scenarios have been presented: low price scenario of $60/bbl. and high price scenario of $100/bbl. This is to align with the volatile oil market prices which sometimes have dramatic oscillations.

Table 3-2: "Government Take" from a barrel of oil (oil price at $60/bbl.)

One Barrel of Oil (Full Cycle)		
Assumptions 50% Cost Recovery Limit 60% Government Profit Oil Share 30% Corporate Income Tax (CIT)		Oil Price $60/BBL Costs $30/BBL
	Cumulative Gross Revenues $60	
Contractor Share		Government Share
$30.00 Assumed Costs	Costs Recovery 50% Limit ---------------------------------------	
	$30.00 Profit Oil	
$12.00	Profit Oil Split 40/60%	$18.00
($3.60)	Tax Rate 30%	$3.60
$8.40		
--------------------------------	------------------------------------	---------------------------------
$38.40	Division of Gross Revenues	$21.60
$8.40	Division of Cash Flow	$21.60
28%	Take	72%
Established Government Take Per Barrel $21.60		
Notes Perpetual growth not accounted for Discount rate not factored Assumed costs (capital costs + operations costs)		

Table 3-3: "Government Take" from a barrel of oil (oil price at $100/bbl.)

	One Barrel of Oil (Full Cycle)	
Assumptions 50% Cost Recovery Limit 60% Government Profit Oil Share 30% Corporate Income Tax (CIT)		Oil Price $100/BBL Costs $30/BBL
	Cumulative Gross Revenues	
	$100	
Contractor Share		Government Share
$30.00	Costs Recovery 50% Limit	
Assumed Costs	--------------------------------------	
	$70.00 Profit Oil	
$28.00	Profit Oil Split 40/60%	$42.00
($8.40)	Tax Rate 30%	$8.40
$19.60		
--------------------------------	------------------------------------	---------------------------------
$49.60	Division of Gross Revenues	$50.40
$19.60	Division of Cash Flow	$50.40
28%	Take	72%
Established Government Take Per Barrel $50.40		
Notes - Perpetual growth not accounted for - Discount rate not factored - Assumed costs (capital costs + operations costs)		

Table 3-4: Calculation of annual revenues from oil based on proven reserves in Kenya

Realistic Scenario Proven reserves* = 600 million barrels Estimated production = 100,000 barrels per day	
$60.00/BBL (Oil Price)	**$100.00/BBL (Oil Price)**
Government Take $21.60 /BBL	Government Take $50.40 /BBL
$21.60 x 100,000 barrels	$50.40 x 100,000 barrels
$2,160,000 Per Day	$5,040,000 Per day
$2,160,000 x 365 Days	$5,040,000 x 365 Days
$788,400,000 Per Year	$1,839,600,000 Per Year

Table 3-5: Calculation of annual revenues from oil based on estimated reserves in Kenya

Optimistic Scenario Estimated reserves = 2.9 billion barrels Estimated production = 230,000 barrels per day	
$60.00/BBL (Oil Price)	**$100.00/BBL (Oil Price)**
Government Take $21.60 /BBL	Government Take $50.40 /BBL
$21.60 x 230,000 barrels	$50.40 x 230,000 barrels
$4,968,000 Per Day	$11,592,000 Per day
$4,968,000 x 365 Days	$11,592,000 x 365 Days
$1,813,320,000 Per Year	$4,231,080,000 Per Year

* Proven reserves, courtesy of Tullow Oil Plc 2013 Annual Report & Accounts

As seen on Table 3-5, based on the two oil price scenarios of $60 per barrel and $100 per barrel it can be observed that the country could earn about $780 million per year and $1.8 billion per year, respectively. In Kenya's economic context these are massive revenue receipts

especially coming from just one sector. Moreover, these are revenues based on an average production of 100,000 barrels per day. This is the realistic scenario because it is based on the proven recoverable reserves (600 million barrels). However, the country could discover more oil and even reach what the industry has estimated to be 2.9 billion barrels. In this case the daily production rate may go up. Gabon with proven reserves of about 3 billion barrels produces about 237,000 barrels per day; therefore if Kenya was to attain such levels, the annual revenues due to the government would be as illustrated in Table 3-5. This is the optimistic scenario.

The key informants said that revenue projection comparisons with equally endowed countries could only be ascertained if the fiscal regime (including PSC) in Kenya is relatively similar to the countries in question. For instance, the Top-Down comparison with Ghana may not yield accurate projections if Ghana's PSCs has fundamentally different sharing systems from Kenya's PSCs. The other factor to consider is tax administration capacities. This is the reason why this study chose to use an estimated oil production rate (barrels per day) and rational options of crude oil prices (as well as details of PSCs) for International Oil Companies operating in the country.

The mining industry would as well provide substantial revenues to the government as illustrated in Table 3-6.

Table 3-6: Revenue Projections from the Mining Industry

Mineral	Reserves	Projected government share (US$)
Coal	400 million tonnes (proven)	12 billion
Mineral sands	140 million tonnes (proven)	300 million
Rare earth minerals	40 million tonnes (estimated)	60 billion
Soda ash & Fluorspar	-	5 billion
Others (gold, gems, etc.)	-	700 million
Total		78 billion

Source: Author's compilation. Data from Industry Players, CBK and KNBS

Assumptions:

Ð Estimates based on proven reserves and current market value of minerals
Ð Estimates based on entire lifespan of the mining projects
Ð Value indicated is the total government take in the form of taxes and royalties

The average lifespan of a mining project is 25 years. This therefore means the country would earn about US$78 million in 25 years according to Table 3-6 above. Subsequently, Table 3-7 below further calculates the projected annual income for the country.

Table 3-7: Projections of annual income from mining sector

Annual revenues calculation
Assuming the average lifespan of mining operations to be at 25 years;
Total income over 25 years = US$78 billion
US$78 billion for 25 years ≈ US$3 billion for 1 year
US$3 billion Per Year

Revenue projections from natural resource extraction are a common global practice in resource-rich countries. However, accuracy of projections depends on the government's internal capabilities to assess and synthesise the information required for projections. This was the general view of the key informants. They opined that it is possible to get fairly accurate revenue estimation but caution should be taken not to be too optimistic. Revenue projections are only viable if the country has a regime and fiscal framework that can withstand the test of time – sensitive to commodity price volatility and stable for the investors continued operation. One respondent noted that:

> "…it is alright for the government to develop long-term goals/plans but it should create current structures that will guarantee realisation of the goals/plans..."

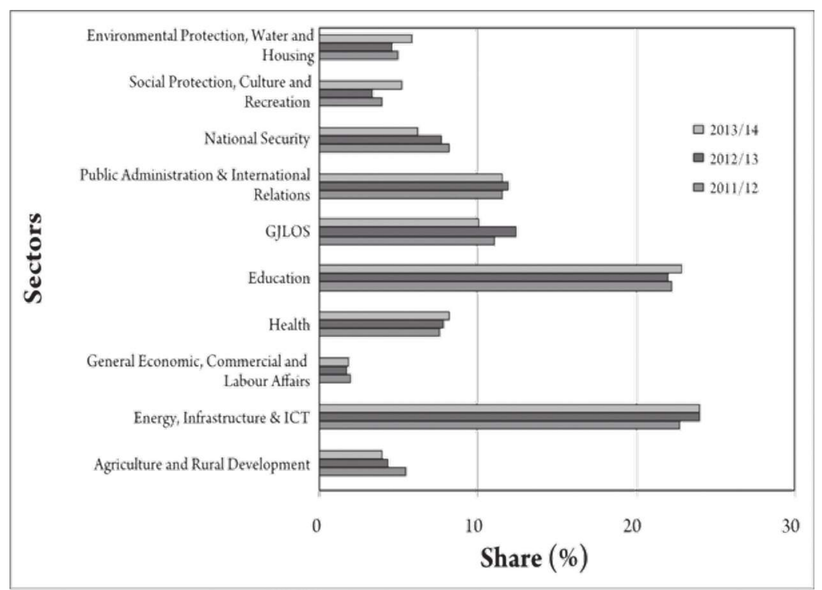
The informants indicated that the country needs to invest in geological surveys and mapping to establish the true mineral potential of the country. They noted a need to desist from the over-reliance on investors for this information because the investors may have their own interests. Some respondents were very optimistic about the country's potential for massive oil reserves. One respondent pointed out that the potential for Kenya to discover more oil is big given that oil has only been discovered in just two blocks (13T and 10BB) and gas in one block (Block 9) out of the four dozen exploration blocks in the country.

4.2.2 Expenditure

Kenya's spending patterns are guided by the Public Finance Management Act and the budgetary process is hinged on the Medium Term Expenditure Framework (MTEF). MTEF was adopted by the Government of Kenya so as to link national policies, planning and budgeting more closely. The National Treasury has been driving policies to ensure that the MTEF and subsequent annual budgets are aligned with the Second Medium Term Plan 2013-17 to ensure successful implementation of the Plan and the government's priorities (V2030 2014). The government seeks to pursue a fiscal policy for growth but this poses the challenge of how to create "fiscal space" for meeting various competing demands for public spending, and at the same time endeavouring to maintain macro-economic stability. Key among these competing needs that lead to expansionary expenditure include social sector spending, investment in infrastructure development, public wage bill, transfer for county government structures and transitional related challenges. This scenario compels the government to put measures to enhance revenue

collection, but at the same time, re-orient expenditure to priority areas as well as commit to improve efficiency in spending (IEA, 2014). Total government expenditure has increased in the last few years but within the last three years, public spending priorities have been in social programmes and infrastructure. Vision 2030 projects, water supply, police services, Judiciary and Parliament also received large shares. Chart 3-4 below shows sector funding within the period.

Chart 3-4: Public expenditure allocations by MTEF sectors, 2011/12 - 2013/14



Source: Ministry of Finance (2013), Budget Policy Statement

It is widely felt that spending, especially on non-essential recurrent expenditure has been getting out of control. The study respondents see the political class as the stewards of these runaway spendthrift tendencies. A Kenya Treasury respondent elucidated the process involved in allocating funds to ministries and what emerged is that ministries have autonomy on how they spend funds. In this scenario there have been setbacks in the absorption of the development budget owing to poor planning and procurement bottlenecks. In regard to MTEF deepening, all but one respondent believe the government has generally lived up to the spirit of the framework and that it is robustly continuing to entrench the framework in the country's PFM systems. Dissenting respondents gave the following reasons why the medium term framework has not worked:

- Poor absorption of capital investments
- Poorly carried out audits
- Too many quasi-government bodies
- Slow pace of implementation of projects
- Lack of political goodwill
- Huge wage bill with no value for money

The key informants were asked to give an opinion on the likely spending pattern in the face of large extractive revenue inflows. According to the respondents, Kenya's recurring budget deficits can be bridged easily using the anticipated extractive sector revenues. The only concern is that the government might be buoyed by these new revenues to even become more fiscally undisciplined in the absence of controlling policies. Some of the participants said that if governance, political and accountability bottlenecks are addressed, the extractive sector revenues will go a long way in boosting the country's budget. One key government respondent indicated that the government is already putting in place measures to comprehensively seal budget loopholes like the recent rationalisation of the public servants through physical biometric enumeration. The other strategy the government is instituting is an integrated public finance management portal that coordinates and monitors all financial functions such as procurement and auditing.

Despite these efficiency-enhancing efforts almost all respondents strongly believe that the government will spend more especially on recurrent expenditure once it starts receiving oil, gas and mineral revenues. This they believe is because there is lack of broad support – especially from parliament – to control the rising recurrent expenditure. The other major factor supporting this sentiment is the inefficient spending by devolved governments which are fast accumulating a workforce further exacerbating the spending problem. In fact, some in the national government believe that some functions created by the counties are parallel to those of the national government at that level and therefore unnecessary. The position by these informants confirms the wide belief the study found of how countries beginning to exploit resources often tend to spend the revenues fast and imprudently in the absence of controlling policies.

4.2.3 Public Debt

With the increasing potential of gaining revenue from the extractive sector, the government risks borrowing more to cushion its budgetary deficits as illustrated by the floating of a sovereign bond dubbed the Eurobond. The Eurobond which was expected to rise up to $2 billion was oversubscribed indicating that investors were willing to overlook political risks associated with East Africa's largest economy. This borrowing appetite could partly be attributed to anticipation of financial windfall from mineral revenues when production peaks in the near future. The Eurobond document said Kenya's cabinet approved the 2014/2015 budget where it estimated that the net public debt to GDP ratio will decline from the current 52.1 per cent to 49.8 in 2016/2017 (Ken Invest, 2014).

The annual fiscal deficit arising from the increased expenditures that are not matched by increased revenues has led to an increase in the stock of debt in Kenya. Total stock of debt increased from 1.49 trillion (49.3 per cent of GDP) in 2011 to 1.63 trillion (45.8 percent of GDP) in 2012. Consequently, debt per capita has continued to increase from KES. 22,382 in 2007 to 31,837 in 2010 and KES. 38,523 in 2012. However, compared to the previous year, total debt declined from 49.3 per cent of GDP to 45.8 per cent in 2012. This is as a result of significant fiscal consolidation and prudent external borrowing, as well as a strengthened macroeconomic environment. According to the most recent debt sustainability analysis, the biggest risks that

Kenya faces to external debt sustainability come from exchange rate shocks and less favourable terms on new public sector loans (KIPPRA 2013).

Currently, overall public debt as at end of 2013 stood at about KES.1.8 trillion which is about 48 per cent of GDP, a fiscally-imprudent situation. This debt is largely due to deficit-induced borrowing – government spending far outpacing the revenues mobilized forcing it to borrow to bridge this gap. Table 3-8 shows the country's public debt trend from 2007 to 2012. Total debt doubled in between the period relatively outpacing the growth of GDP. The debt per capita also rose steadily in spite of a significant increase of the population.

Table 3-8: Kenya's public debt trend (2007-2012)

	2007	2008	2009	2010	2011	2012
Domestic Debt** (KES million)	404,706	430,612	518,507	660,268	764,223	858,830
External Debt ***(KES million)	396,564	439,967	540,875	569,138	722,805	774,555
Total debt	801,270	870,579	1,059,382	1,229,406	1,487,028	1,633,385
GDP (KES million)	1,833,511	2,107,589	2,366,984	2,553,733	3,048,867	3,440,115
Population (million)	35.8	36.7	37.7	38.5	39.5	40.7
Debt per capita	22,381.9	23,721.5	27,011.3	31,836.9	37,759.2	38,523.2
Domestic debt as a % of GDP	22.1	20.4	21.9	25.9	25.3	24.1
External debt as a % of GDP	21.6	20.8	21.1	22.2	23.2	21.7
Total debt as a % of GDP	43.7	41.3	43.0	48.1	49.3	45.8

Source: Kenya National Bureau of Statistics (KNBS) 2013

With the increase in revenues and expenditures within the emerging extractive sector, Kenya's public debt is projected as follows:

Table 3-9: Kenya's Debt Projections 2015/16 – 2020/21

Financial Year	2015/16	2016/17	2017/18*	2018/19	2019/20	2020/21
Debt Stock (KES. Trillion)	2.2	2.4	2.6	2.6	2.4	2.1

Assumptions made:

- Extractive sector revenues will automatically ease debt burden.
- Linear growth of debt because debt stock has shown a linear growth trend since 2008.
- * This is the year (2017) the country earns first revenues from the extractive sector.
- Annual government receipts from the entire extractive sector estimated at US$4 billion.

The key informants provided the following as the main causes of increasing budget deficits:

- Thin tax base coupled with ambitious spending patterns.
- Inefficient tax administration system.

- Expansionary development agenda (Infrastructure and social services).
- Lack of fiscal discipline in government departments leading to massive loss of funds from the recurrent expenditure receipts.
- Mismanagement of the development budget through poorly planned/prioritised projects some of which end up becoming white elephants.
- Inefficient provision of social services by the public sector.
- Lack of capacities in the relevant institutions.

On the question of public debt, most respondents were of the view that the current debt level is too high for the country and needs to be controlled. Some of the reasons given for the burgeoning public debt are ambitious development projects such as the Standard Gauge Railway Project and LAPPSET Project which the country crucially needs at this point in time. The informants all agreed that Kenya's current financial position makes borrowing inevitable but the funds borrowed should be used in the most efficient way. The thinking is that the country's recurrent and development needs are massive and have outpaced revenue mobilisation so far. Therefore, as the government works to stabilize the budget and entrench PFM principles, borrowing is inevitable but these loans need to be used prudently. Again there is a concurrence by all informants that the oil, gas and minerals revenues will in a big way help lower the public debt, with the right policies and political goodwill. One experienced respondent asserted that if ES revenues will be properly linked to other key sectors like agriculture and manufacturing, then the government will be cushioned significantly in its spending on development as these other sectors will make that contribution. Some respondents believe that Kenya's economy is resilient but this may not be sustained for very long if sound public finance management principles are not entrenched within the system.

4.2.4 Revenue Sharing

Revenue allocation arrangements refer to sharing between different levels of government (e.g. national and county governments) or sharing among individuals (which in principle includes sharing between different generations). Of the many possible forms of revenue sharing and investment arrangements, three have attracted prominence over the years:

a) Public investment projects (PIPs) – This term covers a wide range of public projects. This research focuses mainly on physical PIPs funded by resource revenue;
b) Sovereign wealth funds (SWFs) – A SWF is a state-owned fund that invests with a long-term perspective; and
c) Direct cash transfers (DCTs) – These transfers provide money directly to targeted households or individuals. Sometimes cash transfers are conditional. For example, the transfers may be made on the condition that school age children of the recipient households are enrolled in schools.

From a socio-economic development perspective, the relative merits of the above arrangements can be measured in terms of a number of indicators, such as: economic growth; poverty reduction; governance quality and others. Policymakers as well as members of the public in resource-rich countries would naturally have an interest in knowing whether it matters which (if any) of the above arrangements is adopted (Nguyen et al. 2012).

Interviews from key informants show that revenue sharing is one of the thorniest issues in the conversation around natural resource benefits.

- One of the respondents from the Commission on Revenue Allocation (CRA) which came up with the sharing formula -- National 70 per cent, County 20 per cent, Community 10 per cent - said the formula was designed after wide consultations and analysis of models used in other countries. The respondent further stated that the intention was for the county and community allocations to finance capital developments and these development plans should be designed to outlive administrative/political tenures. In this regard CRA was working to build the necessary technical capacities at the county levels.
- In general, most of those interviewed think that revenue will need to be shared down to the community level but they all held different views on the framework to be adopted and how much of revenue is to be shared down. For example some believe that the community-bound revenues should be administered and managed by an institution independent of the county government while others believe the county is the best conduit. Others want these county/local community funds put in a revolving fund to support local entrepreneurship. Others want the county allocation to be specifically set aside for capital investments like infrastructure development. Reasons given for sharing include compensation on land use and livelihood disruptions, reducing marginalisation and mitigating security threats.
- There were however, reservations on the formula and the idea of giving one mining county so much money yet the resources belonged to all Kenyans. This argument was based on the Constitution, which talks about equitable distribution of benefits from natural resources and thus all counties in the country ought to benefit equitably. The position further stated that the affected communities can receive a rational compensation for the disruption of their livelihoods. Another informant indicated that some of these communities might not be able to absorb revenues due to them because the rate of receipts may surpass the expenditure needs especially for small counties and communities. This argument was supported by another participant who used the phrase "money follows function" to mean the government shouldn't simply pump so much money into a locale where there's no commensurate need for such amounts of money in the first place.
- Most respondents stated that the revenues going to the county and communities should be put in a fund that only finances properly planned and vetted development projects. Oversight mechanisms independent of the implementers should also be factored as well.
- Definition of community remained a challenge for most respondents even though there was an existing definition with the CRA as "the people living around the mining area. The people who are somewhat affected by the mining operations and they have to be indigenous to the area".
- Numerous proposals were floated to establish a mechanism for the allocation of extractive sector revenues. Proposals include a formula for sharing between national government, county government and communities as well as considerations for equity in the establishment of a Sovereign Wealth Fund.

4.2.5 Sovereign Wealth Fund

Mineral resource exhaustibility gives rise to inter-temporal decisions about how much of the resource wealth to consume and how much to save taking intergenerational equity and

fiscal sustainability into consideration. All the respondents interviewed were of the view that a Sovereign Wealth Fund (SWF) is an inevitable ingredient in natural resources developments. This position is influenced by observations made on other countries about how such funds have helped in managing revenues from the extractive sectors. One interviewee stated that current low incomes of the general Kenyan population may justify some significant consumption toward the relatively poorer current generations. The case is different from other more developed countries with a wealth fund like Norway and Abu Dhabi whose Human Development Index is high as they can afford to save most of the funds they get from their natural resources for future generations.

According to a key informant from the Ministry of Finance, the government anticipates that 10 per cent of the extractive sector revenues would be dedicated for the fund. Another respondent suggested that no extractive sector revenue should be channelled through the mainstream budget cycle as this will hide government economic inefficiencies and may disrupt the country's organic growth. Therefore, all these revenues should directly be saved in the Fund and only drawn to finance specific capital investments. The main concern to all the respondents was the management of this Fund: That given the country's poor value system, it will be crucial to divorce the Fund from the executive's discretionary powers and to staff it with credible experts. The respondents also said that the accountability and oversight safeguards should be entrenched in the law. Other respondents suggested high thresholds for withdrawing from the fund.

4.2.6 Economic Competitiveness and the "Dutch Disease"

Respondents felt that a successful extractive sector should be based on four core pillars: competitiveness, sustainability, equity, and accountability. These four pillars are indivisible if a country is to have a sustainable extractive sector. Several factors shape competitiveness in the sector but the bottom-line is to strike a balance between returns to the nation and returns to the investors who risk their capital. There is need to leverage on existing mineral reserves to attract the sufficient capital and investment and maintain this investment climate for sustained periods. To achieve this, a country will require a good mining policy, stable and transparent regulatory framework as well as clear communication between the key players (Nguyen, D et al. 2012). There is a huge potential to improve Kenya's competitiveness regionally and globally. Offering a stable investment environment is one way of attracting multinational mining companies that have sufficient capital to optimally extract the resources.

Studies have shown that unless a country benefits initially from good governance, the influx of oil revenues tends to exacerbate corruption and encourage rent seeking at the expense of productive activities. This can lead to conflict between the central government and the counties that produce the oil and gas, or between the latter and those that do not have oil and gas reserves. World oil prices are volatile, so dependence on revenues from oil may lead to excessive government spending in times of a boom, which becomes hard to reduce and leads to excessive borrowing when the oil price and revenues fall. Finally, the positive impact of oil and gas imports on the balance of payments can appreciate the real exchange rate, crowding out other tradable sectors, principally in agriculture and manufacturing. This is what

is popularly known as the "Dutch Disease". In a monetary union, the consequences of the latter for non-oil and gas-producing countries can be especially harmful, since they do not benefit from the resource revenues, but incur the costs of exchange rate over-appreciation. In the EAC context the competitiveness of the member countries is adversely affected (Masson, P.R. 2012).

The studies further show that macroeconomic elements such as inflation have to be factored in when decisions are made because the extractive sector revenues often impacts on inflation and the government will have to ensure the monetary policy responds appropriately. With the revenue projections made in this study for Kenya, it is obvious then that the country will experience a resource boom. A resource boom has two effects. First, there is the resource movement effect. This is the drawing of mobile factors of production away from other sectors of the economy to the booming resource sector. The effect is the reduction of output in the non-boom tradable and non-tradable sectors. Second, there is the spending effect. The resource boom raises incomes and so raises demand for tradable and non-tradable goods. The prices of the former are fixed by world markets, but the latter prices tend to rise with domestic demand causing inflation.

The experience of other countries in Africa and elsewhere suggests that large extractives revenues can have major disruptive effects on the country concerned and its neighbours. A good example in the Eastern Africa region is South Sudan which has significant oil reserves and whose economy is almost entirely dependent on oil revenues. The country has undergone on-off civil conflicts for a long time and some quarters have attributed the conflict to fighting for control of the oil wealth.

The views collected from Key informants show that Kenya has a very energetic workforce, a vibrant private sector and a strong political footprint in the region. The emerging extractive sector will simply reinforce Kenya's position as the region's economic hub. This reinforces the position stated earlier in the literature review on how the extractive sector can help thrust the country into middle- income status by the year 2030. Other informants noted that Kenya's economy will become more competitive when the emergent extractive sector is coupled with other planned, developments like the LAPPSET project, and other major transport infrastructural transformations. They think that possible hindrances to the country's competitiveness during ES development are inefficient public finance management, rampant corruption, rent seeking and inflation. In general, it was established that the country's trade and investment landscape could look better if the effects of the "Dutch Disease" are controlled and this may only happen through appropriate policy formulation.

5 Discussions

5.1 Economic Growth

The process by which a resource boom affects the economy is complex and depends upon such things as how the revenues are used and the structure of the economy in question. The new discoveries in the extractive sector have the potential to contribute significantly to economic growth. However, firstly, this is subject to the development of a coherent legal and policy framework that would ensure the presence of both forward and backward linkages to the rest of the economy, and the maximization of the opportunities arising from the extractive sector. Secondly, accountability and productive use of earnings from Kenya's natural assets is paramount if economic growth is to be realised (KIPPRA 2013). From the extractive sector revenue projections – under the realistic scenario and using the country's 2014 rebased economy as a base – economic growth is estimated at between 10 and 11 per cent. This is arrived at by assuming that the economy will continue growing at its generic average rate of 5 per cent and adding that to 6 per cent which is the projected annual contribution to GDP from the extractive sector. This case scenario is possible if the extractive sector will not stifle other non-resource sectors such as agriculture and manufacturing. And the economy could grow in the following ways:

- If the ES is properly linked to other key sector like agriculture, the economy will be automatically boosted.
- It will help regularise the deficit of Balance of Trade making Kenya more competitive.
- It will encourage creation of varied service industries whose ripple effect will be widely felt.
- Investment of ES revenues on social services will create incentives for further development in different sectors.
- Cushioning the government in times of economic recession.

If the "Dutch Disease" befalls the country, the economy will most likely stagnate because the traditional productive sectors will be crowded out by the growing extractive sector.

However, the overall impact of higher public spending on growth may be low if the quality of investment projects declines or if other expenditures drain resources from the public investment programs. From the revenue projections established, it is possible for the extractive sector accruals to finance the annual budget of the Ministry of Education, the biggest spender in terms of revenue allocation. This change in spending patterns would give the government space to allocate resources to investments which may beget more revenues contributing to real economic growth.

5.2 Poverty Reduction

Poverty reduction, which is Kenya's top priority in the development agenda, also remains among the targets of the Millennium Development Goals (MDGs). Turkana, Kwale, Kilifi and Kitui counties where different mineral discoveries have been made also have the highest incidences of poverty. The extractive sector operations have a transformative and poverty-reducing potential, and ability to expand health and education. To realize this potential, however, mechanisms are needed to channel resource revenues for projects that fight poverty and improve people's lives (World Bank 2103c). The capacity of the local authorities to manage their share of revenues is however a big issue. This means that for poverty to be reduced in this context there is need for effective policy making and capacity building of local authorities and communities. Local communities most affected by oil, gas or mining projects often receive very little information about potential impacts and benefits. Transparency initiatives need to be more inclusive and relevant to local needs (Emma, 2014).

Natural resource wealth is ostensibly expected to uplift the livelihoods of people in a country. According to the government planners – as well as the economic modelling done in this study – the extractive sector revenue volumes at its peak will be much bigger than any other economic sector. This means that there will be more revenues to share out. This is the view of a respondent from the Ministry of Finance. All the respondents strongly believe that the extractive sector will significantly help reduce poverty and uplift the general welfare of Kenyans through the following ways:

- Increased FDI which spurs opportunities for local entrepreneurship linked to ES.
- ES influences on infrastructure development which in turn opens new business frontiers, for instance, small economies have been seen to crop up around mining towns and centres. For example Naivasha town's growth is attributed to Ol Karia Geothermal Project.
- Through skills transfer and technology which can then be utilised in other sectors.
- Through employment creation in the ES operations and supporting enterprises.

In the same vein all the respondents agreed that poverty reduction and economic development can only be achieved if governance systems are fair and robust. Implementation was cited by two participants as one of the biggest hindrances to the realisation of any plans in Kenya; therefore, laws coupled with political goodwill are needed to ensure that the ES significantly reduces poverty and promotes the general economy. In this regard several participants suggested that the country learns from other comparable countries, rationally emulate the best practices and avoid the bad practices. For instance, the "Dutch Disease" has precedents in several countries like Nigeria and as such Kenya can analyse the actions and inactions that made such countries end up like that. Specific good lessons Kenya can learn from are from Botswana, South Africa and Trinidad & Tobago. However, Kenya is advised to adopt these best practices "with a pinch of salt." For example Ghana, whose extractive sector model is erroneously being praised globally, currently has unique challenges in their frameworks such as weak fiscal regimes.

Finally, all the respondents averred that things could go terribly wrong if the country does not get it right in the management of revenues from the extractive sector. They said that

the Kenyan people have demonstrated the potential to get into conflict therefore it will not be surprising for them to start fighting over oil, gas and mineral resource control. Any such conflict can lead to heavy regression of the economy.

5.3 Spending Patterns Predictions

In section 4 of this paper, extractive revenue projections were made and it was found that the country is facing an impending mineral windfall. The availability of such large amounts of fiscal resources is in itself not enough to produce development. Instead, its impacts depend on the capacity of the state to control, extract and allocate resources, as well as its ability to generate consensus around a development strategy based on the exploitation of mineral resources. Managing the extractive sector revenues well is much the same as managing any budget well, but some issues are more important for a resource abundant country. These include how much to save for future generations, how to achieve economic stability in the face of erratic revenues, and how to ensure that spending is of high quality, whether in the form of large investment projects, public consumption, or subsidies. It is clear that revenue streams from the extractive sector can finance productive physical and social investment or fuel unsustainable consumption booms and eventual fiscal crises. With transparent distributional mechanisms, such revenue can improve public welfare and create arenas for local enterprise development. The question on how all these can be achieved will rest on the leadership and established institutions.

This study has found that the country is potentially set to receive massive incomes from the sector once production of the mineral resources is at optimum. Faced with this revenue windfall the government will essentially have four choices: increase spending, decrease taxes, pay down public debt or save revenues. Similarly, if the revenues decline unexpectedly, causing a fiscal deficit, the government can cut spending, increase taxes, or borrow. The government's massive and ambitious infrastructural projects indicate a high likelihood of extractive revenues being absorbed to offset the massive costs involved. Ordinarily, expenditure on reproductive infrastructure is a good thing. However, the choice of infrastructure and its economic sense is important to avoid white elephant projects. All the planned infrastructure projects in the country will require huge capital inputs. It is therefore easy to deduce that the extractive sector is seen as a key provider of these much needed funds so that government slows down on borrowing. The other sectors likely to receive a direct resources injection are education and agriculture, areas that have received increased attention by three ruling administrations and the trend is likely to continue. These particular sectors are likely to receive immediate spending outlay in efforts to diversify extractive sector income to deepen the broader economic development.

Kenya's debt stock as established in this paper is fiscally unsustainable. The country (at the time of writing) had rebased its nominal GDP resulting in a bigger-than-earlier-thought economic size. This effectively lowered the debt to GDP ratio, presumably giving the country room to borrow and escalate the actual debt stock. Two scenarios are likely to occur with the onset of the extractive sector income. The first one may be increased borrowing; a practice the government could adopt hedging on anticipated extractives revenue. This kind of borrowing

may actually precede the commencement of mineral and oil production. This scenario was observed in Ghana where the government borrowed significantly hoping to regularise the loans using the oil money that was yet to be earned. As a result the country got into a debt crisis. The other scenario is the more prudent one whereby the country will progressively borrow less and utilize extractive sector revenues to finance projects that would otherwise be financed through borrowing. Consequently, the debt stock would decrease and if the trend is maintained, Kenya's economy will be significantly self-sustaining.

The government is not likely to fundamentally change its priorities as planned to drive the Vision 2030. The extractive sector has already been identified as the seventh sector under the economic pillar of the Vision. Therefore the industry seems poised to supplement the other economic sectors in the country in revenue mobilisation.

5.4 Macroeconomic Stability

Mineral wealth creates fiscal space for social welfare provision; it reduces possibilities for sector diversification; and introduces external dependence, which produces fiscal vulnerability. Good governance, sound institutions and abundance of revenue are necessary and indispensable, however, not sufficient by themselves for a sustained growth and durable poverty reduction: There is also the need to implement good economic policies (Same, 2009). In order to prevent the misuse of proceeds from minerals, the country should adopt clearly defined participatory resource management mechanisms well before hydrocarbons start to generate revenues. Preferably, by the time oil and gas moneys start to flow, a list of prioritized development projects to be funded with the new revenues should be identified, with direct input from the citizens. At the sub-national level the limitations of participatory approaches to development funding are well known, particularly when it comes to identifying representative community leaders. Once counties start receiving the proceeds from the extractive industries, competition between local groups for access to these and to the benefits of projects developed around them, may increase particularly during the initial phases of Devolution.

The government will be focusing on achieving and maintaining a sustainable public finance and debt trajectory while managing volatility. It will have to facilitate economic diversification by delinking public expenditure from oil and other minerals revenues and improving the efficiency and composition of public spending. Focus will need to shift to adopting development objectives such as increasing pro-poor growth and achieving the Millennium Development Goals. Table 3-10 shows the public expenditure trend and how it has led to deficits and inevitable borrowing.

Table 3-10: Statement of National Government Operations, 2009/10 – 2013/14

STATEMENT OF NATIONAL GOVERNMENT OPERATIONS, 2009/10 – 2013/14 (KES Million)					
	2009/10	2010/11	2011/12	2012/13*	2013/14+
Revenue	574,135.08	673,287.95	736,106.55	835,074.16	1,017,739.47
Expense	574,253.05	733,348.08	859,195.04	929,091.53	1,134,285.29
Current expenditure	525,671.23	641,408.73	700,412.80	802,472.96	929,276.07
Capital expenditure	48,581.82	91,939.35	158,782.24	126,618.57	205,009.22
Gross Operating balance	-117.97	-60,060.13	-123,088.49	-94,017.37	-116,545.82
Net lending/borrowing	-114,941.69	-151,626.50	-219,364.01	-231,211.09	-300,017.02
*Provisional estimates + Revised estimates					

Source: KNBS, Economic Survey 2014

From the revenue projections given earlier in the paper, putting into consideration oil, gas and mining revenues, it is estimated that the country could earn up to KES 400 billion in a year in the realistic scenario. This amount is more than what the government borrowed in the fiscal year 2013/14. Therefore, mineral resources revenue will most likely help to stabilise the budget as well as provide funds for capital expenditure, assuming that all these funds will be injected in the country's budget pipeline. However, to safeguard the country's organic growth, good national income and public debt statistics will be needed to distinguish mineral from non-mineral GDP. Ultimately, the country's macro-economic stability will be achieved when the country is able to control non-essential spending and utilise the fiscal cushioning opportunities that oil, gas and mining presents.

5.5 Equity and National Cohesion

The Constitution of Kenya (2010) article 69 states that the state shall ensure sustainable exploitation, utilisation, management and conservation of the environment and natural resources. The article seeks to ensure the equitable sharing of the accruing benefits; access to information and encourage public participation in the management, protection and conservation of the environment. The constitution also states that all mineral resources belong to the people of Kenya and any benefit that may arise from these resources must be shared equitably. Most mineral resources have ironically been discovered in traditionally marginalised regions of the country such as Turkana and Kitui which are semi-arid environments. The new mineral discoveries will definitely positively transform the livelihoods of some of these communities. These communities have already claimed resolute ownership of the minerals, expecting significant benefits from their exploitation. However, the regulatory framework for the sector needs to acknowledge that mineral resources need to benefit all, that is, all the citizens in both current and future generations. Some of the resource-induced conflicts in Africa have been fuelled mainly by an asymmetrical sharing of mineral resource benefits. Peace and stability at both national and local levels will be guaranteed if there is equitable benefit sharing mechanisms of the revenues from the extractive sector. Moreover, in a considerably

tribally polarised society like Kenya, care should be taken to appease all groups as revenues from the extractive sector are out into respective actions.

6 Conclusions

Natural resources can offer vast opportunities for economic development of Kenya by accounting for a major share of export and government revenues. This study has found the potential for a windfall or “revenue bonanza” to be real and if managed properly these revenues could be used to speed up development and lift the country and its citizens out of poverty. Kenya’s Human Development Index (HDI) performs poorly compared to most African countries and therefore the emerging extractive sector gains can help to regularize this unfavourable situation. As established in this study, there are various factors that will determine the outcome of natural resource developments. This mainly has to do with how the government first manages the non-resource economy and how it puts its fiscal house in order before an environment can be created to manage the extractive sector resources.

With the onset of natural resource exploitation, the country will need to first understand the potential enormity of the industry. It is clear that oil, gas and minerals revenues have to be thought about differently and therefore managed differently. The challenge is to ensure that institutions and fiscal policy frameworks lock in proper natural resource management principles. These frameworks begin at the point of entry to ensure the country gets the best possible deal in the agreements with the mining investors. The tax administration and collection frameworks will need to ensure optimum receipts from the sector. Subsequently the government has to control the runaway spending that has been characteristic of different state departments and the burgeoning public debt. This will create a breathing space for the extractives revenues which can be used in regenerative capital investments for the country.

There is no best model for revenue sharing but the administrators will need to explore the country’s context and deploy the best sharing mechanism possible. This is mainly through investing in projects that benefit citizens across the board. Ultimately the test of how well extractive revenues have been utilised lies in the number of people it will raise out of poverty and the impact on the larger economy. Just like in some countries, the quality of life of Kenyans should improve with the development of the extractive sector. Things can go wrong and the “Dutch Disease” or worse still “the Resource Curse” may not be a farfetched consequence in the Kenyan context. But there are good signs in regard to the regulatory frameworks as the government is already instituting reforms for the sector. However, there are issues beyond the regulatory framework like corruption, impunity, value system and politics that will need to be addressed if realistic change is to be realised in this regard. It is therefore right to say that the extractive sector’s contribution to the fiscal growth of the country will largely depend on the adoption of best practices and sound planning.

7 Recommendations and Areas For Further Research

This study has illustrated the massive potential gain from the extractive sector and how the new revenue inflows may impact the socio-economic landscape of the country. Because of the established economic importance of the sector, it is necessary for the government and all relevant actors to synergise efforts and institute an enabling and progressive environment for the management of the sector. A lot needs to be done at several levels by several actors but this will only happen if information and knowledge is shared widely and communities sensitised. The study analysed the findings of the research and came up with the following recommendations necessary for a fiscally sound development of the extractive sector in the country:

- Continue to build and maintain capacity in terms of skill sets at relevant agencies and more crucially in skills of assessing the suitability of contractual terms and on other areas of the mining value chain.
- Continue to encourage the systematic integration and implementation of public finance management principles in the government activities and programmes.
- The design of policy frameworks should acknowledge that mineral resource life spans are finite and uncertain, and therefore these policies should ensure maximum possible reap (good deal) for the people of Kenya.
- Create policies that make natural resources a fuel/driver of other sectors of the economy through backward, lateral and forward economic linkages. This would in a way help avoid the "Dutch Disease" and create opportunities for employment.
- Share the benefits from the extractive sector in the best equitable way possible because all minerals belong to all Kenyans regardless of mineral locale but compensate local communities appropriately.
- Rationalise the public sector and re-evaluate the devolved county structures to control government expenditure so that ES revenues are not used solely to bridge budget deficits but for capital investments.
- Set up a Sovereign Wealth Fund with tight safeguards on its management and allocate significant portions of ES revenues into this fund.
- Encourage a political environment that is progressive in terms of promoting good management of natural resources in the country.
- Ensure citizens participation in the extractive sector development discourse to mitigate possible conflict. This is possible through access to reliable information to the citizenry and encouraging conversation around the subject.
- Encourage production and tracking of reliable data which will guide formulation of relevant policies for the industry.

- Join and adopt international and regional development and transparency initiatives aimed at ensuring ES revenues are well managed. These include the Africa Mining Vision and the Extractive Industry Transparency Initiative (EITI).

This study explored the potential fiscal outcomes of a markedly developed extractive sector in Kenya. It looked at the general fiscal elements that characterise the sector, analysed the composition, identified gaps and made recommendations based on information that was obtained. It will be beneficial for the country if more in-depth research was carried out on the design and management of fiscal regimes employed in the country for both the mining and oil & gas industries. This would provide stakeholders with a tool to better analyse the contracts terms and the associated socio-economic impacts. The other area that would benefit from further, more focused analysis is on extractives sector revenue management especially in terms of sub-national fiscal governance and regional development. This would provide an understanding of the nature of policies that will best inform wise revenue management at the county and local community level including the methods required to build the necessary capacity at these administrative levels.

Another interesting field of further research is on the specific methods on how the extractive sector can spur the development of other non-resource sectors such as agriculture, manufacturing, local enterprise through backward, forward and lateral linkages. Finally, more research is necessary on the design, management and oversight of a well-functioning Sovereign Wealth Fund, as the government has published the intention of establishing one.

Appendices

Appendix I: Interpretation of ToR

This research paper aims at looking at how the emerging extractive sector and the consequent accrued revenues are managed. The emerging extractive sector is likely to grow steadily in the next few years thereby changing the hitherto silent state of things. The government is going to receive massive revenues in the form of royalties, production sharing, bonuses and taxes. With all these new revenues the government's fiscal wealth is bound to increase and it is upon the governance systems to ensure these revenues are distributed equitably across the country, both at the national, devolved and local community levels and the potential to reduce poverty and grow the economy. The researcher's work was to analyse the fiscal implications of these revenues on government expenditure practices, macro-economic instruments, and on poverty reduction and growth of the economy.

The issues under evaluation are wholesomely meant to give a coherent picture of how the extractive sector revenues will have an effect on the economy and uplift the economic status of citizens. Among the key issues that have been discussed include:

- Production and revenue trends of the extractive sector.
- Contracting laws and the consequent revenue implications.
- Public budget evolution and the nexus with the emerging extractives sector.
- Government spending and borrowing analysis (sectoral spending, SWFs, Debt management).
- Government debt management and correlation with impending extractives sector development.
- Revenue allocation projections for the county governments and local communities.
- Implications of the extractive sector revenues on poverty reduction and economic growth.
- Implications of the extractive sector revenues on the country's competitiveness and potential for "Dutch Disease" outcomes.

The information elicited by this paper provides a perspective on future ES policies for Kenya that has not previously been explored. That perspective sharpens our knowledge of the implications from the policy choices that the Kenyan governance apparatus will adopt. The recent surge of ES importance in the Kenyan macro-economy could be sustained but might just as easily become a relatively short-lived episode in the country's economic history if not prudently managed. The paper is subsequently supposed to propose policy recommendations based on the analysis of collected evaluation data. The study was carried out based on this interpretation.

Appendix II: KI interview questions

Fiscal Implications of a Vibrant Extractive Sector

Key Informant Interview Questions

This document contains key informant interview questions around the fiscal implications of the emergent extractive industry in Kenya. Interviewer/s will briefly explain who they are, the objective of the interview, and the possible uses of the information and ideas provided by the key informant. They will also assure the key informant of confidentiality.

All the key informant interviews will be done on a one-to-one basis to ensure confidentiality and protection of the informant. All interviews will be recorded by taking extensive notes, and then detailed interview summary compiled for each interview.

Name (Optional) ______________________________ Title/Position________________________

Organization____

Date filled____

Key outcomes from KI interviews

1) Mining contracts & implications on revenue management
2) EI revenues projections
3) Government spending
4) Revenue sharing (between national and county governments)
5) Impact of EI revenues on growth & poverty reduction

Introduction

Tell me about yourself.

Probe:

a) How long have you been in this institution?
b) How long have you been in your current position? (not applicable to normal citizen)

About the mining contracts and implications on revenue management

To answer the following questions, the informant needs to understand basic mechanisms of contracting of the EI

1) Do you believe the country has got a good deal in the contracts it has signed with mining investors? Kindly explain

2) What kind of weakness points exist for either party (Government & Mining Company) when negotiating the contracts and how does this affect expected revenues for either party?

3) What best practice/model*, if any exists, would Kenya adopt in the contracting process?

* A model that gives the country the best possible benefit from the natural wealth and ensures the mining investor remains sustainably profitable

About EI revenue projections

To answer the following questions, the informant needs to understand the extractive industry revenue modelling (First, provide informant with information on model used in this stud)

1) Is revenue projecting a reliable way of knowing the potential wealth the country can receive? If not, what other alternative way is there?

About the Kenyan public budget and public debt

To answer the following questions, the informant needs to understand the country's budgetary facts and processes

1. Current budget deficit (KES190billion) is about 4.5% of GDP. What are the barriers to controlling these recurring deficits? Do you think EI revenues will help bridge this gap?

2. Do you expect that the new EI revenues will change this ratio for the better or not?

About government spending

To answer the following questions, the informant needs to understand how the country allocates money for various fiscal needs

1) I'm interested in understanding how the Kenyan government allocates money for the different expenditure needs. What are your initial thoughts about this?

2) If you are conversant with the guiding MTEF framework on government budgeting and spending do you think the government has lived up to the spirit of the framework? Is the spending policy-guided and priority-oriented in your observation? (such as dedicating sufficient funds for development according to structural transformation plans)

3) Kenya's recurrent expenditure is considered unsustainable by all standards (over 60% of budget). Do you think new EI revenues will give the government the space to spend more on recurrent expenditure?

4) What policies on expenditure should be adopted as the country prepares to receive mineral resource revenues?

About revenue sharing between national and county governments

1) Different models have been suggested on how mining revenues should be shared out for equity purposes: for instance here is one suggestion,
   Government take – 75 per cent
   County take – 20 per cent
   Community take – 5 per cent
   What would be your recommended revenue sharing formula in this regard and why the choice?

2) ***CRA-specific question:*** Your commission is mandated to allocate revenues under the new devolved system. In regards to the minerals revenue sharing formula what is CRA's recommended formula and what is the economic and social reason behind the regime? Did CRA consult widely in arriving at this regime?

3) Would county governments be able to absorb and appropriate well a portion of the mineral resource revenues that is shared to them? Can they develop the capacity to do so?

4) Would local communities* be able to absorb and appropriate well a portion of the mineral resource revenues that is shared to them? Can equity be guaranteed at the community level? (*mining region communities)

5) What can you tell me about the proposed sovereign wealth fund? Should the government go ahead and create it? Why?

About impact of EI revenues on growth and poverty reduction

1) Do you believe that the emerging extractive industry has the potential to significantly reduce poverty incidences? Through which mechanisms?

2) What kind of government spending and revenue distribution is likely to equitably reduce poverty? Should the government legislate (draft laws) strategies for achieving this or should it simply encourage fair distribution through policies?

3) How well can the country leverage on the emerging extractive industry so as to grow the economy? Do you think that things may go wrong? How?

4) What specific lessons can Kenya learn from other resource abundant countries that have been in our situation? Do you think that the country is able to counter the Dutch Disease in this discourse? How can it achieve this?

5) ***For EI experts:*** In general, do you think Kenya is going to remain competitive with the new industry revenues in regards to aspects such as inflation and sustainability?

Respondents' cooperation

Excellent ☐ Fair ☐ Average ☐ Bad ☐

List of Interviewees (Key informants)

National Level

- Francis Wawiye - Ministry of Energy and Petroleum
- Moses Njeru – Acting Commissioner of Mines, Ministry of Mining
- Adan Wario - Policy Advisor, Economics and Natural Resources Ministry of Finance
- Amenya Nyakundi – Advisor, Management of Natural Resources Commission for Revenue Allocation (CRA)
- Martin Ayisi - CIC & National Assembly consultant on mineral resources
- Kiama Kaara - Executive Director, Kendren (Kenya Debt Relief Network)
- Robert Simiyu – Governance Advisor, Canadian Cooperation Office
- Carol Kiangura – Coordinator for East & Southern Africa, PWYP
- Cliff Otega - Extractive Sector Expert
- Charles Wanguhu – Coordinator, Kenya Civil Society Platform on Oil and Gas

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GENDER, VALUE CHAIN AND WOMEN PARTICIPATION IN THE EMERGING EXTRACTIVE SECTOR

Miriam W. Oiro Omolo

1 Introduction

Gender refers to the roles, relations, activities and inter-play between men, women, boys and girls. It is defined by culture, and for this reason, is referred to as a social construct. It follows that gender roles, relations and activities vary across different cultures, socio economic classes, ages and political regimes.

Gender has both social and economic implications. The social implications of gender interactions play out in different parts of a society. The socially constructed norms affect the way men and women are perceived in the society resulting in different roles being assigned to them. Conventionally certain roles such as childcare, family care, cooking, tiling of land among others have been largely left to women, and this can also strongly be associated with their biological role of childbirth. Men on the other hand, have been the decision makers in the home, protecting the family from any harm, financial responsibilities towards the family. The socials norms as defined by society have ended up in most cases discriminating against women. Jütting & Morrisson (2005) provide examples, which include unequal property rights, obstacles to free movement, early marriage and polygamy, among others.

The economic implications of gender relations largely play out in labour force participation. In the labour market, women tend to engage in activities that are culturally associated with women. They largely build from the roles already defined by the society through norms/ laws/codes or traditions. On the same note, men also tend to participate in activities that are culturally associated with men's roles such leadership.

1.1 The Research Problem

Gender may manifest itself in a range of ways. The societal definition of gender roles has led to gender bias, which has resulted in the preference of one gender over the other. Socially, women have been assigned certain roles such as childcare; this is related to their biological nature of child bearing. Men on the other hand have been given leadership roles in the home, and the responsibility of financial provision for their families, which arguably is unrelated to their biological nature. Consequently, women have not effectively participated greatly in the labour market and are therefore unlikely to benefit explicitly from any structural transformation of the economy. For example, the benefits accruing from the exploration of the oil and mineral discoveries in Kenya are unlikely to benefit women directly if they are not actively participating in sectors of the labour market where such activities are taking place.

In Kenya, more men actively participate in the labour market compared to women. The Government of Kenya estimates that the number of wage employed women is 8.13 million as compared to men who are 14.5 million. Men's participation in the labour market almost

doubles that of women. In terms of labour market growth, in 2002, males constituted 70 per cent of the labour market while women were only 30 per cent. This however changed in 2013, where females now constitute 36 per cent of the labour market.

The disparity in male-female labour force participation is also evidenced by the incomes earned. Based on gender disaggregated data on average wage earnings, the number of males in the income group that earn less than KES 10,000 per month almost triples that of females in the same category. The number of males earning KES 15,000 - 19,999 is five times more than that of females in the same category. The highest income bracket of more than KES 100,000 per month has three times more males than females in the same category, GOK (2012). Overall, this data indicates a lower average wage earned by females. Unfortunately, the Government does not provide gender disaggregated data on average wage earnings by sector.

Kenya has made several mineral discoveries such as titanium ores in the coast region, significant coal concentration deposits in the Mui basin, large oil deposits in the tertiary Rift basin, and gas in the offshore wells of Lamu basin. These discoveries have resulted in international oil companies signing product sharing agreements with the Kenyan government to carry out oil exploration. The Government has also issued 175 exclusive/special prospecting licenses and 10 mining leases. The Government further acknowledges that the Kwale mineral sands deposits mining project is the biggest in Kenya with a potential of producing rutile, zircon and titanium concentrates (GOK, 2013). With these discoveries, the mining sector has registered increase in gross output of around 38 per cent, while incomes earned in this sector have risen by 51 per cent between 2009 and 2013. It is expected that the oil sector has registered even more growth in terms of value of output and incomes earned.

The mining and quarrying sector has seen an increase in its labour market. In 2002, there were 53,000 employees in this sector, and this increased to 94,000 in 2013. Disaggregation of this growth by gender shows male participation increased by 81 per cent resulting in current male employment of around 76,000 males. Female labour force participation increased by around 64 per cent to 18,000 (GOK, 2014). Participation of males in this sector has grown compared to that of females, and there is a large income disparity between males and females. It is expected that male-female employment and income disparity, is likely to widen if initiatives are not put in place to encourage more female participation in the extractive sector. Consequently, the emerging seventh sector, which is the extractive sector, is likely to be a major driver of gender income inequality in the national labour market. It is therefore important to examine gender participation in the extractive sector value chain and provide appropriate policy and legislative recommendation.

1.2 Research Objectives

1. Establish the socio cultural ideologies of men and women in the extractive sector's focus areas and how they affect men and women's labour force participation.
2. Map out participation in the upstream value chain of ES by gender.

3. Establish the opportunities, challenges and risks of men and women participating in the ES Soperations focus areas.
4. Establish the impacts of the ES operations on both men and women in the focus areas.
5. Provide recommendation for policy and legislative action that will ensure equitable distribution of ES operations benefits to men, women and youth.

1.3 Research Scope

Table 4-1 provides a summary of the recent and existing mineral resources in Kenya, which will be the focus of this research.

Table 4-1: Recent and Existing Mineral Resources by County and Sector

COUNTY	MINERALS	SECTOR
Kajiado	Soda Ash	Mining
Kwale	Titanium Sands	Mining
Kilifi	Titanium Sands	Mining
Turkana	Oil	Oil and Gas
Kitui	Coal	Rear earths, coal

1.4 Significance of Study

This research study directly feeds into the Government of Kenya Vision 2030 Second Medium Terms Plan whose theme is “Transforming Kenya: The pathway to devolution, socio economic development, equity and national unity.” This study reflects the theme, as it looks at the social (gender) and economic (labour force participation) components of the extractive sector value chain. The study will feed into the economic pillar of Vision 2030 as it seeks to answer the question of supply points and value chain mapping from a gender perspective. The information gathered can inform the Government on the skills required in the extractive sector vis-à-vis what is available at the local level.

The social pillar of the Vision 2030 plan, which focuses on gender, youth and vulnerable groups, seeks to ensure ‘equity in access, control and participation in resource distribution for the improved livelihoods of women, youth and vulnerable groups.” This study looks at gender equity in labour market participation for selected value chain points in the extractive sector. The harmful social practices, norms and codes that hinder female participation in the extractive sector will be brought out for policy action to facilitate increased gender participation in the emerging sector. Secondly, this study focuses on Kitui, Kilifi, Turkana, Kajiado and Kwale counties due to their ranking as the most vulnerable communities in terms of economic empowerment. This study presents data and recommendations on how these vulnerable communities can participate in the emerging minerals, oil and gas sector in order to reduce the number of vulnerable groups needing social protection.

Lastly, an analysis of the extractive sector value chain from a gender perspective will generate information on the employment opportunities that the sector can generate. GOK (2013) acknowledges that while the economy has registered growth, the growth has not been sufficient to generate employment opportunities for new entrants into the labour market, especially women. With the right policies based on this research work, the Government can put in place initiatives that will ensure that the extractive sector reduces the number of vulnerable groups that require social protection through employment creation.

2 Review of Literature

2.1 Gender as a Social Construct

Culture provides the platform for gender ideologies. It defines the rights, responsibilities and relations between men and women. Culture is a distinctive pattern of ideas, beliefs and norms that distinguish a community's way of life. Baden (2000) notes that, culture determines the gender ideologies, rights and responsibilities of men and women. These ideologies influence access to, and control over, resources and participation in decision making. Gender on the other hand is defined by Deutsch, (2007) as what we do. It is a system of social practices that defines the roles of men and women in the society. Mukhopadhyay & Ratna, (2003) equally note that gender remains a basic criterion that structures most societies around the globe. They provide the example of South East Asia where caste divisions, class and gender has resulted in a complex, highly structured and hierarchical society.

Gender interactions can result in systemic and unequal treatment of one sex over the other based on societal norms. Women having less access to control of resources, decision making and power in all institutional spheres such as the household, community, market and state, results in gender discrimination. In African society, gender discrimination results in male child preference over the girl child. In the labour market, this can manifest by women taking part in low skill activities characterised by low pay. Women tend to earn low pay as compared to men with the same skills and education level (Baden, 2000). In Kenya, the number of wage-employed women stands at 8.1 million as compared to men who are 14.5 million. This low rate of participation is influenced by gender related issues such as levels of educational attainment.

2.2 Gender and Female Labour Force Participation

Several studies have empirically examined the determinants of female labour force participation in various parts of the world. In Africa for example, Atieno (2006) examined the determinants of female labour force participation in Kenya's informal sector and found that the important determinants of female labour force participation were age, schooling, location (whether rural or urban) and whether an individual is a household head. In South Africa, Yakubu (2010) also examined factors that determined female labour force participation. Yakubu found that education was a significant predictor of participation in the labour market. Secondly, women who were cohabiting or divorced or separated were more likely to participate in the labour market as compared to their married counterparts. Further, older women than married and/or younger women, were more likely to participate in the labour market. Dayioglu & Kirdar Murat G. (2010) equally found that in Turkey, education, age, location and the number of children that a woman has, were significant determinants of female labour force participation.

Contreras and Plaza (2008) studied the determinants of female participation in Chilean labour force and incorporated culture in their analysis. In their work, they constructed a cultural variable in the form of an index. This index determined whether a woman exhibited a tendency to approve or disapprove cultural aspects and behaviour consistent with machista views. They responded to the following questions: *(1) The man and the woman should both contribute to the family's income (2) The man's job is to earn money and the woman's job is to take care of the house and the family (3) Men should assume more responsibility for domestic work than they currently do and (4) Men should assume more responsibility for childcare than they currently do.*

Based on these questions, 44 per cent of the women were found to belong to the traditional cultural structure whereby men were the financial providers for the family and women were the family and child care givers. Contreras et al (2000) found that education is a significant determinant for women to participate in the labour market. On culture, they found that the more a woman internalised the machista cultural values, the less likely she would participate in the labour market. In addition, women with high levels of education would not want to participate in the labour market because of the cultural restrictions. Chamlou, Muzi, & Ahmed, (2011), when looking at labour force participation and social norms in Middle East and North Africa (MENA) countries, asked household members questions relating to their attitudes towards women's work outside the home and, for members who opposed women's such work, the reasons why. They found that the labour force participation rate of women living in households with a positive attitude towards women's outside work more than doubled that of women with a negative attitude.

Gender and Participation in ES Value Chain

The value chain approach focuses on the vertical relationship between buyers and sellers and the movement of a good or service from producer to consumer (Riisgaard, 2010). In undertaking gender value chain analysis, Terrilon (2011) outlines the following important issues that must be factored in:

- Division of labour on production, processing, transportation and trade within the value chain according to gender roles
- Proportion of men and women working in a specific sector by activity such as supply, production, processing, transport and trade.
- The distribution of men and women in the formal and the informal economy
- Whether women concentrate more on production, processing, trading and marketing
- Whether women are involved in stages where value added is generated
- The power dynamics and governance structures within the value chain as well as the roles of men and women, the exchange relationships, and opportunities for men and women within the value chain process.

Gereffi and Fernandez-Stark (2011) further point out that it is important to examine the dynamics and structures of companies under each segment in order to establish their sourcing practices or suppliers. Further to this it is important to establish the type of companies involved and their key characteristics such as whether they are international, local, state owned, private, large, small or medium sized enterprises. Understanding these structures is important for

establishing the governance dynamics and who controls what segment of the value chain.

There are limited studies on gender and value chain mapping particularly in Africa. However, studies by Saibull (2012) and Mjimba (2014) attempt to establish components of the Tanzanite and gold value chain in Tanzania. Saibull (2012) categorises components of the Tanzanite value chain as inbound logistics, license acquisition, minerals prospecting, and machines acquisition; the mining operations involve application of manual technology for small scale miners and sophisticated mining technologies for large scale miners whereas the marketing and sales activities include brokerage and registered dealer's trade. Mjimba (2014), further attempts to map out activities within each component of gold mining value chain in Tanzania. He notes that at the exploration stage, most companies prefer to undertake in-house geological interpretation of data while outsourcing geophysical work. This approach of establishing of value chain components and mapping out activities will be used in this analysis.

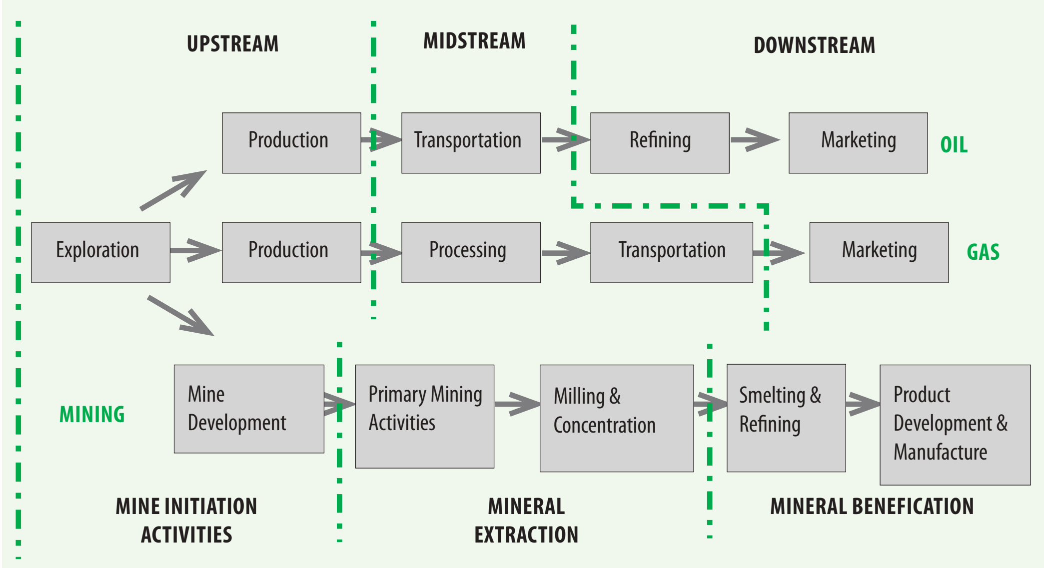
3 Methodology

3.1 Conceptual Framework

The conceptual framework to be used in this paper borrows from different sources in order to come up with an analytical approach that is empirically possible. A generic form of the oil and gas and mining industry value chain has been used to guide the analysis. Exploration in oil and gas can largely be divided into three processes: upstream, midstream and downstream. Upstream involves the exploration and production process; midstream has transportation refining and processing; while the downstream process entails distribution and retail sales. In mining, the activities can largely be grouped into mine initiation, mineral extraction and mineral beneficiation activities as shown in figure 4-1. This research uses the methodology by Saibull (2012) and Mjimba (2014) whereby the activities or inputs within each value chain are established.

This approach is critical for mapping out the value added at different stages in the chain. This form of layering is important for generating information on jobs and firm participation at different stages of the chain Gereffi and Fernandez-Stark (2011). Given that Kenya is at the exploration stage of oil production, mapping will be limited to the exploration process. In regards to the mining sector, the focus will extend to the mineral extraction stage. This study will examine the position of males and females in each stream of the value chain; and the benefits that accrue to players in the value chain. Within each of these activities the study will establish what is sourced locally or out of the country. Of the activities/inputs that are locally sourced, the study will undertake a gender analysis in order to establish if the activities/inputs are done by males/females or male/female owned enterprises, based on data availability. The activities in the labour market can largely be classified as market and non-market activities. The non-market activities include the care economy, which is largely made up of the care role women provide in the households. This activity is not captured in the system of national accounts. The market activities can be further divided into non-wage (self-employed) and wage employment. Wage employment is what is commonly and easily captured in the system of national accounts.

Figure 4-1: Extractive Sector Value Chain



Source: Author's compilation

3.2 Analytical Framework

The study used a probit model to analyse the determinants of labour force participation in ES following several works of Atieno (2006), Yakubu, (2010) and Chamlou et al. (2011). A probit model of labour force participation was estimated to identify the role of gender in the participation of women in Kenya's extractive industries (Equation 1).

$$LFP_i = \alpha + \chi B + \varepsilon_i \qquad (1)$$

Where the dependent variable, LFP, takes a value of 1 if a woman participates in the upstream value chain of ES and a value of zero otherwise;   is a matrix that contains variables such as education, age, age-squared, number of children, presence of a partner, regional dummies (urban/rural), marital status, number of children, and age of children; B represents parameters to be estimated; and   is random error term.

3.3 Data

Data for this analysis was obtained from both primary and secondary sources. Data sets from the Afrobarometer survey, the Kenya Integrated Household Budget Survey (KIHBS) and the Kenya Population and Housing Census were used. Fieldwork was undertaken to collect qualitative data using key informant interviews to reinforce findings from the literature review and from econometric data analysis.

- **The Afrobarometer 2012**
  Afrobarometer is an independent, nonpartisan research project that elicits information on a wide range of socio economic and political topics. The Afrobarometer survey is drawn from

national samples of 1,200 or 2,400 persons from extremely heterogeneous societies. The sample universe is made up of a randomly selected representative cross section of citizens of voting age within a country. This survey also provides basic information such as gender, age, level of education and asset ownership for items such as a television and radio. This information is important for profiling respondents in an analysis.

- **The Kenya Integrated Household Budget Survey (KIHBS 2005/06)**
  KIHBS data was collected with the main objective of obtaining a wide spectrum of socio economic indicators required to measure, monitor and analyse the progress made in improving living standards in a single integrated household survey. This data contains information on demographics, housing, education, health, agriculture and livestock, enterprises, expenditure and consumption, household social amenities and community perspectives.

- **Kenya Population and Housing Census 2009**
  The Kenya Population and Housing Census 2009 data contains information on individuals and housing characteristics. It provides information on population and household distribution by administrative and political units.

4 Development and The Gender Challenge

4.1 Gender Perceptions

From the literature review, it is clear that social norms shape society, and that this is likely to affect the manner in which males and females socially interact. Table 4-2 provides the Kenyan society's perception of whether women should be subjected to traditional laws and customs or treated with equal rights as men in various aspects of the development process. There is a declining perception that women should be compelled to conform to traditional laws and customs in public and private spheres. While in 2003 around 27 per cent either strongly agreed or agreed with this perception, in 2011, the percentage declined to around 12 per cent. In 2003, around 71 per cent of the society held the view that women should have equal rights as men; this increased to 84 per cent in 2011. This is illustrated in Table 4-2 below.

Table 4-2: Society's Perception of Women Being Subject to Traditional Laws and Customs

Statement 1: ***Women have always been subject to traditional laws and customs and should remain so*** **Statement 2:** ***Women should have equal rights and receive the same treatment as men do***				
	2003	2005	2008	2011
Agree/very strongly agree with statement 1	27.3	28.9	0.0	12.4
Agree /very strongly agree with statement 2	71.2	68.8	0.0	84.4
Agree with neither	1.5	2.2	-	3.2
Total	100.0	100.0	0.0	100.0

Source: Author's calculation from Afrobarometer data 2003-2011

In 2003, 81 per cent of the society felt that women should have the same chance as men have, of being elected to political leadership. However, in 2011, the percentage of those who supported this opinion dropped to 76 per cent. Those who preferred male leaders increased to 22 per cent in 2011. The change in perception was largely dictated by the sex of respondents. More females were interviewed in 2005 and they supported female leadership, as compared to 2011 when more males were interviewed, and they supported more male dominated political leadership. This is illustrated in Table 4-3 below.

Table 4-3: Society's Perception of Women's Leadership

Statement 1: ***Women should have the same chance of being elected to political office as men*** **Statement 2:** ***Men are better political leaders than women and should be elected rather than women***		
	2005	**2011**
Agree/very strongly agree with statement 1	81.3	76.1
Agree /very strongly agree with statement 2	16.8	21.7
Agree with neither	1.8	2.2
Total	100.0	100.0

Source: Author's calculation from Afrobarometer data 2005 and 2011

Field interviews of community representatives in Kwale county show that the gender perceptions on what role women should play in society remains strong. Respect for a woman is not pegged on her career achievements but the degree to which she adheres to the cultural norms of the society.

Box 4-1: Gender Perceptions- Excerpts from the Field

Acculturation is often viewed as a second-culture learning especially when behaviour changes from one culture to another. One cause of behaviour change is rural-urban migration in search of education and economic gains. Rural-urban migration tends to be a good indicator of a community's under development. With acculturation, indigenous cultural elements tend to be replaced by behavioural patterns considered to be modern. In Kwale County, there has been migration to urban areas in search of more resources and better living conditions. Women, who have low levels of education in this county, have migrated to urban areas in search of education as well as better economic means to uplift their standards. These women who have succeeded in education have acquired stature in society given their ability to engage in high level intellectual discourse. Today, it is possible to get over 1,000 educated women, unlike years back when they were few.

Religion provides a basis of cultural norms in a society like Kwale. Islam is the dominant religion while Christians are a minority. These religions while heterogeneous in nature influence cultural norms and behavioural patterns. In Kwale, men are allowed to be polygamous while the woman is generally viewed as a 'homemaker', and is expected to take care of the home, bear children, and do household chores. Outside the home, she is made to believe that women are of lesser value and should remain controlled in public. In cases where a woman is educated, and advanced in her career, she is required to adopt the cultural norms once she is back in the village. She is not respected until she is able to cook and observe the norms of the community—making meals, cleaning, taking care of the home—irrespective of her education and position in society. If she cannot carry out the cultural norms, the village is more likely to refer to her as an

outcast. She is not respected because of her level of education but rather, how she abides by the norms and values.

The difference between the older and the younger generation seems to have widened over the years as a result of changes in cultural practices by women. While the older generation observes cultural norms, the younger generation is educated and informed about gender equality. The women have become bold, as a result of recognising that gender equality is a basic human right. The changes are also emerging because various organisations are sensitizing the community on gender discrimination and ways to overcome gender inequality. NGOs based in Kwale have embarked on assisting 'chamas' to empower women, eliminate discrimination, encourage savings and achieve equality between women and men as partners and beneficiaries of development. These projects have assisted the women of Kwale to uplift their livelihoods. Previously, it was difficult for women in Kwale to make something of their savings because their partners would access the money saved and use it for themselves. This led to women registering their 'chamas'[1] officially to avoid harassment from the men. Subsequently, cases of partners taking away the women's savings declined, as the men could no longer forcefully obtain the money since it now belonged to the members of the chama. .

Overall, Kwale County is experiencing progress promoting gender equality. To an extent, society is willing to accept new gender roles as long as it does not contradict with culture. However, gender disparities persist. Indeed as one respondent stated, "in Kwale county, societal acceptances of new gender responsibilities remain too ambitious."

Source: Fieldwork

4.2 Socio Economic Profiles by Region and Gender

Table 4-4 provides gender disaggregated socio economic indicators of the five counties within the scope of this study. Kilifi and Kitui counties are the most populous of the counties, with more than one million people. In terms of population densities, Kilifi and Kwale counties have high population densities. This implies that there is a strong likelihood of land pressures given that extractive industries operations require large tracts of land for exploration and industries generally give rise to increased demand for human settlement as employment opportunities emerge. All the counties have high poverty incidence with Turkana County being the highest at 44 per cent. Kajiado County has a low immunization rate of children less than one year, which stands at 31 per cent. Turkana County equally has a low immunization rate of around 31 per cent for children less than one year.

1 A chama is an informal cooperative society that is normally used to pool and invest savings by people in East Africa, and particularly Kenya. Chamas is the Kiswahili word for "group" or "body" and is also referred to as a "micro-savings group". These groups arose out of the idea of harambee, which means "all together", in the late 1980s and 1990s.[2] Originally, chamas tended to be exclusively women's groups, but as chamas started to grow in sophistication and success, men started participating in chamas as well. Taken from Wikipedia http://en.wikipedia.org/wiki/Chama_(investment) Accessed on 6th November 2014.

Table 4-4: Selected Socio-Economic Indicators

	National	Kilifi	Kajiado	Kwale	Kitui	Turkana
Population	38,610,097	1,109,735	687,312	649,931	1,012,709	855,399
Population Density (per km²)	66	88	31	79	33	12
Poverty Incidence (%)	47.2	71.4	38.0	74.9	63.5	94.3
Education (%)						
School Attendance (Age 6-13)						
Male	58.2	58.6	59.7	60.5	58.9	54.0
Female	59.4	60.0	59.7	62.3	60.5	58.1
School Attendance (Age 14-17)						
Male	22.6	22.5	21.9	22.1	24.8	20.6
Female	21.8	23.1	23.7	22.9	24.8	20.5
Post-Secondary Education						
Male	3.8	1.2	2.5	0.5	1.3	0.6
Female	3.8	1.0	2.7	0.5	2.0	0.3
Health						
Fully Immunized <1year	64.0	78.0	30.9	68.1	59.8	30.9
Malaria incidence (% 1st outpatient visit)	27.7	16.1	24.8	22.6	21.3	31.2
TB in very 10,000	39	30	15	40	29	9
Household Services						
% with access to electricity	22.7	16.7	39.8	10.6	4.8	2.4
% access to improved drinking water	66.5	75.9	72.3	65.8	50.8	74.3
% with access to improved sanitation	87.8	65.5	74.2	48.6	69.1	17.8

Source: Commission on Revenue Allocation (CRA) County Fact Sheets & Kenya Population and Housing Census 2009

All the counties listed in table 4-4, that is, Kilifi, Kajiado, Kwale, Kitui and Turkana, have a higher primary attendance rate than secondary school. Secondly, there is slight gender parity against females in both primary and secondary school attendance. In Turkana this has implications for labour force participation and the quality of jobs that members of the communities can engage in. Post-secondary education, which includes polytechnics, tertiary colleges, and post graduate programmes remain very low. This has negative implications for the engagement of county residents in highly skilled capital-intensive work in the extractive sector.

4.3 Gendered Labour Force Participation and Implications for the Emerging Extractive Sector

The total number of persons in Kenya actively engaged in employment is around 12.7 million. Of this number, 2.1 million are in formal sector wage employment, 769,000 are either self-employed or unpaid family workers while those in informal employment (10.5 million), make up the rest (GOK, 2013). The focus of this research is on wage employment due to lack of adequate gender disaggregated data on the informal sector and self-employment. Out of the 2.1 million Kenyans in wage employment in 2013, females constituted 25 per cent. This could mean less income security for women.

Most women in wage employment work in the Education sector (21 per cent) followed by the Agriculture, Forestry and Fishing sector. The same pattern is observed with men, in that most men work in the Education sector, followed by the Agriculture, Forestry and Fishing sector. This implies that if there are strong backward linkages with these key sectors in the extractive sector women are likely to benefit.

Generally, there are more men than women in wage employment across the sectors with the exception of the Health and Social Work sector and other services[2]. The presence of more women than men in the Health and Social Work and other services sectors could be due to the family and child care role assigned to women by society. There are far less women than men working in the Mining and Quarrying and Construction sectors. This could be because women are perceived to be the weaker sex physically and emotionally whilst these sectors are viewed as required high levels of physical labour.

Table 4-5: Wage Employment in Kenya (thousands)

	2011		2012		2013	
	Male	Female	Male	Female	Male	Female
Agriculture, forestry and fishing	234.2	107.2	209.9	127.8	217.8	128.9
Mining and quarrying products	7.6	1.1	7.3	1.7	7.6	1.8
Manufactures	214.0	62.9	192.8	78.1	201.5	78.8
Electricity, water and Gas	15.6	4.7	15.9	6.9	17.0	7.2
Construction	94.7	12.6	94.2	21.9	106.7	23.6
Wholesale and retail trade; repairs	135.0	35.7	147.0	51.0	159.2	53.2
Transport and storage	68.8	7.7	62.2	13.0	63.9	12.5
Accommodation and catering services	50.3	20.5	44.5	24.4	48.1	25.6
Information, Communication and Technology (ICT)	51.3	26.9	52.4	33.3	57.3	35.4
Financial and insurance services	29.2	20.2	33.8	27.8	37.2	29.8
Real estate services	2.1	1.5	2.0	1.7	2.2	1.6
Professional and support services	46.8	15.4	47.8	19.4	53.5	19.7
Public administration	119.0	52.4	133.5	73.9	141.6	76.2

2 The other services sector is largely made up of domestic servants, the activities in these sectors resonate with women's child and family care roles based on societal norms.

	2011		2012		2013	
	Male	Female	Male	Female	Male	Female
Education	237.6	146.8	220.8	164.0	232.4	168.4
Health and social work	41.9	59.6	41.6	63.1	45.3	67.5
Other services	79.1	81.7	60.9	81.0	59.9	83.1
	1,427.2	656.9	1,366.6	789.0	1,452.5	813.2

Source: GOK (Various)

Annex table A2 further provides probit results for the determinants of male and female labour force participation in Kenya. Three models were run: male (1), female (2) and all (3) for the male, female and national sample respectively. Age was found to be a significant determinant of both male and female labour force participation. In addition, the higher the number of children one has, the greater the probability that both men and women will participate in the labour market. Married women are less likely to participate in the labour market as compared to divorced or single women, probably due to choice or cultural pressures to remain at home to produce non market goods. Married men on the other hand are more likely to participate in the labour market as compared to single and divorced men. Education, which was measured by years of schooling, was found to be a significant determinant for one to participate in the labour market. These factors have also been reported in previous studies in Kenya, South Africa, Jordan and Turkey (Atieno, 2006; Chamlou et al., 2011; Contreras and Plaza, 2008; Dayioglu & Kirdar Murat G., 2010; Manda, 2004; Yakubu, 2010)

Annex table A2 is important in informing policy makers on which sectors women are likely to participate as compared to men. There is increased probability of women participating in Health, ICT, Accommodation and Catering and Wholesale and Retail Trade sectors. Men on the other hand have increased probability of participating in Electricity, Gas and Water, ICT, Real estate and Education sectors. From these results, men are likely to gain more from extractive sectors if these sectors have strong backward linkages, which is quite likely given that the extractive sector is likely to demand inputs from these sectors. ICT is a common sector where both men and women are likely to gain, however, based on the statistics presented in table 4-5, there are more men engaged in the ICT sector as compared to women, hence in terms of magnitude, men would gain more from the demand of ICT services by the extractive sector operations.

Annex table A3 examines the factors that determine labour force participation in Mining, Wholesale and Retail Trade, and Transport and Storage sectors. These three sectors form part of the extractive operations value chain as illustrated in figure 4-1. In the mining sector, increased years of schooling reduce the probability of participating in this labour market. In the Wholesale and Retail Trade sector, age is a significant determinant of participation, implying that as one grows older, the probability of participation in the retail sector reduces by 2 per cent. Annex table A4 provides the interpretation of key dummy variables in percentage using a scaling factor. The marital status of both men and women significantly affects labour force participation in both the Wholesale and Retail Trade, and the Transport and Storage sectors.

Single men and women have a 40 per cent higher chance of participating in the Wholesale and Retail Trade sector compared to those who are married. Those who are divorced have a 26 per cent higher chance than married persons for participating in the same sector (Wholesale and Retail Trade). In the Transport and Storage sector, single and divorced individuals—72 and 41 per cent respectively— are more likely to participate as compared to those who are married.

Looking at the three sectors from a gender perspective, women have a 24 per cent lower chance of participating in mining as compared to the men; furthermore, a female with increased years of schooling has a 0.21 per cent less chance of participating in this sector as compared to the male counterparts. Regarding Wholesale and Retail Trade sector, women are 21 per cent more likely to participate than men. Location is also a significant factor of participating in the wholesale and retail sector, those who live in the urban areas are more likely to participate (109 per cent) as compared to those in the urban areas. If the government would like to encourage female participation, then the Wholesale and Retail Trade sector would be an important sector through which women could tap into the activities of the extractive sectors, as they could act as service providers for extractive sector companies. There is an 82.6 per cent less likely chance that females will participate in the Transport sector as compared to the male counterparts; however, a female with increased years of schooling is more likely to participate by 0.15 per cent as compared to a male counterpart. Those living in the urban areas are also likely to participate in this sector by 89 per cent.

5 Gender and Extractive Sector Value Chain Mapping

The first step in establishing the value chain map is to derive the activities within each stage of the value chain. Table 4-6 provides a summary of some of the activities within the different stages of selected extractive sector activities. This table is derived from information obtained from field and desk literature review. While the focus is on Mining and Oil and Gas sectors, there is limited information available on mining. Several activities have been identified that are associated with oil and gas explorations and mining activities in general, these include:

- Catering and camping services- this involves activities such as provision of catering services (food) and accommodation facilities to companies located in the oil extraction areas such as those in the Rift Valley.
- Seismic services- provision of exploration techniques that assist in profiling surfaces below the earth's surface in order to establish whether hydrocarbon exists. The seismic services can be in 2D or 3D.
- Trucking and transportation services.
- Freight forwarders and custom clearing services.
- Liaison services.
- Drilling and coring services - provision of drilling services for wells, directional drilling, generation of reservoir information for enhanced drilling performance and core services include the provision of lithology, porosity, permeability, saturation, wettability, and electrical properties that form a reservoir.
- Lifting inspections and audits- this includes offshore container inspection, lifting gear, wire, chain, webbing and shackle condition survey, inspection of drill pipes and fork lifts.
- Civil works - design, construction and maintenance of physical/naturally built environments.
- Crane and fork lifting services.
- Mine waste disposal services.
- Water management and waste water treatment services.

Data collected shows a sample of companies undertaking various activities in the oil and gas sector. It is important to note that most of the activities are undertaken by foreign companies. For example, drilling and coring activities are largely undertaken by foreign companies. This implies that opportunities for technology transfer from foreign technologically skilled companies to local companies are likely to be limited. There are several local catering and accommodation services in Kenya that could be sourced to provide some of these services. It is important for the Government of Kenya to develop an extractive sector development strategy, which has a strong local content development, implementation and monitoring plan, otherwise very few businesses whether small or medium will benefit from the opportunities arising in this sector.

Apart from the expected benefits of micro, small and medium enterprise development, there are employment opportunities emanating from operations in the extractive sector. Table 4-7 provides a summary of the Kenyan nationals versus expatriates for an oil and gas company. 82.5 per cent of those employed are Kenyan nationals while the rest are expatriates. Most of the expatriates are either in management or director positions. The nationals are largely made up of skilled and unskilled workers. Further scrutiny of the definition of 'skilled' by example shows that this cohort includes: welders, plumbers, electricians, crane operators, assistant drillers, mason, and group financial controller. For the expatriates, skilled employees include surveyors, drillers, and vibe technicians. Management positions in the case of expatriates include managers (operations, finance), supervisors, rig superintendents and tool-pushers. The positions held by Kenyan nationals for this category included surveyors, advisors and engineers. In a sample Kenyan company providing services to the oil companies, skilled employees include ecologists and sociologists. Semi-skilled positions for the Kenyan nationals include floor men, sample catchers and junior cooks. The unskilled nationals include road marshals, guards, general workers, laundry people, dishwashers, drivers, ablution attendants and waitresses. There is a large disparity in the manner in which positions given to the nationals are clustered (skilled, semi-skilled, management and directors). The government should ensure that the extractive sector uses the official labour clusters in defining the skill level; otherwise the national is likely to be misled on the quality of employment.

Data on the sex of the owners of enterprise involved in ES is not available.

Table 4-6: The Extractive Sector Value Chain Activities

SECTOR	STAGE	ACTIVITIES	SOURCING (FR/LC)-EXAMPLES
Mining			
Mine Initiation/ Extraction	Mine Development, Mining, milling/concentrate	• Trucking and transportation services • Mine waste disposal services; • Water management and wastewater treatment systems services • Power infrastructure and system and any on-site generation facilities services • Camp and catering services • Fuel supply and storage services • Cranes and forklifting services • Vehicle storage and maintenance facilities • Water supply services • Sewage and waste disposal services • Freight forwarders and customs clearing services • Telecommunications • Civil works	• Zenith Mining and Construction (FR) • AFEX (FR), Ardan • GGS (FR), BGP (FR) • ROLSS (FR), Trans East (LC) • Baker Hughes (FR), Sakson (FR), Haliburton (FR), Weatherford (FR), PR Marriot (FR), • Earthview (FR), Kurrent Technologies (LC), Citiscape • Freight Forwarders (LC) • KK Security, Newport (FR) • New Edge Solutions • TAI • Spica Marine Inspections (LC) • Alpha Logistics (LC)
Oil and Gas			
Upstream	Exploration	• Camp and catering services • 2D & 3D seismic services • Trucking and transport services • Drilling and coring services • Environmental services and social audits	

SECTOR	STAGE	ACTIVITIES	SOURCING (FR/LC)-EXAMPLES
		• Freight forwarders and customs clearing services • Security services • Telecommunications • Civil works • Lifting inspections and audits • Cranes and forklifting services	

Table 4-7: Employment in the Oil and Gas Sector (Case Study)

N=2149	Expatriates	National	TOTAL
Director	66.7	33.3	**0.1**
Management	69.7	30.3	**5.5**
Semi-Skilled	25.3	74.7	**48.5**
Skilled	3.4	96.6	**19.1**
Unskilled	2.4	97.6	**26.7**
Total	17.5	82.5	**100.0**

Source: Fieldwork

The quality of employment matters greatly in establishing whether a type of employment activity that an individual engages in will drive them out of poverty or is a poverty coping mechanism. Oiro et al (2004) found that not all jobs are welfare enhancing i.e. moving an individual out of poverty. For example, using the cost of basic needs approach (CBN), 50 per cent of unskilled private sector workers were found to be poor compared to, 33 per cent skilled private sector workers being poor. Using these statistics as a guide, it is highly unlikely that the employment opportunities provided by the ES operations will provide a 'big push' for Kenyans out of poverty. Employment quality should be closely scrutinized.

When the national extractive sector employment data is disaggregated by gender (table 4-8), female participation in the sector is even more discouraging. Only 9.4 per cent of those employed in this sector are females. This occurrence is corroborated by our analysis, which empirically showed that more men are likely to participate in the mining sector as compared to women. Majority of the women are unskilled with most of their positions being: housekeeping, waitresses, tent cleaners, and labourers. These activities reflect cultural perceptions of women and their care giving roles in society. It follows that in employment, they are assigned to areas that are aligned to the societal norms and women themselves also resign to look for employment opportunities aligned to the gender roles. There are exceptional cases in this survey where unskilled women are drivers and road marshals. The women in management in this case include responsibilities such as programme coordination and being a Valuer. Clearly such women have high level of education for them to be able to occupy such positions, this supports the finding that increased years of schooling increases the probability of participating in the labour force.

Table 4-8: Gender disaggregated participation in the Extractive Sector

N=1772	Female	Male	TOTAL
Director	0	100.0	**0.1**
Management	11.4	88.6	**2.6**
Semi-Skilled	3.8	96.2	**19.8**
Skilled	6.2	93.8	**26.5**
Unskilled	13.1	86.9	**51.1**
Total	9.4	90.6	**100.0**

Source: Fieldwork

5.1 Challenges, Risks and Opportunities

Table 4-9 provides the challenges, risks and opportunities for the extractive sector value chain and gender participation.

Table 4-9: Challenges, Risks and Opportunities

Challenges	Risks	Opportunities
• Societal norms have largely defined women's care giving role, which affects the types of jobs that they engage in the labour market. • The care-giving role of women is not captured in the system of national accounts; this largely reduces the true value of women's participation in the labour market. • Women's participation in the extractive sector is much lower than other sectors of the economy. • The quality of employment in the ES remains low and if no standard classification of skill level is obtained, then both males and females will not gain. • Information on services procured by extractive sector firms is not easily available making it difficult to establish local content of these firms. • The definition of local content is likely to be misleading if the focus is only on the number of local persons employed.	• Women are unlikely to benefit from the ES operations given the low participation rates in the sector. • Gender norms still remain a major determinant of women's choice of whether to participate in labour force and the type of activity to engage in. • While there are employment opportunities in the extractive sector, the quality of jobs being created may be a poverty coping mechanism rather than 'the big push' out of poverty.	• There are several activities that are cross cutting in the value chain such as ICT and transport where women can participate. • With the right policies/laws geared towards the extractive sectors, women are likely to gain from the opportunities arising from this sector.

6 Conclusions and Policy Recommendations

The study sought to establish gender participation in the extractive sector by first reviewing the gender perceptions of the Kenyan society in the counties where extractive operations are taking place. The study further established the determinants of female labour force participation and the sectors where female are likely to participate more. The study draws the following conclusions:

1. There is a very low level of participation of women in the extractive sector (less than 10 per cent), while there are eight times more men participating in the labour market within this sector.
2. Women are more likely to participate in the Health and Social Work, ICT, Accommodation and Catering and Wholesale and Retail Trade sectors, while the men have increased probability of participating in Electricity, Gas and Water, ICT, Real Estate and Education sectors.
3. Men are likely to gain from the extractive sector operations since they participate directly in the Mining sector and indirectly in sectors that provide services to the extractor sector.
4. Education, age and marital status are the key determinants of participating in the labour market.

Based on these conclusions, the following are the key policy recommendations that will assist in ensuring that women actively participate in the extractive sector in a gainful manner:

Policy Recommendations	Implementer
• The Mining bill must include specific provisions on gender equality and equity that will empower women in the extractive sector.	• Technical Committee in the Ministry of Mining • Parliamentary on Natural Resources
• The government must introduce communication and sensitisation programmes to eradicate cultural norms that inhibit women from actively participating and contributing to the extractive sector.	• Ministry of Sports, Culture and Arts • Vision 2030 Delivery secretariat
• The government must put in place capacity building implementation plans targeting women and girls. These plans must be accompanied by monitoring and evaluation plans for tracking outcomes. • The government must develop an extractive sector development plan that defines a framework through which the micro, small and medium enterprises can engage in the extractive sector as service providers. • The government must put in place a partnership/technology transfer plan and framework for each foreign company engaged in this sector, foreign companies must have local partners and a technology transfer strategy and plan.	• Ministry of Industrialisation and Enterprise Development • Extractive Sector firms
• The government must develop punitive policies aimed at discouraging gender discrimination in the extractive sector.	• Ministry of Labour, Social Security and Services
• Businesses must be compelled to use a government comprehensive skill level cluster to classify employees in the extractive sector.	• Kenya National Bureau of Statistics • Ministry of Devolution and Planning

Glossary

Chama: A chama is an informal cooperative society that is normally used to pool and invest savings by people in East Africa, and particularly Kenya. Chama is the Kiswahili word for “group” or “body” and they are also referred to as “micro-savings groups”. They arose out of the idea of harambee, which means “all together”, in the late 1980s and 1990s. Originally, chamas tended to be exclusively women’s groups, but as chamas started to grow in sophistication and success, men started participating in chamas as well. Taken from Wikipedia http://en.wikipedia.org/wiki/Chama_(investment) Accessed on November 2014.

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Annexes

ANNEX 1: Terms of Reference - Gender and Value Chain

Gender can be defined as "culturally based expectations of the roles and behaviour of males and females." The socially constructed norms affect the way men and women are perceived in the society resulting in different roles being assigned to them. It follows that in any value chain, men and women tend to have different roles largely defined by the society. With the discovery of minerals, oils and gases, the new structural change in the economy is likely to affect both men and women differently. In examining the extractive sector value chain operations; it is important to separately examine its impact on men, women and youth in order to ensure that the challenges emanating from the activities do not overburden one cohort, while the benefits that accrue are shared equitably among all stakeholders. This approach will ensure sustainable development of impacted communities. This has the impact of increasing the development effectiveness of ES operations for the community and nation as a whole. The objectives of this paper will be to profile and establish the gender related challenges in the extractive sector value chain. This is important in ensuring that the development initiatives emanating from the ES factor in gender disparities, which can be used in county/community development planning.

Objectives

1. Establish the socio-cultural roles of men and women in the extractive sector focus areas.
2. Map out the ES value chain i.e. mining oil and gas vis-a-vis gender participation in the ES value chain by gender.
3. Establish the opportunities, challenges and risks of men and women participating in the ES operations focus areas.
4. Establish the impacts of the ES operations on both men and women in the focus areas.
5. Provide recommendation for policy and legislative action that will ensure equitable distribution of ES operations benefits to men, women and youth.

ANNEX 2: Additional Results

Table A1: Descriptive Statistics

	Male	Female	All
N	10,681	9,863	20,544
Marital Status			
Married	0.57 (0.50)	0.61 (0.49)	0.59 (0.49)
Divorced/Widower	0.03 (0.18)	0.14 (0.34)	0.09 (0.27)
Single	0.40 (0.49)	0.26 (0.46)	0.32 (0.47)
Area of Residence			
Urban	0.34 (0.47)	0.32 (0.47)	0.33 (0.47)
Rural	0.66 (0.47)	0.68 (0.47)	0.67 (0.47)
Sectors			
1. Agriculture	0.50 (0.50)	0.60 (0.49)	0.55 (0.49)
2. Mining	0.01 (0.10)	0.003 (0.05)	0.006 (0.08)
3. Manufactures	0.05 (0.21)	0.02 (0.15)	0.035 (0.18)
4. Electricity, Gas and Water	0.01 (0.07)	0.0005(0.02)	0.002 (0.05)
5. Construction	0.05 (0.21)	0.002 (0.05)	0.03 (0.16)
6. Wholesale and Retail Trade	0.12 (0.32)	0.17 (0.38)	0.14 (0.35)
7. Transport	0.06 (0.23)	0.003 (0.06)	0.03 (0.17)
8. Accommodation and Catering	0.02 (0.15)	0.02 (0.15)	0.02 (0.16)
9. ICT	0.01 (0.07)	0.004 (0.07)	0.01 (0.07)
10. Finance and Insurance	0.004 (0.06)	0.002 (0.05)	0.003 (0.06)
11. Real Estate	0.002 (0.05)	0.0003 (0.02)	0.001 (0.04)
12. Professional Services	0.01 (0.11)	0.008 (0.09)	0.01 (0.10)
13. Public Administration	0.03 (0.18)	0.009 (0.10)	0.02 (0.15)
14. Education	0.07 (0.25)	0.05 (0.22)	0.06 (0.24)
15. Health	0.009 (0.09)	0.01 (0.11)	0.01 (0.10)
16. Others	0.06 (0.24)	0.08 (0.11)	0.07 (0.26)
Age (in years)	33.2 (12.4)	33.2 (12.2)	33.2 (12.3)
Number of Children	2.8 (2.2)	3.1 (2.2)	2.9 (2.2)
Number of income activities	1.1 (0.4)	1.1 (1.3)	1.1 (0.9)
Years of Schooling	7.8 (4.4)	6.5 (4.6)	7.1(4.6)

Source: Author's Calculations from KIHBS 2005/06.

Standard deviation in parenthesis

Table A2: Probit Regressions: Determinants of Labour Force Participation, by Gender

	Sub-sample (1)	Sub-sample (2)	Full sample (3)
	Male	Female	All
Married (Base Category =Single)	-0.171	0.161*	0.004
	(0.15)	(0.07)	(0.06)
Divorced	-0.054	0.483***	0.422***
	(0.10)	(0.09)	(0.07)
Presence of Children Age 0-14 years	-0.158	-0.009	-0.097
	(0.10)	(0.08)	(0.06)
Age (in years)	0.041*	0.073***	0.077***
	(0.02)	(0.01)	(0.01)
Age squared	0.001**	-0.001***	-0.001***
	(0.00)	(0.00)	(0.00)
Agriculture (Other Services =Base C.)	-0.371*	0.001	-0.106
	(0.15)	(0.10)	(0.08)
Mining	-0.394	1.371***	0.266
	(0.30)	(0.31)	(0.26)
Manufactures	0.180	0.002	0.277
	(0.23)	(0.21)	(0.15)
Electricity, Gas and Water	0.919**	0.000	1.552***
	(0.35)	(.)	(0.31)
Construction	-0.267	0.230	0.342*
	(0.19)	(0.55)	(0.14)
Wholesale and Retail Trade	0.078	0.240*	0.157
	(0.18)	(0.11)	(0.09)
Transport and Storage	0.228	0.375	0.808***
	(0.23)	(0.50)	(0.19)
Accommodation and Catering	-0.049	0.810**	0.562***
	(0.23)	(0.25)	(0.16)
ICT	0.779*	1.129**	0.991***
	(0.34)	(0.38)	(0.29)
Finance and Insurance	0.321	0.000	1.149***
	(0.37)	(.)	(0.33)
Real Estate	-1.039*	0.000	-0.291
	(0.48)	(.)	(0.49)
Professional Services	-0.568	0.602	0.111
	(0.43)	(0.45)	(0.34)
Public Administration	0.460	0.000	1.122***
	(0.28)	(.)	(0.24)
Education	-0.522**	0.179	-0.032
	(0.19)	(0.16)	(0.12)
Health	-0.096	1.329***	0.724**
	(0.39)	(0.37)	(0.27)
Area of residence (Urban =1)	0.005	-0.202*	-0.148*
	(0.09)	(0.09)	(0.06)
Number of Children	-0.041*	-0.034**	-0.040***
	(0.02)	(0.01)	(0.01)

	Sub-sample (1)	Sub-sample (2)	Full sample (3)
	Male	Female	All
Number of income activities	0.160	0.003	0.008
	(0.18)	(0.02)	(0.02)
Years of Schooling	0.036***	0.030***	0.035***
	(0.01)	(0.01)	(0.00)
Constant	1.271**	-0.258	-0.010
	(0.46)	(0.31)	(0.25)
Pseudo-R2	0.725	0.428	0.582
N	9887	8510	18500

t statistics in parentheses, *p < 0.05, ** p < 0.01, *** p < 0.001.

Source: Author's Calculations from KIHBS 2005/06.

Table A3: Marginal Effects of Determinants of Labour Force Participation in Selected Sectors of the Extractive Sector Value Chain.

	(1)	(2)	(3)
	Mining	Wholesale, Retail	Transport
Divorced	0.0277	0.234***	0.344***
(Base Category=Married)	(0.24)	(4.65)	(3.75)
Single	-0.203	0.339***	0.541**
	(-0.89)	(4.80)	(3.08)
Age 0 to14 years	0.0227	-0.0149	-0.0267
	(0.18)	(-0.29)	(-0.30)
Age (in years)	-0.0264	0.0228*	0.00750
	(-1.07)	(2.15)	(0.35)
Age squared	0.000235	-0.000427**	-0.000351
	(0.72)	(-3.19)	(-1.25)
Location (Urban=1)	0.147	0.738***	0.635***
	(1.27)	(18.59)	(9.56)
Presence of Children	0.0278	0.0132	-0.0109
	(1.49)	(1.39)	(-0.58)

	(1)	(2)	(3)
	Mining	Wholesale, Retail	Transport
Number of activities engaged in	-0.00941	0.0369	-0.0479
	(-0.21)	(1.49)	(-0.64)
Years of Schooling	-0.0629***	0.00144	-0.00485
	(-5.58)	(0.29)	(-0.76)
Gender (Female=1)	-0.281*	0.192***	-1.748***
	(-2.03)	(3.55)	(-9.22)
Dummy (Age, years of)	-0.00210*	-0.0000146	0.00152**
Schooling and gender)	(-2.26)	(-0.08)	(3.05)
Constant	-1.468***	-1.946***	-1.741***
	(-3.43)	(-10.43)	(-4.73)
N	18804	18804	18804

t statistics in parentheses, * p < 0.05, ** p < 0.01, *** p < 0.001

Source: Author's Calculations from KIHBS 2005/06.

Table A4: Change in Dummy Variables (%).

	(1)	(2)	(3)
	Mining	Wholesale, Retail	Transport
Divorced (Base Category=Married)	2.81	26.36***	41.06***
	(0.24)	(4.65)	(3.75)
Single	-18.37	40.35***	71.77**
	(-0.89)	(4.80)	(3.08)
Location (Urban=1)	15.84	109.17***	88.70***
	(1.27)	(18.59)	(9.56)
Gender (Female=1)	-24.50*	21.17***	-82.6***
	(-2.03)	(3.55)	(-9.22)
Dummy (Age, years of schooling and gender)	-0.21*	-0.0000	0.15**
	(-2.26)	(-0.08)	(3.05)
N	18804	18804	18804

Source: Author's Calculations from Table A3 – using the formula ($e^{b} - 1$) %

ANNEX 3: Gender and Value Chain- Individual / (KI) Questionnaire

General information

County: ____________________ Constituency:____________________________ Ward: ____________

Gender

- Please name some of the cultural norms that are practiced in your community?
- What are the norms and values regarding women's/men's roles and responsibilities?
- Are there cultural norms that hinder women from participating in the labour market?
- If yes, do you think women share these norms?
- Is society willing to accept new gender roles/responsibilities where women are allowed to work?

MANAGING THE EXTRACTIVE SECTOR IN KENYA: THE ROLE OF LEGISLATION AND ENVIRONMENTAL IMPACT ASSESSMENT

Robert Chira

Summary

The extractive sector in Kenya contributes around one per cent of the country's GDP but with discovery of oil, coal, rare earths and titanium, the industry's contributions are set to rise. The experience, expertise, and knowledge of the citizens on the extractive sector are generally low. The emerging extractive sector is set to change Kenya's policy and economic landscape and the government must now deal with the environmental implications of the oil and other natural wealth discoveries. The emerging extractive sector is likely to have negative externalities affecting the environment through contamination of land and water affecting both animals and humans. Inadequate waste management from exploration activities can degrade the environment. Socially, vegetation clearing for oil exploration and transportation often leads to displacement of communities in large scale. Additionally, there are health and safety concerns for community members and staff taking part in the oil drilling. Cultural resources could also be destroyed in areas that were previously considered sacred for cultural preservation.

The existing environmental legislation and policy is fragmented, and administered by different government sectors with inadequate implementation structures rendering them ineffective and inefficient. As an important step towards exploitation of the newly-discovered natural resources, it is worthwhile to evaluate the extent to which the country's legislative framework addresses environmental concerns associated with emerging resources and its adequacy. Therefore, the significance of this review is to analyse all environmental related legislation and its applicability to the extractive sector. The review further identifies the adequacy of the laws for the extractive sector and makes recommendations on the appropriate government enforcement strategy to enhance effectiveness and efficient implementation.

The approach to this study is through a desk review of legislation and policy relating to environmental management in Kenya and especially concerning the emerging extractive sector. A number of laws and policies are selected on the basis of their relevance to issues affecting the environment, communities, natural resource use and developing economic sectors of the country. These regulatory legislation covering land, forest, wildlife, mining, water, environment, and energy are reviewed as well as the Constitution, being the supreme law in Kenya. A few stakeholders were selected for key informant interviews representing the government and private companies with a stake in the extractive sector.

Kenya has numerous statutes which relate to environmental concerns. Most of these statutes are sector specific, covering issues such as public health; soil erosion; endangered species; water rights and water quality; air quality, noise and vibration, energy, cultural, historical, scientific and archaeological sites; land use; and resettlement. However, the overarching environmental law is the Environmental Management Conservation Act (EMCA) 1999, supervising and coordinating over all matters relating to the environment. None of the sectoral laws comprehensively address impacts associated with the emerging extractive sector but contains fragmented legislation

targeting different aspects of the environment that are sectoral in approach. The fragmented legislation either complements EMCA 1999 or duplicates the principle law resulting in sectoral legislation overlaps.

The results further indicate that policies and legislation fragments reviewed are coherent in approach to environmental management, although there are areas where the laws overlap. Duplications and overlaps present inherent risk of conflict in the management of environmental issues among key sectors. Such overlaps may result in inefficiency, lack of clarity and cause confusion on who is responsible for environmental management issues. This overlap could also play a multi-sectoral complementary role in environmental management. Removal of such conflict is a requisite for ensuring all sectoral environmental governing structures exist and conform to EMCA. EMCA should further be reviewed to recognize and have a provision in the Act for the important complementary role played by other sectors. As Kenya embraces environmental demands associated with the emerging extractive sector, the country cannot have a single act encompassing environmental governance and management. All sectors would require strong environmental component with clear environmental conservation and management structures.

It is important to develop the needed human resource capacity for NEMA and other stakeholders to understand the oil, coal and gas cycle, which will help in the management of impacts associated with the extractive sector. Enactment of pending energy, mining, community land and natural resource benefit sharing bills has the advantage of reducing conflict among different sectors, national and county governments, and minimize political overtures. There are several areas on policy and legislation requiring review to harmonize sectoral and cross-sectoral laws on environment giving NEMA a strong supervisory role, develop strong institutional frameworks at national and county government levels, domesticate international environmental agreements, develop guidelines on operations of extractive sector players and align all sectoral legislation with the new constitution.

1 Background

There are several legislations that have been enacted in Kenya to ensure environmental protection and conservation. Different institutions in Kenya are implementing these legislations that also have a bearing on the emerging extractive sector in Kenya. The extractive sector represents extraction of minerals and hydrocarbons with expected subsequent benefits from accrued rents which can then be used for economic growth and provision of social services. The industry is expected to have implications on the environment – biological and physical environment as well as the social-cultural environment by impacting on community livelihoods and economies. The new mineral finds can potentially solve the government's budget deficits, bring economic benefits for Kenyans and accelerate socio-economic structural transformations.

Kenya is at the initial stages of exploiting the extractives. Thus it is not surprising that, the experience, expertise, and knowledge of the citizens about the extractive sector are generally low. However, the emerging extractive sector is set to change Kenya's policy and economic landscape and the government must now deal with potential environmental implications of the oil and other natural wealth discoveries. In particular, the government must ensure that the right policies, legislation and institutions exist to govern the extractive sector, and that the resources generated from the sector are effectively utilized for sustainable and inclusive growth. The government is actively undertaking offshore explorations with the aim of making gas discoveries, while making new mineral discoveries such as titanium and coal, which adds to the already existing mineral stocks such as soda ash, fluorspar and diatomite among others. As a result of the new development in the extractive sector, it is not clear whether the existing environmental legislation and policies are adequate to cover the impacts associated with the emerging sector.

The new developments in the extractive sector are likely to impact on the environment; hence proper implementation of the EIA is critical for the protection and conservation of the environment. Addressing the widespread nature of the impacts associated with the extractives may require more stringent and comprehensive legislation in areas of exploration and extraction. The existing Environmental Impact Assessment (EIA) policies and guidelines will be subjected to environmental demands of expanding exploitation of natural resources at unprecedented rates. The lead government institutions, agencies and communities will thus need to consider issues relating to appropriate environmental use, conflicts and practices. This paper takes cognizance of the fact that many of the impacts may not have been experienced in Kenya before and will likely threaten community livelihoods, ecosystems, fauna, and flora. Specific examples of negative consequences associated with the extractive sector include air and soil pollution, land use conflict, land degradation and loss of livelihood support systems.

1.1 The Statement of the Problem

There are several legislations which are meant to conserve and manage different aspects of the environment. For example, the Wildlife (Conservation and Management) Act of 2013, mandates the Kenya Wildlife Services to manage wildlife through the creation of parks and national reserves, while the Forest Act of 2005, mandates Kenya Forestry Services to provide for the establishment, development and sustainable management (including conservation and rational utilization) of forest resources for the socio-economic development of the country. The National Museums and Heritage Act of 2006 mandates the National Museums of Kenya to act as a national repository for things of scientific, cultural, technological and human interest and to identify, protect, conserve and transmit the cultural and natural heritage of Kenya among other responsibilities. Currently, the Environmental Management and Coordination Act of 1999 mandates the National Environmental Management Authority (NEMA) to coordinate all the environmental management and conservation activities in Kenya. These laws were created when Kenya's mining and quarrying sector accounted for less than one per cent of GDP. The laws focused on minerals such as fluorspar, soda ash, diatomite and gold among others. Environmental impacts associated with the extraction of these minerals were limited to the exploration and production processes in the extractive sector value chain (Fig. 2-1).

The emerging extractive sector is likely to have negative externalities of a larger magnitude that span the whole extractive sector value chain. These externalities effects on the environment include contamination of land and water from oil pipeline ruptures during exploration and transportation. Wastes produced by oil drilling contain metals such as mercury, lead or zinc in amounts beyond what is allowed by the WHO. These wastes tend to affect both animals and humans, especially when the humans and animals rely on the water around the exploration areas for drinking. Therefore, waste management from exploration activities can degrade the environment if not well managed. Socially, vegetation clearing for oil exploration and transportation displaces communities in large scale, while there are health and safety concerns for community members and staff taking part in the oil drilling. Cultural resource could also be destroyed in areas that were previously considered sacred for cultural preservation. It is not clear to what extent the current environmental management and conservation laws in Kenya can adequately address the new issues emerging as a result of a growing extractive sector.

The fragmentation of the environmental laws and implementation by different institutions presents the risk that dealing with the environmental impacts of the emerging extractive sector is likely to become an elusive target, due to overlapping mandates or gaps in the laws. Firstly, it is therefore prudent to review environmental laws in Kenya and establish how they adequately cover possible sources of impacts associated with the extractive industries that were not previously foreseen. Secondly, the fragmented pieces of acts and legislations need to be harmonized in order to take care of all other stakeholders' risks, opportunities and challenges. Lastly, a key component of environmental protection and conservation under the extractive sector operations is to ensure that comprehensive environmental impact assessments are undertaken. Currently, it is not clear to what extent Kenya is adequately equipped to undertake such assessments on the extractive sector operations. Similarly, enforcement of identified

mitigation measures is inadequate although there are several sectors responsible for ensuring environmental management.

1.2 Study Objectives

In order to address the potential challenges in the environmental sector following the emergence of the extractive sector, the research study sought to carry out the following:

1. Review the legal framework governing national resource management and conservation in Kenya, their overlaps and coherences in addressing emerging extractive sector challenges and risks;
2. Review the institutional framework for natural resource management and conservation in Kenya, their coherences and overlaps addressing emerging extractive sector challenges and risks;
3. Review the environmental standards requirements for the extractive sector operations in Kenya as stipulated by the National Environmental Management Authority (NEMA);
4. Review the natural resource management initiatives by the extractive sector stakeholders in Kenya and their adherence to (3) above;
5. Establish the social and environmental challenges, opportunities and risks associated with the extractive industries operations; and
6. Provide policy and legislative recommendations that ensure sustainable environmental use in the extractive industries.

1.3 Significance of Study

The existing environmental legislation and policy is fragmented, and administered by different government sectors that lack coordination rendering them ineffective and inefficient. The EMCA, 1999 is the overarching Kenyan legislation that applies to all types of environmental operations. However, several government agencies and sectors have their sets of legislations on environmental conservation and management. For adequate and effective application of environmental laws, all relevant legislations need to be well articulated for different stakeholders for effective environmental management. The significance of this study is to review all environmental related legislation and its applicability to the extractive sector. The review will further identify their adequacy in the extractive sector and make recommendation to the appropriate enforcement government agency. This will enhance their effectiveness and efficient implementation.

2 Methodology

2.1 Conceptual Framework

The figure below represents a conceptual framework for stepwise analysis of the environmental management and conservation challenges within the extractive sector. A generic form of the oil and gas, and mining industry value chain will be used to guide the analysis. Exploration in oil and gas can largely be divided into three processes: upstream, midstream and downstream. Upstream involves the exploration and production process; midstream entails transportation refining and processing; while the downstream process involves the distribution and retail sales. In mining, the activities can largely be grouped into mine initiation, mineral extraction and mineral beneficiation activities. Using the structure, we shall identify environmental challenges and implications associated with all processes for the two sectors. The research will focus on establishing possible sources of impacts associated with each process for appropriate environmental mitigation strategies.

Figure 5-1: Extractive Sector Value Chain

Source: Author's compilation

2.2 Data Sources and Description

A desk review was undertaken to review legislation and policy relating to natural resource management in Kenya with a bearing to the emerging extractive sector. A few laws and policies

were chosen on the basis of their relevance to issues affecting the environment, communities, natural resource use and the development of the economic sectors of the country. Such regulatory principle laws were covering land, forest, wildlife, mining, water, environment, energy and the constitution as the supreme law in Kenya. The study further selected a few stakeholders for key informant interviews that included government sectors and private companies involved in the extractive sector.

The Constitution of Kenya (2010) is the supreme legal organ of the Republic of Kenya. Article 42 of the Bill of Rights of the Kenyan Constitution provides that "every Kenyan has the right to a clean and healthy environment, which includes the right to have the environment protected for the benefit of present and future generations through legislative and other measures". Part 2 of Chapter 5 of the constitution is dedicated to Environment and Natural Resources. Kenya's Vision 2030 is the current national development blueprint for the period between 2008 and 2030 and has been developed following the successful implementation of the Economic Recovery Strategy for Wealth and Employment Creation, which saw the country's economy bouncing back on the path to rapid growth since 2002. The Kenya Vision 2030 is the national long-term development blue-print that aims at transforming Kenya into a newly industrialized, middle-income country providing a high quality of life to all its citizens by the year 2030 in a clean, secure and sustainable environment. This will be achieved through promoting environmental conservation to better support the economic pillar. Minimizing pollution and improving waste management through the application of the right economic incentives in development initiatives is envisaged.

Representative laws are being reviewed, including EMCA, 1999, which is the overarching law on environmental conservation and management. In pursuit of this Act, there are several regulations specific to various aspects of the environment e.g. environmental impact assessment and environmental audit, pollution, water quality among others. Wildlife (Conservation and Management) Act of 2013 is the principle law on regulating wildlife management in Kenya and has provisions for environmental management and is in conformity with EMCA, 1999 requirements on environment management.

The National Mineral and Mining Policy, 2010 is aligned to other sectoral policies particularly the Energy Policy, Environment Policy, Water Policy and Land Policy. The policy is inclusive of all minerals found in Kenya with the exception of gas and oil resources. The policy recognizes a number of challenges in the mineral and mining sector, one of them being environmental degradation. The Mining Bill, 2013 requires miners to undertake environmental impact assessment as required under the Environmental Management and Coordination Act. The Act also demands for compliance with the provisions of the Water Act, 2002 concerning the right to the use of water from any water resource. Water Act, 2002 was developed to ensure sustainable and harmonized utilization of water resources throughout all sectors. The Act has provisions for water catchment area conservation. Forest Act, 2005 integrates forestry sector with other stakeholders in the conservation and management of the forest resources through collaborative management. The new forest policy advocates for improved sustainable use of forest resources to improve livelihoods, conservation of water, soils and biological diversity.

Land Act, 2012 recognizes four categories of tenure, namely freehold, leasehold, customary land rights and partial interest defined in the Act or any other law. It further recognizes private, community and public lands that are at risk of impacts associated with the extractive sector industries. According to Land Act, 2012, community land on which most exploration is taking place, is managed in accordance with the law relating to community land enacted pursuant to Article 63 of the Constitution. The land is managed by registered community members and by county government for unregistered community land. The community land systems largely lack certificates of occupancy subjecting them to abuse of speculation. The land Act has revised, consolidated and rationalized previous land laws so as to provide for the sustainable administration and management of land and land-based resources, and other connected purposes. The Act gives effect to the principles and objects of devolved government in land registration. Prior to the enactment of this legislation, the country's substantive land laws were contained in several statutes making it incomprehensible to most users. The Act also provides for the legal regime that will govern inter alia the administration and management of public land and private land; contracts over land, leases, charges, compulsory acquisition, easements and related rights.

Occupational Safety and Health Act, 2007 provides for the safety, health and welfare of workers and all persons lawfully present at work places. It also provides for the establishment of the National Council for Occupational Safety and Health and for connected purposes. The Act provides for pollution control and safety measures and up to a certain extent protects workers in the extractive sector, although most investors are using international regulations. Section 3 (1) states "that the Act shall apply to all workplaces where any person is at work, whether temporarily or permanently". Under this Act, the duties of the Occupier are provided in Section 6. County Government Act, 2012 has provisions for integrated development plan that of necessity has to regulate environmental issues and provides for citizen participatory approach in policy formulation and implementation. The citizen also has a right to petition on matters under the responsibility of the county Government, one of them being environmental management.

Energy Bill, 2014 provides for the sharing out of proceeds (art. 135) raised from the exploitation of petroleum resource between the national Government, the county government and the local community. In compliance with legislation on environmental pollution (art. 162), the bill provides for strict adherence to Merchant Shipping Act, the Environmental Management and Coordination Act, regulations there under and all international maritime conventions ratified by Kenya relating to prevention of pollution of the environment, dumping of waste, safety, liability and compensation for pollution damage. The Bill further provides for environmental liability on petroleum transportation, handling and marketing, and environmental health and safety laws compliance under article 170 on Environmental Liability Policy. A person engaged in petroleum business (art. 189) has to comply with the relevant environmental, health and safety regulations or guidelines issued by National Environmental Management Authority.

3 Legal and Policy Framework Governing Environmental Conservation in Kenya

3.1 Background

There are several policies governing environmental conservation and management in Kenya most of which have not been brought under one umbrella but are articulated from different government sectors. The various policies cover all stakeholders who have been identified as critical to sustainable management of the environment. Concerted efforts are required to enhance implementation at sectoral level for effective management of environmental issues. Overlaps and repetitiveness of sectoral policies and legislations are noticeable but may rather be viewed as synergetic in sharing environmental management responsibilities. Conversely, there is also inherent risks associated with the overlaps and repetitiveness in polices and legislations where such convergence may result in ineffective management of the environment. Some of these policies and legislation include Water Act 2002, as amended in 2012; The Mineral and Mining Act, 2010; Mining Bill, 2013; Health and Safety Act, 2007; Forest Policy and legislation, (Forest Act, 2005), Wildlife Policy and legislation, The Wildlife (Conservation and management) Act 2013, and EMCA Act 1999 among others.

3.2 Environmental Legal Framework

Kenya has numerous statutes which relate to environmental concerns. Most of these statutes are sector specific, covering issues such as public health; soil erosion; endangered species; water rights and water quality; air quality, noise and vibration, cultural, historical, scientific and archaeological sites; land use; resettlement; etc. With the enactment of the Environmental Management and Coordination Bill in December 1999, the Institutional framework for environmental management was strengthened. The Environmental Management and Coordination Act (EMCA) of 1999 provided for the establishment of the NEMA, which became operational in July 2002, with the statutory mandate to coordinate all environmental activities. The Environment Management Coordination Act (1999) is divided into 13 parts, covering main areas of environmental concern. The main EMCA 1999 tenets revolve around: the right to live and work in a clean environment;, conservation of biological resources and protection of significant environmental areas;, and protection of the ozone layer and emissions of gases to the atmosphere. The Act provides for the setting up of the various environmental regulations and guidelines which are relevant and adequate to the emerging extractive sector in Kenya. EMCA, 1999 regulations include: Biological Diversity, 2006; EIA/EA, 2003; Waste Management, 2006; Fossil Emissions Control, 2006; Controlled Substances, 2007; Noise and Air Quality, 2008; and Excessive Vibrations, 2009 regulations.

Other sectoral laws complimenting EMCA, 1999 with relevance to environmental management are Water Act, 2002; Wildlife (Conservation and Management) Act, 2013; Mining Bill, 2013; Forest Act, 2005; Energy Bill, 2014 and their respective policies, to mention but a few. For instance, section 76 of the Water Act states that no person shall discharge any trade effluent from any trade premises into sewers of a licensee without the consent of the licensee upon application indicating the nature and composition of the effluent, maximum quantity anticipated, flow rate of the effluent and any other information deemed necessary. The Wildlife (Conservation and Management) Act mandates KWS to sustainably conserve, manage, and enhance Kenya's wildlife and its habitats, and provide a wide range of public uses in collaboration with stakeholders for posterity. The Kenya Wildlife Policy is also particularly informed by the Constitution, the National Land Policy, the Transition to Devolved Government Act, 2012, the Intergovernmental Relations Act, 2012, the Land Act 2012, as well as the National Climate Change Response Strategy of 2010, which underscores protected areas landscape such as forests, unique role in both climate change adaptation and mitigation. The National Climate Change Action Plan (NCCAP) of 2013 is instrumental in mitigating Green House Gases (GHG) emissions. To achieve its initiatives towards low carbon climate resilience strategy, NCCAP proposes the enactment of stand-alone climate change law and amendment of sectoral laws to facilitate priority actions. For NCCAP to be effectively implemented, a sound and enabling policy, legislation, and institutional framework must be in place. The NCCAP is further complemented by Forest Act, 2005 and forest policy. Both Kenya Wildlife and Forest policies recognize the need to involve other government agencies respecting their jurisprudence and responsibilities. The National Mineral and Mining policy, 2010 has a raft of measures that include compliance with environment, health and safety legislation and in liaison with other relevant institutions, develops specific regulations for mining operations in environmentally sensitive areas such as forest reserves, nature reserves and national parks.

Overlaps among sectoral laws are evident with a good example on catchment rehabilitation or management. Several of these acts such as the Forest Act, 2005; Wildlife (Conservation and Management) Act, 2013; and Mining Bill, 2013 among others, provide for rehabilitation of degraded landscape. The Water Act, 2002, confers on the Water Resource Management Authority (WRMA) powers to regulate and protect water resources quality from adverse impacts, and manage and protect water catchments, thereby complementing the role of NEMA, the principle institution exercising general supervision and co-ordination over all matters relating to the environment.

3.3 Coherences and Overlaps

Each of the cited legislation and policy frameworks has a component in environmental conservation and management. The policies and legislation fragments for these sectors are coherent in approach to environmental management. Overlap in policy and legislation is evident where, for instance, the Water Act, 2002 establishes regulatory agencies without any reference to the Environmental Management and Coordination Act (EMCA), which establishes the National Environmental Management Authority (NEMA) as the principal agency responsible

for environmental regulation. In particular, EMCA provides that NEMA shall "exercise general supervision and coordination over all matters relating to the environment." In the absence of a clear provision in the water act on how the WRMA and the Water Service Regulatory Board (WSRB) are linked or accountable to NEMA, the water act is likely to perpetuate the undesirable situation which EMCA sought to remedy, namely the lack of coordination in the management of environmental resources such as water. Even though WRMA complements NEMA there is need for accountability to NEMA as the mandated body coordinating environmental issues in the country.

Further, the National Water Authority (NWA) confers on the WRMA powers such as regulating and protecting water resources quality from adverse impacts, and managing and protecting water catchments without any reference to NEMA, which is declared by EMCA to be the lead agency as far as environmental management is concerned. There is, therefore, an urgent need to rethink the relationship between NEMA and the WRMA/WSRB, by strengthening EMCA on stakeholders' responsibilities in environmental conservation and management. However, the Water Act, 2002 backs two regulations on waste generation and water pollution both of which are anchored on EMCA provisions. The Water Quality Management Regulation 2006 has provisions for water pollution as stipulated under Section 147 of EMCA, 1999 while Waste Management Regulation 2006 falls under Sections 92 and 147 of EMCA on waste generation and management.

Several sectoral policies and legislation are well articulate of EMCA as the environment management regulating act. Such framework of legislations seems to avoid conflict and duplication of responsibilities among some government sectors. Examples are Wildlife (Conservation and Management) Act, 2013; water pollution and waste generation regulations under the water act; Mining Bill, 2013,; and the Forest Act 2005, although the latter has some duplication with EMCA on management of degraded areas. The Land Act 2012 has clear overlaps with other sectoral laws on environmental management concerning allocation of public land (art. 12) where the act prohibits allocation of public land under forest and wildlife reserves, prone to degradation, water catchment, rivers and streams, and cultural areas.

The policies advocated by these sectors need to have linkages with NEMA as the main environmental agency as well as each other to promote development and implementation of legal instruments such as Memoranda of Understanding (MoU) among relevant lead agencies. These sectors include Kenya Wildlife Service, Kenya Forest Service, Water Resources Management Authority, County Governments, National Environment Management Authority, National Land Commission and KENGEN among others having overlapping mandates.

3.4 Adequacy of the Laws to Govern the Extractive Sector

EMCA 1999 is considered effective on issues on environmental management by some private entities but ineffectively implemented by NEMA as the lead agency. Owing to the fact that no sector can incorporate all environmental requirements in one act, NEMA may not have an opportunity to enact legislation that adequately addresses all environmental issues.

Provisions on using international regulations standards where national ones are lacking in their effectiveness, is a positive step towards having a comprehensive legislation. Other countries have similar provisions although regulators in pursuit of the principle law are more elaborate in covering upstream to downstream impacts of the extractive sector. Ineffective implementation of EMCA is blamed on lack of adequate regulatory mechanism and expertise at NEMA. NEMA is deemed to lay more emphasis on review of EIA/EA documents rather than regulating impacts associated with licensed projects.

Regulatory role should be devolved to lower level of experts at county level, with lean high level experts to audit operational phases against known standards. Such stringent enforcement measures are widely lacking and would serve as the basis for effective management of environment not only for extractive sector but also for other industries i.e. large-scale farming and construction among others. For NEMA to be more effective, more resources and expertise is needed on the ground to regulate operations of licensed proponents. NEMA further requires exposure of its staff to the extractive sector requirements through special courses in countries where the extractive sector has succeeded as well as where necessary facilities and equipment are available. Training oceanographers, marine geologists, deep sea fisheries experts and deep drilling engineers are among other needed professions to take care of the extractive sector's environmental requirements. NEMA regulations should further be clear and stringent on EIA expertise requirements to weed out unqualified EIA/EA experts. A review of EIA/EA expert requirements is urgently needed to make it more professional and experts accountable for their reports. Postgraduate EIA/EA training is a requisite to having the needed professionalism as is the need to expose NEMA employees to environmental demands of the extractive sector in other countries where such issues have successfully been addressed. NEMA regulations must also demand for full implementation of mitigation measures identified in EIA/EA reports.

The laws reviewed have components on community involvement but community participation still remains elusive, although communities most bear environmental consequences associated with any form of environmental manipulations. Stringent regulations in pursuit of current and future environmental laws are needed to fast track community participation in environmental issues that are bound to impact on community livelihoods. Such regulations should be developed by NEMA as the lead agency in partnership with other stakeholders and given prominence at the county and national government levels.

Existing oil companies in Kenya assert that NEMA lacks capacity in understanding the oil and gas industry. All other stakeholders lack understanding of the oil and gas cycle, which affects management of impacts associated with the extractive sector. Continued conflict between the national government, county government, and members of parliament, political interests, high expectation from all the stakeholders and interference within the area of operation further complicates operations of the industry with residual impacts on socio-economic wellbeing of the community. Lack of enactment of Community Land and Energy Bills is further impacting on environmental management of the extractive sector.

The existing environmental, health and safety standards for the country are inadequate forcing the extractive sector to use international standards and best practices in the oil and

gas sector. On human rights, the civil organizations do not have capacity to monitor oil/gas industry in Kenya and due to lack of national standards, the industry is presently using UN-Convention on human rights. Beyond NEMA regulations, the existing extractive companies are observing Performance Standards as stipulated by IFC and equator principles for oil and gas mainly on environmental management, biological conservation, labour, indigenous people and pollution. The review of EMCA need to take this into consideration to fast track issues on environmental management instead of relying on the clause that international regulation will be observed where they are not covered by national laws. EMCA regulations especially on waste management and handling of hazardous material are rather weak for the extractive sector and would, therefore, further require a review to cover the impacts associated with oil and gas. For instance, there are no regulations on the disposal of synthetic lubricants used for drilling shafts. Lack of comprehensive national regulations, shortage of qualified personnel and dependence on international regulations has the risk of multi-national extractive sector players taking advantage to circumvent environmental management requirements in the country.

The existing sectoral laws on environment are explicit and in conformity with EMCA, 1999. However, several administrative structures are scattered among several government agencies and sectors affecting their effective implementation. The Mining Act, 2013 is the principal law regulating the extractive sector in Kenya. However, this piece of legislation does not apply to petroleum and hydrocarbon gases, which are covered under the Energy Bill, 2014. EMCA has generic requirements on issues to be considered in EIA and guidelines for carrying out Environmental Impact Strategic (EIS) study under the Second and Third Schedules respectively. To augment these schedules, the Mining Act, 2013, ought to have a specific schedule listing the issues requiring EIA, that are specific to the extractive sector. The Energy Bill, 2014 has provisions for oil/petroleum/coal extraction but the legislation needs to develop regulations on management of operational discharges, management, collection and treatment of waste, and the procedures for notification of oil spills.

Several other sectoral acts are applicable to the extractive sector's impacts on water, soil and air pollution in conformity with EMCA, although these are regulated by different actors. Petroleum and hydrocarbon are not prominently covered under any of the acts so far reviewed, giving the impression that concerted efforts are required to immediately address this sub-sector of the extractive sector by enacting an Energy Bill. Laws governing the fossil fuel emissions by the Energy Regulatory Commission only regulate downstream activities of petroleum products but have no provisions for upstream and mid-stream activities.

The Mining Act, 2013 has provisions for radioactive minerals although they are not elaborate enough. The act repeals the Mining Act, the Trading in Unwrought Precious Metals Act and the Diamond Industry Protection Act. The act has given much prominence to diamonds and is quiet on other extractives such as rare minerals. For comprehensive coverage of the extractive sector in Kenya, the act should give prominence to other extractives as is the case for diamonds.

The National Mineral and Mining policy, 2010 recognizes a number of challenges in the mineral and mining sector, one of them being environmental degradation. To address these

environmental issues, the policy takes cognizance of the need to comply with environment, health and safety legislations and in liaison develop with other relevant institutions specific regulations for mining operations in environmentally sensitive areas such as forest reserves, nature reserves and national parks. Consultative approach in the development of petroleum and hydrocarbons legislation is a requisite in adhering to best extractive sector practices in ecologically sensitive areas like the marine ecosystems.

4 Institutional Framework Governing Environmental Conservation

4.1 Background

The Constitution of Kenya, 2010, is the supreme law of the Republic and binds all persons and all State organs at both levels of government. Every person has the right to a clean and healthy environment, which includes right to have the environment protected for the benefit of present and future generations through legislative and other measures particularly those contemplated in article 42, and especially in article 69. The article in part provides for the establishment of environmental impact assessment, environmental audit and monitoring of the environment. It also encourages public participation in the management, protection and conservation of the environment. The article further provides for the utilization of the environment and natural resources for the benefit of the people of Kenya. Section 2 of the article also requires every person to cooperate with State organs and other persons to protect and conserve the environment and ensure ecologically sustainable development and use of natural resources. Article 70 deals with the enforcement of environmental rights, compelling everyone to prevent omission that is harmful to the environment. It also provides public officers with powers to discontinue any act or omission that is harmful to the environment and also provides for compensation to victims. In 2001, The Government established the administrative structures (National Administrative Framework) to implement the EMCA as the overarching law in ensuring clean environment as stipulated in the constitution. The main administrative structures, their roles and mandates are described in the following sections for a few of the sectors chosen for this study, with those established under EMCA taking the lead.

4.2 The Roles and Mandates of Institutions Governing Environmental Conservation

4.2.1 The National Environment Council

The National Environmental Council (NEC) is established by section 4 of the EMCA Act and is chaired by the Minister (now Cabinet Secretary) responsible for Environment. It is responsible for policy formulation and directions for the purposes of the Act. The council also sets national goals and objectives, and determines policies and priorities for the protection of the environment. NEC promotes co-operation among public departments, local authorities (now county councils), private sector, non-governmental organizations and such other organizations engaged in environmental protection programmes, and performs such other functions as are assigned under the EMCA.

4.2.2 The National Environmental Action Plan Committee (NEAPC)

NEAPC is established under section 37 of the EMCA Act and is chaired by the Permanent Secretary (now Principal Secretary) in the Ministry responsible for Planning and National Development. Its function is to prepare a National Environment Action Plan every five years for consideration and adoption by the National Assembly.

4.2.3 Standards and Enforcement Review Committee (SERC)

SERC is established under section 70 of the EMCA Act to advise the Authority on how to establish criteria, procedures and standards for environmental management. It is chaired by the Principal Secretary, Ministry of Environment and Mineral Resources (MEMR) - now Environment, Water and Natural Resources.

4.2.4 Environmental Impact Assessment Technical Advisory Committee (TAC)

The Authority is allowed under section 61 to establish an ad hoc TAC committee when need arises to review some of the EIA reports received by the NEMA. The Director General appoints members and prescribes the terms of reference and rules of procedure for the TAC.

4.2.5 The Public Complaint Committee (PCC)

The EMCA has also established a Public Complaints Committee, which provides the administrative mechanism for addressing environmental harm. The Committee has the mandate to investigate complaints relating to environmental damage and degradation. Its members include representatives from the Law Society of Kenya, NGOs and the business community. The PCC is established by section 31 of the Act and is chaired by an appointee of the Minister (now Cabinet Secretary) who shall be a person qualified to be a Judge of the High Court. The function of PCC is to investigate any allegations against any person, institution or the Authority in relation to the condition of the environment. The PCC can on its own volition investigate any case of environmental degradation and make a report of its findings together with its recommendations to the National Environment Council.

4.2.6 National Environmental Tribunal (NET)

NET is established by section 125 of the Act and is chaired by an appointee of the Cabinet Secretary and who shall be a person qualified to be a Judge of the High Court. The NET reviews administrative decisions made by NEMA relating to issues of revocation or denial of licenses and conditions of licenses. It also provides legal opinion to the NEMA on any complex matter where the NEMA seeks such advice. The Tribunal is also empowered to change or give an order, give direction and to carry out investigations where necessary.

4.2.7 National Environment Trust Fund (NETF)

NETF is established by section 24 of the Act and vested in the Authority. It is administered by a Board of five Trustees, including its Chairman, appointed by the Cabinet Secretary. NETF

facilitates research intended to further the requirements of environmental management, capacity building, environmental awards, environmental publications, scholarships and grants.

4.2.8 NEMA

The responsibility of NEMA is to exercise general supervision and coordination on over all matters relating to the environment and to be the principal instrument of Government in the implementation of all policies relating to the environment. In addition to NEMA, the Act provides for the establishment and enforcement of environmental quality standards to be set by a technical committee of NEMA known as the Standards and Enforcement Review Committee (SERC), which governs the discharge limits to the environment by the proposed project.

4.2.9 Provincial and District Environmental Committee

PECs and DECs have been overtaken by the New Constitutional dispensation that has a two tier government, the national and county governments. Revision of the EMCAthat establishes the committees needs to take cognizance of the structure created by the new constitution. These committees are established by section 29 of the EMCA, 1999 and members are appointed by the Minister through a gazette notice. The committees are responsible for the proper management of the environment within the Province or District in which they are appointed. The PEC and DEC are chaired by the Provincial Commissioner and the District Commissioner respectively. Since 2003, NEMA has initiated gazettement of 3 sets of PECs and DECs in the country.

The Provincial and District Environmental Committees also contribute to decentralized environmental management and enable the participation of local communities. These environmental committees consist of the following:

- Representatives from all the ministries;
- Representatives from local authorities within the province/district;
- Two farmers/pastoral representatives;
- Two representatives from NGOs involved in environmental management in the province/ district; and
- A representative of each regional development authority in the province/district.

4.2.10 Energy Regulatory Commission

The Energy Regulatory Commission (ERC) was established as an Energy Sector Regulator under the Energy Act, 2006 in July 2007. ERC is a single sector regulatory agency, with responsibility for economic and technical regulation of electric power, renewable energy, and downstream petroleum sub-sectors, including tariff setting and review, licensing, enforcement, dispute settlement and approval of power purchase and network service contracts. The Energy Bill, 2014, proposes to regulate exploration, production, importation, refining, exportation, transportation, storage and sale of petroleum and petroleum products. It further provides for regulation of exploration, production, processing, transportation, storage, exportation, importation and sale of coal and other energy minerals. The bill also intends to formulate, set, enforce and review environmental health, safety and quality standards for the energy sector,

in coordination with other statutory authorities. It has provisions for developing guidelines on ratified or ascended treaties, conventions and protocols affecting the energy sector in consultation with other statutory authorities.

4.2.11 Water Resources Management Authority

Water Resources Management Authority is a corporate body functioning under the direction of a Governing Board. It is responsible for water resource management. The Authority develops principles, guidelines and procedures for the allocation of water resources, assesses and re-assesses water resources potential, receives and determines applications for permits for water use, monitors and enforces conditions attached to the permits for water use. Furthermore the Authority regulates and protects water resources from adverse impacts, manages and protects catchment areas, determines charges and fees to be imposed for the use of water from any water source, gathers and maintains information on water resources from time to time to publish forecasts, projections and information on water resources. It also liaises with other bodies for the better regulations and management of water resources. It establishes offices in the catchment areas called Catchment Area Advisory Committee whose membership consists of government Officials, stakeholders and communities.

4.2.12 Kenya Wildlife Service

Kenya Wildlife Service is mandated to sustainably conserve, manage, and enhance Kenya's wildlife, its habitats, and provide a wide range of public uses in collaboration with stakeholders for posterity. KWS in its mandate is guided by the Wildlife (Conservation and Management) Act 2013, which acknowledges community participation in conservation and management of wildlife through community wildlife associations. Management plans are used as instruments which lay out components of participatory management. The wildlife act has provisions in respect to conservation, protection and management of the environment in conformity with the provisions of the Environmental Management and Coordination Act.

4.3 Coherences and Overlaps in Institutional Mandates

EMCA, 1999 has provisions for regulating environmental matters through committees and councils as stipulated in the act. These committees form the arm of NEMA as the mandated environment management authority in ensuring effective management of the environment. Other institutions have their own environmental regulatory structures that are implicit in the act although they have functional regulatory committees. Such structure recognizes EMCA and other government statutory bodies involved in environmental conservation and management. Different sectoral bodies complement one another on environmental management matters and duplicates to a certain degree the role of NEMA as stipulated in EMCA. This has a chance of affecting efficiency in environmental management by any of the stakeholders, especially where convergence in activities may arise. Such overlaps and conflicts should be avoided by strengthening EMCA on stakeholders' complementary responsibilities if the act is to meet its intended purpose. For instance, the Water Act, 2002 confers on the WRMA powers such as

regulating and protecting water resources quality from adverse impacts, and managing and protecting water catchments without any reference to NEMA, which is declared by EMCA to be the lead agency on environmental management. Such overlaps call for urgent need to rethink the relationship between NEMA and the WRMA/WSRB, with a view to making them complementary in responsibility and recognized by EMCA as such.

The National Environment Council is responsible in promoting cooperation among public departments, local authorities (now county councils), private sector, non-governmental organizations and other organizations engaged in environmental protection programmes. This body is strategic in its mandate and coordination of environmental issues in the country although it perhaps requires to be more proactive in driving environmental issues among stakeholders, by ensuring all county governments undertake Strategic Environmental Assessment (SEA), especially were major projects are being undertaken/planned. Further to this, SERC should be expanded, made more professional and participatory in reviewing EIA/EA reports to assist NEMA uphold professionalism in this overwhelming task. NEAPC must of essence ensure that five-yearly National Environmental Action Plans development is adhered to, in order to inform NEC's environmental strategies.

4.4 Implications of the Overlaps on Environmental Management and Governance

Several government sectors and agencies have environmental structures implicit in their acts that complement EMCA, 1999. Where duplications occur, there is inherent risk of conflict in the management of environmental issues in the country. Such overlaps may results in inefficiency, lack of clarity and may cause confusion on who is responsible for environmental management issues. This overlap may also be assumed to play a multi-sectoral complementary role in environmental management. Removal of such conflict is a requisite to ensure all sectoral environmental governing structures exist and conform to revised EMCA. EMCA should further be reviewed to recognize the important complementary role played by other sectors. As Kenya embraces environmental demands associated with the emerging extractive sector, the country cannot have a single act encompassing environmental governance and management. All sectors would require strong environmental component with clear environmental conservation and management structures. Formulation, review or realigning of EMCA to take the lead in environmental management should be subject to consultations among different government sectors and other stakeholders. Implications of having implicit or weak environmental management and regulatory structures by various sectors have consequences of ineffective and inefficient approach towards environmental management.

Merger of different sectors by the government presents legislations conflicts on environmental and natural resources management. These acts have components on environmental issues that may not be aligned and, therefore, bringing in the risk of conflicts, and the ineffective and inefficient management of the environment. The merged institutions need to harmonize their legislation, and create strong environmental management structures in consultation with EMCA, 1999. The legislation should further address environmental concerns in relation to the

new constitutional dispensation. These mergers have the advantage of reducing the number of legislations and players in environmental management enhancing law implementation for efficiency and effectiveness.

5 Environmental Impact Assessment

5.1 Adherence to Environmental Standard Requirements

The present legislation and policy had not envisaged the challenges of environmental management and protection in the context of a vibrant extractive sector. If any, EMCA dealt with implications of the inconspicuous extractive sector environmental consequences at the downstream sub-sector. It is worth noting that Kenya did not have expansive extractive sector but it is becoming evident that in the near future, the country has to contend with environmental issues associated with such an industry. A particular area of concern is the environmental consequence of extracting coal, gold, copper, rare earths, petroleum and hydrocarbons, and diamonds. Environmental impacts will span across different ecosystems ranging from upstream to downstream subsectors. Such ecosystems include forest/mangroves, marine/ coral reefs, estuarine, wetlands, forests, lakes and savannas. Environmental implications will be borne by different sectors mandated to conserve biological and other natural resources. The country will for the first time contend with environmental issues that were not envisaged before. Some of these sectors include but are not limited to KWS (parks, reserves and their biodiversity contents), NMK (archaeological, heritage and monuments), KFS and KEFRI (forest resources), KEMFRI (marine resources), and government ministries (soils, water, air, health and safety, etc). Presently, these government bodies have sectoral legislative and policy frameworks that are directing their operations on environmental management, although they may be weak on implementation structures. Faced with the upcoming environmental challenges associated with the extractive sector it will prove prudent to comprehensively analyze the emerging environmental issues and act(s) that will best address them. Similarly, a revamped EMCA is mandatory as the focal government framework for overseeing environmental matters. EMCA, 1999 is explicit on EIA/EA regulations which are comprehensive enough to cover the extractive sector, although the Second and Third Schedules are too generic in approach as to the undertaking of EIAs. Review of issues dealing with EIA/EA must be done in tandem with the Strategic Environmental Assessment (SEA) guidelines (2012) for a comprehensive approach towards environmental management of the industry. However, other legislative frameworks in existence may require a review and re-drafting to meet the demands of the emerging extractive sector from upstream to downstream activities. Stringent regulations are required for experts to qualify to undertake EIA/EA in order to maintain professionalism.

The emerging extractive sector raises the need for different players in the industry to develop new laws/enacting existing bills or mechanisms for protecting the environment. Management of operational discharge, collection and treatment of waste, and the procedure for notification of oil spills may require different set(s) of regulations anchored to EMCA.

5.2 Social and Environmental Challenges, Opportunities and Risks associated with the Extractive Industries Operations

The constitution and other sectoral policies are clear on the need for a clean and healthy environment for the citizens. Community participation is enshrined in almost all government sectors as the main mechanism for environmental management. Although community participation is mainstreamed in most government sectors, the structures needed for effectiveness are yet to be drafted and formalized. The extractive sector has its challenges, risks and opportunities. Environmental challenges associated with the industry are loss of land and grazing pastures, food shortage through land degradation, resources degradation, management of wastes and oil spills, and the need to change culture and lifestyles. Other challenges include management of hazardous material, management of contractors to implement environmental mitigation measures adequately, understanding of the local laws in relation to the international standards, lack of adequate NEMA personnel to handle the tight exploration activities and oil/gas cycle, social impacts related to exploration and managing expectations from stakeholders. Waste management and possible oil spills can have major implications on community livelihoods especially by affecting water sources, pasture and woodlands. Oil exploitation areas lie within nomadic pastoral areas, which are water deficient, suffer from recurrent drought cycles where 80-90 per cent of communities depend on wood fuel for domestic energy. Degradation of the environment will inevitably risk peoples' livelihoods through loss of natural resources critical in supporting their livelihoods. Consequently, this will lead to resource conflicts, political instability, poverty and criminal activities. To mitigate these challenges, reviewing EMCA to strengthen its capacity on EIA/EA expertise, enhancing training for NEMA experts and enforcement capacity, and bringing EMCA at par with international standards is a necessity. The reviewing of the Act should further take cognizance of challenges posed by environmental pollution and the needed mitigations strategies.

Risks include health and safety, pollution (air, water and soil), diseases, conflict for resources and opportunities, scarcity of resources, and general environmental degradation. However, there are opportunities associated with the industry, namely employment, financial resources accruing from the industry (benefit sharing) and associated infrastructural development. These challenges, risks and opportunities may not be explicit under the existing environmental acts and even where there is an attempt, the necessary structures are needed at the national and county government levels. Environmental challenges and risks associated with the extractive sector and other development activities requiring EIA are inadequately covered under regulations in pursuit of EMCA. Other acts also have provisions on environmental restoration but Occupational Health and Safety Act, 2007 is a relatively comprehensive Act on risks and challenges presented by the extractive sector. County governments are of necessity needed to enact their own laws in line with the constitution, taking cognizance of existing sectoral laws to address risks and challenges associated with the extractive sector, create awareness and educate communities on these risks and challenges. The counties should further enact laws to engage proponents to facilitate education and training of the affected communities to take job opportunities offered under the extractive sector.

Benefits to communities are more explicit in the Energy Bill, 2014 but implicit in other sectoral laws governing environmental management. EMCA, being the overarching environmental law, is quiet on community benefits, although such regulations need to be more prominent in other sectoral laws governing natural resource extraction. Such sectors are the immediate beneficiaries and should work with the county, national governments and communities on the best practices in benefit sharing in line with the constitution. Communities have previously not been involved and altogether do not share in the accrued benefits emanating from resources found in their areas, although they suffer most from impacts associated with extractions. Review of EMCA need to specify the role and the need for other sectors to enact laws towards community benefits to ameliorate them and encourage their goodwill to participate in environmental management. Other opportunities are centred on minimizing natural vegetation destruction for wood fuel by using natural gas/oil and improving land cover in line with the forest policy. Issuance of title/customary certificates of occupancy in target areas of extractive industries has the advantage/opportunity of reducing land speculation and streamlining access.

Natural Resource Benefit Sharing Bill, 2014, once enacted has the potential of resolving issues on benefit sharing where it is proposed that the community would get 12.8 per cent, county government 27.8 per cent and national government 60 per cent of the proceeds. The Mining Act, 2013, has provision for benefit sharing and also has environmental protection bond sufficient to cover the costs associated with the implementation of the environmental and rehabilitation obligations under the provisions of relevant Environmental Management and Coordination Act. However, it is not clear in the act how the legal framework would govern the implementation of such a bond in addressing environmental concerns and community livelihoods. The Mining Act and Natural Resource Benefit Sharing Bill would further require harmonization to have one overarching benefit sharing law.

6 Conclusions and Recommendations

6.1 Summary

The magnitude of environmental implications of the emerging extractive sector in Kenya was not adequately provided for in the existing EMCA and other complementary sectoral legislations. Concerted efforts are in top gear towards the enactment of such laws to cover issues relating to this industry. Previous legislation on environmental management was diverse covering water resources, land, forest, wildlife, occupational safety and health, mining among others. These acts are not specific to the extractive sector although its environmental impacts are addressed implicitly. Presently, the government is in the process of improving the existing acts in line with the new constitution and the extractive sector. Some of these legislations are the Energy Bill, 2014, Mining Bill, 2013, 2014, County Government Act, 2012, Land Act, 2012 among others. Existing sectoral laws are complementary to EMCA in managing environmental issues and as these sectoral laws are being enacted, EMCA further requires review, to regulate environmental laws both at national and county levels, as well as having a strong component in devolving environmental regulations to other sectoral bodies.

6.2 Conclusion

The Environmental Management and Coordination Act (EMCA) of 1999 provides for sound management of the environment. But some of its provisions have proved inadequate and require revision. In addition, many of the sectoral and cross-sectoral laws and policies are inadequate although some tend to complement EMCA. There is need to address sectoral laws and policies in line with the Constitution taking cognizance of the two tier government dispensation (the National and County Governments). Environmental policy should be informed by international conventions/treaties/initiatives with relevance to the extractive sector. Further to this it is important to strengthen and streamline the institutional capacity to deal with environmental issues both at national and county government level for more participatory, effective and efficient approach.

6.3 Recommendations

6.3.1 Policy Action

Due to conflicts and inadequacy of some of the provisions under EMCA, 1999, the policy makers should undertake the following:

- Review and harmonize existing sectoral and cross-sectrol laws on environmental

management with the new constitution;
- Strengthen NEMA as the body mandated with environmental management to supervise and coordinate environmental matters;
- Strengthen policy on benefit sharing and other opportunities arising from the extractive sector at the communities and county government levels;
- Develop institutional framework for stakeholders at national and county government level to participate in environmental management under the supervision of NEMA;
- Develop a comprehensive policy on the emerging extractive sector in Kenya that includes mineral, and petroleum and hydrocarbons; and
- Domesticate international conventions/initiatives that are relevant to the extractive sector in our policy and legal framework. A good example is the Extractive Industry Transparency Initiative (EITI) and United Nations Convention on the Law of the Sea (UNCLOS).

6.3.2 Legislative Action

- The government should enact the pending Energy, Community Benefit Sharing, and Community Land Bills to operationalize their implementation as a matter of urgency.
- Each government sector should enact strong environmental legislation component with clear environmental conservation and management structures.
- Strengthen EMCA, 1999 to comprehensively cover all aspects of environmental concerns associated with the extractive sector in Kenya taking cognizance of the complementary roles played by other sectors in the government.
- Review EMCA to have stringent guidelines on EIA/EA experts that can stand the test of time in defense of their work, and NEMA to also train needed EIA/EA expertise for the extractive sector.
- Review all environmental legal frameworks to create necessary structures at all government levels to enhance implementation for efficiency and effectiveness in environmental management.
- Align EMCA with the new constitution in reference to environmental management.
- Enact county government laws that protect, conserve and manage the environment as well as laws that recognize community rights in line with the new constitution.
- Develop legislation to strengthen EMCA on environmental bonds putting into place an implementation framework to manage the environment and sustain community livelihoods.
- Develop oil/petroleum complementary legislation on management of operational discharges, management, collection and treatment of waste, and the procedures for notification of oil spills.

7 Further Research Areas

The following areas of interest are proposed for further research for a more comprehensive analysis on issues relating to environmental concerns presented by the extractive sector in Kenya:

- An in-depth review of the country's legislation to accommodate different sectors of the economy, socio-cultural and bio-physical environment together with undertaking sectoral and public consultations to formulate the best approach/mechanisms/structure needed to mitigate impacts associated with the emerging extractive sector;

- Understanding of how existing legislation meets the needs of the country in terms of environmental management, its adequacy and implementation structures and mechanism in place for community and county governments participation in environmental management and conservation;

- Relating issues on environmental concerns, social-cultural and other community expectations with lessons from other developing countries that have walked the same path of extractive sector economies;

- Benefit sharing issues are still a major area of contention in the management of the extractive sector and by extension environmental issues. This component requires further research to develop appropriate principles on resource benefit sharing.

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THE POLITICAL ECONOMY OF THE EXTRACTIVE SECTOR

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1 Introduction

1.1 Background

The extractive sector in Kenya was traditionally made up of firms trading in minerals, such as soda ash, fluorspar, salt, and diatomite. This industry accounted for about one per cent of national Gross Domestic Product (GDP) and three per cent of total export earnings[1]. The discovery of oil and gas deposits in the country has raised expectations of the different stakeholders in large, in benefits that are expected to accrue from this industry. The government also expects to collect substantial revenues from oil and gas taxes and royalties. The private companies are expecting increases in their profits with the new operations taking root in the industry. Furthermore, local communities expect to get gainful employment from mineral extracting companies, given that most of their operations take place within communities. The discovery of oil, gas, and minerals is expected to boost the country's economy, coming at a point in time when the country is embarking on the implementation of an ambitious devolved system of governance comprising a National Government and forty-seven County Governments that come with huge administrative costs.

The inclusion of the extractive sector as the seventh industry in the economic pillar of Kenya's second Medium Term Plan (MTP) of Vision 2030 shows the importance attached to this emerging industry by the Government. This industry is fast gaining prominence due to its revenue potential and ability to significantly contribute to national development through increased export earnings that will result in higher GDP growth. The national government has on its part committed and embarked on the development of policy, legal and institutional framework with the objective of ensuring that the exploitation of oil, gas, and mineral resources in the country is done in a transparent and accountable manner for the benefit of all stakeholders in the country. The stakeholders can generally be grouped into five categories, namely, the national and county governments, private sector, civil society, local communities, and the development partners. The stakeholders have varied interests and ability to influence developmental processes and outcomes not only in the extractive sector but in the whole country.

The existence of diverse stakeholders with varied interests and their ability to influence developmental trajectories necessitates the need to undertake a political economy analysis of how the extractive sector functions. This sort of analysis is important because the bulk of interactions of the extractive stakeholders occur outside the market system. Thus political processes and mechanisms are required to ensure that interests of all stakeholders are taken care of to reduce the risk of conflict over mineral wealth that can weaken the country's social

1. Government of Kenya, 2013 Second MTP (2013-17), Kenya Vision 2030.

cohesion. A political economy analysis can shed light on the way behaviours of individuals and groups can be modified by systems of incentives that are compatible with self-interests of different stakeholders. Self-interest is the underlying driver of behaviour. As plainly put by Adam Smith (1776) in his book 'The Wealth of Nations':

> ***'It is not from the benevolence of the butcher, the brewer, or the baker, that we expect our dinner, but from their regard to their own self-interest.'***

The political economy analysis disaggregates behaviour according to (a) interests of stakeholders; (b) the incentives that are available or that can be designed to satisfy different interests; and (c) institutions for regulating behaviours in the furtherance of different interests (Hudson & Leftwich, 2014). Political analysis also includes analysis of power and the sources and forms of the power wielded by the different interest groups. Such analysis offers ways of understanding the processes that drive and constrain positive development by focusing on how the structures and institutions of power shape agents' behaviours. The analysis shows how the various agents, acting in competition or in cooperation, strategize for, frame, generate, use, mobilize and organize power and the associated institutions to bring about change that serves self-interests in the process of national development (Hudson & Leftwich, ibid.). The authors observe that there is convergence in political economy studies that, while technical, administrative or managerial factors explain poor development performance, the way in which political and economic processes interact is critical to national development. In situations where the political process is felt not to cater for the interest of all stakeholders, there has been conflicts and wars.

Department for International Development (DFID) (2009) notes that political economy analysis is concerned with the interaction of political and economic processes in a society: the distribution of power and wealth between different groups and individuals, and the processes that create, sustain, and transform these relationships over time. The analysis takes into consideration the interests and incentives driving the behaviour of the different groups or stakeholders. It accounts as well for distribution of power across individuals, firms and other organisations. The mechanisms governing the use of power by stakeholders include formal institutions (laws, regulation and rules) and informal institutions (norms, culture and ethics). The contribution of the extractive sector to positive developmental outcomes requires collective action by different stakeholders. Needless to say such action cannot be mobilized without mechanisms for cooperation.

Despite their huge revenue potential, resource-rich countries of Africa have not been able to translate the resource wealth into improvement in lives of citizens as most beneficiaries of the resources end up being people with a higher ability to influence outcomes, such as formal elites comprising of politicians, bureaucrats and businessmen, among others, and informal elites who are largely warlords. The appetite for self-aggrandizement by the elite has resulted in unequal sharing of benefits, with the local population whose land hosts the extractive industries. The extractive industries that operate under capture of the elite end up degrading the land and/or leaving local communities impoverished. These youth in such communities lack the requisite skills that would enable them secure better paying jobs with the extractive companies. This

poor management of stakeholder interests, coupled with weak governance of oil, gas, and mineral resources, has resulted in mineral resource-rich countries in Africa, including Nigeria, Sierra Leone and the Democratic Republic of Congo, being embroiled in conflict over the same resources, thereby placing them among the most disrupted nations in the world. Collier (2010) notes that, natural resource discovery is one major factor that is known to deepen political problems as it generates divergent elite interests. Given the precedent already set in these countries, Kenya should manage the interest of the different stakeholders effectively to avoid the natural resource curse, whereby the very resources become the source of conflict and the reason for mismanaging the extractive sector as well as the whole economy

1.2 Problem Statement

The nature of politics, governance and institutions in a country has a large influence on performance of an extractive sector. That is, political economy factors determine the extent to which the extractive sector can contribute to a positive development outcome, e.g., poverty reduction. Although Kenya has market and formal institutions that promote equitable sharing of benefits accruing from the extractive sector, the sector has numerous stakeholders with different interests and power that could undermine the proper functioning of governance institutions. That is, the markets and other institutions might fail to promote production efficiency and equity of opportunities within the extractive sector. The stakeholders can also affect operations and development outcomes of the extractive sector by influencing decisions and policies that local and central governments formulate for the industry. As already noted the key stakeholders of the extractive sector include the national government; the county governments (especially in areas where mining and drilling are taking place); the companies that have been awarded mining contracts; civil society; local communities; and development partners. The existence of several groups with competing interests in the extractive sector can lead to conflict, especially when one group uses its power to serve its own interests at the expense of others' interests.

The huge revenue potential from the Kenyan extractive sector places the country at risk of conflict. The potential conflict is with regard to control over the industry resources, particularly the newly found minerals. The risk would be elevated by poor management of the resources, by absence of transparency in sharing of the resources and by disregard of some stakeholder interests, particularly the interests of local communities. A political economy examination of operations of the country's extractive sector is critical because the operations (such as mining and drilling) entail alienating huge tracts of land from local communities. The land issue is important for the growth of the extractive sector because the expansion of the industry involves curtailing of agricultural activities. Since over 80 per cent of Kenyans derive their livelihood from agricultural activities, an expanding extractive sector would invariably come into conflict with farmers and pastoralists over the use of land. There are also concerns over possible harmful impacts of the extractive sector on national politics, as the extractive sector can fuel group contestation over revenue from scarce natural resources for use in advancing their political interests.

The extractive sector is also known to produce environmental problems that affect mostly the

poor. The environmental problems associated with the extractive sector include: the cutting down of vegetation, trees, forests, and grass; removal of land cover and top soil; and pollution of air and water. Of concern also is that mining activities result in increased usage of surface and underground water. Increased demand for water by mining companies as the extractive sector expands is a potential source of conflict between local communities and the mining companies.

Regions where minerals, oil and gas discoveries have been made in Kenya, including Anza, Mandera, the coastal Lamu basin and the Tertiary Rift basin fall within the arid and semi-arid land (ASAL) of the country. Environmental conditions in these areas have in the recent past been made worse by the impact of climate change resulting in frequent droughts. Most of these areas have also historically been marginalized by central governments, which are likely to have the lion's share of the revenues from the new minerals, an issue that would certainly raise eyebrows among local communities.

The Sessional Paper Number 10 of 1965 on 'African Socialism and its Application to Planning' had far reaching implications for arid and semi-arid regions. This policy by the independent Kenya government balkanized the country by focusing resources to areas with "absorptive capacity" effectively locking out some of the now mineral-rich regions from growth, making them lag behind in development. This policy further widened inequality between these parts of the country with other regions. The key economic features of ASAL of Kenya include pastoralism; communal land ownership; and a highly mobile population, for whom mobility is a rational response to environmental conditions and to a social system which places a premium on communal patterns of decision-making and ownership and which is driven by customary institutions (GOK, 2011). These are critical factors that key players in the extractive sector need to be alive to given the fact that a lot of discoveries of oil and minerals are in these regions.

In Turkana County where there are discoveries of oils, 87.5 percent of the population is poor, 73 percent of individuals interviewed from the Afrobarometer[2] Survey in 2012 felt that their economic condition was very bad, 53 percent of this same group felt that their situation was worse than other regions and that their living condition was likely to worsen. At least 71 percent of this community goes without food, while 91 percent go without water. For this community, their three main problems include: famine/food shortage (29 percent), water shortage (16 percent) and poor management of economy (16 percent). Furthermore, over 70 percent of members of this community feel that they are not treated fairly by the national government. In Kwale and Kilifi counties where there are large deposits of minerals, the communities identify land disputes as a major cause of violent conflict. This implies that if the land that that is allocated to mining or drilling activities were to negatively affect pasture, food or food supplies conflict would likely arise.

Whereas the question as to whether local communities will benefit from the extractive sector seems to have an answer in the constitution because public land, including all minerals and mineral oils are held by the national government in trust for the people of Kenya. A situation

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2. Afrobarometer is an independent, nonpartisan research project that measures the social, political, and economic atmosphere in Africa. Afrobarometer surveys are conducted in 35 African countries and are repeated on a regular cycle. The instrument asks a standard set of questions tracking trends of public attitudes over time.

where only the national government, industry players and a few elites benefit from the country's extractive sector while the local communities bear the brunt of the operational costs would be a largely untenable situation and could lead to undesirable developmental outcomes or conflict.

1.3 Research Objectives

The overall objective of this part of the project was to carry out a study on the political economy of Kenya's extractive sector with the aim of averting social conflicts over the sharing, control and use of oil and mineral resources. Specific objectives of the study include:

1. Undertaking of a stakeholder mapping of all players (change agents) in the extractive industry;
2. Establishment of the socioeconomic profile of the focus areas in order to understand the environment under which the stakeholders operate;
3. Establishment of institutions that affect the operations of the extractive sector and their interactions (power and interests) in achieving development of the extractive sector;
4. Development of developmental outcomes of extractive sector focus areas based on the interactions between stakeholders and institutions using scenarios methodology; and
5. Providing policy and legislative recommendations that will ensure pro-poor oriented development outcomes of the extractive sector operations.

1.4 Significance of Research

This study is significant as Article 69, 1 (a) of the Constitution of Kenya 2010 requires that the state "ensure sustainable exploitation, utilization, management and conservation of the environment and natural resources, and ensure the equitable sharing of accruing benefits". The constitution also requires the state to "utilize the environment and natural resources for the benefit of the people of Kenya" (Article 69, 1 (h)). Both levels of government, the national government and the forty-seven county governments, therefore, have to ensure that national interests and the interests of local communities are well taken care of in the management of natural resources and that there is equity in the application of national resources towards national prosperity.

The study is also important as it highlights the interest of the various groups in Kenya's extractive sector. This will help policy makers in ensuring that, apart from taking care of stakeholders' interests through appropriate policies and legislations, appropriate political mechanisms will be put in place that will ensure that these diverse interests are properly managed for the benefit of the country and its citizens. An analysis of the political economy of the sector is, therefore, essential as it looks at the allocation of sectoral resources through power as opposed to the markets, firms or institutions. Doing this will ultimately contribute towards efforts that aim at ensuring a more cohesive Kenyan society as envisaged in the Social Pillar of the Vision 2030. It will also contribute towards equity and national unity as espoused in the Second Medium Term Plan (2013-2017) of the Vision 2030.

Analysts have argued that Kenya's divergent economy and relative stability shall ensure that the country escapes the resource conflict, a phenomenon that has ravaged a number of resource-rich countries of Africa. However, reduction in foreign receipts from the sale of agricultural produce such as horticulture, coffee and tea, as well as the effects of downturn in tourism from terrorism related incidents as witnessed in the recent past, may see the natural resources industry form a critical part of the country's economy attracting more interest from different groups. It is important to map out these groups.

The analysis enables understanding of existing and potential obstacles to allocating the country's extractive sector resource rents for positive developmental outcomes. It also enables understanding of the relationships between stakeholders and decision makers, the powers that stakeholders wield and incentives and interests that inform industry policies and decisions. The analysis also enables understanding of how stakeholder incentives can be aligned towards the spending of revenue obtained from the industry in order to improve stakeholder welfare, especially at the local level.

Policy recommendations from the study will contribute towards enhancing inclusivity, transparency, and accountability in the management of resource and revenue in Kenya's extractive sector. The recommendations will also inform the development of industry programmes by both state and non-state actors with the objective of mitigating conflict, and the realization of positive developmental outcomes from revenues and resources in the industry.

2 Literature Review

Political economy is an area of great interest to a large group of researchers, especially from economics and development studies. Hudson and Leftwich (2014) observe that, the "first generation" studies in political economy, undertaken in the 1990s, mainly addressed issues of governance but largely from a technical, administrative, managerial, capacity-building and, subsequently, public industry management perspective. The 'second generation' literature is best typified by: the Department for International Development's (DFID) Drivers of Change, the Swedish International Development Agency's (SIDA) Power Analysis, and the Dutch Strategic Governance and Corruption Analysis (SAGCA). The Drivers of Change approach considers interaction between structural features, including economic and cultural structures; institutions; and agents including internal actors among these being political leaders, civil society organizations (CSOs) and trade unions among others (DFID, 2009). Also developed are country-level analytical tools that help in exploring the impact of political economy factors on development programming. This generation emphasized on historical, structural, institutional and political elements that shaped the context within which the actors worked. They observe that, the 'third generation' literature is influenced by assump¬tions, concepts and methods drawn from economics, emphasizing the way in which institutions, interests, and incentives shape behaviour to produce developmental outcomes.

Prior to the 1990s, the dominant narrative on the extractives sector was of the 'Dutch disease'. A 'disease' occasioned by the adverse effects on manufacturing of natural resource discoveries. Specifically, when a country experiences a resource boom due to a tradable resource discovery and/or to an increase in a resource price, it normally undergoes a real appreciation of its exchange rate and, as a result of rising wages, a relocation of some of the labour force to the resource industry. Krugman (1987) observes that a real appreciation reduces the international competitiveness of other tradable industries because resource-based exports crowd out commodity exports produced by those industries. Emerging contemporary literature has also focused on the 'Resource curse' also referred to as the 'paradox of the plenty'. This is the economic underperformance of many resource-rich developing countries, as compared to economies that are less natural resource-intensive. This phenomenon tends to threaten a country's long-term socioeconomic development prosperity. Jeffrey Sachs (1995) observes that, even after factoring for variables such as initial per capita and trade policies, resource-rich countries grew more slowly than other poor countries. Collier (2010) observes that, while initially the resource curse was viewed as economic matter, it has now become clear that the interplay between politics and valuable natural resource is a big factor in the resource curse. He further observes that the interplay is not necessarily one way in that, not only politics can affect natural assets, but also that natural assets can affect politics.

Rational actor perspectives in political economy portray political actors as rational utility-maximizing individuals. However, when it comes to natural resource abundance, the political actors are faced with the opportunity of self-enrichment through rent-seeking. Existing literature along this line of thought as argued by Ross (2001)is that when governments receive windfalls from a resource boom, rational political elites will take the opportunity to either directly seize the rents created by resource booms or gain control over the right to allocate them. Ascher (1999) suggests that resource-rich countries have generally wasted their natural resources because political elites have tended to use them to pursue various programmatic and political objectives including controversial financing of development programs, providing economic benefits to particular groups, capturing rents for the government treasury, creating rent-seeking opportunities in order to secure private industry cooperation in relation to other objectives, gaining control over rent allocation, and evading accountability. Robinson et al. (2002) confirm that rent-seeking behaviour is most likely to lead to negative economic outcomes when resource booms are perceived to be temporary as political elites focus on maximizing the rents that they can extract in the short term. Even where booms are perceived to be permanent, the study found that economic outcomes are likely to be negative because political elites will still have an incentive to engage in inefficient redistribution of economic resources in order to influence elections.

In their case study on the political economy of the extractives governance in Sierra Leone, Fanthorpe and Gabelle (2013) provide a review of key developmental challenges, obstacles and constraints to effective governance of the natural resources industry. The study highlights that Sierra Leone's Truth and Justice Reconciliation Commission reported that the central cause of the civil war in the country had been the endemic greed, corruption and nepotism of political elites, who plundered the nation's assets, including mineral riches. The study observes that the country's import economy in the 1970s was fuelled by the lucrative diamond state controlled by the governing elite through politically managed distributions of mining and mineral export licenses. Elites also managed to position themselves as the main beneficiaries of rural development programmes. The study observes that, the government of President Joseph Momoh that came into power in 1985 was unable to prevent regime insiders from brokering private deals with foreign businesses to exploit the country's natural resources, especially diamonds, fisheries and timber. This literature exposes the danger of dominant interest groups and the impact on a country's stability.

Fanthorpe and Gabelle (ibid.) underscore the need for better understanding of formal and informal rules, incentives and underlying roles of political drivers, a clearer perception of how the network of key stakeholders shapes policy around natural resources management, and improved appreciation and recognition of the institutional structures and boundaries within which all groups of stakeholders interact and cooperate, is established. The study underscores the need for change from old ways of over-centralization of decision making in the face of new demands from below, and that a country's natural resources should benefit the entire population rather than just a few stakeholders or interest groups, if the country is to avert conflict over resources.

Gbegi and Adebesi (2013) link conflict over natural resources in Nigeria to domination by particular interest groups. The study finds that despite being a major oil producing country for decades, the lack of equitable distribution of oil wealth and environmental degradation, resulting from exploration activities, have been identified as key factors aggravating actions from environmental rights groups, inter-ethnic conflicts, and civil disturbances from ethnic militias such as the Movement for the Emancipation of the Niger Delta and the Niger Delta Vigilante Force (NDDC, 2005). Similarly, Cabello (2011), in an analysis of the prevailing institutions in the mining industry in Burkina Faso, sought to understand how different groups of stakeholders would likely position themselves with respect to different reform initiatives, by assessing the framework of both formal and informal institutions. He found that, conflicting ideologies existed between different government ministries on whether mining taxes should be set to maximize public revenue or attract investment. The study further identified potential ways in which space for progressive reform might open up; this included the population's frustration with the lack of development, the potential entry of major companies, and the professionalization of employees of the mining company; with this, the study recommended inclusiveness in sector policy making and implementation.

Most of the existing literature on the political economy of natural resources, however, seem to focus more on the resource curse though some countries such as Botswana, Chile, Indonesia, Australia, Malaysia and Canada, though well-endowed with resources, have been able to achieve positive developmental outcomes. The success of Botswana, richly endowed in diamond, which is the main contributor to the government's revenue, exports and GDP, has been attributed to good policies that protect the property rights of investors, provide political stability and encouragement of public participation (DFID, 2013).

3 Methodology

3.1 Conceptual Framework

The conceptual framework (Figure 6-1) examines the relationship and interactions between stakeholders in Kenya's extractive sector. Each of these groups of stakeholders has incentives and interests in the industry. These groups also wield different levels of power that they may use to influence decisions and policies made in the industry. The interaction between these stakeholders, and power interplay among them through a political process, is likely to yield different developmental outcomes depending on how the various groups utilize the powers that they wield, and the kind of policies and decisions that are ultimately formulated and implemented as a result, and whether the interests of the various interest groups are well taken care of. One possible result of stakeholder interaction would be a situation where an interest group or some interest groups take advantage of their superior influence and power to influence policy and decisions to their advantage; and worse still, use these resources for self-aggrandizement at the expense of other groups leaving behind a disgruntled lot. This would be recipe for conflict and could lead the country to the path of a resource conflict that will ultimately result into a resource curse. Good management of the extractive resources and revenues obtained from the same, and good management of stakeholder interests and powers is, however, likely to result in policies and decisions that are satisfactory for all stakeholders resulting in positive developmental outcomes from resources and revenues that accrue from the industry. Shifting interest by stakeholders, especially policy makers and foreign direct investment, towards the extractive sector at the expense of other industries of the economy may however result in a decline in the performance of these other industries, such as agriculture and manufacturing, contributing to a 'Dutch disease' situation.

Figure 6-1: Conceptual Framework - Political Economy of Extractives in Kenya

Source: Author's compilation.

Scenario analyses can help address important **policy issues**, such as:
Anticipate and Leverage Change: Scenarios help identify surprises and discontinuities in trends and in the key factors that are identified as being crucial to supporting the realization of the desired future. As such, it becomes easier to identify pitfalls and provide opportunities to leverage new opportunities as well as produce robust and resilient strategies.

Stimulate New Ways of Thinking: Scenarios encourage thinking beyond traditional approaches to problem solving and exploitation of opportunities. They have the power to break stereotypes and this new way of thinking can serve as a catalyst for radical as opposed to incremental changes. They bring a new dimension to ongoing conversations on the problems and issues related to the experience and reality of the country.

Reduce Future Risk: The use of scenarios can help the government, private sector, and civil society groups better determine the outcome of certain actions before they are actually taken. Further, by being able to recognize various signals, surprises can be minimized while responses and action can be made more effective.

Develop Consistent Frameworks: Within the framework of a nation, it is difficult to orchestrate a focused vision. Scenarios, however, provide a common framework and language for discussing and dealing with complex conditions and options. Most importantly, they help build and expand common ground, the presence of which is essential for societies to address and seek solutions to their problems.

It is important to reiterate that scenarios are not in any way predictions. They are, however, an essential tool in understanding the complex and uncertain environment within which actors must operate, and a tool through which we can challenge our own assumptions for better preparedness of the future.

3.1.2 Scenarios Methodology

The objective of the extractive sector scenarios was to make sense of the possible uncertain outcomes that may be brought about by the extractive sector. This is particularly important because the new resource finds have raised expectations for different stakeholders of the benefits that could accrue from this industry. The government expects to collect more revenues from taxes and royalties, the private sector companies expect increases in their profits and the local communities expect to have higher incomes from the opportunities availed by the sector. While these are valid expectations, varied interests and ability to influence developmental outcomes in the sector could shift the balance of power in ways that may not have been anticipated before.

It therefore becomes imperative to check the possible ways in which the roles and relations of various actors in the transactional space could evolve in order to determine the pitfalls to avoid, and the opportunities to take advantage of with the aim of pushing for a transparent and accountable process that takes into account everybody's mutual interest and results in strong social cohesion. We therefore used sense-making scenarios to structure the conversation.

Different scenarios are likely to emerge as a result of interactions among stakeholders in Kenya's extractive sector. The first scenario, and an undesirable scenario as a result of interaction among industry stakeholders, would be a situation where an interest group or some interest groups take advantage of their superior power to influence policy and decisions in the industry to their advantage and worse still use industry resources and revenues for self-aggrandizement at the expense of other groups. This is likely to result in discontentment among other stakeholders and is likely to result in resource conflict (curse), especially if the latter group comprises of local communities.

A second scenario that is likely to arise is the 'Dutch disease' scenarioÐshifting interest by stakeholders towards the extractive sector at the expense of other sectors of the economy, such as agriculture that employs around 80 per cent of the country's population, and manufacturing may however result in a decline in the performance of these sectors plunging the country into a 'Dutch disease' scenario. This scenario is likely to arise when monetary policy does not deal with exchange rate imbalances associated with high oil exports resulting in increase in foreign exchange. Corruption and transparency is a key factor in the determination of the final costs in oil production.

A third scenario in which all stakeholders regardless of their influence and the level of powers wielded are satisfied, would result in a situation where there is good management of the extractive resources and revenues obtained from the same and good management of stakeholder interests and powers. Through an inclusive approach, the country develops policies and legislation that take in the interest of all stakeholders and decisions in the industry are satisfactory to all interest groups. Resources obtained from the industry are applied equitably at both the local and national level. These scenarios yield positive developmental outcomes for the country.

3.2 Data Sources and Analysis

The data were obtained from studies extractive industries conducted by government and non-governmental agencies operating at the national, regional and international levels. The specific data sources included journals, working papers, books and websites Additional data were gathered using unstructured questionnaires in individual and group interview settings. Focus group discussions and telephone interviews were used to obtain qualitative data.

Other important sources of data for this paper included Afrobarometer surveys. Afrobarometer is a research project that conducts regular surveys in 35 African countries to observe trends in economic, social and political matters. Four rounds of surveys have been administered in Kenya-in 2003, 2005, 2008, and 2011. The relevant data from respondents in Kajiado, Kilifi, Turkana, Kitui and Kwale Counties are outlined below. The data is a good indicator of the general perception that residents of the counties being studied have of their identities, economic status compared to other Kenyans, and the various arms of government among other issues relevant to the political economy in their political units. These, however, are opinion surveys, and are therefore subject to weaknesses attendant to questionnaires such as reporting bias where, for example, respondents might want to portray themselves as less tribal than they really are. These statistics can help build scenarios as discussed in section 3.1.

4 Descriptive Statistics

4.1 Economic Condition

An individual's level of satisfaction with his/her economic conditions as compared to others is a good indicator of whether dissatisfaction would arise leading to conflict as illustrated by IEA and SID (2000). All the counties where minerals have been discovered have very high incidence of poverty: Turkana 87.5 per cent, Kilifi 58.4 per cent, Kitui 60.4 per cent, Kwale 70.7 per cent, and Kajiado 38 per cent, against a national poverty incidence rate of 45.2 per cent. The opinions of the residents of these administrative units on their level of satisfaction with their economic status are just as important as the actual figures on economic welfare. Table 6-1 provides the trends of the different communities' opinions about their economic conditions. The residents of three counties showed increasing level of dissatisfaction with their economic condition between 2003 and 2011. In 2003, for example, 34 per cent of the respondents in the five counties thought their living conditions were bad. In the subsequent surveys, the number increased to 56 per cent (2005), 75 per cent (2008), and 73 per cent (2008), respectively. In all the four surveys, the percentage of the respondents in the five counties who thought their living condition was bad was higher than the national averages. The figure was especially high in Turkana County, recording 100 per cent and 96 per cent in 2008 and 2011, respectively.

Table 6-1: Level of Satisfaction with Economic Condition[3]

	2003			2005			2008			2011		
	Bad	Good	Neither good nor bad	Bad	Good	Neither good nor bad	Bad	Good	Neither good nor bad	Bad	Good	Neither good nor bad
Kajiado	17.9	56.4	25.6	50.0	20.0	30.0	61.5	0.0	38.5	100.0	0.0	0.0
Kilifi	34.8	30.4	34.8	53.3	23.3	23.3	65.0	10.0	25.0	64.5	20.9	14.5
Kitui	34.3	35.7	30.0	62.5	25.0	12.5	81.8	9.1	9.1	73.1	11.5	15.4
Kwale	59.1	31.8	9.1	57.9	10.5	31.6	85.7	7.1	7.1	80.0	10.0	10.0
Turkana	36.4	63.6	0.0				100.0	0.0	0.0	95.5	4.5	0.0
Subset	34.0	39.9	26.1	56.0	20.0	24.0	75.7	6.8	17.6	73.0	14.8	12.2
National	33.1	41.1	25.8	43.3	35.6	21.1	63.9	16.2	19.9	71.4	15.0	13.7

Source: Afrobarometer

When asked for opinion on how they compared to other Kenyans in terms of living conditions in 2003, 33.5 per cent of the sample from all the five counties together thought their conditions were the same as other Kenyans, 31.9 per cent thought their living conditions were worse, and 34.6 per cent thought their living conditions were better. However, the subsequent three

3. Subset in this and the subsequent tables indicates the sum of the responses from the five select counties.

surveys paint a dimmer picture. The percentage of the respondents in the select counties who thought their living conditions were worse than those of other Kenyans increased to 54.7 per cent (2005), 54.1 per cent (2008), and 50 per cent (2011), all higher than the national percentage of those who thought their individual living conditions were worse than those of other Kenyans. Of the four surveys, only in 2003 did the largest proportion of the respondents in the five counties (89.9 per cent) thought that their economic standards would improve in the 12 months after the survey. This was likely an effect of the euphoria of the change in government in 2002; the national percentage was 86.6 per cent. The figure for this variable dropped significantly in the later surveys. In 2005, even though the 37.3 per cent who thought their living standard would improve was higher than those who thought it would stay the same or decline, this was a significant drop from the 2003. The proportion of interviewees in these five counties who thought their living conditions would get worse was higher than the national percentage in the last three surveys.

Table 6-2: Comparison of Economic Condition Compared to Other Kenyans

	2003			2005			2008			2011		
	Better	Same	Worse	Better	Same	Worse	Better	Same	Worse	Better	Same	Worse
Kajiado	43.6	38.5	17.9	20.0	30.0	50.0	23.1	46.2	30.8	0.0	0.0	100.0
Kilifi	21.7	28.3	50.0	23.3	26.7	50.0	0.0	40.0	60.0	30.0	34.5	35.5
Kitui	37.1	32.9	30.0	0.0	31.3	68.8	18.2	36.4	45.5	13.5	28.8	57.7
Kwale	36.4	27.3	36.4	21.1	26.3	52.6	0.0	35.7	64.3	10.0	30.0	60.0
Turkana	36.4	54.5	9.1	n.a	n.a	n.a	0.0	0.0	100.0	13.6	13.6	72.7
Subset	34.6	33.5	31.9	17.3	28.0	54.7	9.5	36.5	54.1	20.4	29.6	50.0
National	36.6	38.4	25.0	29.1	36.9	34.0	16.5	33.5	50.1	23.8	30.5	45.7

Source: Afrobarometer

4.2 Identity

It is generally believed that identity is a significant driver for political affiliation in Kenya. A higher percentage of the respondents in the counties under study and nationally indicated that they ascribed higher prominence to ethnic identity over national in the 2005, 2008, and 2011 surveys. This percentage ranged between 35.1 per cent and 37.3 per cent, as shown in Table 6-3. On average, most of the respondents thought the living condition of members of their ethnic group was worse than those of other Kenyans: 85.3 per cent in 2005 and 52.7 per cent in 2008.

Table 6-3: More Salient Identity Category

	2003				2005			
	Group	National	Not applicable		Group	National	Not applicable	Refused to answer
Kajiado	7.7	53.8	38.5		30.0	20.0	50.0	0.0
Kilifi	34.8	34.8	30.4		43.3	33.3	23.3	0.0
Kitui	8.6	55.7	35.7		25.0	12.5	62.5	0.0
Kwale	54.5	27.3	18.2		42.1	10.5	47.4	0.0
Turkana	18.2	45.5	36.4					
Subset	20.7	46.3	33.0		37.3	21.3	41.3	0.0
Kenya	19.6	51.7	28.7		45.6	14.2	39.9	0.3
	2008				2011			
	Group	National	Not applicable	Refused to answer	Group	National	Not applicable	Refused to answer
Kajiado	30.8	30.8	38.5	0.0	50.0	0.0	50.0	0.0
Kilifi	35.0	20.0	45.0	0.0	31.8	2.7	65.5	0.0
Kitui	59.1	13.6	27.3	0.0	36.5	7.7	55.8	0.0
Kwale	14.3	0.0	71.4	14.3	42.5	0.0	57.5	0.0
Turkana	0.0	0.0	100.0	0.0	31.8	9.1	59.1	0.0
Subset	35.1	14.9	47.3	2.7	35.2	3.9	60.9	0.0
Kenya	39.5	11.8	48.0	0.7	36.6	7.5	55.5	0.4a

Source: Afrobarometer

Whether economic conditions translate into political influence is a key question in the examination of the politics and economics of identity. In 2005, 86.7 per cent of the respondents in these five counties thought that the ethnic group to which they belong had lower political influence than other groups. This proportion declined to 50 per cent in 2008, which was still a higher proportion than that of the respondents who thought their ethnic community had equal or higher political influence than other ethnic groups. Table 6-4 provides a summary of whether members of the counties are proud to be Kenya.

Table 6-4: How much Political Influence does Your Ethnic Community have Compared to Others?

	2005				2008			
	Better	Not Applicable	Same	Worse	Better	Not Applicable	Same	Worse
Kajiado	10.0	0.0	40.0	50.0	38.5	0.0	23.1	38.5
Kilifi	3.3	0.0	6.7	90.0	5.0	0.0	10.0	85.0
Kitui	0.0	0.0	6.3	93.8	50.0	0.0	22.7	27.3
Kwale	5.3	0.0	0.0	94.7	7.1	14.3	28.6	50.0
Turkana	n.a	n.a	n.a	n.a	0.0	0.0	60.0	40.0
Subset	4.0	0.0	9.3	86.7	24.3	2.7	23.0	50.0
Kenya	26.1	0.1	33.3	40.5	25.3	0.7	36.7	37.3

Source: Afrobarometer

4.3 Community Participation

The cohesiveness of a community and the propensity of the residents of the community is an important factor to observe where extraction occurs. This would signal, for example, whether and how the community would air their grievances should the extraction activity be harmful to their community. Afrobarometer asked respondents whether they belonged to ethnic or community groups, whether they joined other members of their community to raise issues and whether they had participated in demonstrations and protests. The proportion of respondents in the counties studied who had joined a group to raise an issue was quite high, 61.7 percent in 2003, 50.7 percent in 2005, 41.9 percent in 2008, and 51.7 percent in 2011. This is shown in Table 6-5.

Table 6-5: Have You Gotten Together with Others to Raise an Issue?

	2003			2005			2008			2011		
	No	Refused to answer	Yes	No	Refused to answer	Yes	No	Refused to answer	Yes	No	Refused to answer	Yes
Kajiado	17.9	10.3	71.8	40.0	10.0	50.0	38.5	7.7	53.8	16.7	16.7	66.7
Kilifi	30.4	6.5	63.0	46.7	0.0	53.3	75.0	5.0	20.0	49.1	10.9	40.0
Kitui	34.3	11.4	54.3	12.5	31.3	56.3	40.9	0.0	59.1	32.7	15.4	51.9
Kwale	31.8	9.1	59.1	52.6	5.3	42.1	71.4	7.1	21.4	20.0	10.0	70.0
Turkana	18.2	9.1	72.7	n.a	n.s	n.a	20.0	0.0	80.0	22.7	4.5	72.7
Subset	28.7	9.6	61.7	40.0	9.3	50.7	54.1	4.1	41.9	37.0	11.3	51.7
Kenya	29.8	10.3	59.8	36.4	14.8	48.7	35.8	6.9	57.3	32.5	14.2	53.3

Source: Afrobarometer

4.4 Violence and Conflict

One of the fears associated with the extractive sector is that, there is an attendant risk of increase in violence in the struggle for the proceeds of the extraction. Overall, the proportion of respondents who thought violence was justifiable for a political cause is lower than those who thought violence for political purposes is unjustifiable. However, there were some statistics that were especially unnerving. For example, 45.4 per cent of respondents in Kwale thought violence was justifiable in the 2003 survey, though this percentage declined to 10 per cent in 2011. Table 6-6 provides a summary of this. The 2003 survey asked respondents what they thought were the main causes of conflict in their districts. The figures for the relevant causes were: boundary and land disputes (21.86 per cent); ethnic/tribal differences (7.65 per cent); and political/leadership disputes (4.3 per cent).

Table 6-6: Is Violence Justifiable?

	A: The use of violence is never justified in Kenyan politics *B: In this country, it is sometimes necessary to use violence in support of a just cause*					
	2003			2005		
	Agree with A	Agree with B	Agree with neither	Agree with A	Agree with B	Agree with neither
Kajiado	82.1	17.9	0.0	50.0	50.0	0.0
Kilifi	63.0	37.0	0.0	70.0	30.0	0.0
Kitui	98.6	1.4	0.0	93.8	6.3	0.0
Kwale	54.5	45.4	0.0	78.9	21.1	0.0
Turkana	72.7	18.2	9.1			
Subset	79.8	19.7	0.5	74.7	25.3	0.0
National	80.4	18.5	1.2	75.6	23.3	1.0
	2008			2011		
	Agree with A	Agree with B	Agree with neither	Agree with A	Agree with B	Agree with neither
Kajiado	84.6	15.4	0.0	83.3	16.7	0.0
Kilifi	80.0	20.0	0.0	77.3	22.7	0.0
Kitui	86.4	13.6	0.0	80.8	19.2	0.0
Kwale	42.9	57.1	0.0	87.5	10	2.5
Turkana	80.0	20.0	0.0	77.3	22.7	0.0
Subset	75.7	24.3	0.0	80.0	19.6	0.4
National	71.8	25.7	2.4	84.7	13.6	1.7

Source: Afrobarometer

4.5 Confidence in Institutions

To get a general picture of the opinion of the respondents on the different government institutions, the study observed the numbers on the level of trust in the president (executive), the courts of law (judiciary), and parliament (legislature). In addition, the opinion regarding

the financial management capability of the local councils (used as a proxy for county governments) was also observed. In 2003, 56.4 per cent of the respondents in these five counties trusted parliament "a lot"; that figure dropped to 13.3 per cent in 2005, rose to 18.9 per cent in 2008, and declined to 14.3 per cent and 2011. There was a similar decline in trust in the representatives of the three arms of government, not only in these counties, but also nationwide, as outlined in tables 6-7 to 6-9.

Devolved government that was formalized by the promulgation of the 2010 constitution has introduced a new player in the form of county government, which has the important role of providing services using funds that could be derived from extractives. How these funds are managed will determine how successful the extractives sector becomes, and whether the residents of these counties benefit from the resources in their territories. This study used opinions about the honesty of local councillors as a proxy for the residents' opinions on the county officers' management of funds.

Table 6-7: How Much Do You Trust the President?

	2003			2005		
	A little	A lot	Not at all	A little	A lot	Not at all
Kajiado	17.9	82.1	0.0	50.0	50.0	0.0
Kilifi	28.3	71.7	0.0	70.0	13.3	16.7
Kitui	8.6	91.4	0.0	37.5	62.5	0.0
Kwale	31.8	68.2	0.0	89.5	10.5	0.0
Turkana	72.7	27.3	0.0	n.a	n.a	n.a
Subset	21.8	78.2	0.0	65.3	28.0	6.7
Kenya	26.0	72.4	1.6	54.3	32.3	13.5
	2008			**2011**		
	A little	A lot	Not at all	A little	A lot	Not at all
Kajiado	38.5	61.5	0.0	83.3	16.7	0.0
Kilifi	45.0	30.0	25.0	38.2	54.5	7.3
Kitui	40.9	40.9	18.2	73.1	13.5	13.5
Kwale	78.6	14.3	7.1	60.0	35.0	5.0
Turkana	40.0	40.0	20.0	63.6	18.2	18.2
Subset	48.6	36.5	14.9	53.5	37.4	9.1
Kenya	55.9	28.2	15.9	57.4	31.6	11.1

Source: Afrobarometer

Table 6-8: How Much Do You Trust Parliament?

	2003			2005		
	A little	A lot	Not at all	A little	A lot	Not at all
Kajiado	25.6	71.8	2.6	20.0	50.0	30.0
Kilifi	43.5	47.8	8.7	63.3	6.7	30.0
Kitui	30.0	62.9	7.1	75.0	18.8	6.3
Kwale	54.5	31.8	13.6	84.2	0.0	15.8
Turkana	27.3	45.5	27.3			
Sub-total	35.1	56.4	8.5	65.3	13.3	21.3
Kenya	38.3	56.3	5.4	63.0	16.5	20.5
	2008			2011		
	A little	A lot	Not at all	A little	A lot	Not at all
Kajiado	76.9	23.1	0.0	83.3	16.7	0.0
Kilifi	65.0	15.0	20.0	53.6	11.8	34.5
Kitui	63.6	18.2	18.2	69.2	23.1	7.7
Kwale	42.9	28.6	28.6	75.0	15.0	10.0
Turkana	100.0	0.0	0.0	81.8	4.5	13.6
Sub-total	64.9	18.9	16.2	64.3	14.3	21.3
Kenya	63.7	20.7	15.6	64.2	18.5	17.3

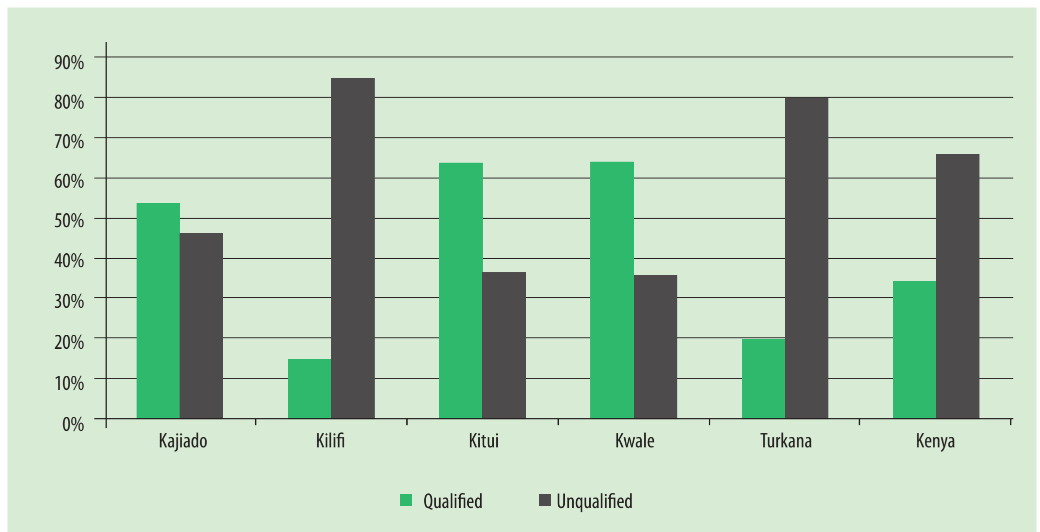
Source: Afrobarometer

Table 6-9: How Much Do You Trust the Courts of Law?

	2003			2005		
	A little	A lot	Not at all	A little	A lot	Not at all
Kajiado	41.0	43.6	15.4	80.0	20.0	0.0
Kilifi	43.5	50.0	6.5	83.3	10.0	6.7
Kitui	54.3	38.6	7.1	75.0	25.0	0.0
Kwale	45.5	31.8	22.7	73.7	26.3	0.0
Turkana	63.6	27.3	9.1			
Sub- total	48.4	41.0	10.6	78.7	18.7	2.7
National	50.0	38.5	11.5	65.9	22.0	12.1
	2008			2011		
	A little	A lot	Not at all	A little	A lot	Not at all
Kajiado	53.8	23.1	23.1	83.3	16.7	0.0
Kilifi	65.0	15.0	20.0	63.6	18.2	18.2
Kitui	81.8	13.6	4.5	80.8	17.3	1.9
Kwale	57.1	21.4	21.4	80.0	15.0	5.0
Turkana	60.0	0.0	40.0	86.4	9.1	4.5
Sub- total	66.2	16.2	17.6	73.0	16.5	10.4
National	68.4	14.3	17.3	62.7	25.4	11.9

Source: Afrobarometer

Chart 6-1: How Honest is Your Local Councillor in Managing Funds?



Source: Afrobarometer

4.6 Discussion

The evidence presented in sections 4.1-4.3 shows the current political and economic situations in counties where the activities of the emerging extractive sector are likely to be located. Not only do these counties experience higher poverty incidence rates than the country rates, but the residents of these counties also feel that they have little political influence. One could, therefore, infer that the residents of these counties would expect that a significant portion of the proceeds from the extraction within their administrative units be used to improve the local economic situation. This inference is further strengthened by the fact that most of the respondents indicated a higher salience of their ethnic identity compared to national identity. The threat of violence, attendant with the discovery and exploitation of mineral resources, cannot be wished away. With these preliminary statistics, there is a high likelihood of the 'resource curse' scenario taking place. A careful balance will be necessary to ensure that even though private investors get the returns from exploiting the natural resources, residents local to those areas where the extraction occurs are not left out in the distribution of the proceeds. That the residents have high interest in public affairs such as this one, and a large portion have even joined groups to raise complaints, is impressive as it indicates should the residents need to advocate for their rights or speak up against malpractice in the sector, then it would be relatively easy to organize them.

5 Stakeholder Mapping

5.1 Background

Stakeholders in the extractive sector in Kenya comprise of individuals or institutions that must be considered in policy/decision making process; they can largely be grouped as state and non-state actors, and are either local to where exploration and extraction is taking place, national, or international. The stakeholders include institutions that are likely to affect or be affected by activities of the country's extractive sector. Among these are claimants who have rights over the sector's resources. They have influence of varied magnitude which includes the power to mobilize or influence policy though agenda and priority setting, legislation and power of the execution of policies; power over resource allocation; technical skills; and control over information and the framing of issues in the country's extractive sector. Stakeholder interests in the industry may relate to: transparency and accountability, the environment, inclusive growth, the distribution of industry resources, local/county versus national interests, national interests versus international interests, and culture and livelihoods.

The devolved structure of governance, and the emphasis on public participation in governance processes, provides opportunities for more stakeholders in Kenya's extractive sector, especially at the county level. These include local communities, county governments and their institutions and structures including the County Executive and County Assemblies. Civil Society Organization (CSO) groups pushing for county-specific interests in the industry have also mushroomed in counties where extractive work is being undertaken. Some of the state actors in Kenya's extractive sector include the executive at both levels of government, government ministries, departments, and agencies. Stakeholder interests in Kenya's extractive sector can therefore hardly be generalized but have to be analysed on a case-by-case basis.

5.2 Kenya's Extractive Sector Stakeholders and their Interests

5.2.1 National Government

5.2.1.1 The Executive

Kenya's adoption of the two-tire devolved system of governance, comprising of the national government and county governments, has come with high administrative costs. With a ballooning public wage bill at about 12 per cent of the country's Gross Domestic Product, well above the worldwide recommended 7 per cent, it is in the interest of the national government to maximize on revenue collection, including revenue that accrue from the extractive sector, in order to meet this cost as well as implement development programs and provide public services to citizens.

The national government in the Vision 2030 aims at creating a "globally competitive and prosperous country with a high quality of life by 2030" by transforming the country into "a newly-industrializing, middle-income country, providing a high quality of life to all its citizens in a clean and secure environment". The Vision 2030 identifies oil and other mineral resources as a priority industry under the Vision's Economic Pillar, an indication of the government's recognition of the industry as a potential contributor to the country's economic growth. The second Medium Term Plan of the Vision 2030 (MTP 2013-2017) identifies a number of flagship projects for oil and mineral resources in the country.

The national government's Executive, comprising of the Presidency and Cabinet made up of Cabinet Secretaries responsible for specific ministries, represent the decision making organ in Kenya. Key ministries in the country's extractive sector include: the Ministry of Mining and the Ministry of Energy and Petroleum. Other ministries related to the industry include the Ministry of Environment, Water and Natural Resources, and the Ministry of Land. The Ministry of Mining was established as a separate ministry following the discovery of oil and gas in the country in 2012. The Ministry of Energy and Petroleum leads and coordinates industry work in energy, oil, and gas.

The national government has expressed commitment to putting in place policy, legal and institutional reforms that will ensure that the country benefits financially from the extractive sector, especially following the discovery of oil and gas. Some of the efforts towards these are seen in the revision of the Energy Bill 2012; review and update of the Petroleum Act; development of a National Mining Policy; and development of a policy on the management of commercial discoveries of petroleum resources.

The national government has also established the National Mining Corporation. The corporation is to hold stakes in mines and establish a Sovereign Wealth Fund to manage revenue obtained from the country's extractive sector. The government has also identified a number of flagship projects for oil and other mineral resources as highlighted in the Vision 2030 and the Second MTP (2013-2017) with the objective of establishing the commercial viability, developing requisite infrastructure and production of oil, gas, and other minerals.

The Ministry of Mining, in the year 2013, established a task force to review mining licenses and agreements issued by the Mines and Geological Department from 2003 as part of efforts intended at streamlining the mining industry. The task force was mandated to review all the agreements and licenses relating to prospecting, exploration and mining issued between January 2013 and May 2013, with a view of ascertaining their legality and establishing whether due process was followed in their issuance, and recommend clear modalities and processes of licensing which will ensure transparency and spell out clear timelines. The ministry subsequently cancelled 31 mining licenses issued by the department.

Even with all these efforts on the part of the government, individual and institutional roles and responsibilities, if not well checked, may hamper coordinated and sustained efforts in improving extractives governance, thereby depriving the country of maximum economic, social, and benefits from large-scale mining.

5.2.1.2 Parliament

The Constitution of Kenya 2010 established a bicameral Parliament comprising of the National Assembly consisting of Members of Parliament representing constituencies, and the Senate comprising of Senators representing the interests of County governments. Parliament has control over public expenditures at the national level. This gives its members the authority to review, amend, and authorize the national budget.

Parliament is responsible for drafting and reviewing bills, and passing legislation needed for effective management and reform of natural resources. The Kenyan Parliament can, therefore, introduce legislation that requires companies awarded mining contracts to disclose the revenue they earn. Legislation that is pending in Parliament at various stages include: the Mining Bill 2014; the Petroleum Exploration and Production Bill 2014; the Energy Bill 2014; the Model Production Sharing Contract 2014; the Environmental Management and Coordination Bill; the Sovereign Wealth Fund Bill; the County Royalties Bill; and the Community Lands Bill. The Senate Ad hoc Committee on natural resources has also carried out consultations with citizens, e.g., in Taita-Taveta County, to collect views from locals, investors and county leaders for inclusion in the Natural Resources Bill 2013 on royalties.

By exerting its oversight authority during the budget process and in the development of the country's medium- and long-term economic strategies, Parliament is critical for the developmental outcomes of Kenya's extractive sector as it has the ability to guide the country's economic policy towards countering both the 'Resource curse' and the 'Dutch disease' associated with the extractive sector.

The National Assembly has the mandate of playing oversight over the national government's executive by exercising oversight over the implementation of laws, policies, and government departments in order to enhance transparency, accountability and performance. Through its oversight function, Parliament can conduct investigations to examine particular policy issues surrounding the country's extractive sector. It can also engage in the monitoring and evaluation of government policies for the industry, to ensure that government's implementation of programs in the country's extractive sector is being undertaken effectively and legally and that resources obtained from the industry are accounted for properly and shared equitably.

The ability of Parliament to effectively play its oversight role over the Executive and Kenya's extractive sector is, however, pegged on the willingness by the Executive and other actors in the industry to share relevant information that will inform legislative decisions. The law making role of the Executive with Parliament also determines the National Assembly's ability to meaningfully discharge its legislative function. Kenya finds itself in a situation where the ruling political party or coalition dominates. This raises concern when it comes to the development of legislation for the extractive sector. The National Democratic Institute (NDI) (2007) observes that "in countries where ruling party control is pervasive, legislatures are often used to rubber stamp executive policy after little or no debate (NDI, 2007)".[4] Kenya's National Assembly, therefore, runs the risk of passing legislation that may not be favourable for the extractive industry, especially if legislators across the political divide do not properly scrutinize bills

4 Cited in Parliamentary Oversight of the Extractive Industry, the World Bank.

that come in front of the house and if the “tyranny of numbers” clouds debates on proposed legislation. This requires greater collaboration between legislators of the ruling coalition and those from the opposition when analysing proposed bills.

Members of Parliament in both houses are uniquely positioned to monitor the effects of the extractive sector on citizens as they are the link between the government, investors in the industry, civil society and the citizen. It is in the interest of individual Members of Parliament, and Parliament as an institution, to ensure that citizen interests in the extractive sector are heard and articulated, and that national interest super cedes. Members of Parliament, especially those representing regions where exploration and mining is taking place, have direct interest in the activities and the on-goings in the industry right from policy formulation to the extraction and the sharing of revenues, as it is the communities and the environment in areas that they represent that are most likely to be affected by mining activities.

Members of Parliament: both the National Assembly and the Senate can incorporate citizen feedback into decision making on the country’s extractive sector as it is they who represent citizens and groups, bringing their needs, aspirations and concerns to the house where they can be factored into the policy making process. They also mediate among the various interests they represent, reaching agreement on budgets and policies which are supposed to promote national interests, even as they respond to constituency, county, and group concerns.

5.2.2 County Governments

The devolved system of government is 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. The constitution shares the responsibility of natural resource management between the National and County governments. The constitution also gives room for the County governments to formulate policies in addition to National Government policies on natural resources and environment conservation.

County governments also have the responsibility of raising revenue that will enable them deliver on their mandate in providing public service in key sectors as agriculture, water and health, which have since been transferred to County governments as per Schedule Four of the constitution. County governments, therefore, need to harness all available resources including human, finance and natural resources. County governments where oil, gas, and minerals have been discovered have so far expressed concerns over the transparency of contracts that the national government is entering into with private investors and the plight of their constituents in as far as extractive activities are concerned. County governments look forward to benefiting from the extractive sector resources, given that most of them have over the years been marginalized by successive governments in terms of resource allocation. Other County governments also look forward to a share of the revenues that accrue from these national resources.

Each of the forty-seven County governments has a County Executive comprising of the Governor and Members of the County Executive Committee appointed by the Governor and

approved by the County Assembly. The County Assemblies have the mandate of legislation at the county level. Just as with their counterparts in the National Assembly, it is in the interest of members of respective County Assemblies to ensure that resources available in the county, including natural resources, are well utilized for the benefit of their constituents and counties. It is, however, emerging that there is need to build the capacity of Members of County Assembly on policy formulation, as well as legislation, as a number of those elected into these positions are getting involved in these processes for the first time.

So far, there seem to be no specific county-level bodies mandated to take action in the extractives industry. There are however county-level institutions, such as the Office of the Surveyor and Revenue Office, which may have a strong influence over the industry by way of licensing and legal consent. There is also need for proper coordination at the county level to ensure that these offices carry out their mandate strategically. County governments may also have had power passed down to them by the constitution, but are yet to translate their political power into working power. Many are still contending with the challenge of building consent amongst the diverse interests of the local administrations that have been conglomerated under the new County governments.

5.2.3 Civil Society Organizations

Civil society organizations have been widely recognized worldwide as a critical industry. A strong civil society can have a positive influence on a government. Kenya's civil society organizations including Community Based Organizations (CBOs) and Non-Governmental Organizations (NGOs) operating at the national and county level are an increasingly important agents for promoting transparent, effectiveness, openness, responsive and accountable governance in the country's extractive sector.

The civil society has been able to further good governance through the analysis of proposed legislation for the sector, public policy, advocacy, and monitoring performance by government and the action of public officials. Civil society organizations have also been able to build social capital, mobilize citizens for engagement in governance and enable citizens identify and articulate their needs. They also provide critical information on potential crisis and thus contribute to early warning systems. This is critical for the sensitive and seemingly guarded extractive sector. Civil society can also be resourceful and innovative as they involve local communities in the identification and resolution of development problems that are more sustainable.

There is increasing interest by the civil society in the Kenya's extractive sector. Civil society organizations operating at both levels of government, and working in the extractive sector, have in the recent past formed coalitions that largely aim at greater public engagement and accountable governance in the industry. Among these is the Community Action for Nature Conservation (CANCO), which has been involved in, and pioneered oil and gas community, stakeholder engagement and advocacy since 2009. The organization has so far managed to build relationships with various stakeholders including partners, donors, the government and project beneficiaries and target groups.

Also established is the Kenya Civil Society Platform on Oil and Gas (KCSPOG). The objective of the platform is to support awareness and advocacy among civil society and community groups in oil-affected regions. The platform was established in February 2013 as a collective civil society voice in the developing field of oil and gas. The platform brings together CSOs and networks around oil and gas resource management including issues of: environment, land and livelihoods to share common advocacy priorities and to coordinate diverse and collective views to effectively influence government policies and legislation.

Friends of Lake Turkana (FoLT), a grass root organization founded in 2009, has taken the mantle of educating the citizens in Turkana and surrounding of the oil exploration areas in order for them to take action and dispel the 'Resource curse' of violent conflicts, environmental destruction, corruption and displacements among other issues of concern to local communities. FoLT advocates for equitable distribution of oil wealth between the central government and Turkana County. The organisation has also been working with local communities in an effort to increase community participation in environmental protection, policy formulation, sustainable management and wise use of natural resources. It also lobbies for increased participation of communities in the development and governance of their resources. FoLT also campaigns for the rights of communities to access their natural resources by fighting environmental injustices and the violation of community rights.

The critical role played by civil society of ensuring social accountability by state actors in Kenya has, however, recently come under threat with the proposed Public Benefits Organizations Bill 2012. The Bill proposes to make it a requirement that public benefit organizations (PBOs) operating in Kenya obtain 85 per cent of their funding locally. This has been viewed as an attempt by government to gag civil society as well as cripple their ability to hold government accountable. The passage of the proposed legislation with this requirement will also make it difficult for CSOs to undertake advocacy work, mobilize communities for sensitization and action and even push for accountable governance in the country's extractive sector. If passed, the Bill will force many CSOs to close down as majority depends on external donor funding to implement their activities.

5.2.4 Media

The role of the media in Kenya's extractive sector is to disseminate information on the on-goings in the industry. Through the media, stakeholders, including local communities, can be informed on matters concerning the industry in their localities, thus empowering them to effectively play their role in the implementation of local content. Informing and educating stakeholders about the nature of the industry is a necessary requisite for participation in decision making process at both the national and county level as envisaged by the constitution and legislation on devolution. The media is an influential source of information for the public with the ability to guide perceptions on activities in the country's extractive sector.

Agitation for transparency and accountability in Kenya's extractive sector cannot come from civil society organizations working on governance issues and political leaders alone. The media has a critical responsibility to push toward government and corporate openness in the industry.

This requires more investigative journalism and greater collaboration with other stakeholders, including both state and non-state actors operating in the industry.

Kenya has several media houses, including local vernacular radio stations, operating in the regions where oil, gas and minerals have been discovered. The kind of information that they relay to local communities will greatly influence the level or kind of engagement. The sensitive nature of the country's extractive sector, however, requires objective reporting by the media. Objective and accurate reporting of the extractive sector by both the print and electronic media is largely informed by the interest of the media, and whether there are other interests or external influence, mainly political that may affect the accuracy of information being relayed. Inaccurate and poor reporting on issues pertaining to the exploitation of extractive sector resources has the potential of contributing to or fuelling resource conflicts. This is critical given the impact that the media had following the 2007 national elections with some vernacular radio stations having being accused of inciting their target audience along ethnic lines resulting in targeted attacks of certain ethnic communities.

One of the challenges facing the media is that information on extractive activities is not readily available. Obtaining information on critical documents such as contracts between the government and private investors in the industry may not be easy to come by. Other challenges facing the media include inadequate resources, intimidation and interference and media ownership. Inadequate training, resources and/or journalistic freedom to publish accurate, well-researched, in-depth coverage of sensitive issues of the economy is a challenge faced by the media in many developing countries when reporting on the extractive sector. Acknowledging this, the Media Council of Kenya (MCK) has, however, embarked on capacity-building of journalists on the country's extractives industry in the pursuit of its mandate of improving media performance through topical interventions on national development issues. The MCK acknowledges the need to equip and provide journalists with knowledge to carry out more in-depth, investigative approach to coverage of the extractive sector.

5.2.6 Development Partners

Development partners worldwide have strongly supported the governance mechanisms in the extractives industry. A multi-donor extractive industry secretariat[5] of the extractive sector centre in Kenya, an information centre, was established in January 2013 through the Africa Development Bank (AfDB). The mission of the secretariat is to provide quality information on the extractive sector to the government of Kenya and facilitate cooperation among development partners, private industry and CSOs by engaging extractive sector through round table discussion in order to enhance transparency in the industry at community, county, national, regional and international levels with the objective of contributing to the achievement of the national development goals.

The secretariat establishes and maintains regular contact with all development partners involved in supporting and developing the extractive sector in Kenya, and develop a framework

5 http://ngo.optimtechsolutions.com/developmentpartners.php

to gather and maintain a depository of current information on their activities, including: establishing, on a regular basis, who is doing what, where, with what instruments and funds, so as to identify gaps and to coordinate and facilitate cooperation among development partners. It fosters and promotes exchanges of best practices and experiences, as well as synergies and complementarities among development partners, taking into account their respective comparative advantages and institutional mandates. The secretariat also identifies and proposes activities and initiatives for donor support, and assist in mobilizing support (technical and/or financial) for the development of the extractive industry in Kenya. It also provides support to facilitating within and amongst government institutions. Furthermore, it establishes, develops and maintains contacts with all stakeholders concerned with the extractives sector in Kenya, including relevant government agencies, departments and institutions, regional and sub-regional institutions, the private sector, civil society, and other stakeholders.

The World Bank, through the World Bank Kenya Petroleum Technical Assistance Project (KEPTAP), aims to improve the capacity of the Kenyan Government by strengthening the capacity of the government to manage the petroleum industry and wealth for sustainable development impacts. The project has four components; (i) capacity-building in order to strengthen the capacity of the government's major institutions engaged in the development and governance of the petroleum industry; (ii) revenue management to strengthen the government's capacity to manage revenue streams from the petroleum industry for sustainable development impacts; (iii) sustainability of industry reforms to strength the government's capacity to integrate the petroleum industry in its broader economy; and (iv) project management to support the government in managing and coordinating the project and building its procurement, financial management, safeguards management, and monitoring and evaluation capacity through the provision of technical advisory services, training, acquisition of goods, and operating costs. The project is to be implemented by the Ministry of Energy and Petroleum, and will run for six years.

5.2.5 Local Communities

The discovery of oil, gas, and minerals in Kenya has come with high expectations from host communities that the new wealth will translate into improved livelihoods from monetary revenues, increase foreign exchange earnings and surpluses to finance much needed socioeconomic development which ultimately would translate to a reduction in poverty levels. The entire country is also hopeful that revenues from the country's extractive sector will ensure prosperity for all.

Local communities where extractive activities are or will be taking place are likely to be the ones most affected by activities in the mining industry. A number of locals face relocation from their homes as the government creates land to pave way for mining activities. The extractive sector also has environmental implications that are likely to fall heavily on local communities where extraction is being undertaken.

Local community in Kwale County understand that the county is well-endowed in minerals and do expect economic empowerment and compensation through shares or percentage of

incomes that accrue from the minerals. Of concern, however, is that they may not benefit much as companies operating in the industry are following agreement with the national government and this may result into conflict between the companies and local communities. The diversion of water by Base Titanium through the construction of a dam has however affected availability of the commodity to residents of Ramisi region and Mivumoni in the county and is already raising concerns among the residents.

Communities in Turkana have started positioning themselves, even before production begins to ensure that they obtain a share of the revenues and also demand for a share of the royalties paid to the government by the investors. Of concern, however, is that local communities where extractive work is being done generally lack the requisite skills that would enable them to secure employment in the mining companies owing to the fact that the industry does not require much of unskilled or semi-skilled labour. Turkana based CSOs requested for 50 per cent of royalty share. They have also demanded that each family affected by oil operations receive monthly stipends as soon as production begins (Turkana CSOs, 2012) (Vasquez).[6]

> " The ongoing oil exploration in parts of Turkana South and East districts has been suspended indefinitely following protests by local communities…Tullow Kenya announced it has temporarily suspended its operations in oil wells in the region until calm is restored". "Tullow confirms that there have been a number of demonstrations at Tullow operated sites in Northern Kenya regarding local concerns around employment…" "We have temporarily suspended our operations across Block 10BB and Block 13T in Turkana East and Turkana South sub-counties. The action came after residents of Turkana South and East districts staged protests for alleged failure by Tullow Oil Company to offer them job opportunities and tenders. Led by area legislators James Lomenen (Turkana South) and Nicholas Ng'ikor (Turkana East), they marched to the Twiga 1, Etuko and Ngamia 1 oil well sites to protest over lack of opportunities that could economically empower the locals. They accused Tullow Oil and associate companies of short-changing them on employment, tenders and vehicle hire contracts in the oil camp".
>
> Source:
> http://www.standardmedia.co.ke/business/article/2000096359/tullow-oil-suspends-operations-over-conflict-with-locals

The alienation of land from local communities paving way for the mining companies is bound to disrupt the livelihoods of locals who rely on either pastoralism or agriculture as their main source of livelihood. This is of concern, especially in a country where agriculture is the main source of livelihood for over 80 per cent of population. Communities in most target areas possess a strong sense of community ownership over land and resources that come with it. This in turn creates an equally strong sense of entitlement to benefits from "outsiders" using their land for profit. This sense of entitlement is stronger in most areas where exploration

6 Kenya at the cross roads: Hopes and fears concerning the development of oil and gas reserves.

of oil is being done, Turkana specifically, due to decades of marginalization by successive governments and even the colonial government. This makes it difficult for extractive companies trying to build constructive relationships with local communities in their areas of operation. Disrupting livelihoods would require creating alternative sources of income for locals either in the upstream industry that supplies goods to the mining industry or downstream industry.

5.2.6 Private SectorĐMining Companies

Mining companies are business enterprises whose main objective is to maximize profits and protect their investments. It is for this reason that most of these companies have tended to determine governance in the extractive sector in countries where they operate. The dominance of multi-national corporations in Africa's extractive industries is that mineral extraction is capital-intensive, requires sophisticated technology, has long gestation periods and is also risky as there is no guarantee that oil will be discovered (Asiedu, 2013). This also explains the reason as to why foreign direct investment increases with the discovery of natural resources.

There is, however, need for extractive companies operating in Kenya to understand the downstream implications of their actions. They have to build and foster relationships with a wider range of stakeholders (notably, communities, trade unions and development partners) to ensure security and protection for their operations. Base Titanium operating in Kwale County has so far contributed towards community development through the development of two schools and the purchase of an ambulance for the referral hospital at Msambweni. Companies awarded mining contracts have engaged in Corporate Social Responsibility (CSR) in their areas of operation.

Tullow Oil is the most significant international oil company operating in Kenya in terms of acreage and market capitalization. The company holds the largest market value among Kenya's small oil players followed by the two Canadian companies Africa Oil and Taipan Resources. Other companies involved in Kenya's upstream oil and gas industry at the moment are FAR, Afren, Marathon Oil, Total, Anadarko and PTT Exploration and Production Company Limited (PTTEP).

5.2.7 Networks

Several networks have been established comprising of Civil Society Organizations and private firms engaging in Kenya's extractive sector. The Kenya Oil and Gas Association (KOGA), comprising of oil and gas exploration and production companies in Kenya, focuses mainly on the common interests and challenges facing these companies. The association aims at bringing together the players in order to promote the industry's activities as well as work with stakeholders in building the new industry.[7] The association is made up of companies that have been licensed by Ministry of Energy and Petroleum. The main objective of the association is to promote the activities of the upstream industry by working with the government and other key stakeholders to ensure that industry activities are carried out responsibly.

7 http://www.busiweek.com/index1.php?Ctp=2&pl=986&pLv=3&srl=53&spl=20&cl=11

Also established is the 'Nairobi Process: A Pact for Responsible Business' a new initiative developed by the Institute for Human Rights and Business (IHRB) in collaboration with the Kenyan National Commission for Human Rights (KNCHR) which aims to embed human rights due diligence through the application of the United Nations (UN) Guiding Principles on Business and Human Rights in the emerging oil and gas industry in Kenya. The 'Nairobi process' brings together a group of extractive companies, including both multinationals and smaller exploration companies, which have been granted oil and gas exploration licenses in Kenya to address collaboratively key areas of human rights concern as this nascent industry develops over the coming years. The focus of the 'Nairobi process' include: advocacy with government to implement its duties and integrate relevant international corporate responsibility standards into new legislation; business-to-business learning by bringing exploration and production companies together to explore common challenges and good practice based on the UN Guiding Principles, and sharing lessons from the wider East Africa region and beyond; and CSO capacity-building with national human rights institutions in East Africa and CSO actors around the application of the UN Guiding Principles within the oil and gas industry.

The Kwale County Natural Resources Network (KCNRN) advocates for sustainable utilization of resources and effective beneficiary mechanism for local communities for mineral exploits. The network mobilizes community members in the county so that they may form cooperatives to address their concerns. KCNRN also advocates for effective county policy to govern conservation of ecosystem. It works in partnership with Kwale County Government, the private industry including Base Titanium, geologists, the National Environmental Management Authority (NEMA), among other stakeholders towards the establishment of a platform for consensus.

5.3 Stakeholder Interest and Power Mapping

Stakeholder power, in the case of the extractive sector in Kenya and this study, measures the degree of stakeholder ability to impact the country's extractive sector. Stakeholder interest enables the measuring of the degree of stakeholder support or opposition to industry. The most dominant sources of power that have been observed, by mapping and analysing powerful actors in any given context have been: position, political influence, connection, knowledge, expertise, money, and resources/infrastructure and physical power/threat of violence (IDS, 2012).[9] Unequal power dynamics in the extractive sector are at the centre of relationships, practices and policies that perpetuate poverty, oppression and exclusion and so we need to address them if we want to achieve real change in people's lives.

Some of the issues that may divide industry stakeholders and opposing poles of opinion on those issues include: stakeholders who favour greater versus lesser environmental regulation; stakeholders in favour of a free market approach versus those in favour of Kenya-led development of the industry; stakeholders in favour of land ownership and land rights, particularly communal ownership versus those for private land rights; stakeholders who favour allocation of more revenues to the national government versus those in favour of county governments, especially counties where extractive activities are taking place, and whether national or county governments have primacy in the management of natural resources; and

8 http://www.ihrb.org/pdf/Nairobi-Process-Business-Convening-Summary-Report.pdf
9 https://www.ids.ac.uk/files/dmfile/Wp400.pdf

stakeholders who favour greater versus lesser transparency in the extractives industry (though opponents of transparency would not necessarily express their opinion in that way).

There are those stakeholders in the industry who would argue that the state, for the sake of national development, can override communal land rights, while there are those who would argue for the primacy of communal land rights, i.e., of their legal equivalence to private land rights. The state has been fast to assert its authority over communal land and accords the communities little room to express their interests, as opposed to the owners of private land. Communal and private land ownership rights should be equal in all regards, some say.

The national government stands out as the stakeholder wielding a lot of powers in Kenya's extractive sector. It is the government through the Executive, comprising of the Presidency, Ministries, and other government agencies that formulate policies and legislation for the extractive sector. The government, through the executive, issues licenses and contracts to extractive companies. The government also has the powers to revoke contracts awarded to mining companies. Of importance also is the fact that, the government, through the Kenya Revenue Authority, imposes and collects taxes in the industry. It is the government that also receives royalties paid by private investors in the industry. The government using its machinery is also responsible for the development of policies in the industry, including revenue sharing policies in a way that addresses its interests and the interests of other stakeholders in the industry.

Parliament, which is also one of the arms of the national government, and especially the National Assembly, wields power as it is responsible for the formulation of legislation. Parliament, in formulating legislation, has to ensure that the interests of the country and the citizens are well articulated in policies developed. The independence of Parliament in the current political set up may, however, prove to be a challenge as party loyalty seems to be overriding the ability of individual members of Parliament to adequately address the needs of their constituents. Members of Parliament, however, have the ability to mobilize their constituents in order to ensure that national and citizen interests are well taken care of in the development of industry legislation. Parliament, through its various Committees, also has the ability to summon industry players and the Executive before it to answer matters of concern as they arise.

Civil society organizations have the ability to mobilize grass root stakeholders, agitate for and lobby for transparency and accountability in the industry. Through community mobilization and education, CSOs, operating at both the national and community level, are able to enhance the capacity of citizens and other stakeholders to actively engage in the extractive sector governance. CSOs, working in the extractive sector and other related areas, such as governance and public finance management issues, also have the ability to engage in policy discourse given that they have a wealth of information that can influence and inform policy decisions. Their ability to do so is, however, dependent on donor funding as majority of CSOs operating in the country rely on donor funding to implement their projects.

The media too has the power to mobilize stakeholders, especially communities, into action through the dissemination of information on the on-goings in the industry. Through investigative journalism, the media also has the ability to influence the actions of policy makers.

This they can do by highlighting concerns in relation to transparency and accountability issues in the extractive sector. The ability of the media to disseminate information to stakeholders, however, depends on the availability of the same.

The citizen, especially local communities in areas where extractive activities are taking place, are key stakeholders in Kenya's extractive sector as they are the ones most affected directly by these activities. Though they wield less power and have less influence in decision making and the formulation of industry policies and legislation, this is a critical group that has the ability to affect the operations of companies awarded mining contracts. It is in the interest of both the government and the companies to keep this group engaged somehow, as well as informed of the on-goings in the industry. Local communities, however, need proper mobilization for them to engage in industry governance and to agitate for their interests.

Figure 6-2: Example of Stakeholder Power Mapping on Communal Vs. Land Rights

High Power Stakeholders Emphasizing Private Land Rights	High Power Stakeholders Emphasizing Communal Land Rights
• National Executive • Government Ministries • Government Agencies (NEMA) • Government Departments • Auditor General • Treasury • State Security • Kenya Oil and Gas Association • National Chamber of Commerce • Development Partners • National Oil Corporation • Private Investors e.g. Tullow Oil • Kenya Private Sector Alliance • Extractive Industry Technical Working Group • Judiciary • Common Market for Eastern and Southern Africa • Central Bank of Kenya • UN Economic Commission for Africa • National Assembly • Media • Oil Field Service Companies, • Nairobi Process	• National Assembly • Media • Oil Field Service Companies • Nairobi Process • Council of Governors • Affected County Governments • National Environmental Management Authority • Women Representatives • County Departments • County Surveyors and Revenue Office • United Nations Women • Faith Communities • Central Organization of Trade Unions

Low Power Stakeholders Emphasizing Private Land Rights	*Low Power Stakeholders Emphasizing Community Land Rights*
• Africa Union • Insurance Companies • Africa Mining Development Centre • International Mining for Development Centre • Africa Oil	• County Governments • Media • World Wildlife Fund • Kenya Civil Society Platform on Oil and Gas • Kenya Oil and Gas Working Group • EITI • Open Society Initiative for Eastern Africa • OXFAM • CORDAID • Insitute of Law and Environmental Governance • Kenya Platform for Oil and Gas • Kenya Women Parliamentary Association • Working Group on Extractive Industries

Source: Stakeholder mapping undertaken by IEA. Available at http://prezi.com/zknlpq-ftcph/ministry-of-mining-and-p/

6 Scenario Analysis

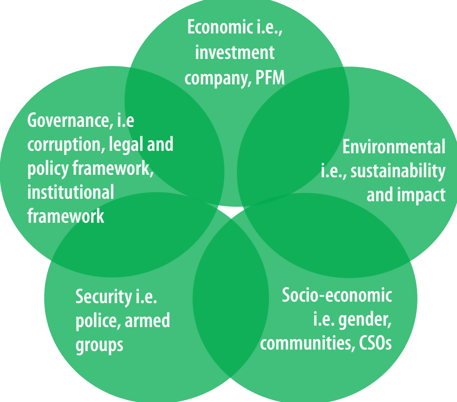
6.1 Introducing Scenarios

Scenarios are analytical stories describing different future possibilities and how such situations might come about and why. They are, therefore, plausible stories about the future. The exercise of scenario building seeks to have participants explore and reveal the complex and intricate interrelationships and dynamics of the various issues being studied to be able to uncover the unknown unknowns that may have to be dealt with, whether we like it or not. It is envisaged that, through this process, different interest groups can find common ground and a common language to proactively be more prepared for different eventualities. Through the process, participants have a chance to deepen their insights about the decisions they have to make by carefully understanding the implications of each decision beforehand.

6.2 Kenya Extractive Sector Scenarios

The dynamic characteristics in today's complex operating environment of the extractive sector industry are key in determining future trends. While some of these factors that cause change in the sector are new, most stem from the socioeconomic changes Kenya has undergone during the past decade. The driving forces also represent common strategic concerns faced by others when dealing with the extractive sector. The five main clusters of future determinants include: the economy mainly operations of investment companies and public finance management concerns; governance mainly policy, legal and institutional frameworks; environmental concerns mainly sustainability and impact; socioeconomic issues mainly relationships between investors and communities; as well as in/security mainly community tensions due to ES resources, armed groups and official security response, as shown Figure 6-3.

Figure 6-3: Drivers on which the Scenarios Stories are Predicate Upon



Given that the objective of the scenarios was to check the possible ways in which the roles and relations of various actors in the transactional space would evolve, the scenarios framework is based on two main factors: the policy decision made by the government regarding how the ES sector will be run, which would in turn determine the level of prudence in managing ES resources; as well as the nature and extent of stakeholder engagement in order to gauge the social license/ability of private ES companies to operate in the community. The framework is then interwoven with the evolution of the main drivers (identified in Figure 6-1) to show different futures Kenya might face as a result. The three main stories that are likely to emanate from the extractive sector given the drivers are explained in sections 6.2.1-6.2.3 below.

6.2.1 Resource 'Dilemma' Scenarios

In this scenario, there is emphasis on the growth of ES sector; two-thirds of the GDP, over half of government revenues, and nearly 75 per cent of exports are from the extractives. The country achieves its middle-income status by 2030 but other sectors like agriculture and manufacturing shrink (Dutch disease). Due to the prominence of the transnational corporations in the extractive sector, resource governance and the level of prudence in managing resources is partially transparent. Stakeholder engagement is also weak resulting in a weak social license to operate in the communities where the extractives are located.

6.2.1.1 How Did the 'Resource Dilemma Scenario' Occur?

After the significant discovery of various extractives, government opted to promote Public Private Partnership (PPPs) in the sector. The government gave high tax incentives to the investing companies who comprised of the traditional players like Australia, Britain and Canada. The contractual agreements were not fully disclosed to the public and the revenue sharing framework gave more advantage to the Transnational Corporations (TNCs) than to the government. During good times, when there was a boom in the prices of the extractives, i.e., resource rent taxes, windfall profits taxes and sliding scale royalties, the companies benefited more. However, during bad times when there was a burst in prices, the government bore most of the losses. At the country level, the revenue allocation formulae prescribed by CRA (National 75 per cent, County 20 per cent, Community 5 per cent) was opposed by counties as being unfair. However, nothing was really done to change it.

In subsequent years, the country experienced both budget surpluses but mostly budget deficits mainly due to the low benefits that accrued to the government. The money was all spent in capital projects and recurrent expenditure with minimal savings made into the trust fund as originally designed but national debt was lowered. Corruption was also low due to the efficient management of TNCs. Eventually the sector dominated the economy at the expense of others like agriculture, service and manufacturing. The extractive sector, for example, accounted for two-thirds of the GDP, over half of government revenues, and nearly 75 per cent of exports. The sector was dominated by expatriate employees who provided all the skilled labour. Locals provided all the unskilled labour, which was initially intense when the extraction process began but significantly reduced with time. Skills transfer was required by the government but the law was not enforced. The locals therefore remained in the working poor category. As a result,

the counties where the EI's were located grew into peri-urban centres, but with numerous mushrooming slums to accommodate the migrant workers.

With regards to community engagement, the companies viewed the consultation process as part of an environmental and social impact analysis to meet external requirements. The process was, therefore, made easier by consulting community elites who did not represent the wider interests of the community but positioned themselves between the company and the community for personal gain. This greatly undermined cohesion and resulted in a weak social license to operate. The little engagement that occurred between the companies and the communities was approached with a fixed agenda by the TNCs, thus limiting the space available to meaningfully engage. Focus was on 'winning' and achieving specific outcomes. A tokenistic approach to corporate social responsibility was employed by the companies where, occasionally, one off contributions to community projects was made with intense pomp and advertising.

Even though communities indirectly benefited from the EI companies, through social development projects, high inequalities was witnessed as some people immensely benefited from ESs while the majority did not experience any change at all. Most citizens became passive towards the EI and the TNC operations. Though the country suffers aspects of the 'Dutch disease' today (in 2030) and the ES returns are below the sector's optimum due to massive repatriation of resources, it has managed to achieve a middle-income status as planned.

6.2.2 Resource 'Curse' Scenarios

Due to the nationalization of the ES, economic growth stagnates. GDP declines due to the haphazard development of the sector and weaknesses in the policy, legal, institutional and fiscal frameworks. The inefficiencies of the public sector plague the EIs seriously incapacitating them. Resource governance and the level of prudence in managing resources are marred with corruption. On the other hand, non-involvement of stakeholders results in a non-existent social license to operate in the communities where the extractives are located, seriously aggravating communities to frequently disrupt ES activities. By 2030, Kenya is a fragile state with a low-income status.

6.2.2.1 How Did the 'Resource Curse Scenarios' Occur?

After the significant discovery of various extractives, government opted to nationalize the extractive sector. Due to the unnecessary red tape, especially in licensing of TNCs and the high cost of doing business, many potential investors were discouraged and looked for other investment opportunities in the region. Meanwhile, the government fostered a strong partnership with China making it the biggest ES investor in the country. There was no disclosure of the contractual agreements and the revenue sharing framework was not at all clear. Resources from the ES were shared between the Chinese TNCs and government officials who embezzled most of the funds. At the country level, revenue sharing was done as prescribed by CRA but county officials embezzled it.

Due to very low fiscal controls, budgets were based on overoptimistic projections of the ES resources, which were sometimes used as guarantees during periods of economic bursts. A huge proportion of the income also went to recurrent expenditure and corrupt dealings. Government ended up overspending and incurring more debt thus experiencing major budget deficits and causing an unstable macroeconomic environment.

Both the skilled and the non-skilled labour were provided by expatriate employees, mainly from China. The locals remained unemployed in the sector largely because the training for relevant skills was not required and no policies existed to compel companies to employ a certain proportion of locals. These counties remained largely rural and the unemployment levels made community members, especially the youth, very resentful.

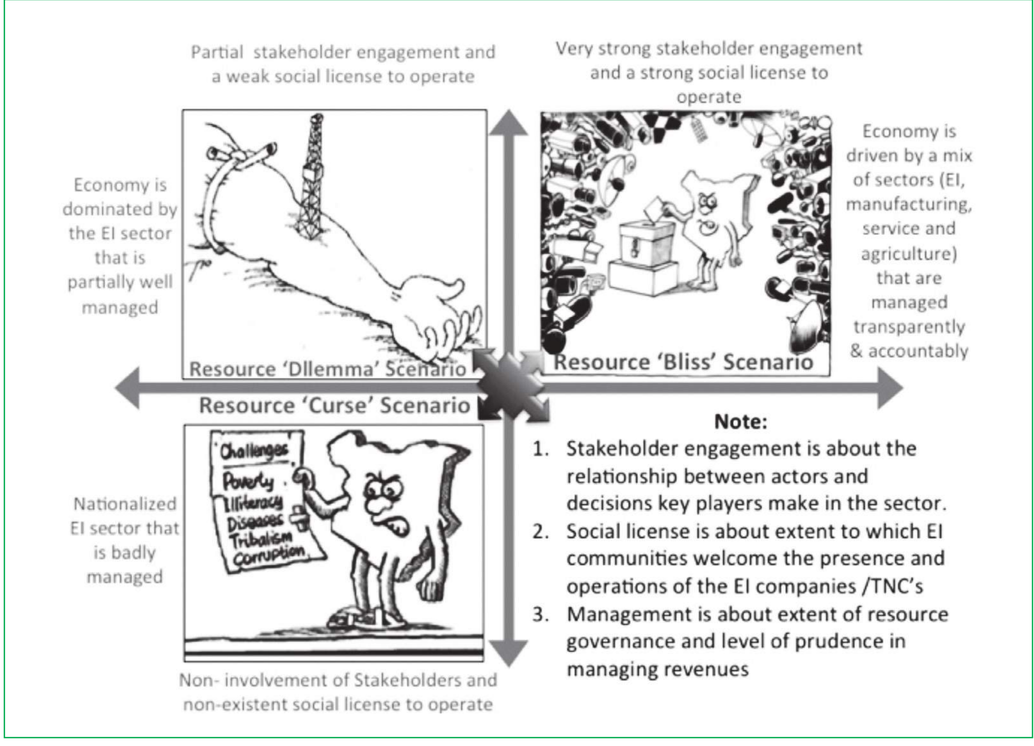
With regards to community engagement, the government and the Chinese companies viewed the consultation process as a waste of time or a means to unnecessarily compensate people. This assumption led to negotiation avoidance, which escalated frustration among communities, acts of violence, lawsuits, work stoppages and increased demands, all of which were more costly and time consuming. The social license to operate was therefore non-existent due to non-involvement of community stakeholders.

When it became impossible to quell the chaos in the communities, negotiations were held with the most threatening groups for 'protection' of the Chinese companies and for work to continue. Without realizing it, acts of violence were legitimized thus increasing the risk of long-term instability within communities. Most people felt that their lives were worse off after the establishment of EIs. Poverty had deepened, especially because inflation of local prices prompted by the existence of foreign workers in the community intensified cost of living. There was proliferation of arms, emergence of new militia groups and radicalization of youth. Calls for cessation in these rich mineral counties were rife forcing the government to intensify its security presence in those areas. Unfortunately today (in 2030), the country is very fragile and is still a low-income country.

6.2.3 Resource 'Bliss' Scenarios

The extractives sector becomes a major GDP earner with agriculture, manufacturing, service, tourism, retail, and wholesale contributing significantly to the country's economic growth, thus maintaining a balance of trade. Government establishes an equal partnership with the transnational companies (TNCs), carefully working out revenue- and risk-sharing agreements that enable the country to gain major benefits from the sector and equitably share in the risks. Strong monetary policies allow for very transparent management of resources. Strong stakeholder engagement leads to a strong social license to operate and by the year 2024, Kenya achieves an upper middle-income status, surpassing the vision 2030 aspiration.

Figure 6-4: Scenario circumstances



6.2.3.1 How Did 'Resource Bliss Scenarios' Occur?

After the significant discovery of various extractives, government opted to foster long-term partnerships with mining TNCs to inject the much-needed foreign capital investment while enjoying an ownership stake and promoting satisfactory climate for such investment in all major mining operations. The government did not give any tax incentives whatsoever but ensured access to reliable energy and a low cost of doing business. The efficient licensing administration coupled with the strategic positioning of the country in relation to its landlocked neighbours, the access to a sea port and great air, road and rail infrastructure made the country a very attractive ES destination for both traditional players in the sector like Australia, Britain and Canada as well as investors from emerging markets like the BRICs.

Carefully worked out revenue- and risk-sharing agreements enabled the country to gain major benefits from the sector and equitably share in the risks. At the county level, after many learning lessons, CRA finally got a widely accepted resource-sharing formulae based on an equal share between the national and the county governments. The development of integrated IT-based extractive sector revenue management system helped in accounting for the ES resources.

In subsequent years, the country realized considerable revenues from the ES due to a strong fiscal position thus permitting a budget surplus. Kenya invested huge resources in a trust fund and paid off all its foreign debt. Significant financial reserves were built that enabled the economy to ride out the economic shocks. Major resources were also used to finance a wide

range of social and economic infrastructure including roads, water, education, health as well as social services and welfare support schemes both in the EI counties and countrywide.

The sector contributed to high employment opportunities as it employed 40 per cent of the skilled workforce, half of whom were locals and they stressed the importance of engendering this labour force. This was especially after the intensive human resource development programmes carried out through student scholarships to universities abroad in 2017, as well as the establishment of relevant courses in local universities. The strong enforcement of skill-transfers laws and mandatory employment quarters of locals in the sector contributed to the success of the programme. The well-paid employees contributed significantly to the rise of a new middle-income group of Kenyans. As a result, the counties where the ES was established flourished into urban centres.

Anti-corruption legislation and structures were reviewed. A ‘three pronged attack’ on the vice was implemented, i.e., public education and reporting, detailed public investigation and prosecution (even of the most powerful individuals). As a result, corruption drastically reduced and by 2019, the CPI rated the country at place seven out of 163 countries, making it the least corrupt country in Africa.

With regards to community engagement, the TNCs were required by law to extensively engage communities. The TNCs saw the consultation process as one that generated creative ideas. They also saw it as an opportunity to receive creative solutions even before exploratory operations commenced. The investment companies consulted with threatening groups, positive community actors as well as ordinary community members. While some of the conversations were more difficult than others, the social license to operate was very high due to a very comprehensive stakeholder engagement, thus quelling off any resistance. In the interest of longer-term contributions to peace and stability, companies thought creatively about using their convening power to foster peaceful relations between different stakeholders in the region, e.g., by sponsoring annual intercommunity marathons or beauty pageants. They also partnered on a long term basis with groups to support community projects. The companies also floated shares and gave community members first priority thus raising the level of trust and ownership. Many community members reported an increase in household incomes, and poverty significantly reduced in these areas.

By 2024, six years prior to the visions aspiration, Kenya has achieved an upper middle-income status.

6.3 Key Policy Messages from the Scenarios

Table 6-10: Key Policy Messages from the Scenarios

Issue	Resource 'Dilemma' Scenario	Resource 'Curse' Scenario	Resource 'Bliss' Scenario
Policy framework	Full privatization of the sector means fewer gains for the government and for Kenyans.	A political and nationalist approach to the sector will cripple the ES sector due to the inefficiencies of the bureaucracy. Government therefore should not take a direct role in the operations of mining ventures.	A healthy co-ownership/partnership of the ES processes between government and the private sector will ensure mutual benefits for the country and its citizens.
Legal and institutional framework	• Some archaic laws are updated. • Some conflicting laws Harmonized. • Strong verbal commitment to international conventions/ initiatives with relevance to extractive sector in our policy and legal framework. E.g., Extractive Industry Transparency Initiative (EITI).		• Update archaic laws. • Amalgamate the myriad laws in the sector into one law governing the sector. • Harmonize conflicting laws. • Domesticate international conventions/initiatives with relevance to extractive sector in our policy and legal framework. A good example is the Extractive Industry Transparency Initiative (EITI).
EI public finance management	It is dangerous to over rely on revenue from the ES sector because of its vulnerability to boom and burst cycles.	Recurrent (consumption) spending should be financed from non-mineral revenue sources. It is dangerous to borrow against future mineral revenues and to accumulate debt on the basis of the ES.	• Alternative sectors should be developed to generate alternative sources of income to cushion against economic shocks. • Prudent public finance management principles must be applied in line with the constitution. • Based on the fact that minerals are non-renewable resources, which get depleted, revenues should be reinvested in assets of some kind, rather than consumed. • The interpretation of investment spending is fairly broad, and includes all government spending on physical infrastructure (such as roads, water supplies, schools, etc.) as well as spending on education and health care, on the basis that this represents investment in human capital.

	Lowering taxes or giving tax holidays should not be a strategy for encouraging ES investors because of the resulting loss in massive benefits for the country.		There has to be an open and transparent tax regime that aims at an appropriate rate of tax (low for marginal mines and high for established and profitable operations) that yields a fair rate of return for investors but enables government to secure rents in excess of that rate of return for the national benefit.
Economic benefits			The ES should yield considerable macroeconomic benefits for the country, accelerate growth, raise living standards and lead to the extensive investment of social and economic infrastructure, as well as healthy fiscal and balance of payments positions.
Employment	The government should not rely on the goodwill of investors to benefit the community or create employment opportunities for its people. This has to be conditional.		Investors should be required to have localization and training plan that will, over time, enable citizens to take over skilled positions. A certain quota of local employees has to be engaged by the company for affirmative action reasons.
Environment			Minimize the environmental damage caused by ES operations.
Availability of geo-data			Availability of information must be provided in line with the right to information provisions of the constitution to allow for transparent dealings and public scrutiny of the EI sector.
Resource ownership	Kenya's ES is not private property.	Kenya's ES is not government property.	Kenya's ES belongs to the communities and the Kenyan people at large. The government is a custodian and therefore has to act in trust to ensure that Kenyans get maximum benefits from the ES.
Stakeholder engagement	Efficient operation of ES without community engagement leads to unbalanced benefits for the actors.	A strong social license to operate and high levels of trust are critical factors for ES operations.	Extensively involving communities to achieve trust and ownership of the ES processes enables mutual benefits for all actors and maximizes on benefits for all.

7 Conclusions and Recommendations

Sound management of stakeholder power and interests in Kenya's extractive sector, and transparent and equitable sharing of revenue generated by the industry can provide the foundation for long-term sustainable pro-poor growth with positive developmental outcomes that will largely contribute towards the realization of the country's Vision 2030. This requires efficient, equitable and sustainable use of sector resources.

The government may reflect on relevant social, economic, and environmental factors when making decisions that aim at transforming industry resources into other forms of wealth. This will require trade-offs between different stakeholders, as this resource wealth and economic and social benefits linked to it, if poorly managed, can disintegrate as witnessed in a number of oil and mineral resource-rich countries in Africa.

The fact that politics and governance in the industry play a key role in natural resources management requires that policy and decision makers need to pay special attention to a meaningful participation of local communities in the governance processes of the industry resources. This requires sustained consultation between all stakeholders.

The government should endeavour to convert existing oil, gas and mineral resources into human, social and financial capital and more sustainable livelihood opportunities, not only for local communities where extraction is taking place, but nationally. Whereas these resources are an important source of growth, government revenues and foreign investment in the industry does not automatically lead to positive developmental outcomes as a number of resource-rich countries are also among the poorest nations in the world experiencing high levels of conflict.

Policy makers ought to recognize the potential for the "resource curse" and work effectively to counter it. This requires good governance, strong institutions, effective regulation and rigorous environmental and social safeguards that will contribute towards the realization of the potential of mineral wealth for pro-poor growth.

The government to consider imposing maximum transparency from licensing and the award of contracts stipulating the government's share of revenues, to the point of reinvestment of such revenues in social spending.

The national government, together with respective county governments, should establish accountability forums including stakeholders in the industry. The government need to consider promoting mechanisms of checks and balances through parliament and non-state actors.

Non-state actors and local community representatives need to be involved in decision making

about the country's extractive industry legislation and policy. The national government, working together with respective county governments, to consider establishing mechanisms for local communities in areas where extractive activities are to be undertaken to participate in decision making.

There is need for a communication strategy on the on-goings in the industry. The government should consider publishing, regularly, details of revenues obtained from the extractive sector and how these are being applied towards development. Attention in this regard can also be given to local communities which have so far expressed their interests and concerns.

The government to consider putting in place regulatory mechanisms that protect communities affected by activities of the extracting companies, especially in regard to environmental impact of activities undertaken in the industry. The government should carry out independent impact assessment prior to approving extractive sector activities.

The government needs to ensure that the country receives significant proportion of revenues obtained in the industry while signing contracts with private investors. National interest should prevail during signing of contracts and special attention should be paid to ensuring that revenue distribution arrangements agreed upon between the government and the investors do not jeopardize the future of the country given the fact that these resources once extracted cannot be replaced and therefore the country should reap maximum benefits from the same.

Locals in communities where extractive activities are being undertaken lack skills that can enable them secure employment in the companies awarded contracts in the industry as most of these jobs require technical expertise. The government should, through policy and legislation, make it a requirement that private investors undertaking extractive activities transfer skills to locals so that they may be able to secure skilled employment in the industry, in future.

The national government, working in collaboration with respective county governments, need to ensure adequate investments in social and economic assets. This will enable the government break the cycle of resource dependence and poverty, and also avert any potential conflict over these limited resources.

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