MINISTRY OF MINING

THE REPORT OF SUB-COMMITTEE

ON

COUNTRY MINING VISION GAP ANALYSIS

DRAFT REPORT

MARCH 2017
FORWARD

Realizing the importance of a well-managed extractive industry, African states under the African Union developed the African Mining Vision (AMV) to guide the development of the extractive sector. The AMV was adopted by the African Union Assembly of Heads of State and Government as the key continental framework to promote mineral resource base development and structural transformation on the continent. The AMV seeks to foster a transparent, equitable and optimal exploitation of mineral resources to underpin broad based sustainable growth and socio-economic development.

To meet the objectives of the AMV, African Union member states were encouraged to domesticate the AMV in line with their respective national development blue prints. Accordingly, Kenya started the domestication process in line with the National Constitution 2010 and the Kenya Vision 2030 with a view to developing the Country Mining Vision (CMV).

To set the stage for the development of the Country Mining Vision, stakeholders were tasked to conduct the country gap analysis of the extractive sector whose report formed the basis for the development of a work plan for the implementation of the domestication process and the eventual development of the Country Mining Vision.

I thank the UNDP and all other stakeholders for their commitment and dedication that has seen the successful development of this gap analysis report that will ultimately contribute as an input to the development of Kenya’s Country Mining Vision (KCMV).

Sign.

Dan Kazungu
Cabinet Secretary
**MINISTRY OF MINING**
ACKNOWLEDGMENT

We appreciate all the stakeholders who participated and contributed to the development of the Kenya Country Mining Vision gap analysis report. The UNDP and the Ministry of Mining played an important role in facilitating the domestication process. Our gratitude goes to UNDP for facilitating the development of the Country Mining Vision Gap Analysis Report. The Multi Sectoral Technical Committee (MS-TC) coordinated all the activities leading to the development of the Country Mining Vision gap analysis report. The Secretariat worked tirelessly to produce documents for discussion during the MS-TC meetings. Much appreciation goes to the members of the sub-committee *(see list in Annex 1)* that prepared this final CMV gap analysis document. Ultimately, special thanks to the Cabinet Secretary, Ministry of Mining, Dan Kazungu for providing the vision for the development of the Country Mining Vision Gap Analysis Report.
<table>
<thead>
<tr>
<th>Abbreviation</th>
<th>Description</th>
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<tbody>
<tr>
<td>ACE</td>
<td>Africa Centre of Excellence</td>
</tr>
<tr>
<td>ADR</td>
<td>Alternative Dispute Resolution</td>
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<tr>
<td>AfDB</td>
<td>African Development Bank</td>
</tr>
<tr>
<td>AMV</td>
<td>Africa Mining Vision</td>
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<tr>
<td>CDAs</td>
<td>Community Development Agreements</td>
</tr>
<tr>
<td>CoK</td>
<td>Constitution of Kenya</td>
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<tr>
<td>CSR</td>
<td>Corporate Social Responsibility</td>
</tr>
<tr>
<td>EAC</td>
<td>East African Community</td>
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<tr>
<td>EEZ</td>
<td>Exclusive Economic Zone</td>
</tr>
<tr>
<td>EIA</td>
<td>Environmental Impact Assessment</td>
</tr>
<tr>
<td>EMCA</td>
<td>Environmental Management and Coordination Act</td>
</tr>
<tr>
<td>GDP</td>
<td>Gross Domestic Product</td>
</tr>
<tr>
<td>JKUAT</td>
<td>Jomo Kenyatta University of Science and Technology</td>
</tr>
<tr>
<td>KENIA</td>
<td>Kenya National Innovation Agency</td>
</tr>
<tr>
<td>KMA</td>
<td>Kenya Maritime Authority</td>
</tr>
<tr>
<td>KNBS</td>
<td>Kenya National Bureau of Statistics</td>
</tr>
<tr>
<td>KRA</td>
<td>Kenya Revenue Authority</td>
</tr>
<tr>
<td>LAPSSSET</td>
<td>Lamu Port South Sudan Ethiopia Transport Corridor</td>
</tr>
<tr>
<td>M&amp;E</td>
<td>Monitoring and Evaluation</td>
</tr>
<tr>
<td>MoU</td>
<td>Memorandum of Understanding</td>
</tr>
<tr>
<td>NACOSTI</td>
<td>National Commission for Science, Technology and Innovation</td>
</tr>
<tr>
<td>NEMA</td>
<td>National Environment Management Authority</td>
</tr>
<tr>
<td>NRF</td>
<td>National Research Fund</td>
</tr>
<tr>
<td>PIEA</td>
<td>Petroleum Institute of East Africa</td>
</tr>
<tr>
<td>R&amp;D</td>
<td>Research and Development</td>
</tr>
<tr>
<td>SOGA</td>
<td>Skills for Oil and Gas Africa</td>
</tr>
<tr>
<td>TDR</td>
<td>Traditional Dispute Resolution</td>
</tr>
<tr>
<td>TTU</td>
<td>Taita Taveta University</td>
</tr>
<tr>
<td>TVET</td>
<td>Technical and Vocational Education and Training</td>
</tr>
<tr>
<td>UNDP</td>
<td>United Nations Development Programme</td>
</tr>
<tr>
<td>UNESCO</td>
<td>United Nations Educational, Scientific and Cultural Organization</td>
</tr>
<tr>
<td>VAT</td>
<td>Value Added Tax</td>
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INTRODUCTION AND BACKGROUND

Minerals in Kenya are found within specific geological settings in the country. Precious metals (gold and silver) and copper occur within the Archean-Nyanzian craton of Western Kenya. The protozoic Mozambiquan belt traversing central, northern and southern parts of the country hosts gemstones (Ruby, Garnet, Sapphire, Emerald, Aquamarine, etc), Kyanite, Graphite, Kaolin and Magnesite. The sedimentary rocks of Paleozoic age are widely distributed in the country and hosts deposits of limestone, iron ore, base metals (lead, zinc & barite) and heavy mineral sands (titanium). Minerals such as trona (soda ash), gypsum, calcite, diatomite, fluorspar, natural carbon dioxide, geothermal fields and recently a variety of gem quality rubies are found within the rift valley.

Table 1: Summary of Mineral Production in Kenya.

<table>
<thead>
<tr>
<th>MINERALS AND OCCURRENCE</th>
<th>YEARLY (2014) PRODUCTION</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Soda Ash</strong></td>
<td></td>
</tr>
<tr>
<td>Lake Magadi in Kajiado County</td>
<td>400,000 metric tons</td>
</tr>
<tr>
<td></td>
<td>Approx. value: KSh 8 billion</td>
</tr>
<tr>
<td><strong>Fluorspar. Calcium Fluoride (CaF$_2$).</strong></td>
<td></td>
</tr>
<tr>
<td>Kerio valley (Kimwarer, Choff and Kamnaon sites) in Elgeyo-Marakwet County.</td>
<td>100,000 metric tons</td>
</tr>
<tr>
<td></td>
<td>Approx. value: KSh 3 billion</td>
</tr>
<tr>
<td><strong>GOLD</strong></td>
<td></td>
</tr>
<tr>
<td>Migori (Rongo and Nyatike), Narok (Lolgorian), Turkana, Kakamega, Siaya, Marsabit, Samburu and West Pokot.</td>
<td>Karebe Gold Mining Ltd (2014): 93,491 gms (KSh 284 million)</td>
</tr>
<tr>
<td><strong>Diatomite</strong></td>
<td></td>
</tr>
<tr>
<td>Kariandusi in Nakuru</td>
<td>200 metric tons</td>
</tr>
<tr>
<td></td>
<td>Approx. KSh 85 Million</td>
</tr>
<tr>
<td><strong>Gemstones</strong></td>
<td></td>
</tr>
<tr>
<td>Kajiado, Turkana, West Pokot, Samburu, Kitui, Makueni, Tharaka Nithi, Marsabit, Taita Taveta, Kwale and Kilifi Counties</td>
<td>200 metric tonnes</td>
</tr>
<tr>
<td></td>
<td>Approx. KSh 250 million</td>
</tr>
<tr>
<td><strong>Titanium. Exists in forms of Rutile-TiO2 and Ilmenite- FeTiO</strong></td>
<td></td>
</tr>
<tr>
<td>Kwale and Kilifi Counties</td>
<td>Ilmenite (2014) 280,000 metric tons (KSh 2.4 billion)</td>
</tr>
<tr>
<td></td>
<td>Rutile (2014): 52,000 metric tons (KSh 3.5 billion)</td>
</tr>
<tr>
<td></td>
<td>Zircon (2014): 23,000 metric tons (KSh 2.1 billion)</td>
</tr>
</tbody>
</table>
Kenya is rich in mineral resources with known deposits of soda ash, fluorspar, titanium, gold, coal, manganese, iron ore, gypsum, diatomite, chromite, limestone, silica sand, oil and natural gas (see table 1 above for details of production quantities). Indications are that the country is potentially rich in rare earth minerals, and increased exploration is expected to lead to new mineral discoveries. Significant concentrations of coal deposits exist in Mui basin. The discovery in 2012 of oil in the tertiary rift basin and gas in the offshore of Lamu basin indicates existence of variable quantities of oil and gas and the potential of the country as a oil and gas producing nation.

Over many years, Kenya has not benefited fully from its mineral potential and the sector has been contributing less than 1% to the country’s GDP, until production of titanium-bearing mineral sands commenced in Kwale County and began to add another close to 1% to the GDP. Base Resources acquired this world class Kwale Mineral Sands Project from Tiomin Resources in 2010 and began production in late 2013.

On 27th May 2016 the Mining Act 2016 came into effect, a biggest milestone in the history for the search of the mining law and ending the journey that has taken more than two decades. The Act replaced the pre-independence Mining Act Cap. 306 of 1940. In keeping with the provisions of the Constitution 2010, the Act vests the ownership of the minerals in the national government in trust of the people of Kenya. The Law applies to all minerals, which are detailed in first schedule, except for petroleum and hydrocarbon gases. It also introduces Community Development Agreements, mandatory for all holders of large scale mining rights, and sharing of royalties among the national government, the county governments and the communities. The Act seeks to formalize and regulate the Artisanal Small Scale Mining sector.

The Ministry of Mining was created in 2013 upon realization of the immense potential of mining sector in Kenya. In order to enhance service delivery to the Kenya public, and in order to discharge its mandate, the ministry is structured into the following directorates: Geological Surveys, Mines, Mineral Promotion and Value Addition, Resource Surveys and Remote Sensing, and Corporate Affairs.

Kenya Government identified the extractive sector as one of the seven sectors in the economic pillar envisioned to drive Kenya to Vision 2030 through the Second Medium Term Plan. Kenya
aims to optimize the sharing and utilization of mining revenues. This includes addressing pre-existing illicit financial flaws like transfer pricings et cetera.

The Africa Mining Vision is an ambitious policy framework that serves as a blueprint for policy makers and other stakeholders seeking to change the extractive sector to a broad based economic growth and development. The AMV champions for a paradigm shift in mineral resource management. Through targeted policy reform, the AMV seeks to address structural flaws in our laws and policies. At most times, these flaws in laws and policies have promoted mono sectorial dominance, weak institutional capacities and information asymmetry between companies and the government. With the full adoption and realization of the African Mining Vision, it’s doubtless the sector will reap positive results.

This report has explicitly noted out nearly all existing gaps in the Kenya’s extractive sector. The report plays a major role in the process of domestication of the Africa Mining Vision (AMV) into the Country Mining Vision (KCMV). The main objective of this gap mapping analysis is to assess the extent to which these gaps affect and derails the extractive sector in Kenya and therefore will attract expeditious resolution during the implementation stage of the Kenya Mining Vision Work-plan.
METHODOLOGICAL APPROACH

The Sub-committee on CMV gap analysis is a creation by the CMV Multi Sectorial Technical Working Group tasked with the development of gap analysis report by reviewing all the available documents and analyzing the gaps there in the extractive sector. The sub-committee was constituted on 8th December 2016 at the Laico Hotel, Nairobi with a view to undertake the exercise and develop a report on the same in early January 2017. The gap analysis report is a major component of domesticating the AMV into Country Mining Vision. In this regard, multi-disciplinary team of experts representing different institutions with a bearing on mining and/or extractive industry was constituted. The team was drawn from KIPRA (chairing), ministry of Mining, KRA, NEMA, NLC, Taita Taveta University and the Kenya Chamber of Mines among others (See annex 1 for detailed list).

The subcommittee held a retreat/working session on the 23-28th January 2017 in Naivasha to come up with a draft Gap analysis report/working document that would be shared to the entire subcommittee to provide more inputs/cross-fertilization followed by further drafting and validation processes by the Multi Sectorial Technical Working Group. Initial consultations and brainstorming sessions were conducted between experts from agencies that constituted the sub-committee formed to develop this document. The sessions aimed at rationalizing and harmonizing diverse technical background and intuitional perspectives as well as provide ownership of the process and the deliverable. This process resulted in the agreement on the mode of working during the retreat and issues to be addressed as the review process progressed. The agreed format for the review was that each member will focus on the following:

i. Identify the title of the document being reviewed;
ii. scrutinize the arguments and facts in the document;
iii. Single out/pick the challenges/constraints/gaps identified in the document and make a list of them;
iv. What are the measures to address these gaps?

The team adopted participatory and multi-pronged approaches. The first stage was to review relevant documents including policies, strategies and reports (both published and unpublished) at Individual and later at group level. After reviews were done, individual write-ups /drafting sessions were initiated to succinctly document the key outcomes of the review process in terms of gaps and possible recommendations to cure the identified gaps. The second stage involved plenary sessions where each member of the subcommittee presented their write-ups while other members scrutinized, verified for factual correctness and critiqued the specific group/individual reports as well as provided further inputs. At this point, the team deliberated and agreed on the format and sectioning of the draft report and what each chapter/section will cover. In general, it was agreed that each section will cover; the situational analysis; gaps identified and the recommendation. The team then consolidated individual/group reports into one draft report based on the agreed format and sectioning.
The third stage involved reading through the draft report as a group, page by page, section by section and sentence by sentence making corrections and checking factualness of the contents. This was slow but necessary step to achieve a zero draft. The gaps and areas not covered were identified and members tasked to build up the report by providing the information omitted. This information was then consolidated into the main report and the team projected the new draft and went through it following process of stage three. The team was satisfied and agreed that the draft produced was a good starting point but tasked the team leader to go through the draft to refine it and circulate to members for input before it is tabled to the CMV Multi Sectorial Technical Working Group. The final comments/inputs were incorporated to produce this draft report on "CMV Gap Analysis in the Extractive Sector".
LEGISLATIVE AND POLICY FRAMEWORK

Situational Analysis

The legislative and policy framework in relation to a particular industry encompasses the regime of laws that regulates the said industry. These refers to the constitution, policies, statutes (and regulations made within the statutes) and the interrelationships amongst these documents. The constitution is the ultimate reference point where all policies and laws emanate from. A policy is a document that identifies issues (in a particular industry) that the government wishes to address and then it provides a road map on how to address such issues for purposes of socio-economic development. Currently, the regime of the law governing the industry is majorly the Constitution 2010, Mining Act of 2016, Sessional Paper No.4 of 2004 on Energy, National Land Policy 2009, Energy Act 2006, National Environmental Policy 2013, Energy Act 2006, Petroleum (Exploration and Production) Act Chapter 308 Laws of Kenya among others.

The Constitution of Kenya 2010

Article 62 of the Constitution defines all minerals as part of public land and vests them in the National Government. Article 69(1) binds the state to ensure that there is a sustainable exploitation, utilization, management and conservation of the environment and natural resources. Sub-Article 2 thereof places a duty upon all persons to cooperate with the state in protecting and conserving the environment.

The Mining Act of 2016

This legislation gives effect to Articles 60, 62 (1)(f), 66 (2), 69 and 71 of the Constitution in so far as they apply to minerals; provide for prospecting, mining, processing, refining, treatment, transport and any dealings in minerals and for related purposes. It also provides for the consolidation of the laws relating to Mining. The Act came into force on 13th May 2016. The meaning of environment under the mining Act 2016 has the meaning assigned to it under the Environmental Management and Coordination Act, 1999. Part XI of the Act addresses issues on health, safety and environment. Section 176 (1) states that a mineral right or other license or permit granted under the Act shall not exempt a person from complying with any law concerning the protection of the environment. Section 177 specifically states that provisions of the Act and rights or entitlement conferred under a mineral right shall not exempt a person from compliance with the provisions of the Water Act, concerning the right to the use of water from any water resource. This specifically protects our water resources. Kenya's Mining Act 2016 recognizes the artisanal miners in Part VI, Section 92 to 100. The Act further defines artisanal mining as traditional and customary mining operations using traditional and customary means.

The Energy Act, 2006

The rationale for the enactment of the Energy Act, 2006 was to regulate the energy sector particularly the generation, transmission and, sale of electrical energy and the importation and sale of petroleum products.
It also deals with other forms of energy (renewable and non-renewable). It consolidated the then Electricity Power Act, 1997 and the then Petroleum Act. However, the Act does not deal with upstream petroleum. This is dealt with under the Petroleum (Exploration and Production) Act, chapter 308, Laws of Kenya. On environment, the Act makes reasonable provisions for protection of the environment. It sets conditions and standards on environmental protection, which must be met by persons dealing with sale of electricity and petroleum. It also makes reference to other conditions under EMCA.

**The Environmental Management and Coordination Act**

The Environmental Management and Coordination Act CAP 387 is one of the very comprehensive pieces of legislation that the government of Kenya has ever come up with. It provides appropriate legal and institutional frameworks for the protection and conservation of the environment and securing of a sustainable use of natural resources. In order to achieve the ideals in the Act, it provides for the coordination of the diverse sectoral and crosscutting land and environmental issues. Generally, the Act regulates the management of the environment. It places an obligation (as well as penalties for breach or violation) on all persons to safeguard and enhance the environment so that the right to a clean and healthy environment is attained. It covers all aspects of environmental concerns.

**Other Laws**

There are various other pieces of legislation regulating various aspects in the extractive industry such as the Land Act, 2012, Land Registration Act, 2012 and National Land Commission Act, 2012. The Land Act, 2012 revised, consolidated and rationalized land laws with an objective to provide for a sustainable administration and management of land and land resources. In relation to the extractive industry, the Act regulates compulsory acquisition of land by the national government (it repealed the Land Acquisition Act) and makes provisions for a sustainable use of natural resources. The Land Registration Act, 2012 was intended to consolidate and rationalize the registration of titles to land and to devolve the registration of titles to land to the county level. It regulates the registration of both public and private land and the recording of community interests. Section 4 of the Act expressly excludes the application of the law to registration relating to mining, petroleum or geothermal energy.

**Harmonization of Regional laws**

Kenya is a member of the East African Community which is the regional intergovernmental organization. In Tanzania we have the mining Act of 2010, In Uganda we have the Mining Act of 2003 with several Regulations enacted in 2004. In Rwanda we have the law of Mining and Quarry Operations of 2014 and Law on Mineral Tax of 2013. In Burundi we have the Mining and Petroleum Act of 1976. In South Sudan we have the Mining Act of 2012 while in Kenya we have the Mining Act of 2016. All the countries in the region have a set of different mining legislations which unfortunately are not harmonized with member
states. The East African Community too lacks a single harmonized regional law on Mining although there are efforts to come up with EAC extractives policy¹

Despite having all the laws as discussed above, Kenya lacks a Mining Policy which lays the basis for an effective management of the sector. However, several efforts have been initiated by the Government to ensure that the Country has an adequate Mining policy. The government is currently working with stakeholders in coming up with a comprehensive and adequate mining policy. The draft mining policy is expected to advocate for optimum utilization of mineral resources and sound environmental management in order to ensure sustainable development of the sector.

Gaps Identified

i. Lack of harmonization of different legislation on Mining in the region leading to smuggling of mineral across the region and thus affecting the entire sector.

ii. Lack of mining policy which lays the basis for an effective management of the sector

iii. A general lack of appropriate policy frameworks and strategies to drive the industrialization, value addition and beneficiation agenda.

iv. In as much as the current Mining Act provides for the regulation of artisanal miners, there is lack of regulations to govern the activities of artisanal Miners.

v. The artisanal miners continue to operate on other peoples licensed facilities which pose a challenge of conflict.

vi. Ambiguous definition of Community

Recommendation

1. The government should prioritize the completion of draft mining policy and any pending concerns addressed immediately. Parliament too should be involved in the process for the finalization of the draft policy.

2. There is need for the East Africa Legislative Assembly and the East African Secretariat to work with all EAC countries in the region to ensure that the Mining legislations of various countries are harmonized to address the emerging challenges and loopholes that currently exist.

¹ www.eala.org>uploads
FISCAL REGIME

Situational Analysis

As noted in AMV\textsuperscript{2}, translating mineral wealth into overall economic development and enriching the lives of citizens paradoxically remain the bane of many resource-rich African countries Kenya included. The two major challenges facing mineral-rich countries are first how to design the revenue sharing arrangements between host country and investors, and second how to manage the revenues for the greatest public benefit. Governments face complex and often difficult decisions in the design of a fiscal regime for mining revenues, which will at the same time optimize the share of mineral revenues that accrue to the government, improve management and use of mineral revenues, and facilitate the achievement of optimal revenue-sharing arrangements. A stable and fair fiscal regimes provide a suitable business environment both for Governments as well as prospective investors. For Government, it provides a basis for promotion of Kenya’s natural resources, ensures a steady flow of revenues and ensures that Kenya will receive equitable share of revenues from its natural resources. For investors it provides the confidence necessary to consider investing in extractive activities in the country.

Incentives for Mining and Mineral Development

The most important incentive for investors is availability of geo data on mineral deposits and a stable regulatory environment. Kenya operates in a competitive environment with other countries offering incentives that investors are willing to take up. The extractives sector was therefore losing fairly good opportunities to explore its mineral resources. McKinsey\textsuperscript{3} observed that one of the most important incentives is availability of geo data on mineral deposits and a stable regulatory environment for investors.

Effectiveness of Tax Regimes

The Income Tax Act 2014 and Tax Procedure Code 2015 are currently in use, with Schedule 9 detailing taxation of Extractive Industries and Part II specific to the Mining Sector. Companies in the Extractives Industries are subject to Corporation tax, income taxes as well as Royalties. Taxes in Kenya are mainly corporate income tax (30\% for resident, 37.5\% non-resident), VAT (16\% on inputs) as well as levies, duties and other charges. The oil & gas sector uses Production sharing contracts where oil and gas produced are shared between the Government and oil companies at an agreed rate, after taxes have been paid. A rate of 30\% for resident and 37.5\% non-resident companies in the extractives industries sector applies for Capital Gains tax.

Gaps Identified

i. Little on the quality and grade of mineral resources in Kenya
ii. Lack of stability, application and consistency in regulation from enforcement and fiscal regimes.

\textsuperscript{2} Africa Mining Vision Guide book
\textsuperscript{3} McKinsey, Kenya Mining Strategy 2030 diagnostic
iii. Lengthy licensing times and lack of adequate promotion were also cited as hindering potential investors from considering Kenya as a viable investment destination.

iv. There is insufficient effort to improve the overall attractiveness of the sector by giving investors’ confidence and coordinating incentives offered in the extractives value chain, thereby capturing its true potential.


vi. Use of incentives to attract investors and build confidence in the sector undermine revenue to the Government. These include stabilization clauses, tax holidays, tax exemptions and Export Processing Zones.

**Recommendations**

1. Government pre-investing into the sector through mineral prospection in the country reduces costs for investors and shows country commitment and potential. This can be achieved by increasing the budget in mapping and providing geological databases and facilitating stability and investment to increase production in current facilities.

2. Financial mechanisms to incentivize exploration and improve consistency of legislation need to be considered.

3. Coordinated investment promotion activities should be undertaken. Guidelines for investment need to be developed and coordinated by the various agencies involved in investment promotion, allowing for periodical and inclusive reviews of investment schemes.

4. In the long term, it is proposed that lobbying for the development of lower cost energy sources and more robust transportation and other infrastructure in Kenya be an option to improving incentives.

5. Incentives in the sector that affect revenue are needed to be consultatively decided on, centrally coordinated and the performance of revenue reviewed to ensure that there is benefits accruing back to the Government.

6. Legislative reviews and amendments and rules against tax avoidance and evasion should be carried out to safeguard revenue.

7. Minimizing use of tax exemptions and holidays and undertaking periodic review of exemptions to ensure that the original case for the granting of exemptions still applies. Also elimination of stability clauses or limiting them to the requisite taxes for a maximum period to recovery of the initial capital and if used, making provision for balanced periodic review clauses.
REVENUE MANAGEMENT AND BENEFIT SHARING

Situational Analysis

The experience of oil and mineral producing countries, especially those in sub-Saharan Africa, highlights the challenges of government in managing mineral revenues. Revenues from minerals extraction first accrue to governments and invite strategic decision making on how much to spend now and how to spend it, and how much to save and the management of the saving. The revenues offer governments the fiscal space to fund the provision of physical infrastructure, such as improvements in education and health and social amenities that affect the lives of all citizens.

Revenue Collection

The Mining Act 2016 (Part XII on Financial Provisions) Sections 182-183 outlines how revenue from mining is collected and remitted to the State. The Petroleum (Exploration, Development and Production) Bill 2015 Section 80 (3) gives KRA the mandate to collect petroleum taxes, subject to provisions of the Income Tax Act and royalties and the Government share of profit oil, subject to the assenting of the Petroleum Bill. However, revenue collection under the fiscal regimes provide challenges related to capacity to collect and availability of information that would enable collection. Information asymmetry between mining companies and KRA can expose the country to tax avoidance and evasion by these companies.

Benefit Sharing from Wealth Accruing from Mining

The revenues generated through natural resource exports provide governments with finance to invest in health, education, water and sanitation, and infrastructure that can expand opportunity and support inclusive growth. Unfortunately, many governments have made poor use of the revenues at their disposal. While management of commodity-based revenue flows has improved, inefficient and inequitable public spending systems have limited human development gains. The Mining Act 2016 (Part XII on Financial Provisions) Section 183 outlines sharing of revenue from Mining activities at 70% to the National Government, 20% to the County Government and 10% to the Community where mining activities occur.

Gaps Identified

i. Lack of mechanism to detect and prevent tax evasion and avoidance schemes resulting in revenue loss like transfer pricing, debt servicing, offshore management fees, under-invoicing of sales, and the use of derivatives in natural resources and fluctuations of commodity price in international market as a result of fixed royalty rates chargeable on extractives

ii. Lack of transparency in revenue collection; i.e. it’s not clear what use the 70% that goes to the national government is put into neither the 20% that is transferred to the counties

iii. The Mining Act does not expressly give KRA, as the Government’s Single Revenue Collector, the mandate to collect royalties on behalf of the Ministry of Mining.

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iv. The requirements in the sector for participation of multiple agencies require coordination and consistency to ensure that revenue is secured. Highly technical fields like audit of costs presents a challenge to KRA with the mining companies overstating costs.

v. Inadequate mechanisms (accounting rules and reporting standards and procedures) to track government revenues from the extractive sector and to the national government, county and communities allocation as per the constitution

vi. Lack of long term development plan that guides the allocation and use of natural resource revenues.

vii. Lack of mechanisms to enforce the provisions on benefit sharing of extractive industries revenues as per the legislations.

viii. Lack of clear legal rules on spending / savings of mineral revenue

Recommendations

1. The MoU on revenue collection between the Ministry of Mining and KRA should be fast tracked and finalized for implementation.

2. Tax evasion and avoidance schemes could be prevented by continuous strengthening of legislation to seal loopholes and improve transfer pricing rules.

3. Joint audits and other operations between KRA and the relevant ministries and agencies will ensure that technical and financial claims are adequately vetted.

4. Disclosure of information (contracts and licenses, production/extraction data, beneficial ownership of companies involved in the mining sector and all revenue streams) pertaining to extractive industries companies in a timely manner will ensure that tax avoidance and evasion is effectively prevented.

5. Information sharing (repositories) between Government and agencies would ensure an adequate mechanism for supervision of mining companies’ activities by all relevant stakeholders.

6. Adopting Investing in investing strategy where part of resource revenue is saved, both to manage volatility and to support investments when resources shall deplete.

7. Managing the social and environmental impacts of natural resource exploitation to benefit mining nations.
MINERAL SECTOR GOVERNANCE

Situational Analysis

Governance of the mineral sector refers to the legal and institutional environment in which various stakeholders interact. It requires transparency and public participation, stakeholder consultation and engagement as well as the promotion and protection of human rights in the mineral sector. A key challenge to the effective governance of mineral resources in Africa is the lack of domestication into national policies, laws and institutional frameworks and standards of international transparency and accountability initiatives. In order to strengthen domestic accountability in the mineral sector, there is a need for stakeholders to own their governance processes and mechanisms. This will provide greater participation of all stakeholder in policy formulation and decision-making, ownership of the resulting outcomes as well as legitimacy of the governance process.

Typically, the mineral resource sector in Africa is marked by the lack of transparency which results in poorly negotiated mineral concessions with fiscal terms that are sub-optimal and do not maximize the net present value of mineral investment. Transparency in decision making and accounting for revenue is a major policy challenge in many countries. This is largely due to inadequate institutional arrangements in the management of the sector on the one hand, and inefficient revenue management systems that do not foster strategic choices of how mineral revenues are used, on the other. The lack of accountability and transparency in the management of these revenues exacerbates poor governance and often fuels cycles of corruption, conflict, and poverty.

Gaps Identified

i. No or unclear policy framework for the engagement of various stakeholders

ii. Lack of transparency of the companies to the local communities in relation to their dealing with the communities as well as the amount of the budgets for the projects they have planned for the communities

iii. The establishment of the Mineral Commodities Exchange as provided by the Mining Act is yet to take place.

iv. Inadequate sensitization of investors on the requirements for investing in the extractive industry.

v. Lack of proper disclosure by the mining companies. For instance, some investors do not provide correct information of the profits earned from mining activities as a way to evade tax payment

vi. Poor engagement of the local communities resulting into conflicts. Most of the conflicts experienced in the extractive industries are between the investors and local communities who feel that they are not fully involved
Recommendations

1. Setting up of Community liaison committee to deal with community grievances. Composition and structure of this committee should be such that it will have the confidence of the local community and the capacity to effectively engage with the investor and the government on issues of interest and affecting the community.

2. Increased community involvement and sensitization on the mining activities. Right and correct information should be disseminated to the community in order to curb the high expectations.

3. Setting up a future investment fund that the communities would turn to after the mines come to a close. A percentage of the revenue from the mining would be deposited into this fund.

4. Policy framework for Benefit sharing to ensure that the community share reaches them. The mining ACT under sec 183(5) stipulated the division of revenues however it does not set out the mechanisms of ensuring that the beneficiaries get portion of the royalties.

5. Better Corporate social responsibility – Clear information should be disseminated to the communities.

6. Appropriate and detailed Resettlement Action Plan based on research, wide consultation and community involvement on the most ideal alternative land for resettlement. Communities are to be relocated to the most suitable available land within the proximity of the mining area. This will guarantee that the relocated community will still be able to reach out and interact with their neighbors and that they will access economic benefits from the economic activities in the area.

7. Avoid delays in issuance of the licenses. The timelines stipulated in the charter to be strictly followed.

8. Enforce the prioritization of the locals in employment and provision of services which are locally available.
GEOLOGICAL AND MINERAL INFORMATION SYSTEM

Situational Analysis

Geological information has a universal value and is useful for not only mining but all economic sectors such as infrastructure and agriculture. The availability of geological and mineral data allows both the public and private sector to make informed decisions on mineral sector development. The more accessible the information is, the lower the risk on investment in exploration and mine development. In most jurisdictions, national geological surveys (GSOs) are the custodians of geological and mineral information systems. They are responsible for generating basic data and disseminating it, as a public good, in a suitable, good quality, easy and cost effective manner. In Kenya, this role is carried by the Directorate of Geological Survey, Ministry of Mining. Geological data, including maps and mineral resources inventories, are the essential basis for assessing the potential for mineral projects and granting exploration and mining permits. Thus a comprehensive geological and mineral information database will provide the government with better decision-making options and the capacity to negotiate sustainable mineral development contracts with foreign investors.

Data and Information about all Extractive Entities, (mining, oil and gas) exists in both the ministry of mining and the ministry of Energy and Petroleum however limited, and unprocessed. However, the data and information is usually collected for specific purposes and usually never go beyond that specific purpose or shared for use in other project. It is recognized that acquiring data can be costly e.g. in Oil Exploration, drilling geothermal appraisal wells, drilling coal exploratory wells etc. There is need to submit extractive Sector data to a central repository custody for data and information (Geo-Data Bank). An Authority can be set that will safe keep and avail the same whenever required. The primary owner of the data may be motivated to hand over the data/information. Types of data/Information can be of various forms. They include; Geological Resources Occurrences, synthesized (lab, tests etc), Geo-Scientific (Geological, Geochem, Geophysical), Drilling, Seismic, Measurements etc. Others include records of minerals being mined as items of trade currently, records of pricing index for minerals, updated zoning of mineral occurrences and plotted on the map and narratives of the mineral(s) occurring zones.

Geological Data and Mapping

Kenya has not been comprehensively mapped for its mineral wealth explored at a national scale. Geological information is the reference entry material for investments in mining and the extractives sector in general. Interests in mineral development in Kenya date back to early 1930s when the former Mines and Geological department was established under the then East African Protectorate. From this date to present, information on geology and mineral resources has been collected from various parts of the country by various parties including private investors and the government. Geo-science data and information can also be useful for improved land use planning. However, there exist gaps on the current Kenyan geological data and information.
Lack of current geo data and information
The colonial government had given special focus to the minerals sector. However, after independence the successive government focused mainly on agriculture and tourism. As a result, old colonial information on Kenya’s mineral resources is the one mostly being used to guide investments. With technological advancement, fresh discoveries can be made. Most of the geological reports available in the Ministry’s Library are as old as 1970’s to early 1990’s. Reliance on old geological data may result in Kenya missing out on mining related investments.

Credibility of Geological data
Reliable and credible data on mineral resources is crucial for attracting investments in sector. Provision of geological data involves reconnaissance survey, sampling, assaying, interpreting and packaging the results into a report. For credible information all the phases involved in data collection must be professionally acceptable. This calls for adequately trained personnel and well equipped and accredited mineral laboratory. At present the Ministry’s Mineral Laboratory is not accredited and lacks modern equipment for some of essential analytical work.

Data Management, Unpublished data, Scattered and Unshared Geological Data
Over time the former Mines and Geological Department and lately the Ministry of Mining has been undertaking mineral exploration over various parts of the country. Much of the data has not been published and is thus not available to the public. There is the risk that the unpublished data may get lost. Geological data require to be analyzed, collated, packaged and stored for easy retrieval and accessibility by the users. The available geological data is not well management and is of limited use to most of the stakeholders of the extractives sector. Kenya is yet to fully embrace the technological advancements in geo-data management. There are also various government agencies undertaking mineral related geological surveys including Ministry of Mining, Ministry of Water, Ministry of Energy and National Oil Corporation of Kenya. These agencies don’t share geological information among themselves. There is thus wealth of geological data generated and held by various agencies which is not useful to investors as it remains not shared or packaged and remains scattered all over.

Geological mapping and country wide airborne geological survey
Most of the Kenyan geological maps and reports were as a result of exploration work done through technical assistance by development partners. Over time, the Ministry of Mining has not been receiving adequate budgetary allocation to enable it undertake any tangible exploration programmes. Kenya has never undertaken a nationwide airborne geophysical survey, despite the fact that the acquisition of airborne data forms a baseline information in guiding developments in extractives including those in minerals, petroleum, geothermal and water sectors.
Initiatives by the Ministry of Mining towards geo-data information

Ministry of mining has the following initiatives on geo-data information

1. **Proposed Nationwide Geophysical Survey**: - The Ministry of Mining programmed to undertake a nationwide geophysical airborne survey during the 2016/17 financial year, the Ministry had been allocated funds to commence the activity.

2. **Modernizing and Accreditation of the Ministry’s Mineral Laboratory**: - The Ministry is in the process of acquiring modern analytical equipment for its mineral laboratory. This is to be followed by accreditation to enable its assay certificates acceptable globally together with giving credence of geological reports emanating from its mineral analysis.

3. **Establishment of Geo-data Centre**: - Geo-data management has been identified as a very important aspect for investments in the mining sector. To this end the ministry is in process of establishing a geo-data bank to be housed in a Geo-data Centre at Madini House in Industrial Area Nairobi. The databank center will act as a repository of all geological information in the country. The databank comprises of both software and hardware for information management and access. The ministry has been availed by Treasury finances for the purchase of the necessary software and hardware. The old geological data will be scanned and uploaded to the data bank. In addition, the British Geological Survey has agreed to offer technical assistance for the setting up of the geo-data bank as well as availing the geological information on Kenya that is resident with them in Britain.

Gaps Identified

i. Inadequacy of credible geo-data: - There is data which is not considered credible depending on who collected it. However, not available is Geo-data for the whole country which the ministry is working on.

ii. Inadequate funding for the ministry to be able to collect the required geophysical data and establish a unit dedicated to data management.

iii. Lack of Proper inventory of Minerals: - Minerals known to exist to date are in scattered reports. As the sector grows new Minerals will be discovered. No linkages to other players in the extractive industry.

iv. Packaging of Data and Information: - The packaging of the data is not tailor made. Most of the data also is not published and hence not available to customers.

Recommendations

1. The proposed nationwide airborne geophysical survey need to be urgently undertaken to completion

2. There is need for increased funding in minerals related research for updating the old geological information
3. Completion of modernization and accreditation of the Ministry’s mineral laboratory lab
4. Setting up of the Geo-data Centre be fast tracked for data management and access
5. Sharing of geo-data by various government agencies
HUMAN AND INSTITUTIONAL CAPACITY

Situational Analysis

At the very early stage in the process of formulating the Country Mining Vision (CMV), it is essential to map the institutional landscape, not only in terms of those that are related to the mining sector, but also the anticipated institutional arrangements and structures necessary to nurture the dynamic industrialized economy of the future. To meet the requirements of a transformed economic structure, each country will have to build upon or transform existing institutions with a view to equipping them to meet present and future demands. Properly resourced state institutions are key to the development of the industrialized and competitive economy. Yet, most state institutions responsible for the administration of the mineral sector do not have adequate human and material resources to discharge their responsibilities. This goes beyond promotion and regulation of minerals industry operations, and demands the development of an industrial policy which incorporates the organic linkages between the minerals sector and the rest of the economy. The development of these linkages in the context of a globally competitive mining economy requires capacity for visioning, scenario building, and planning taking local environments into account. The scarcity of technical and entrepreneurial skills, capable research, development and innovation institutions and those that offer training in science and technology, impede Africa’s efforts to promote a knowledge-driven and competitive industrialized economy.

Africa, despite being a significant producer of many of the worlds’ minerals, lags behind in its quest for industrialization. Part of the reason for this is due to inadequate human resource and institutional capacity on the continent, with the exception of South Africa. Kenya’s position is made worse by the fact that it remains under-explored, despite its geology indicating that it has a great mineral potential. Over many years, Kenya’s mineral sector contributed less that 1% to the country’s GDP until production of titanium-bearing mineral sands commenced in Kwale County in late 2013 and began to add another 1% to the GDP.

For a country to drive its industrialization forward, one of the key prerequisites is availability of adequate numbers of well-trained and skilled engineering workforce. According to [UNESCO (year?)], the ratio between a country’s engineers and the population should be 1: 2,000. Kenya has a population of 43 million\(^5\) people, therefore, the country need to have about 20,000 engineers but has only about 7,000. The situation is much worse when you consider the cadre of engineers required for the extractive industries, such as Mining Engineers and Petroleum Engineers. For example, from its independence till 2005/2006 when local training of mining engineers commenced, Kenya had only twelve (12) trained indigenous mining engineers. One reason for this was that there was no training institution offering the mining engineering course locally and all the twelve were trained abroad.

\(^5\) *KNBS 2015 Fact Book*
Technical and Vocational Education and Training (TVET)

At the launch of the mining engineering programme locally⁶, interest was low as most students and parents did not see the rationale for such a course as very little was heard of in mining. Enrolment started with a pioneer class of six (6) students, progressed to fifteen and eventually stabilized at about twenty-five (25) per admission cohort. It was not until oil was discovered in March 2012 and gas in September 2012 that a sudden rush for the course began, with the admissions being capped at about sixty (60) due to inadequate infrastructure capacity for training and research. The Petroleum Engineering programme was not launched locally until 2013/2014. The teaching of the programmes on extractives faces several challenges, including lack of adequate engineering infrastructure and faculty. Additionally, universities face serious challenges from engineering professional registration bodies which sometimes impose very stringent conditions hard to come by in this field with very few local experts.

The situation in the region is not any better. Tanzania was two years ahead of Kenya, having launched a mining engineering degree programme and a mineral processing engineering programme around 2003 and, later on, the petroleum engineering programme. Uganda only recently launched a degree programme in mineral and mining engineering and a diploma programme in petroleum engineering. On the African continent, South Africa is the most established with programmes for the extractive industries at several universities.

However, the skills shortage is not only felt at the extractives sector but also in other sectors which, judging by the large number of the existing TVET level institutions, one would assume are comfortable. According to the Managing Director of Housing Finance⁷ the TVET is the weakest link in the entire education system yet we require a skilled workforce to roll out programmes identified in Kenya’s Vision 2030. Employers cannot rely on Certificates from formal TVET institutions as a guide to an individual’s actual competencies—instead they have to conduct their own certifications of competencies to determine how much additional on-the-job training new recruits require.

Petroleum Institute Of East Africa (PIEA)

PIEA is the professional body for the oil and gas industry in East Africa Region. The Mission of the PIEA is to provide a forum for expertise and excellence in the oil industry, promote professionalism and free enterprise in the petroleum business supported by the highest operation and business standards. The core objective of PIEA is lobbying with policy makers and regulatory agencies for the provision of a legal, stable, fair, free and competitive market environment.

⁶ JAUAT and TTU
⁷ Paper No. 7- Leveraging the Extractive Industries for Skills Development to maximize Sustainable Growth and Employment, Bill and Melinda Gates Foundation/ AfDB Group, June 2015
Research & Development (R&D)

Need addition from Dr. Arthur Ndegwa

Gaps Identified

i. Inadequate infrastructure capacity for training and research
ii. Challenges from engineering professional registration bodies which sometimes impose very stringent conditions hard to come by in this field with very few local experts
iii. Lack of adequate engineering infrastructure and faculty
iv. The budgetary allocations for Research and Development (R&D) are grossly inadequate for research work. Proposals by faculty undertaking research are grossly under-funded, and only a few staff members are able to access the meager funds
v. Funding research infrastructural facilities has also been a challenge to teaching universities
vi. To date there has been no institution offering technical and vocational level education and training for the extractive industries. The extractive sector has to import foreign skilled workers

Recommendations

1. Government should isolate the few universities offering engineering programmes in the emerging extractive industries and strengthen their infrastructural capacity for laboratories and workshops.
2. The running costs for the specialized labs and workshops, some of which have machines and equipment with high maintenance obligations, and the costs of student industrial attachments and supervision by faculty, are quite high and budgetary allocations should be enhanced if these have to be done effectively.
3. To bridge the gap from lack of high-level faculty to mentor the programmes on extractives, teaching is often undertaken jointly with faculty from overseas universities through partnership arrangements, sometimes at great cost to the local universities. This requires enhanced budgets to pay the high costs involved, say flying in faculty from Australia where salaries are quite high, expensive air-tickets due to the distance etc.
4. The other solution to the challenges of teaching programmes on extractives lies in a university competing for bids to be a Centre of Excellence. The World Bank Group has what is known as the Africa Centers of Excellence” (ACE), which has already seen ACE I and ACE II set off in several countries in Africa.
5. The other initiative is DAAD’s Centers of Excellence in Africa, of which Kenya’s Taita Taveta University won the bid to be the only Centre of Excellence for Mining out of the eight (8) such centers in Africa.
6. The Government has in recent years formed several bodies which are likely to bring with them better possibilities for funding of research and innovation. These are:
• **NACOSTI**: - Vide the Science, Technology and Innovation Act No.28, of 2013, the Government created the National Commission for Science, Technology and Innovation (NACOSTI) to replace its forerunner the National Council for Science and Technology (NCST) established in 1977. The objective of NACOSTI is to regulate and assure quality in Science, Technology and Innovation Sector and advise Government in matters related thereto.

• **KENIA**: - Established under the Science, Technology and Innovation Act, No. 28 of 2013, the Kenya National Innovation Agency (KENIA) core mandate is to develop and manage the National Innovation System. It accredits Research Institutes and Approves all Scientific Research in Kenya.

• **NRF**: - Established under the Science, Technology and Innovation Act No. 28 of 2013 the National Research Fund (NRF) mandate is to facilitate research for the advancement of Science, Technology and Innovation for national development.

• **TVETA**: - Established vide the Technical and Vocational Education and Training (TVET) Act No. 29 of 2013, TVET Authority (TVETA) mandate is to regulate the TVET Sector through Licensing, Registration and Accreditation of Institutions, Programmes and Trainers. TVETA has registered over 600 TVET institutions, both Public and Private, in the categories of Technical Vocational Colleges or Vocational Training centers issuing Artisan, Grade/Trade Test, Certificates, Diploma and Craft Certificates.

• **SKILLS FOR OIL AND GAS AFRICA (SOGA)**: - SOGA, established in November 2015 through a partnership between UK’s Department of International Development (DfID) and the German Ministry of Economic Cooperation and Development (BMZ), its mandate is to design an initiative “that will equip local populations with skills needed to seize job opportunities in the Oil and Gas Sector in East Africa”\(^8\) SOGA aims to get 32,000 East African residents into sustainable work over the course of the project, scheduled for completion by 2020.

\(^8\) Ibid
ARTISANAL AND SMALL SCALE MINING

Situational Analysis

Definition of Artisanal and small-scale mining

The Africa Mining Vision goal on Artisanal and small-scale mining (ASM) Sector is to create a mining sector that harnesses the potential of artisanal and small scale mining to advance integrated and sustainable rural socio-economic development. ASM is one of those terms that do not lend itself to a universally acceptable definition. This is a type of mining, that depends on the most basic of tools (hammers, picks, shovels, buckets, wheelbarrows, etc) and manual labour (no machinery) for excavation and extraction of minerals, mostly done outside the legal and regulatory framework. From the Mining Act 2016; Artisanal Mining means traditional and customary mining operations. When not formalized and organized, ASM can be viewed negatively by governments, environmentalists, etc.; because of its potential environmental damage, social disruptions and conflicts.

In Kenya it is estimated that about 100,000 people are directly engaged in artisanal mining in Kenya. ASM activities take place in many areas of Kenya, mainly in panning for gold, gemstone mining, winning of sand, gravel, clay and quarrying. This happens in areas such as Western Kenya, Nyanza, Mbeere, Tharaka Nithi, Taita Taveta, Kitui among other areas. Although ASM is an income generating activity benefiting low income and vulnerable groups, it is tainted by its association with smuggling, tax evasion, health and safety risks, socio-cultural degradations, and a variety of other illicit activities.

Despite such negative associations, main-streaming ASM has immense potential to contribute to the development of the country’s mining industry by generating employment and income; widening the tax base; adoption of safer, healthier and more environmentally compliant standards; and creation of synergies with the formal large scale mining sector.

Characteristics of ASM operations in Kenya

Most Kenya's ASMs depend on their own labour and most sell their raw minerals to local brokers around their areas. There is some symbiotic relationship between these brokers and artisanal small-scale miners. Some brokers support ASMs with equipment, transport, food, security, and other requirements. In return, ASMs sell their minerals to these brokers. Consequently, they are often exploited by brokers/middlemen as they rarely know the value of their minerals and have little access to the good markets. Conflicts over land endowed with minerals have also been a perennial problem. It has been difficult to obtain accurate and sufficient information/statistics about the state of ASM in the country, given that it was considered informal or illegal in the previous mining act.

The ASM exploits marginal and small mineral deposits. They apply very basic and rudimentary mineral extraction techniques, with lack or low level of mechanization. Unskilled personnel are involved at all levels of operations: technical (geology, mining engineering, environment, etc) and managerial. The literacy levels are low, with some participants who can’t read and understand mining laws and policies,
mine license requirements and other relevant materials/procedures, e.g. Cadaster application. Inefficient mining and processing techniques are most often adopted leading to low productivity. The sector lacks suitable markets and support services and chronic lack of investment capital. They are also characterized by low levels of occupational health and safety standards (accidents and loss of lives, unsafe handling of chemicals especially mercury and cyanide, lung diseases). They pose significant negative impact on the environment (deforestation, land degradation, water and air pollution). Other characteristics include low level of income; operating without legal mining permits (licenses); gender issues and child labor; and land conflicts.

Future of Artisanal and Small Scale Mining in the Mining Act 2016
The Mining Act 2016 makes provision for the inclusion of artisanal and small scale mining for the first time in Kenya. The ASM mining is defined under Section 4 of the Act, as traditional and customary mining operations using traditional and customary ways and means. The Cabinet Secretary under section 93 is tasked with establishing offices in the Counties headed by a representative of the Director of Mines. These representatives shall have the function of granting, renewing and revoking artisanal and small scale mining permits amongst other duties. Under section 94, an Artisan Mining Committee shall also be established in every County. These Committees shall be tasked with advising the representative of the Director of Mines in the granting, renewal or revocation of the artisanal mining permits.

Gaps Identified
i. Legalization, Formalization and Enforcement of ASM in Kenya has historically been ignored, criminalized, and poorly regulated. This has happened due to the lack of consideration from the previous policies and laws. But this gap shall be addressed by the new Mining Act, policies and regulations that will be formulated to operationalize the sections of the Act.
ii. Limited technical capacity of miners (cadaster application etc.) and vocational skills training offered to the ASMs.
iii. Lack of access to finance and appropriate technologies
iv. Inaccessibility of good markets for the ASMs
v. Plagued with gender and child labour issues that are inadequate addressing
vi. ASM sector is prone to trade in conflict minerals
vii. There has been no clear and definite ASM Engagement mechanism.
viii. There is no sustainable development in ASM undertakings.

Recommendations
1. Improve information and statistics collection on artisanal and small-scale mining
2. Identify and allocate exclusive areas for artisanal and small-scale mining (Ring fencing, as cited under section 13 of the Mining Act 2016.
3. Formalizing the preexisting illegal ASM activities and the formation of co-operatives and associations
4. Promote value addition of ASM mineral products for higher sale values. The Government has established the Directorate of Mineral Promotional and Value Addition to have a closer look at this matter and so far it’s on the onset of opening a Gem Value addition Centre in Voi. The project among many others coming soon, shall serve as pilot projects to promote value addition.

5. As one way to create good market for ASMs, the Government should arrange fair-trade initiatives to give them the opportunity to trade their products under better selling terms and conditions. Also this shall make sure they sell their products to legalized mineral brokers and dealers.

6. Providing support with equipment and working capital-

7. Capacity building: The Government, NGOs, and other bodies should work together to initiate and run programs to conduct outreach and training activities to artisanal and small-scale mining groups (licensed as well as informal/unlicensed). For example, on technology e.g. cadaster licensing application, safe health and environmental practices, and entrepreneurial skills)

8. Facilitate geological investigations in small-scale mining areas

9. Government is coming up with clearer policies on artisanal mining, to streamline the application and regulatory oversight. Together with the establishment of Artisanal Mining Committee this matter shall be laid to rest.

10. Streamline the fiscal framework to inhibit mineral smuggling

11. Advising ASM to conduct feasibility studies for their mining projects in order to simplify acquisition of loans from commercial banks and other financial institutions

12. Formation of ASMs cooperatives, associations or enterprises to support communication, cooperation and coordination. This will create good networks between ASM miners to share information and coordinate activities for a higher productivity.
LINKAGES, INVESTMENTS AND DIVERSIFICATION

Situational Analysis

Mineral resources are a finite national asset and will inevitably be depleted. The only way that minerals can be (indirectly) sustainable is through fiscal and mineral economic linkages. This is at the core of the Africa Mining Vision (AMV). Of core importance is the promotion of fiscal linkages whereby resource rents are reinvested into long-term human, social and physical infrastructure to replace the resource capital lost with new capital that can outlive mining. The direct mineral linkages include up and downstream value addition (mineral beneficiation), knowledge linkages - science, technology, engineering, and mathematics (STEM), skills and research development and innovation (RDI) - and spatial linkages. Upstream (or backward) linkages refer to the various direct and indirect inter-firm relationships connecting an industry with its suppliers or supply chain. These include specialized manufacturers, input providers, agents and distributors and service suppliers. Upstream linkages are the first to arise in a mineral project, and first to wane when it eventually closes down. Downstream (or forward) linkages reflect the interconnectedness of a specific sector to other sectors in the economy that consume its output. The value of the mineral (by weight) relative to its original value generally rises at each stage of the downstream or forward linkages. Side-stream linkages underpin the viability of other sectors not directly related to mining in an economy and are deliberately promoted in many mining countries, such as Canada and Australia. However, despite these potential financial, economic and social benefits, upstream and downstream linkages between the minerals sector and the local economy in Africa are weak. Mineral products are generally exported in raw or partially processed forms. Most inputs for mineral-related activities are also imported.

One of the African Mining vision goal is to increase the level of investments flows into mining and infrastructure projects to support broad socio-economic development. Currently in Kenya, the investments in the mining sector are considerably low. According to KNBS 2016 Economic survey, investment in the mining sector declined and mining and quarrying industry registered an increase of 13.1 per cent to 13.8 thousand persons employed in the sector in 2015. This was however, a deceleration compared to a growth of 40.2 per cent realized in 2014. Most minerals products are exported in raw or partially processed form. In addition, most inputs for mineral related activities are imported. Kenya lacks an appropriate policy frameworks and strategies to drive the industrialization, value addition and beneficiation agenda.

The mining Act 2016, stipulates outsourcing of some of the materials and labour in the local market but does not give a clear indicator or target for achievement on beneficiation and value addition. Though the mining Act lays the foundation for the local content promotion in the extractive industries, there are no incentives for value addition in Kenya explaining why most of the mineral products are exported in raw form.
Gaps Identified

i. Limited access to finance for expansion and to take on additional contracts at the same time and the challenges of accessing and paying for qualified and technically astute staff to work on these projects.

ii. Limited understanding of international standards for industry participation and lack of specific information on the sectors needs in terms of goods and services and when they are needed in particular

iii. Lack of manpower and technical capacity in petroleum exploration. Most citizens lack the technical know-how of the mining industry. Even, if the law stipulates that they ought to be involved during the mining process, this lack of experience and knowledge makes it difficult for them to be involved or contracted by the mining industries

iv. Investments in the extractive industry are risky and capital intensives and most locals lack the capacity to invest in the same. This is also backed by the KNBS Economic Survey report which intimate that credit financing in the mining industry in 2015 had declined as compared to the previous year.

v. Lack of local content policy

vi. The procurement policies of mining companies constrain backward linkages (local content)

vii. Lack of resources to finance business development and infrastructure in the country

viii. Lack of harmonization of national policies (mineral, industrial, investment, infrastructure, trade, agricultural, fiscal, education and ICT policies)

ix. Lack of national Policy on Extractive sector of Kenya;

x. Lack of incentives on mineral development value chain;

xi. Where available, the policy frameworks are normally not supported by appropriate laws and regulations.

xii. Lack of institutions with well-defined mandates to monitor and evaluate progress on value addition.

Recommendations

1. Promotion of the fiscal linkages where resource rents are reinvested into long term human, social and physical infrastructure to replace the resource capital.

2. Promote private sector participation alongside Public sector participation in extractives (PPP)

3. Promote alliances, joint ventures to develop capacity and ensure that the locals can participate in the industry.

4. Provide inter-linkages with financial institutions.

5. Transparency and Provision of clear information when it comes to government services.
6. Review and ensure that international trade and investment agreements do not constrain the ability of African countries to develop up and down stream beneficiation industries.
7. Predictable rules and procedures of investing in the industry.
8. Channel mineral rents to minerals development and infrastructure development.
9. Deliberate efforts should be made to constitute a coordinating body on issues impacting the effective growth of the mineral sector. The body should draw representation from all institutions and bodies with mandate on mineral development.
INFRASTRUCTURE DEVELOPMENT

Situational Analysis

Infrastructure is one of the key economic pillars in Kenya’s vision 2030 blueprint. Over the past, the country has invested significantly in the infrastructure development projects e.g. the standard gauge railway, improvement of Mombasa Port, LAPSET project among others. Despite this laudable effort by the government, there still exist gaps in the infrastructure development especially where mineral, oil and gas resources have been discovered. Most mineral resources are found in the remote areas where infrastructure is not there or not well developed. This makes it hard for the contractor especially during the setting up of mining companies as it will entail developing the roads to ensure that heavy equipment can be easily transported into the mining area which is a cost to the investor. Moreover, poor infrastructure affects local suppliers who have been contracted by the mining companies to deliver their merchandise to the mining site due to inaccessibility of the areas.

Telecommunication and Internet connectivity infrastructure is also very integral to the growth of the Extractive sector in Kenya. Majority of the mining sites are located in remote areas where this infrastructure is unavailable.

The Mining Act 2016 under article 191 (1) embraces technological advancements by providing for a computerized cadaster and registry which includes an online transactional facility to enable applications for the granting and renewal of mineral rights to be submitted online. The Cadaster is already in place and has been upgraded to an online portal, where applications payments, reporting and correspondence with the Ministry of Mining are undertaken. So far, the Ministry of Mining at various stages of establishing the institutions created by the Mining Act 2016.

Gaps Identified

i. Huge infrastructure gap between areas producing oil/minerals and other parts of the country
ii. Lack of mechanism for establishing shared infrastructure use in the extractive industry.
iii. Lack of Mechanism for reinvestment of tax revenues in infrastructure development
iv. Lack of oversight on how the tax revenue is being spent and monitoring of the quality of the projects being undertaken
v. Lack of constant (reliable) water and power supply to the mining areas
Recommendations

1. The government needs to synchronize infrastructure development to mineral resource locations. This measure will, first attract investments as the setting up cost for the investors will be low and they will be more willing to invest in the country and Secondly, the government will be able to charge more royalties from the mining companies like in the case of South Africa.

2. Channel mineral rents/ royalties into infrastructure development in line with the African Mining vision.

3. Proper framework for reinvestment of tax revenues in the infrastructure development.

4. Proper oversight on tax revenue expenditure.

5. Setting up infrastructure programs by National Government, County Governments.
LAND ACCESS

Situational Analysis

Accessing land for mining and mineral resource development is a major challenge for the entire extractive industry. Land is not only where the general operations of mining take place but also happens to be the host of minerals and other natural resources. Article 260 of the Constitution defines land as (a) the surface of the earth and the subsurface rock; (b) any body of water on or under the surface; (c) marine waters in the territorial sea and exclusive economic zone; (d) natural resources completely contained on or under the surface; and (e) the air space above the surface. Accordingly, natural resources are defined to include rocks, minerals, fossil fuels and other sources of energy as per the Constitution. All land in Kenya belongs to the People of Kenya either as a nation, individuals or communities and is categorized as public, community or private (Article 61 of the COK, 2010).

Mostly, the challenges regarding land access is compounded by broad-spectrum definition of land and more specifically public land in accordance with article 62 (1) of the COK 2010 as, commoditization and privatization of land well as equity issues (both procedural and distributive). The definition of public land to include minerals and mineral oils (article 62 (1) (f) is likely to spark serious debate on the management, utilization and development of minerals in Kenya. This is because it portends jurisdictional conflicts between communities, county government and national governments. In addition, with no clear guideline on how far wide stakeholder engagement and consultations should go in regards to natural resources exploitation and mineral development (procedural equity) as well as mechanisms for revenue collection and sharing (distributive equity), there are serious gaps that need urgent attention and intervention to realize meaningful economic growth in this sector.

Community Land Act 2016 and mining

It gives effect to article 63 of the Constitution of Kenya. It recognizes ancestral (community) land rights, provides for the registration of community land rights (ownership) and stipulates the role of county governments in the management of community land. It also spells out the procedure for converting community land generally, and either to public or private land and the setting aside of community land for public purposes. The act empowers the state to regulate the use of community land. It therefore defines "community" as a consciously distinct and organized group of users of community land who are citizens of Kenya and share any of the following attributes: - (a) common ancestry; (b) similar culture or unique mode of livelihood; (c) socio-economic or other similar common interest; (d) geographical space; (e) ecological space; or (f) ethnicity
In this act, Subject to Article 40 (3) of the Constitution and the Land Act, no interest in, or right over community land may be compulsorily acquired by the State except in accordance with the law, for a public purpose, and upon prompt payment of just compensation to the person or persons, in full or by negotiated settlement. Yet, there is no guideline for a just, and prompt payment regarding compulsory acquisition of community land. In addition, there is no guideline for compulsory community land acquisition by the state, envisaged to facilitate land access for mining and mineral resources development in /within community land. This portends serious conflicts between communities and investors in mineral sector as well as with the government.

**Mining Act 2016 and Community Development Agreements (CDAs)**

Subsection 2 of Section 36 of the Community Land Act 2016, requires that an agreement relating to investment in community land shall only be made between the investor and the community. In addition, the Mining Act 2016 provides for the development of Community Development Agreements (CDAs) between communities and large scale mining license holders. Yet the state has powers to regulate use of any land, interest in or right over land in accordance with section 38 of the community land Act and article 66 of the COK. Section 38 of the Community Land Act states in part that the management of community land shall be subject to national and county government laws and policies relating to: - (a) fishing, hunting and gathering; (b) protection of animals and wildlife; (c) water protection, securing sufficient residual water, hydraulic engineering and safety of dams; (d) forestry; (e) environmental laws; (f) Energy policy; and (g) exploitation of minerals and natural resource.

Since Minerals and minerals resources are defined as public land in accordance with article 62 (1) (f) of the Constitution, whether occurring in private or community land, it provides a glaring gap in terms of exploitation of minerals within community land due partly to skewed interpretation of the laws governing land and land-based natural resources management as well as the geopolitics regarding mining and mineral resource development within community lands. Minerals are state property and the ownership is vested on the state (Republic of Kenya), within the ambit of national government in accordance with the Mining Act 2016. Inadequate capacity regarding effective negotiations and contracting by communities presents a major gap for effective realization of revenue mobilization from community land mineral development. Jurisdictional turfs/wars are likely to emerge between county and national governments as well as with communities.

**Gaps Identified**

i. Lack of guidelines for effective, just and prompt compensation of communities and affected persons where mining and mineral development take place

ii. Absence of guidelines for land acquisition from private and community land owners where mining and mineral resources development are carried out
iii. Lack of guidelines for community land conversion into public land due to existence of minerals; which are defined as public land

iv. Lack of a framework for alternative dispute resolution (ADR)/ traditional dispute resolution (TDR) on matters land and sustainable land management. While the Constitution entrenches ADR/TDR for managing and resolving disputes regarding land, there are no guideline/regulation to this regard.

v. Land Succession challenges – unclear legislations and lack of guidelines for communities in relation to land succession.

vi. Land consolidation (CAP 283), compensation and conflicts. In counties where land consolidation (CAP 283) has been taking place e.g. Meru, Tharaka Nithi, the discovery of minerals and minerals resources development may be a challenge due to injustices perpetuated by CAP 283, which sort of encourages dispossession and marginalization/inequalities.

vii. Compensation of genuine land owners during mineral prospecting and exploration may be difficult due to conflicts between the real land owners (natives) and the owners claiming right over lands after consolidation

viii. Corruption and integrity in the land sector. Instances of double allocations of land may present challenges during land acquisition and compensation for mining and mineral resources development.

ix. Land speculations for major project developments such as for mining and mineral resources development may result in huge costs for mining and mineral resources development.

Recommendations

1. There is need for a specific but robust guidelines to unpack how land access can be achieved to spur socioeconomic development within the mining and extractive industry sector. Such guidelines should entail compulsory land acquisition for mining and extractive industry, especially for mining development within community and private lands.

2. Development of robust stakeholder engagement strategies, revenue collection and sharing protocols as well as the establishment of binding agreements and consensus building between communities and mining investors.

3. There is need to develop specific guidelines on the roles and rules of engagement between the county, national governments and communities where mining and mineral processing take place.

4. These should be clearly stipulated approval mechanisms/regimes and tools to fast-track mineral development and socioeconomic development.

5. There is need to repeal CAP 283 that sort of encourages dispossession and marginalization/inequalities.
COMMUNICATION AND KNOWLEDGE MANAGEMENT

Situational Analysis

Developing an effective and multi-pronged communication strategy and a plan acts as a strong tool in developing trust and confidence as well as improving understanding and awareness of the roles and responsibilities; benefits of the mining processes and mineral resources development and reduce unnecessary tensions, conflicts, resistance and misconceptions among and by different stakeholders. The communication strategy should underscore the socio-economic benefits, potential environmental risks and mitigations therein while leveraging on the political good will and commitment by the state to develop the country’s mineral resources for sustainable development. A robust communication and stakeholder engagement strategy aims to ensure informed participation, ownership, managing expectations, improving awareness and social acceptance – the social license. The strategy should communicate a grievance management channel/dispute resolution mechanism to deal with emerging conflicts and grievances.

Mining and extractive sector portends serious challenges in terms of conflicts due to huge and wild public expectations mainly from the government, investors, community leaders/opinion/gatekeepers and communities themselves. Inadequate stakeholder communication and engagement is major impediment to the realization of the full mining potential in the Country. Partly, this is attributable to ineffective communication approaches and tools to achieve the requisite understanding, ownership and knowledge and awareness; and therefore enhance capacity for informed participation, policy and decision-making by various stakeholder groups involved in the mining and mineral resources development processes.

Effective communication, both vertical and horizontal, is a pre-requisite to sustaining and building trust and confidence among and between mining actors and players.

Gaps Identified

In a nutshell, there are four critical gaps that need to be filled for sustainable mining and mineral resources development in Kenya in relation to communication and knowledge management:

1. Lack of a communication and stakeholder engagement strategy and associated plans
2. Inadequate knowledge and information management regimes/systems
3. Lack of/inadequate (or at least documentation of) traditional knowledge systems and use/application regarding mineral resources development and mining.
4. Lack of a grievance management channel/dispute resolution mechanism to deal with emerging conflicts in the extractive sector
MONITORING, SUPERVISION AND ENFORCEMENT

Situational Analysis

The Mining Act provides guidance on monitoring supervision and enforcement i.e. institutional framework, defining roles and responsibilities and guidelines on Monitoring, Compliance and Enforcement. Effective monitoring provides a critical link on forward and backward linkages in the sector and mining companies are more accountable for minerals extracted.

Compliance issues

The ministry’s regulatory responsibilities require a range of central analytical and local enforcements capabilities as well as implementation across the varying Government bodies, which were largely missing. This includes having an adequate local presence in mining areas which is the responsibility of mining license execution & monitoring. It also cites gaps in capacity to manage compliance issues, monitor performance, Corporate Social Responsibility, and monitor performance of the community development agreements (CDAs).

Under article 47 (2(g), the Act makes it mandatory for a holder of a large scale mining license to enter into an agreement with the community where the mining operations will be carried out. This agreement is known as the Community Development Agreement.

Monitoring performance and Corporate Social Responsibility

In Kenya, shortage of monitoring personnel and lack of coordination of other government agencies affect the monitoring, supervision and enforcement in the sector.\(^9\) Stakeholder mapping and engagement is critical to implementation of the country's adequate and comprehensive monitoring of the sector. CSR has evolved, increasingly becoming interlinked with sustainable development and in particular making sure that environmental and community issues are adequately addressed. CSR schemes should not act as a substitute for government responsibility but rather build on what government is doing. For example, a CSR-built clinic or school is more likely to last, if it is done in consultation with health or education ministry with plans to staff or provide doctors and teachers to ensure continuity after the mine closes or end of the project.

Gaps Identified

i. Poor implementation of laws and strategies for compliance and monitoring.

ii. Lack of an elaborate M&E framework for compliance monitoring.

iii. Poor institutional capacity in funding, human, equipment and technology for monitoring, supervision and enforcement.

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\(^9\) Kenya AMV draft UNDP
iv. Lack of coordination of other government agencies in monitoring, supervision and enforcement in the sector.

v. Poor coordination between government agencies, county governments and Companies on community development initiatives

vi. Lack of continuity or sustainability plans after mining operations ceases. CSR projects/initiatives tend to come to an end when mining projects also end.

vii. Corporate community initiatives may divert attention away from broader political, economic and social solutions, and be inappropriate mechanisms for addressing social problems in developing countries.

viii. CSR programmes may fail to address the needs of communities and therefore detrimentally affect their sustainable development.

ix. Gaps in capacity to monitor compliance, performance, Corporate Social Responsibility, and performance of CDAs

Recommendations

1. Stakeholder mapping and engagement is critical to implementation of the country's adequate and comprehensive monitoring of the sector.

2. Implementation of legal and regulatory provisions of the Mining Act and other legislations and regulations would ensure monitoring and enforcement is carried out effectively, including ensuring that county institutional support is established.

3. Development of monitoring and evaluation framework for compliance and enforcement of mining activities.

4. Publishing information on revenue flows to mining communities and how much is spent on corporate community initiatives.
REFERENCES


Annex 1: List of participants
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<thead>
<tr>
<th>NAMES</th>
<th>ORGANISATION</th>
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