

**Promoting Open and Accountable Management of
Extractives in Kenya: Implementing the Extractives
Industries Transparency Initiative**

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Abstract

The extractives sector is an area that comes with a lot of hopes for the public worldwide, with the expectations that their governments will use these resources to make their lives as well as the national economy better. These expectations may however need to be managed through ensuring that the said groups of people have the relevant information on the available resources and how the same are to be utilised. One of the most efficient ways of managing these expectations is through promoting open, accountable and transparent governance of the extractives sector as well as how the revenues accrued are utilised. Where such openness and transparency in management of extractives lack, there has been negative effects on the socio-economic development in what is commonly referred to as the resource curse. Unmet expectations have often resulted in conflicts. It is for these reasons that the international community have often attempted to come up with best practices in form of guidelines to help nation states to put in place and implement measures that promote open, accountable and transparent governance of the extractives sector. One of the most common initiatives geared towards this is the Extractive Industries Transparency Initiative (EITI) which is meant to promote the open and accountable management of oil, gas and mineral resources. This paper discusses how Kenya, with its nascent extractives sector can adopt and implement the EITI standard in ensuring open and accountable management of oil, gas and mineral resources. The main argument is that implementation of the EITI standard alongside the domestic laws governing the sector can ensure that Kenya escapes the resource curse that has bedeviled other countries that have seen the sector becoming a source of agony instead of development as anticipated. Notably, these principles also form part of the national values and principles of governance enunciated under the current Constitution of Kenya 2010 and it is therefore argued that the EITI initiative and the principles therein ought to be implemented in a complementary manner.

1. Introduction

Extractive Industries is a term that is often used to describe nonrenewable resources, such as oil, gas and minerals.¹ It is estimated that Africa alone is home to about 30% of the world's mineral reserves, 10% of the world's oil, and 8% of the world's natural gas.²

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¹ United Nations Interagency Framework Team for Preventive Action, "Extractive Industries and Conflict," *Toolkit And Guidance For Preventing And Managing Land And Natural Resources Conflict*, 2012, p.6. Available at https://www.un.org/en/land-natural-resources-conflict/pdfs/GN_Extractive.pdf

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Over the years, and with the recognition of the potentially positive and negative effects of the extractives, there has been an evolution at the international level to establish hard and soft rules to govern the impacts of the extractive industries.³ The extractives sector comes with not only high hopes for the average citizen in a country but also emergence of groups of people and cartels that seek to exclusively benefit from such resources at the expense of everyone else. This may lead to conflicts due to the secrecy surrounding their extraction and lack of accountability from the government and companies involved in the extraction activities.⁴ Some of the identified main drivers of extractive industries- related conflicts causes are: poor engagement of communities and stakeholders; inadequate benefit-sharing; excessive impact on the economy, society and the environment; mismanagement of funds and financing war; inadequate institutional and legal framework; and Unwillingness to address the natural resources question in peace agreements.⁵

It is for some of the above reasons that the Extractive Industries Transparency Initiative (EITI) was started to ensure that these challenges are addressed by way of promoting and ensuring that there is accountability and transparency on the revenues accruing from the dealings in extractives.

The Extractive Industries Transparency Initiative (EITI) is thus the global standard to promote the open and accountable management of oil, gas and mineral resources.⁶ The available data shows that since its establishment in 2003, a large number of resource-dependent countries have committed to the EITI Standard.⁷ There are however some other regional initiatives with similar goals such as the *Africa Mining Vision 2009* which was formally established in 2009 by the African Union (AU), to promote equitable, broad-based development through the prudent

² The World Bank, “Extractive Industries: Overview,” available at <https://www.worldbank.org/en/topic/extractiveindustries/overview>

³ Van Alstine, J., "Transparency in resource governance: The pitfalls and potential of “new oil” in Sub-Saharan Africa," *Global Environmental Politics* 14, no. 1 (2014): 20-39, at p. 20.

⁴ United Nations Interagency Framework Team for Preventive Action, “Extractive Industries and Conflict,” *Toolkit And Guidance For Preventing And Managing Land And Natural Resources Conflict*, 2012. Available at https://www.un.org/en/land-natural-resources-conflict/pdfs/GN_Extractive.pdf

⁵ Ibid, p.7.

⁶ Extractives Industries Transparency Initiative, “Who we are,” available at <https://eiti.org/who-we-are>

⁷ Lujala, P., "An analysis of the Extractive Industry Transparency Initiative implementation process," *World Development* 107 (2018): 358-381.

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utilization of the continent's natural wealth.⁸ While this Vision is relevant to Kenya's extractives industry, the scope of this paper is limited to the EITI.

In the last few years, Kenya has joined the list of countries with oil and gas extractives after the discovery of oil and gas deposits in the Turkana region.⁹ Apart from the oil and gas resources, the other notable mining activities in the country include: Soda ash; magnesite; fluorspar; titanium; diatomite; gold; and carbon dioxide, among others.¹⁰

⁸ African Union, *Africa Mining Vision*, February 2009.

Available at https://au.int/sites/default/files/documents/30995-doc-africa_mining_vision_english_1.pdf

This shared vision will comprise:

- A knowledge-driven African mining sector that catalyses & contributes to the broad-based growth & development of, and is fully integrated into, a single African market through:
 - o Down-stream linkages into mineral beneficiation and manufacturing;
 - o Up-stream linkages into mining capital goods, consumables & services industries;
 - o Side-stream linkages into infrastructure (power, logistics; communications, water) and skills & technology development (HRD and R&D);
 - o Mutually beneficial partnerships between the state, the private sector, civil society, local communities and other stakeholders; and
 - o 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 & 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 industrialising African economy;

- A mining sector that has helped establish a competitive African infrastructure platform, through the maximisation of its propulsive local & regional economic linkages;

- A mining sector that optimises 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.

⁹ Tullow Oil, "About Tullow in Kenya," available at <https://www.tulloil.com/operations/east-africa/kenya>; United Nations, "Greasing the wheels of Kenya's nascent oil and gas sector," 18 July, 2018, available at <https://www.unenvironment.org/news-and-stories/story/greasing-wheels-kenyas-nascent-oil-and-gas-sector>

¹⁰ Extractives Baraza, "Mining: History of Mining in Kenya," available at <https://extractives-baraza.com/resources/overview-of-kenyas-extractive-industry/mining/>

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This paper seeks to appraise Kenya's extractives industry against the Extractives Industries Transparency Initiative with the aim of determining how far the country has gone in achieving the ideals promoted by the initiative.

2. Extractives Industries Transparency Initiative: Background and Overview

The Extractive Industries Transparency Initiative (EITI) is considered as an international hallmark of the efforts to promote better extractive-sector management and improved societal development in natural resource-rich countries.¹¹

The EITI is meant to establish a global standard to promote the open and accountable management of oil, gas and mineral resources.¹² The EITI Standard calls for the disclosure of information along the extractive industry value chain from the point of extraction, to how revenues make their way through the government, and how they benefit the public.¹³

This is meant to strengthen public and corporate governance, promote understanding of natural resource management, and provide the data to inform reforms for greater transparency and accountability in the extractives sector.¹⁴

Currently, there are about 52 implementing countries, and the EITI is supported by a coalition of government, companies, and civil society.¹⁵

Some authors have particularly recommended EITI for African countries involved in oil, gas and minerals extraction for the fact that the extractive industry sector and natural resources has been associated with a curse instead of a blessing for a lot of African countries and thus partly because of lack of transparency in the sector.¹⁶ Experience in countries such as Norway, Canada, Botswana and Ghana points to the fact that extractives can be effectively managed to contribute to sustainable economic growth. However, in other parts of the world including Nigeria, the Democratic Republic of Congo (DRC), South Sudan, and the Central African Republic (CAR),

¹¹ Lujala, P., "An analysis of the Extractive Industry Transparency Initiative implementation process," *World Development* 107 (2018): 358-381 at p. 358.

¹² Extractives Industries Transparency Initiative, "Who we are," available at <https://eiti.org/who-we-are>

¹³ Ibid.

¹⁴ Ibid.

¹⁵ Ibid.

¹⁶ Open Government Partnership, "Extractive Industry Transparency Initiative (EITI)," 18th June 2018. Available at <https://www.opengovpartnership.org/temp-commitments/05-extractive-industry-transparency-initiative-eiti/>

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there is evidence to suggest that extractives if not well managed can be a curse leading to conflict.¹⁷

According to the proponents, to make sure that revenue from the industry contributes to sustainable development, there is need for a tool that tracks revenue collection and where such revenue goes. EITI is considered to be such a tool as it provides information to different stakeholders and citizens.¹⁸ This is because, availability of information on revenue transparency will help citizens appreciate how much money the government receives from the sector and how that money contributes to national budget and translating to service delivery.¹⁹

The EITI is based on a number of principles which were a result of a diverse group of countries, companies and civil society organisations who attended the Lancaster House Conference in London (2003) hosted by the Government of the United Kingdom. They agreed on a Statement of Principles to increase transparency over payments and revenues in the extractive sector.²⁰ The EITI Principles are as follows:

- i. We share a belief that the prudent use of natural resource wealth should be an important engine for sustainable economic growth that contributes to sustainable development and poverty reduction, but if not managed properly, can create negative economic and social impacts;
- ii. We affirm that management of natural resource wealth for the benefit of a country's citizens is in the domain of sovereign governments to be exercised in the interests of their national development;
- iii. We recognise that the benefits of resource extraction occur as revenue streams over many years and can be highly price dependent;
- iv. We recognise that a public understanding of government revenues and expenditure over time could help public debate and inform choice of appropriate and realistic options for sustainable development;
- v. We underline the importance of transparency by governments and companies in the extractive industries and the need to enhance public financial management and accountability;

¹⁷ Oiro Omolo, M.W. & Mwabu, G., (eds), *A Primer to the Emerging Extractive sector in Kenya: resource bliss, Dilemma or Curse*, (Institute of Economic Affairs, November 2014), p.2. Available at www.ieakenya.or.ke/downloads.php?page=1487576975.pdf

¹⁸ Open Government Partnership, "Extractive Industry Transparency Initiative (EITI)," 18th June 2018.

¹⁹ Ibid.

²⁰ EITI International Secretariat, "The EITI Standard 2019: The Global Standard for the Good Governance of Oil, Gas and Mineral Resources," Edition 1, 17 June 2019, p.6. Available at https://eiti.org/sites/default/files/documents/eiti_standard2019_a4_en.pdf

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- vi. We recognise that achievement of greater transparency must be set in the context of respect for contracts and laws;
- vii. We recognise the enhanced environment for domestic and foreign direct investment that financial transparency may bring;
- viii. We believe in the principle and practice of accountability by government to all citizens for the stewardship of revenue streams and public expenditure;
- ix. We are committed to encouraging high standards of transparency and accountability in public life, government operations and in business;
- x. We believe that a broadly consistent and workable approach to the disclosure of payments and revenues is required, which is simple to undertake and to use;
- xi. We believe that payments' disclosure in a given country should involve all extractive industry companies operating in that country; In seeking solutions, we believe that all stakeholders have important and relevant contributions to make - including governments and their agencies, extractive industry companies, service companies, multilateral organisations, financial organisations, investors and non-governmental organisations.

According to the EITI Standard 2019, a country intending to implement the EITI is required to undertake a number of steps before applying to become an EITI country. These steps relate to government commitment, company engagement, civil society engagement, the establishment of a multi-stakeholder group and agreement on an EITI work plan.²¹ After the completion of these steps, the government of the country wishing to be recognised as an EITI implementing country should submit an EITI Application to the EITI Board, endorsed by the multi-stakeholder group.²² The application should describe the activities undertaken to date and provide evidence demonstrating that each of the sign-up steps have been completed. The application should also include contact details for government, civil society and private sector stakeholders involved in the EITI.²³

Of relevance to this paper is the requirement that the government should issue an unequivocal public statement of its intention to implement the EITI. The statement must be made by the head of state or government, or an appropriately delegated government representative.²⁴ It is not an

²¹ EITI International Secretariat, "The EITI Standard 2019: The Global Standard for the Good Governance of Oil, Gas and Mineral Resources," Edition 1, 17 June 2019, p.7.

²² EITI International Secretariat, "The EITI Standard 2019: The Global Standard for the Good Governance of Oil, Gas and Mineral Resources," Edition 1, 17 June 2019, p.7.

²³ Ibid.

²⁴ EITI International Secretariat, "The EITI Standard 2019: The Global Standard for the Good Governance of Oil, Gas and Mineral Resources," Edition 1, 17 June 2019, p.9.

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easy to task to achieve as noted in reference to the experience of other implementing jurisdictions. For instance, despite support and effort put into implementation of the EITI Standard, it has been noted that many participating countries are slow to fully implement it. Some countries, such as Guinea, the Democratic Republic of Congo (DRC), and Kazakhstan, took almost a decade after having officially committed to implementing the EITI Standard before becoming fully compliant members.²⁵ In fact, in some countries, attempts at EITI implementation have totally failed. Such was the case in Bolivia where the interest failed even before the commitment stage since EITI was seen as a neoliberal instrument and thus not in accord with the ideological position of the government.²⁶

3. Kenya's Extractives Legal and Institutional Framework: Gaps and Prospects

The main legal instrument that lays out the core governance principles for the natural resources exploitation in the country is the Constitution of Kenya 2010. Article 10 thereof outlines the national values and principles of governance which must bind all State organs, State officers, public officers and all persons whenever any of them: applies or interprets the Constitution; enacts, applies or interprets any law; or makes or implements public policy decisions.²⁷ These national values and principles of governance include: patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people; human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised; good governance, integrity, transparency and accountability; and sustainable development.²⁸

Article 60 also provides that land in Kenya should be held, used and managed in a manner that is equitable, efficient, productive and sustainable, and in accordance with the following principles- equitable access to land; security of land rights; sustainable and productive management of land resources; transparent and cost effective administration of land; sound conservation and protection of ecologically sensitive areas; elimination of gender discrimination in law, customs

²⁵ Lujala, P., "An analysis of the Extractive Industry Transparency Initiative implementation process," *World Development* 107 (2018): 358-381 at p. 358.

²⁶ Ibid.

²⁷ Article 10(1), Constitution of Kenya 2010.

²⁸ Article 10(2), Constitution of Kenya 2010.

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and practices related to land and property in land; and encouragement of communities to settle land disputes through recognised local community initiatives consistent with this Constitution.²⁹

There are also other provisions across the Constitution that touch on principles related to natural resources and public affairs aimed at achieving: fair land tenure and efficient land use; environmental preservation and protection; citizen participation in the management of natural assets; fair benefit-sharing from natural resources and associated fiscal revenues; transparency in the management of public service and assets; access to information of the public nature.

Away from these constitutional provisions, there are other statutory laws that seek to implement these constitutional provisions in respect of particular sectors and subsectors including the extractives industry.

3.1 Mining Sector

Countries preparing to join the EITI are encouraged to identify potential barriers to systematic disclosures from the outset, for instance by conducting a systematic disclosure feasibility study or addressing opportunities for systematic disclosures as part of the preparations for becoming an EITI implementing country.³⁰

Notably, Kenya made a commitment in 2015 to: (a) join EITI, making it a part of a global multi-stakeholder program designed to increase the transparency of the financial windfall many resource-rich governments receive from developing their oil, gas and minerals. Kenya pledged to establish a government focal point for EITI implementations within six months; and (b) adopt a “transparent policy and legislative framework” for the oil and gas sector, including the adoption of a transparent process for licensing (or awarding) oil and gas blocks as well as publication of contracts between oil companies and the government.³¹

²⁹ Article 60, Constitution of Kenya 2010.

³⁰ EITI International Secretariat, “The EITI Standard 2019: The Global Standard for the Good Governance of Oil, Gas and Mineral Resources,” Edition 1, 17 June 2019, p.8.

³¹ Gary, I., “Amidst the flurry of President Obama’s visit, Kenya commits to a transparent oil boom,” *Oxfam America*, August 21, 2015. Available at <https://politicsofpoverty.oxfamamerica.org/2015/08/amidst-the-flurry-of-president-obamas-visit-kenya-commits-to-a-transparent-oil-boom/>

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Despite this commitment, Kenya is currently neither compliant nor a candidate country.³² Becoming a member would require some self-introspection first to identify the existing gaps and challenges as far as the regulatory framework is concerned. The oil discovery in Turkana County led to stakeholders in the extractives sector calling for a comprehensive and consolidated legislative framework to help track revenue from the sector and enable Kenyans to understand its contribution to the economy.³³ It is noteworthy that Kenya is a resource-rich country and the recent discovery of new sources of crude oil and natural gas increases the urgency for developing a transparent extractives policy.³⁴

As already pointed out, the EITI requires disclosures on how the extractive sector is managed, enabling stakeholders to understand the laws and procedures for the award of exploration and production rights, the legal, regulatory and contractual frameworks that apply to the extractive sector, and the institutional responsibilities of the State in managing the sector.³⁵

The Mining Act 2016³⁶ was enacted to give effect to Articles 60, 62 (1)(f), 66 (2), 69 and 71 of the Constitution in so far as they apply to minerals; provide for prospecting, mining, processing, refining, treatment, transport and any dealings in minerals and for related purposes.³⁷ The Act is to apply to the minerals specified in the First Schedule³⁸. Notably, the Act does not apply to petroleum and hydrocarbon gases³⁹. The Mining Act thus covers only a section of the extractives industry since the extractive industries involves the development and exploitation of oil, gas, and mining resources.

The Mining Act has provisions covering various mining issues including but not limited to: mineral rights disputes relating to license and permits⁴⁰; structures for negotiating mineral

³² EITI, “Base Titanium,” available at <https://eiti.org/supporter/base-titanium>

³³ Open Government Partnership, “Kenya: Publish Oil and Gas Contracts (KE0013),” available at <https://www.opengovpartnership.org/members/kenya/commitments/KE0013/>

³⁴ Ibid.

³⁵ EITI International Secretariat, “The EITI Standard 2019: The Global Standard for the Good Governance of Oil, Gas and Mineral Resources,” Edition 1, 17 June 2019, p.15.

³⁶ Mining Act, No. 12 of 2016, Laws of Kenya.

³⁷ Preamble, Mining Act, 2016.

³⁸ The classification of minerals under first schedule includes: A. Construction And Industrial Minerals; B. Precious stones; C. Precious Metal group; D. Semi-precious stones group; E. Base And Rare Metals Group; F. Fuel Mineral Group; and G. Gaseous Minerals.

³⁹ These fall under the domain of the *Energy Act, No. 1 of 2019*, Laws of Kenya; and *Petroleum Act, No. 2 of 2019*, Laws of Kenya.

⁴⁰ Part ix—Surface Rights Compensation and Disputes (sections 151-157).

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agreements⁴¹; terms and conditions for minimum activity and work programs, structure for payments⁴²; and artisanal and small scale mining operations⁴³. Previously, these have been the subject of several court matters hence the need to settle the same by way of substantive statutory provisions.⁴⁴

As far as the EITI requirements are concerned, the Act carries a number of provisions that may have direct impact on such matters, even though the country is not a participating member. The Act requires that the Cabinet Secretary, the Principal Secretary and any person administering this Act should be guided by the values and principles enshrined in the Constitution and in particular Articles 10⁴⁵, 66(2)⁴⁶, 201 (c) and (d)⁴⁷, and 232⁴⁸ of the Constitution and the principles of

⁴¹ Part Vii—Mineral Agreements (sections 117-142).

⁴² Part Xii—Financial Provisions (sections 182-190).

⁴³ Mining Act, 2016, Sections 92-100.

⁴⁴ See for instance, Mui Coal Basin Local Community & 15 others v Permanent Secretary Ministry of Energy & 17 others [2015] eKLR, Constitutional Petition Nos 305 of 2012, 34 of 2013 & 12 of 2014 (Formerly Nairobi Constitutional Petition 43 of 2014) (Consolidated); Rodgers Muema Nzioka & 2 others v Tiomin Kenya Limited [2001] eKLR, Civil Case 97 of 2001; Tom Mboya Odege v Cabinet Secretary, Ministry of Petroleum and Mining & 3 others [2019] eKLR, Environment and Land Petition 2 of 2018; Cortec Mining Kenya Limited v Cabinet Secretary Ministry of Mining & 9 others [2017] eKLR, Civil Appeal 105 of 2015.

⁴⁵ (1) The national values and principles of governance in this Article bind all State organs, State officers, public officers and all persons whenever any of them --

- (a) applies or interprets this Constitution;
- (b) enacts, applies or interprets any law; or
- (c) makes or implements public policy decisions.

(2) The national values and principles of governance include --

- (a) patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people;
- (b) human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised;
- (c) good governance, integrity, transparency and accountability; and
- (d) sustainable development.

⁴⁶ 66 Regulation of Land Use and property

(2) Parliament shall enact legislation ensuring that investments in property benefit local communities and their economies.

⁴⁷ 201 Principles of Public Finance

(c) the burdens and benefits of the use of resources and public borrowing shall be shared equitably between present and future generations;

(d) public money shall be used in a prudent and responsible way;

⁴⁸ 232 Values and Principles of Public Service

(1) The values and principles of public service include--

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leadership and integrity set out under Chapter Six of the Constitution.⁴⁹ Notably, these constitutional provisions are mainly meant for the Cabinet Secretary who is charged with administration of the Act as well as any other person charged with administering the Act.

As far as the matters falling within the purview of the EITI are concerned, the Mining Act empowers the Cabinet Secretary to make regulations who have since made the following regulations: *Mining (Dealings in Minerals) Regulations, 2017*; *Mining (Licence and Permit) Regulations, 2017*; *Mining (Work Programmes and Exploration Reports) Guidelines, 2017*; *Mining (State Participation) Regulations, 2017*; *Mining (Use of Local Goods and Services) Regulations, 2017*; *Mining (Employment and Training) Regulations, 2017*; and *Mining (Use Of Assets) Regulations, 2017*.

a) *Mining (Dealings in Minerals) Regulations, 2017*

The *Mining (Dealings in Minerals) Regulations, 2017*⁵⁰ were enacted by the Cabinet Secretary for Mining in exercise of the powers conferred by sections 100 and 223 (1) of the Mining Act, 2016. These Regulations are to apply to- the export of a mineral by a holder of a mining right; the removal of minerals by a holder of a mineral right for the purposes of sampling, assay or analysis; the holder of a mineral dealer's licence or dealer's permit; the import of any mineral; and any other person who is not a holder of a mineral right, mineral dealer's licence or dealer's permit but requires the removal of minerals for analysis or testing for purposes other than

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- (a) high standards of professional ethics;
 - (b) efficient, effective and economic use of resources; responsive, prompt, effective, impartial and equitable
 - (c) provision of services;
 - (d) involvement of the people in the process of policy making;
 - (e) accountability for administrative acts;
 - (f) transparency and provision to the public of timely, accurate information;
 - (g) subject to paragraphs (h) and (i), fair competition and merit as the basis of appointments and promotions;
 - (h) representation of Kenya's diverse communities; and (i) affording adequate and equal opportunities for appointment, training and advancement, at all levels of the public service, of--
 - (i) men and women;
 - (ii) the members of all ethnic groups; and
 - (iii) persons with disabilities.
- (2) The values and principles of public service apply to public service in--
- (a) all State organs in both levels of government; and
 - (b) all State corporations.
- (3) Parliament shall enact legislation to give full effect to this Article.

⁴⁹ Sec. 5, Mining Act 2016.

⁵⁰ Legal Notice No. 88, Kenya Subsidiary Legislation, 2017. Available at http://kenyalaw.org/kl/fileadmin/pdfdownloads/LegalNotices/2017/LN88_2017.pdf

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exploration or mining.⁵¹ However, these Regulations are not to apply to the export and import of rough diamonds.⁵²

These Regulations are meant to curb illegal dealings in extraction and/or sale of minerals in the country and specifically spells out the duties of the holder of a mineral dealer's licence which include to: commence or engage in the trading of a mineral in accordance with the terms and conditions of the licence within thirty days after the date of the issue of the licence; not trade in any mineral other than the mineral or minerals specified in the licence; not trade in minerals except in accordance with the terms and conditions set out in the licence; not knowingly engage in trading of a mineral with a person who has not acquired the minerals lawfully or is otherwise not lawfully entitled to deal in minerals; pay all taxes, charges or levies that are required under the terms and conditions of the licence, the Act or any other written law in Kenya; keep complete and accurate records of all activities conducted under the licence at the registered office and submit a true copy to the Cabinet Secretary in the manner as specified in the Act and these Regulations; permit the authorised officer of the Ministry to inspect any documents or records; and submit if any, the sales contract or agreement the holder may sign with a buyer, seller or holder of a mineral right.⁵³

The Regulations are meant to provide more transparency and credibility for investors in solving issues affecting the mining sector in the country.⁵⁴ Despite these Regulations, there are still reports of smuggling of gold and other precious stones in and of the country.⁵⁵ Indeed, it is estimated that Africa is losing over \$60 billion annually due to the illicit mineral trade.⁵⁶ Traders still find a way of bypassing these rules to continue with the illegal trading in raw mineral

⁵¹ *Mining (Dealings in Minerals) Regulations*, 2017, Regulation 3(1).

⁵² *Ibid*, Regulation 3(2).

⁵³ *Mining (Dealings in Minerals) Regulations*, 2017, Regulation 9(5).

⁵⁴ Ali, S., "Govt to make Nairobi a mineral trade hub," *Citizen Digital*, September 26, 2016. Available at <https://citizentv.co.ke/business/govt-to-make-nairobi-a-mineral-trade-hub-142856/> [Accessed on 8/7/2019].

⁵⁵ Otieno, R., "Government red tape killing mining sector, claims lobby," *Standard Digital*, 17th April, 2019. Available at <https://www.standardmedia.co.ke/business/article/2001321316/government-red-tape-killing-mining-sector-lobby> [Accessed on 8/7/2019]; Mnyamwezi, R., "Petroleum CS Munyes exposes minerals smuggling cartels," *Standard Digital*, 21st August, 2018. Available at <https://www.standardmedia.co.ke/article/2001292787/kenya-losing-billions-to-minerals-smuggling-cartels> [Accessed on 8/7/2019].

⁵⁶ Senelwa, K., "Nairobi to process gold and gemstones at value addition centre," *The East African*, Monday February 20 2017. Available at <https://www.theeastafrican.co.ke/business/Nairobi-to-process-gold-and-gemstones/2560-3820176-n8dw6hz/index.html> [Accessed on 8/7/2019].

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resources. Transparency in declaration of revenues is still lacking as far as mineral extraction and other dealings in Kenya are concerned.

b) *Mining (Licence and Permit) Regulations, 2017*

The *Mining (Licence and Permit) Regulations, 2017*⁵⁷ were enacted by the Cabinet Secretary for Mining in exercise of the powers conferred by sections 12 (3)⁵⁸, 153 (3)⁵⁹ and 223 (2), (c), (d), (g), (j), (k) and (1)⁶⁰ of the Mining Act, 2016. These Regulations are to apply to all mineral rights.⁶¹

The *Mining (license and permit) Regulations 2017* provides that all applications for mineral rights shall be made through the On Line Mining Cadastre (OMC) in order for them to be considered for grant.⁶² Having an online application forum is a positive step towards establishing transparency as far as the application process is concerned so that regardless of whether one is a foreign or local investor, there is certainty on the process of seeking mining licenses and permits.

⁵⁷ *Mining (Licence and Permit) Regulations, 2017*, Legislative Supplement No. 40, Legal Notice No. 87, Laws of Kenya. Available at http://kenyalaw.org/kl/fileadmin/pdfdownloads/LegalNotices/2017/LN87_2017.pdf

⁵⁸ (3) Unless otherwise provided for in this Act, the Cabinet Secretary shall make Regulations to prescribe the procedure for— consideration of the applications made under this Act; and negotiation, grant, revocation, suspension or renewal of mineral rights.

⁵⁹ (3) The Cabinet Secretary may make Regulations relating to compensation guarantee bonds.

⁶⁰ (2) Without prejudice to the generality of the foregoing, the Cabinet Secretary may make Regulations prescribing— the fees, royalties, rent and other charges that are payable under this Act or the manner in which they are to be calculated; the royalties that are payable for specific minerals or the manner in which they are to be calculated; the manner in which an area referred to in a mineral right shall be demarcated; the manner in which records, accounts, books and other documents shall be kept, retained and made available for inspection; the procedures to be followed in respect of tendering in areas that have been designated for tendering for large scale operations in accordance with this Act; the measures to be observed in respect of radioactive and other restricted minerals including, the storage and transportation of radioactive and restricted minerals and the sale or supply of such minerals; the measures to be included in programmes for prospecting and mining operations that require the Cabinet Secretary 's approval; the measures to be observed to protect and rehabilitate the environment; procedures for the grant of mineral rights and guidelines for exploration and mining in Kenya's territorial sea, exclusive economic zone and the continental shelf; the areas that are excluded areas under this Act; the categories of mineral rights that are not to be granted in prescribed areas; the form of any licence, permit, form, return or other document to be used for the purposes of this Act; and anything which may be prescribed under this Act and for the better carrying into effect the provisions of this Act.

⁶¹ *Mining (Licence and Permit) Regulations, 2017*, Regulation 3.

⁶² *Mining (Licence and Permit) Regulations, 2017*, Regulation 4.

c) *Mining (Work Programmes and Exploration Reports) Guidelines, 2017*

The *Mining (Work Programmes and Exploration Reports) Guidelines, 2017*⁶³ were enacted by the Cabinet Secretary in exercise of the powers conferred by section 221 (1)⁶⁴ of the Mining Act, 2016. These Guidelines -provide guidance to applicants for, and holders of, reconnaissance licences, prospecting licences, prospecting permits and retention licences on how to prepare work programmes and exploration reports; and are to assist the Director of Geological Surveys to review work programmes and exploration reports that shall be submitted by applicants for or holders of mineral rights.⁶⁵

These reports are meant to enhance the right of access to information for the local people as far as the activities of the mining companies are concerned, but there is no evidence of any such reports being made public since 2017 or even any being filed with the government agencies at all. There is therefore lacking in transparency and accountability from the mining companies in the country.

As such, there is a need to ensure that these Regulations are not only enforced but also such reports should be made available to the public in light of the right of access to information as guaranteed under Article 35 of the Constitution of Kenya 2010 and Access to Information Act, 2016⁶⁶.

d) *Mining (State Participation) Regulations, 2017*

The *Mining (State Participation) Regulations, 2017*⁶⁷ were enacted by the Cabinet Secretary in exercise of Section 48(4)⁶⁸ of the Mining Act, 2016. The purpose of these Regulations is to provide for State participation in prospecting or mining operations carried out by a holder of a mineral right.⁶⁹

⁶³ *Mining (Work Programmes and Exploration Reports) Guidelines, 2017*, Legal Notice No. 85 of 2017, Laws of Kenya. Available at http://kenyalaw.org/kl/fileadmin/pdfdownloads/LegalNotices/2017/LN85_2017.pdf [Accessed on 7/7/2019].

⁶⁴ 221. (1) The Cabinet Secretary may publish and disseminate manuals, codes or guidelines relating to large scale and small scale operations, including in relation to environmental matters.

⁶⁵ Clause 3, *Mining (Work Programmes and Exploration Reports) Guidelines, 2017*.

⁶⁶ Access to Information Act, No. 31 of 2016, Laws of Kenya.

⁶⁷ *Mining (State Participation) Regulations, 2017*, Legal Notice No. 84 of 2017, Laws of Kenya.

⁶⁸ (4) The Cabinet Secretary shall make regulations to provide for state participation in mining or prospecting operations between the Government and the holder of a mineral right.

⁶⁹ *Mining (State Participation) Regulations, 2017*, Regulation 3.

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These Regulations are to apply to all applicants and holders of any mineral right-which entitles the State to a ten percent free carried interest; where the State acquires any additional interest that may be agreed with the holder of a mining licence; and where the State enters into an agreement to participate in prospecting operations or activities under a prospecting licence held by a holder other than the National Mining Corporation.⁷⁰

In line with the Mining Act 2016, the Regulations reiterate that the National Mining Corporation shall on behalf of the State, be the investment arm of the National Government in respect of all prospecting or mining operations.⁷¹ The National Mining Corporation - shall hold the State's ten percent free equity participation or free carried interest in all mining operations; shall be responsible for engaging in any operations relating to any additional interest that the State may acquire and which may be agreed with the holder of a mining licence at a fair market value: and may acquire any interest in or enter into a joint venture, farm-in agreement or any other arrangement with a holder of a prospecting licence for the purpose of conducting prospecting operations.⁷²

The direct interest and participation of the government, albeit through the National Mining Corporation is a positive step towards ensuring that the mining companies declare all the deposits and profits accrued as well as safeguarding the interests of local communities at all stages of mining activities. This will hopefully do away with such situations as the soda ash mining in Lake Magadi where the poverty and lack of investments in Magadi, after 100 years of exploitation of trona worth trillions of shillings, has been attributed to the lack of transparency in the governance of natural resources, corruption, and illegal outflows.⁷³

There has also been other past reported and unreported cases of non-disclosure and non-declaration by the mining companies in the country and this requires the government to have its own watchdog on the ground to curb the vice, hence the need for this Corporation.⁷⁴ The

⁷⁰ *Mining (State Participation) Regulations, 2017*, Regulation 4.

⁷¹ *Mining (State Participation) Regulations, 2017*, Regulation 5 (1).

⁷² *Mining (State Participation) Regulations, 2017*, Regulation 5 (2).

⁷³ Kamau, J., "Magadi saga exposes the ugly side of capitalism," *Daily Nation*, Sunday April 21 2019. Available at <https://www.nation.co.ke/news/Magadi-saga-exposes-the-ugly-side-of-capitalism/1056-5080906-2eii8rz/index.html>

⁷⁴ Sanga, B., "Auditor General reveals how mining companies under-declare tax dues," 25th Aug 2016. Available at <https://www.standardmedia.co.ke/article/2000213275/auditor-general-reveals-how-mining-companies-under-declare-tax-dues> [Accessed on 9/7/2019].

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Corporation is also useful in promoting capacity building in the sector as far as exploration of minerals in the country is concerned.

e) *Mining (Use of Local Goods and Services) Regulations, 2017*

The *Mining (Use of Local Goods and Services) Regulations, 2017*⁷⁵ were enacted by the Cabinet Secretary in exercise of the powers conferred by section 223(1) of the Mining Act, 2016. The purpose of these Regulations is to- promote job creation through the use of local expertise, goods and services, businesses and financing in the mining industry value chain and their retention in the country; achieve the minimum local level and in-country spend for the provision of the goods and services in the mining industry value chain; increase the capability and international competitiveness of domestic businesses; create mining and mineral related support industries that will provide jobs and sustain economic development; achieve and maintain a degree of participation for Kenyans or companies incorporated in Kenya for the supply of goods and the provision of services; and provide for a robust, transparent monitoring and reporting system in relation to the use of goods and services.⁷⁶

These Regulations shall apply to- (a) all applicants and holders of any licence for - the reconnaissance, prospecting and mining of a mineral; the cutting, polishing, processing, refining and smelting of a mineral; and mine support services; (b) all operators, contractors and other entities involved in any project, operation or activity connected or related to mine support services, mineral activity or operation in Kenya.⁷⁷

The Regulations require that the holder of a licence, its contractors and sub-contractors shall, to the maximum extent possible, when purchasing goods and procuring services required with respect to operations or any-activity to be conducted under a licence, give first priority to materials and goods made in Kenya; and services provided by citizens of Kenya or entities incorporated and operating in Kenya or owned and controlled by Kenyans: provided that such goods and services are equal in quality, quantity and price to, or better than, goods and services obtainable outside of Kenya.⁷⁸

⁷⁵ *Mining (Use of Local Goods and Services) Regulations, 2017*, Legal Notice No. 83 of 2017, Laws of Kenya.

⁷⁶ *Mining (Use of Local Goods and Services) Regulations, 2017*, Regulation 3.

⁷⁷ *Ibid*, Regulation 4.

⁷⁸ *Ibid*, Regulation 5.

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Except as otherwise provided in the Act or under these Regulations, an application for a licence should not be granted unless, the applicant has submitted a procurement plan for the purchase of goods and services in Kenya to the Cabinet Secretary.⁷⁹ The plan, if approved, shall form part of the conditions or obligations under the licence.⁸⁰

The mining sector in the country is expected to uplift the lives of its people by not only creating employment opportunities but also jobs through creating markets for local goods. There are no public records or any other form of evidence thus far to indicate if the companies have complied with these Regulations or if indeed the Government, through the relevant ministries have sought to ensure compliance.

f) *Mining (Employment and Training) Regulations, 2017*

The *Mining (Employment and Training) Regulations, 2017*⁸¹ were enacted by the Cabinet Secretary in exercise of powers conferred by sections 46(3)⁸² and 223(1) of the Mining Act, 2016. The purpose of these Regulations is to- promote job creation through the use of local expertise in the mining industry, the entire mining value chain and to retain the requisite skills within the country; develop local capacities in the mining industry value chain through education, skills and technology transfer, research and development; and achieve the minimum local employment level and in-country spend across the entire mining industry value chain.⁸³

These Regulations shall apply to all applicants and holders, of any licence for- reconnaissance, prospecting and mining; cutting, polishing, processing, refining and smelting of a mineral; a large-scale mineral right which is valid after the coming into force of the Act and these Regulations; and mine support services.⁸⁴

⁷⁹ Ibid, Regulation 6(1).

⁸⁰ Ibid, Regulation 6(4).

⁸¹ *Mining (Employment and Training) Regulations, 2017*, Legal Notice No. 82, Laws of Kenya.

⁸² (3) The Cabinet Secretary shall make regulations to provide for the replacement of expatriates, the number of years such expatriates shall serve and provide for collaboration and linkage with universities and research institutions to train citizens.

⁸³ *Mining (Employment and Training) Regulations, 2017*, Regulation 3.

⁸⁴ *Mining (Employment and Training) Regulations, 2017*, Regulation 4.

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An application for any licence shall not be granted by the Cabinet Secretary-unless the applicant has submitted a plan outlining the proposals for the employment and training of Kenyans.⁸⁵

While these Regulations are well meaning and geared towards ensuring that the mining sector creates jobs, employment and results in specialized training for the Kenyan people, it is based on the assumption that locals have some base knowledge that can be built on to achieve the level of expertise required in the execution of the corresponding duties within the industry.

In addition, there are no publicly accessible records to indicate the level of compliance for the existing mining companies in the country. Accountability and transparency are listed under Article 10(2) (c) of the Constitution, as “national values and principles of governance”. Article 10 (1) of the Constitution is binding on all State organs, State officers, and public officers, whenever they: (a) *apply or interpret the Constitution*; (b) *enact, apply or interpret any law*; or (c) *make or implement public policy decisions*.

g) *Mining (Use of Assets) Regulations, 2017*

The *Mining (Use of Assets) Regulations, 2017*⁸⁶ were enacted by the Cabinet Secretary in exercise of the powers conferred by Section 149(6)⁸⁷ of the Mining Act, 2016. These Regulations shall apply to holders of mining licences requiring them to maintain a complete, up to date and accurate register of all its immovable and movable assets.⁸⁸

These regulations, if fully enforced, can be a useful tool in fighting corruption and tax evasion by the mining companies as they seek to promote accountability and transparency on the income and expenses incurred by these companies. These Regulations, alongside other transparency and accountability measures and practices are useful for developing countries such as Kenya, where non-declaration or under declaration of profits by the multinationals has been happening. They can however work well where the authorities involved work with different stakeholders such as the revenue collecting agencies to get the actual figures.

⁸⁵ *Mining (Employment and Training) Regulations, 2017*, Regulation 5(1).

⁸⁶ *Mining (Use of Assets) Regulations, 2017*, Legal Notice No. 80 of 2017, Laws of Kenya.

⁸⁷ The Cabinet Secretary shall prescribe Regulations on the use of the assets.

⁸⁸ *Mining (Use of Assets) Regulations, 2017*, Regulations 3 & 4.

3.2 Oil and Gas sector in Kenya

Kenya's oil and gas sector is a nascent one with the actual discovery of oil and gas reserves having been made only in the year 2012 after many years of exploration.⁸⁹ The UK-based Tullow Oil, in partnership with Africa Oil, a Canadian oil and gas company, made discoveries in two separate blocks of the Lokichar Basin in the sparsely populated northern interior.⁹⁰

Kenya has four (4) petroleum exploration basin and these are: Lamu Basin, Anza Basin, Mandera Basin and Tertiary Rift Basin. Oil and gas exploration in the country began in 1956 and the breakthrough came in March 2012 with the discovery well –Ngamia 1 Well, in Lokichar Basin in Turkana County. As at December 2015 seventy four (74) wells had been drilled with twelve (12) hydrocarbon discoveries to date, nine (9) of which are in Turkana County. The other three are in Anza Basin and Offshore Lamu.⁹¹

The oil and gas sector is mainly governed by the Petroleum Act, 2019⁹² which was enacted to provide a framework for the contracting, exploration, development and production of petroleum; cessation of upstream petroleum operations; to give effect to relevant articles of the Constitution in so far as they apply to upstream petroleum operations, regulation of midstream and downstream petroleum operations; and for connected purposes.⁹³ The 2019 Act came into effect on 28 March 2019, repealing the Petroleum (Exploration and Production) Act of 1984.

The Act is to apply to all upstream, midstream and downstream petroleum operations being carried out in Kenya.⁹⁴

The Act empowers the Cabinet Secretary to negotiate, award and execute a petroleum agreement, on behalf of the national government, in the form prescribed in the Schedule to the Act.⁹⁵

⁸⁹ National Oil, "Wells Drilled," available at <https://nationaloil.co.ke/wells-drilled/>

⁹⁰ Oxford business group, "Kenya sees increased oil and gas reserves, and a shift in energy consumption," available at <https://oxfordbusinessgroup.com/overview/supply-and-demand-market-factors-seem-rise-tandem-increased-reserve-findings-and-growing-domestic>

⁹¹ Republic of Kenya, "The State Department for Petroleum," available at <http://www.petroleumandmining.go.ke/state-department-for-petroleum/>

⁹² Petroleum Act, Act No. 2 of 2019, Laws of Kenya.

⁹³ Ibid, Preamble.

⁹⁴ Sec. 3, Petroleum Act, 2019.

⁹⁵ Sec. 18, Petroleum Act, 2019.

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The Act requires the contractor to submit to the Authority reports on— all geological, geochemical, geophysical surveys, drilling, completion and production data and any other information in accordance with the petroleum agreement and regulations made under this Act; the rates and volume 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 procedure; and the use, injection, venting and flaring of natural gas or petroleum which information shall be based on metering.⁹⁶

However, information obtained under section 45 relating to any matter shall not be published or otherwise disclosed to a third party without prior consent in writing from the person from whom the information was obtained. Provided that nothing in this section shall restrict— the disclosure of such information—(i) to the Cabinet Secretary for the time being responsible for petroleum; (ii) to any officer or authority having functions in relation to upstream petroleum, policy development, economic planning of upstream petroleum operations, tax administration or environmental management; and (iii) in furtherance of a right to a person as provided for under the Constitution and other relevant laws; or the use of such information in any manner, which the Authority deems necessary or expedient in connection with the objects of this Act.⁹⁷

Under the Act, it is the duty of every contractor to furnish the Cabinet Secretary and the Authority as the case may be at such times and in such form and manner, such information as the Cabinet Secretary and the Authority may in writing require.⁹⁸ A person who refuses to furnish the information requested under section 47 or who makes a false statement or a statement which he has reason to believe is untrue, to the Cabinet Secretary, and to the Authority, as required under this Act, commits an offence and shall, on conviction, be liable to a fine of not less than twenty million shillings or to a term of imprisonment of not less than five years or both.⁹⁹

The disclosure of information is a requirement for all stages namely upstream, midstream and downstream.

⁹⁶ Sec. 45, Petroleum Act, 2019.

⁹⁷ Sec. 46, Petroleum Act, 2019.

⁹⁸ Sec. 47, Petroleum Act, 2019.

⁹⁹ Sec. 48, Petroleum Act, 2019.

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The Petroleum Act 2019 also has local content requirements on petroleum operations meant to create jobs and requiring the procurement of locally available goods and services.¹⁰⁰ However, the cost of such local content should be at the prevailing market rate. This is aimed at encouraging the procurement of local content, while ensuring that projects remain fiscally viable.

The Act provides that the contractor shall comply with financial and fiscal obligations in the implementation of the petroleum agreement under this Act and any other written law.¹⁰¹ They are to pay to the National Government all taxes, relevant fees and levies in such manner as may be prescribed by both the petroleum agreement and any other relevant laws.¹⁰²

The Act also provides for revenue sharing among the National Government, county governments and the local communities.¹⁰³

The Petroleum Act also includes a Model Production Sharing Contract ("Model PSC")¹⁰⁴ to be used by the Cabinet Secretary when entering into a petroleum agreement.¹⁰⁵ The Act defines the specific minimum contents of the model PSC.¹⁰⁶

Notably, some of the provisions in this Act seek to address issues similar to those that fall under the concern of EITI.

3.3 Accountability and Transparency in Benefit Sharing: Avoiding the Resource Curse

a. The Natural Resources (Benefit Sharing) Bill, 2018

The *Natural Resources (Benefit Sharing) Bill, 2018*¹⁰⁷ seeks to establish a system of benefit sharing in resource exploitation between resource exploiters, the national government, county governments and local communities; and for connected purposes. The proposed legislation essentially seeks to provide a legislative framework for the establishment and enforcement of a system of benefit sharing in natural resource exploitation between natural resource exploiters, the

¹⁰⁰ Sec. 50, Petroleum Act, 2019.

¹⁰¹ Sec. 53(1), Petroleum Act, 2019.

¹⁰² Sec. 53(2), Petroleum Act, 2019.

¹⁰³ Sec. 57 & 58, Petroleum Act, 2019.

¹⁰⁴ https://www.ketraco.co.ke/opencms/export/sites/ketraco/learn/maps/Legal_Documents/Model_PSC_2015.pdf

¹⁰⁵ Schedule to the Act.

¹⁰⁶ Ibid.

¹⁰⁷ Kenya Gazette Supplement No.130 (Senate Bills No.31).

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national government, county governments and local communities and designates the Commission for Revenue Allocation to oversee the same.¹⁰⁸

Notably, the legislation shall apply to the following natural resources— sunlight; water resources; forests, biodiversity and genetic resources; wildlife resources; industrial fishing; and wind.¹⁰⁹ Implementation of the Bill, once enacted, shall be guided by the following principles: transparency and inclusivity; revenue maximization and adequacy; efficiency and equity; accountability and participation of the people; rule of law and respect for human rights of the people; and sustainable natural resources management.¹¹⁰

The legislation, if enacted, will also amend the Mining Act 2016 by amending section 83 thereof as follows:

(a) by deleting subsection (5) and substituting therefor the following new subsection (5) —(5) The royalties payable under sub-section (1) shall be distributed as follows —(a) twenty per cent of the royalties shall, subject to subsection (6), be paid into a sovereign wealth fund established by the National Government; and (b) eighty per cent of the royalties shall, subject to subsection (7), be shared between the National Government and respective county governments in the ratio of sixty per cent to the National Government and forty per cent to the county governments; and (b) by inserting the following new subsections immediately after subsection (5) — (6) The royalties paid into the sovereign wealth fund under sub-section (5)(a) shall be paid as follows into the following funds constituting the sovereign wealth fund — (a) sixty per cent shall be paid into a futures fund; and (b) forty per cent shall be paid into a natural resources fund. (7) At least forty per cent of the royalties assigned to county governments under sub-section (5) (b) shall be utilised to implement respective local community projects and sixty per cent of the royalties shall be utilised for the benefit of the entire county. (8) Where mineral resources bestride two or more counties, the Commission on Revenue Allocation established under Article 215 of the Constitution shall determine the ratio of sharing the retained royalties amongst the affected counties in consultation with the affected counties.¹¹¹

While the pending legislation will have a wide application and touching on the various types of natural resources as listed above, it is worth pointing out that the suggested amendment on the mining Act 2016 will have a huge bearing on the proceeds of mining activities in the country, if passed. The same seeks to ensure that all the interested stakeholders will have a share of the accruing benefits. This is important in achieving accountability and transparency in mining

¹⁰⁸ Memorandum of Objects and Reasons, Natural Resources (Benefit Sharing) Bill, 2018.

¹⁰⁹ Clause 3, Natural Resources (Benefit Sharing) Bill, 2018.

¹¹⁰ Clause 4, Natural Resources (Benefit Sharing) Bill, 2018.

¹¹¹ Clause 19, Natural Resources (Benefit Sharing) Bill, 2018.

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activities in the country and also a good means of avoiding resource curse. If this amendment is approved, it will be a useful tool in promoting national development as well as community empowerment especially when applied together with the various mining regulations on trainings, employment, local content, among others. The Bill has been pending for over five years due to the contentious issue of benefit sharing between national and county governments, amongst other issues. The Benefit Sharing Bill addresses some important aspects and as pointed out in the *Africa Mining Vision 2009*, the state's ability to optimise the leasing (licensing) of its natural resource assets is concentrated at the outset (conclusion of the exploitation contract) as it is difficult to fundamentally renegotiate contracts at a later stage without sending negative signals to investors on the certainty of contracts, with resulting increased negative investment risk perceptions.¹¹² The Mining Vision thus recommends that it is therefore important to identify all the critical resource linkages at the outset (in the resource exploitation contract/lease/license), even if the local economy is not yet in a position to take advantage of such opportunities.¹¹³ The most important aspects in this regard include: Equitable share of the resource rents; Flexible fiscal regime which is sensitive to price movements and stimulates national development; Third-party access to the resource infrastructure (particularly transport, energy and water) at non-discriminatory tariffs; The development of the local resource supplier/inputs sector where feasible (particularly capital goods, services & consumables), through the use of flexible local content milestones; The establishment of resource processing industries through the use of flexible value-addition (beneficiation) milestones & incentives and the upfront stipulation of competitive pricing of resource outputs/products in the domestic market, for the life of the project; The development of local requisite human resources and technological capacity through stipulated investments in training and R&D, preferably in partnership with the state (joint or matching funding); and Provisions that safeguard transparency and good governance as well as enforce internationally acceptable safety and health standards, environmental and material stewardship, corporate social responsibility, and preferential recruitment of local staff.¹¹⁴

These are some of the issues that the country's legislative and institutional framework on extractives is trying to capture through enactment of laws and regulations. However, despite such

¹¹² African Union, *Africa Mining Vision 2009*, p.17. Available at https://au.int/sites/default/files/documents/30995-doc-africa_mining_vision_english_1.pdf

¹¹³ Ibid.

¹¹⁴ Ibid, p.17.

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efforts, implementation of these laws and regulations is doubtful. For instance, while there are regulations seeking to empower the local people on the extractives by equipping them with skills and expertise for technology transfer, there have been damning reports that the government agencies responsible for overseeing this are not carrying out their mandate. Kenya's Petroleum Ministry is on the spot for failing to utilize millions of shillings set aside for training Kenyans on petroleum operations despite the country facing a severe skills shortage. It was reported through an audit by Auditor-General that Sh943.9 million (\$9.439 million) set aside as Training Levy Fund was still lying in local banks. The State Department of Petroleum had accumulated Sh943,906,947 for training in a local bank account as of June 30, 2018. Kenya's petroleum sector, the extractives sector is still dominated by foreign expertise in technical, exploration and production skills. In a bid to counter this skewed balance, the national government set up the Exploration and Production Act which provides for the establishment of the Petroleum Training Levy Fund for training Kenyans on petroleum operations.¹¹⁵

Indeed, the challenge of implementation of laws and regulations by the existing institutions was also highlighted by the ICJ Kenya in its publication titled: '*Drilling Past the Resource Curse? Essays on the Governance of Extractive in Kenya*'¹¹⁶ which examines the causes of economic, social and political challenges and concludes that the root cause is the failure of governance institutions despite the existence of progressive constitutions and legislative frameworks.¹¹⁷ Empirical studies by other scholars have also concluded that good institutional governance - specifically, a strong public voice with accountability, strong political stability, good regulations, and powerful anticorruption policies tend to conduce a positive relationship between natural resource richness and economic development.¹¹⁸

¹¹⁵ Tubei, G., "Kenya's Petroleum Ministry is on the spot for failing to utilize millions meant for training Kenyans on Petroleum operations despite massive skills shortage," *Business Insider*, July 16, 2019. Available at <https://www.pulselive.co.ke/bi/finance/millions-meant-for-training-kenyans-on-petroleum-operations-gather-dust-in-local/384gf52>

¹¹⁶ Ambani, J.O. (ed.), *Drilling Past the Resource Curse? Essays on the Governance of Extractive in Kenya*, April, 2018, ICJ Kenya, pp.2-3. Available at <https://icj-kenya.org/jdownloads/Publications/Drilling%20Past%20the%20Resource%20Curse%20Book.pdf>

¹¹⁷ ICJ Kenya, "Jurists Forum: Interrogating Trends in Kenya's Extractives Sector," available at <https://icj-kenya.org/news/latest-news/185-jurists-forum-interrogating-trends-in-kenya-s-extractives-sector>

¹¹⁸ Zeynalov, A., "Do Sufficient Institutions Alter the Relationship between Natural Resources And Economic Growth?" *MPRA Paper* 46850 (2013), at p. 11. Available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2413867

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This is even clearer in the case of Nigeria where it has been reported that, despite the enactment of various acts, the culture of impunity and corruption has continued to occupy the country's oil industry and poverty reduction remains elusive.¹¹⁹ However, this does not mean that Nigeria is not an implementing country of EITI. In 2019, Nigeria was rated as having made satisfactory progress overall with implementing the EITI Standard.¹²⁰ Notably, the EITI Board points out that even if a country is found making satisfactory or meaningful progress, it does not indicate whether there is corruption in the country or not. It simply means that the country has put into practice significant aspects of all EITI Requirements and thus has sufficient mechanisms of public disclosure of natural resources.¹²¹ This is a clear indication of the need for concerted efforts from all stakeholders to streamline extractives industry in any country and the need to ensure full and effective implementation of the domestic laws and regulations. EITI membership and implementation alone is not enough.

As already pointed out above, the issues affecting the extractives sector in Kenya are therefore not only limited to those related to modes of benefit sharing. There has been a general lack of openness, transparency and accountability as far as the mining activities are concerned. As far as 2013 and immediately after the discovery of the oil deposits in 2012, there were reports of non-disclosure of the mining agreements that the country has entered into with the foreign mining contractors. An International Monetary Fund (IMF) team was pushing the government of Kenya to make public details of a number of deals it had signed with oil exploration and mining firms. However, the team decried that they had been denied them access to the documents.¹²²

Such situations may have informed the provisions in the *Petroleum Act 2019* which provides under section 49 (5) that any contract is a public document and the Government shall have the right to publish and keep it publicly available. The Government may also publish such

¹¹⁹ Poncian, J., & Kigodi, H. M., "Transparency initiatives and Tanzania's extractive industry governance," *Development Studies Research* 5, no. 1 (2018): 106-121, p. 108.

¹²⁰ EITI, "The Board agreed that Nigeria has made satisfactory progress overall with implementing the EITI Standard," 27.02.2019; Reference: 2019-20/BP-42. Available at <https://eiti.org/BD/2019-20>

¹²¹ EITI, "How We Work," <https://eiti.org/about/how-we-work#upholding-the-standard-internationally-validation>

¹²² Wahome, M., "Kenya denies IMF access to secret mining agreements," *Business Daily*, Sunday, July 21, 2013. Available at <https://www.businessdailyafrica.com/economy/Kenya-denies-IMF-access-to-secret-mining-agreements/3946234-1922406-qjn73nz/index.html> ; Jamah, A., "Stakeholders blame 'secrecy clause' to graft in Kenya mining sector," *Standard Digital*, 19th Oct 2013. Available at <https://www.standardmedia.co.ke/article/2000095810/stakeholders-blame-secrecy-clause-to-graft-in-kenya-mining-sector>

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information concerning the contract as may be required by the laws of Kenya, including for purposes of obtaining ratification of the contract by Parliament in accordance with Article 71 of the Constitution, or in accordance with internationally accepted standards and norms concerning transparency in the extractive industries. Despite this forward looking and commendable provision on accountability and transparency, we are yet to see the publication of such contracts touching on oil and gas agreements in the country.¹²³

Despite its launch in 2009, the *Africa Mining Vision* which also binds the country and seeks to promote transparent, equitable and optimal exploitation of mineral resources is yet to have an impact in not only Kenya but also many other African countries as there are still rampant cases of illicit financial flows, lack of mineral value addition and poverty among communities living in mining areas.¹²⁴

It is estimated that so far, out of the 44 Production Sharing Contracts signed by the government of Kenya, only 10 have been publicised.¹²⁵ In addition, as far as accessibility of information is concerned, it has been observed that the government of Kenya maintains an open data portal and has to some extent availed information on it on some of the on-going projects. However, key information regarding fiscal terms, negotiations and payments is missing on the sites.¹²⁶ While there are many legal and regulatory framework covering contracts, exploration and production, it has rightly been pointed out that the legal framework on revenue collection, revenue allocation and social and economic spending is skeletal at best or is completely non-existent.¹²⁷ In addition, the inclusion and involvement of civil societies, non-governmental organisations and other stakeholders in the transparency and accountability framework is also missing as part of independent oversight across the value chain.¹²⁸

¹²³ See generally, Odote, C., “Release information on all extractives,” *Business Daily*, Sunday, June 30, 2019. Available at <https://www.businessdailyafrica.com/analysis/columnists/Release-information-on-all-extractives/4259356-5177330-vwfkao/index.html>

¹²⁴ Kitimo, A., “Call to adopt mining values and principles in East Africa,” *The East African*, Saturday July 27 2019. Available at <https://www.theeastafrican.co.ke/business/Call-to-adopt-mining-values-and-principles-in-East-Africa/2560-5212362-hwctkgz/index.html>

¹²⁵ Kidunduhu, N., “Transparency keeps resource curse at bay,” *Business Daily*, Wednesday, August 7, 2019. Available at <https://www.businessdailyafrica.com/analysis/ideas/Transparency-keeps-resource-curse-at-bay/4259414-5227226-13y169t/index.html>

¹²⁶ Ibid.

¹²⁷ Ibid.

¹²⁸ Ibid.

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Transparency through public disclosure of the Production Sharing Agreements and other contracts that the government has signed with mining, oil and gas companies builds citizen confidence in the institutions overseeing the governance of the sector and assists in managing expectations.¹²⁹ In addition, mining, oil and gas resources are owned by the citizens and are merely managed in trust by the government. Citizens, therefore, have a right to information regarding how their resources are managed.¹³⁰ Thus, while the EITI standards may not have express requirements on making public the contracts signed, good practice and domestic laws on governance may be used to push for the same. Transparency initiatives in the extractive industries have also made it possible for governments and citizens to engage in the governance of the sector where some governments such as Liberia, Sao Tome, Nigeria, Mongolia, and Ghana have used the EITI to either engage citizens in policy dialogue about resource utilization or governance issues of the extractive industries.¹³¹

Public participation, accountability and transparency are some of the national values and principles of governance as entrenched in the current Constitution of Kenya and other laws governing the extractives sector in the country. Adopting and implementing measures, such as the EITI standard, that will promote public participation and engagement in governance matters can go a long way in achieving an inclusive and equitable society for all.

4. Kenya's Extractives Industry: Achieving the Dream

The extractives industry in Kenya holds high hopes for the Kenyan people with not only increased revenues but also lowered cost of living as the prices of petroleum products have a significant effect on the cost of essential commodities in the country.¹³² Some of the mechanisms that are meant to enhance the economies of the national, county governments and communities through benefit sharing include but not limited to: direct investment in projects that benefit the people, jobs and employment creation and technology transfer amongst others. Notably, this is in line with one of the EITI principles that the prudent use of natural resource wealth should be an

¹²⁹ Makore, G., "Kenya's New Government and Imperatives for Extractives Governance Reform," *Oxfam*, Wednesday, Feb 14, 2018. Available at <https://kenya.oxfam.org/latest/blogs/kenya%E2%80%99s-new-government-and-imperatives-extractives-governance-reform>

¹³⁰ Ibid.

¹³¹ Poncian, J., & Kigodi, H. M., "Transparency initiatives and Tanzania's extractive industry governance," *Development Studies Research* 5, no. 1 (2018): 106-121, p. 109.

¹³² Munyua, J., & Ragui, M., "Drivers of instability in prices of petroleum products in Kenya," *Prime Journal of Business Administration and Management (BAM)* 3, no. 3 (2013): 919-926.

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important engine for sustainable economic growth that contributes to sustainable development and poverty reduction.

In recognition of the fact that the benefits of resource extraction occur as revenue streams over many years and can be highly price dependent, the current legislation seeks to peg revenue sharing on the profits accrued.¹³³

While the current legislation on the extractives industry in the country has several requirements on disclosure and reports touching on various aspects, Kenya cannot currently pride itself as having transparency by governments (both national and counties) and companies in the extractive industries and thus, there is the need to enhance public financial management and accountability. There is hardly any publicly available information on the important aspects that shed light on the status of the revenues from the extractives industry. Its only recently when the President mentioned that the first batch of oil had been exported, and there was mention of the amount exported or its value.¹³⁴ The details of such deals remain few.

In a bid to achieve greater transparency, Kenya needs to reconsider its stand on the EITI. Adopting and enforcing the EITI principles on financial transparency may bring greater levels of practice of accountability by government to all citizens for the stewardship of revenue streams and public expenditure as well as the companies or contractors involved. In order for the communities and the public at large to experience positive impact from the proceeds of oil, gas and minerals in the country, there is a need for high standards of transparency and accountability in government operations and in the contractors' business. It is acknowledged that there are regulations that seek to achieve this, but the problem is that the government and other players do not have mandatory reporting obligations on their actions as is the case under the EITI. Adopting the principles of EITI and the subsequent reporting obligations can go a long way in achieving disclosure of payments and revenues.

The EITI compliance requirements and reporting obligations will ensure payments' disclosure and also involve all extractive industry companies operating in the country.

¹³³ Petroleum Act 2019, sec. 36-39.

¹³⁴ Presidential Strategic Communication Unit, "Kenya in Sh1.3bn oil export deal," *Daily Nation*, Thursday, August 1, 2019. Available at <https://www.nation.co.ke/news/Kenya-joins-list-of-oil-exporters/1056-5219572-qkp633z/index.html>

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Notably, the accountability and transparency requirements are not only restricted to the mining companies but also binds the government by requiring transparency and efficiency in the management of revenue paid to various governmental authorities. In a bid to build an accountable and transparent framework on extractives in the country, there is also a need to invest in skills. Contracts in the extractives sector are shrouded in mystery with most African countries usually being conned by multinationals involved in the exploration, exploitation and extraction of the resources, the first steps towards failure in tracking revenues.¹³⁵

Thus, even as the country needs to embrace and implement the EITI standards, there is also a greater need to build capacity in its people who will be in charge of drafting and implementing the extractives industry contracts.

It is worth pointing out that while we push for adoption of best practices in management of revenues from the extractives sector in Kenya, and considering that Kenya has had no previous experience in oil production, there is a temptation to adopt frameworks from other countries despite the contextual differences between countries.¹³⁶ It is therefore recommended that the Government of Kenya has a responsibility to adopt frameworks that are consistent with the prevailing social, economic, political and cultural circumstances in the country so as to facilitate the development of the oil and gas industry.¹³⁷

Kenya stands to benefit greatly from its oil, gas and mineral resources but only if the same are well managed through accountability and transparency in revenues declaration and ultimately, proper utilisation of such revenues in promoting growth, development and investment in other sectors of the economy. However, it has been observed that simply making information available and extractive activities transparent is inadequate because it cannot fully address the social and economic damage arising from resource extraction.¹³⁸ This is attributed to the fact that the EITI has no inbuilt mechanism to move beyond exposing what goes on in the extractives sector. The

¹³⁵ Welimo, R., "Legal professionals trained on negotiating contracts in extractives industry," Kenya Broadcasting Corporation, August 5, 2019. Available at <https://www.kbc.co.ke/legal-professionals-trained-on-negotiating-contracts-in-extractives-industry/>

¹³⁶ Kenya Civil Society Platform on Oil & Gas, "Setting the Agenda For The Development Of Kenya's Oil And Gas Resources – The Perspectives Of Civil Society," Aug 11, 2014. Available at <http://kcspog.org/setting-the-agenda-for-the-development-of-kenyas-oil-and-gas-resources-the-perspectives-of-civil-society/>

¹³⁷ Ibid.

¹³⁸ Poncian, J., & Kigodi, H. M., "Transparency initiatives and Tanzania's extractive industry governance," *Development Studies Research* 5, no. 1 (2018): 106-121, p. 108.

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initiative has a narrow focus on resource revenues at the expense of broader issues concerning the extractives sector.¹³⁹ This should therefore be addressed alongside such problems as low level of public consultations, the potential for vested interest to be rooted in the frameworks, the potential for oil to divide the people, and the threat that oil poses to the environment, livelihoods of communities and security.¹⁴⁰

Extractives industry has promoted socio-economic development in other African countries without falling into the trap of resource curse. For instance, Botswana, which is neither a member state nor an implementing country of EITI, has extractive mineral industries that have played a crucial role in the development of the country. Through proper management of its resources and thus achieving a mineral-led economic growth, the country has been transformed from one of the poorest countries in the world at the time of independence in 1966 to an upper-middle income country.¹⁴¹ Botswana mainly exports diamonds, as the world's largest producer in value terms, as well as copper and nickel.¹⁴²

Botswana's record of mineral-led development is remarkable and the country is also considered to be relatively free of the corruption and environmental damage that is often associated with mining industries. Public finances are strong, debt is minimal, and the country enjoys investment-grade credit ratings.¹⁴³

It has been observed that Botswana's approach has not been based on offering low-tax incentives, but on a stable, open and transparent policy regime, free of corruption and political interference, that allows investors freedom to operate once agreements have been reached.¹⁴⁴

Botswana has also achieved favourable balance of payments and fiscal positions. In addition, there has been great attention to how these revenues are spent, with an overriding objective of

¹³⁹ Ibid.

¹⁴⁰ Kenya Civil Society Platform on Oil & Gas, "Setting the Agenda For The Development Of Kenya's Oil And Gas Resources – The Perspectives Of Civil Society," Aug 11, 2014.

¹⁴¹ Jefferis, K., "The role of TNCs in the extractive industry of Botswana," *Transnational corporations* 18, no. 1 (2010): 61-92 at p.61.

¹⁴² Ibid, p.61.

¹⁴³ Ibid, p.61; See also International Monetary Fund, Botswana: 2017 Article iv Consultation—Press Release; Staff Report, August 2017, IMF Country Report No. 17/249. Available at <https://www.imf.org/~media/Files/Publications/CR/2017/cr17249.ashx>

¹⁴⁴ Jefferis, K., "The role of TNCs in the extractive industry of Botswana," *Transnational corporations* 18, no. 1 (2010): 61-92 at p.62.

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devoting mineral revenues – derived from the sale of a non-renewable asset – to investment in other assets (economic, social and financial) that will help to generate future economic growth.¹⁴⁵ In addition, significant financial reserves have been built up that enable the economy to get insulation against the economic shocks that may come with risks and uncertainties in mineral commodities.¹⁴⁶

Despite scholarly evidence that mineral-dependent economies perform worse than other, otherwise similar economies across the gamut of development indicators and the argument that mineral dependent states have particularly low living standards, high poverty rates, and high income inequality, Botswana seems to have figured it out to go against the grain and achieved high economic development through its mineral resources.¹⁴⁷ Other countries like Indonesia, Chile and Tanzania have also mitigated the resource curse effects of their substantial mineral sectors and used those sectors to achieve strong development outcomes in many areas.¹⁴⁸

Kenya can learn a lot from the case of Botswana and other countries that have managed to use their mineral resources to promote development through open, accountable and transparent management of the extractives not only in how contracts are awarded but also in how the accruing benefits are used. Investing the revenue from extractives in empowering people (non-monetary investments in communities) as well as proper utilisation and investment of the monies accrued and those in sovereign wealth fund can help Kenya avoid the resource curse and instead build a strong and diversified economy for its people.

5. Conclusion

Since minerals and hydrocarbons are finite resources, developing countries rich in these resources seek for strategies to harness the opportunities created with the extractive industries to

¹⁴⁵ Ibid, p. 62.

¹⁴⁶ Ibid, p.62; See also Kojo, N.C., *Diamonds are not forever: Botswana medium-term fiscal sustainability*, The World Bank, 2010. Available at <https://openknowledge.worldbank.org/bitstream/handle/10986/3962/WPS5480.pdf?sequence>

¹⁴⁷ Dougherty, M., "A Policy Framework for New Mineral Economies: Lessons from Botswana," *Research Paper C1-2011* (2011): 2; See also Limi, A., "Escaping from the Resource Curse: Evidence from Botswana and the Rest of the World." *IMF Staff Papers* 54, no. 4 (2007): 663-699.

¹⁴⁸ Ibid.

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support sustainable economic development.¹⁴⁹ It is therefore important that the industry players in Kenya's extractives industry push for the country to adopt and implement the EITI principles on transparency and accountability in financial reporting.

The EITI Requirements are minimum requirements and implementing countries are encouraged to go beyond them where stakeholders agree that this is appropriate.¹⁵⁰

It is necessary to implement the Extractives Industry Transparency Initiative in order to promote open and accountable management of extractives in Kenya. However, this should be implemented alongside the domestic laws governing the sector as they will come in handy in addressing the other issues such as promoting public participation and consultations¹⁵¹, curbing corruption, promoting fair and equitable benefit sharing for conflict avoidance and security, sound environmental management and governance, empowering communities and enhancing the general welfare of all.

Nigeria, though positively rated as at 2019, is a clear demonstration that more is required than just EITI; proper execution of mandates by domestic institutions and effective implementation of national laws and regulations governing the extractives sector is equally important. Botswana on the other hand, is a good example of how to avoid resource curse by properly managing the available mineral resources as well as diversifying the economy and avoiding over-reliance on extractives as a shock insulator against uncertainties in minerals, oil and gas prices in the international markets. Botswana is also an important country for comparison considering that it is neither a member state nor an implementing state of EITI standard. This has however not affected its commitment to achieving accountable and transparent management of its mineral sector to achieve high economic growth.

¹⁴⁹ Claudine Sigam and Leonardo Garcia, *Extractive Industries: Optimizing Value Retention In Host Countries*, UNCTAD/SUC/2012/1 (New York and Geneva, 2012), p. 1. Available at https://unctad.org/en/PublicationsLibrary/suc2012d1_en.pdf

¹⁵⁰ EITI International Secretariat, "The EITI Standard 2019: The Global Standard for the Good Governance of Oil, Gas and Mineral Resources," Edition 1, 17 June 2019, p.9.

¹⁵¹ *Hassan and 4 others v KWS*, (1996) 1KLR (E&L) 214; *Mada Holdings Ltd t/a Fig Tree Camp v County Council of Narok*, HC Judicial Review No. 122 of 2011, [2012] eKLR; *Meza Galana and 3 others v AG and 2 Others*, HCCC No. 341 of 1993, [2007] eKLR; *Cortec Mining Kenya Limited v Cabinet Secretary Ministry of Mining & 9 others* [2015] eKLR, Environment and Land Case 195 of 2014; *Mui Coal Basin Local Community & 15 others v Permanent Secretary Ministry of Energy & 17 others* [2015] eKLR, Constitutional Petition Nos 305 of 2012, 34 of 2013 & 12 of 2014 (Formerly Nairobi Constitutional Petition 43 of 2014) (Consolidated); *Tata Chemicals Magadi Limited v County Government of Kajiado & 2 others* [2019] eKLR, Petition 2 of 2019; *Lake Naivasha Friends of the Environment v AG and 2 others*, HC Petition No. 36 of 2011, [2012] eKLR.

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The realisation of a prosperous and sustainably developed country is possible through promoting the national values and principles of governance in all sectors of the economy including the extractives. An extractives industry built on accountability and transparency can help manage expectations and thus avoid the resource curse so prevalent in many resource rich countries especially in Africa. Kenya should consider joining EITI as an additional tool alongside the constitutional and statutory requirements to enable it achieve its dream of a profitable extractives sector to boost socio-economic growth.

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