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**TITLE:**

**ENHANCING THE BENEFITS OF LOCAL CONTENT IN KENYA'S MINING  
INDUSTRY.**

**A PROJECT PAPER SUBMITTED IN PARTIAL FULFILMENT OF THE  
REQUIREMENTS FOR THE AWARD OF THE DEGREE OF MASTER OF  
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**BY**

**KAMAU DAVID NGATA**

**G62/82486/2015**

**PREPARED UNDER THE SUPERVISION OF:**

**DR. KARIUKI MUIGUA**

**APRIL , 2018**

**DECLARATION**

I KAMAU DAVID NGATA , do hereby declare this paper to be my original work and that it has not been submitted elsewhere or is not due for submission for a degree in any other university.

**SIGNED:** .....

**KAMAU DAVID NGATA**

This Research Paper has been submitted with my approval as the University supervisor.

**SIGNED :**.....

**DR. KARIUKI MUIGUA.**  
**LECTURER: SCHOOL OF LAW**  
**UNIVERSITY OF NAIROBI**

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## **DEDICATION**

This study is dedicated to all Kenyans who are working hard to see broad-based developmental outcomes for the country. I specifically dedicate the study to policy makers and all stakeholders of project Kenya who believe in the capability of local content to improve lives and have directed their efforts towards realizing this goal.

## LIST OF ABBREVIATIONS

ASM	Artisanal Mining.
ADB	African Development Bank
AIPNF	Australian Industry Participation National Framework, 2001
CDA	Community Development Agreement.
CSR	Corporate Social Responsibility
EAC	East African Community
EIA	Environmental Impact Assessment.
E&T	Employment and Training.
EMCA	Environmental Management and Co-ordination Act.
EITI	Extractive Industries Transparency Initiative.
FDI	Foreign Direct Investment.
FPIC	Free Prior and Informed Consent.
GATT	General Agreement on Tariffs and Trade.
GDP	Gross Domestic Product.
HDSA	Historically Disadvantaged South Africans.
IBA	Impact Benefit Agreement.
ICMM	International Council of Mining and Metals.
IFC	International Finance Corporation.
ILO	International Labour Organization.

IMF	International Monetary Fund.
IPIECA	International Petroleum Industry Environmental Conservation Association
ITPC	C 169 Indigenous and Tribal Peoples Convention.
LCPPF	Local Content and Local Participation in Petroleum Activities Policy Framework, Ghana, 2010.
LCDs	Least Developed Countries.
LC	Local Content.
MNCs	Multinational Corporations.
MRD	Mineral Rights Board.
MPRD	Mineral and Petroleum Resources Development.
NMC	National Mining Corporation.
NTO	National Treatment Obligation.
NRGI	Natural Resources Governance Institute.
NEMA	National Environment Management Authority.
NOGICD	Nigerian Oil and Gas Industry Content Development Act, 2010
NGO	Non-Governmental Organization.
RMDEC	Regional Mining Development and Environment Committee
R&D	Research and Development.
SME	Small and Medium Enterprises.
SEIA	Social and Economic Impact Assessment.

SRI	Social Responsible Investments.
SAPs	Structural Adjustment Programmes.
TRIMs	Trade-Related Investment Measures.
UK-DFID	United Kingdom Department for International Development.
UN	United Nations.
UNCTAD	United Nations Conference on Trade and Development.
UNDRIP	United Nations Declaration on the Rights of Indigenous Peoples.
UNECA	United Nations Economic Commission for Africa.
UNIDO	United Nations International Development Organization.
ULGS	Use of Local Goods and Services.
WTO	World Trade Organization.

## **TABLE OF LEGISLATION**

### **Constitution of Kenya, 2010.**

### **Statutes and other Legal Instruments**

Australian Industry Participation National Framework (AIPNF), Australia, 2001.

Income Tax Act, Cap 470 Laws of Kenya.

Kenya Finance Act (No. 16) 2014.

Local Content and Local Participation in Petroleum Activities Policy Framework (LCPPF) Ghana, 2010.

Mineral and Petroleum Resources Development Act (No. 27) South Africa, 2002.

Nigerian Oil and Gas Industry Content Development Act, 2010.

The Mining Act ( No. 12) Kenya, 2016.

### **International Laws**

C169 Indigenous and Tribal Peoples Convention, 1989.

The African Charter on Human and Peoples Rights, 1981.

United Nations Declaration on the Rights of Indigenous Peoples, 2007.

### **Mining Regulations**

Mineral and Petroleum Resources Development Regulations, South Africa, 2002.

The Mining (Community Development Agreement) Regulations, Kenya, 2017.

The Mining (Employment and Training) Regulations, Kenya, 2017.

The Mining (State Participation) Regulations, Kenya, 2017.

The Mining (Use of Local Goods and Services) Regulations, Kenya, 2017.

Revised Implementing Rules and Regulations of Republic Act (No. 7942), Philippines, 1995.



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# CHAPTER ONE: BACKGROUND TO THE LOCAL CONTENT POLICY IN THE MINING INDUSTRY IN KENYA

## 1.1 Introduction

Kenya is a developing country and an emerging economy in extractive resources. The industry is envisaged to be a major contributor to the country's GDP in the near future. The envisaged contribution of extractives to Kenya's economic development prompted the government to revise some of its long term economic development goals in 2012, by categorizing the extractive sector as one of the economic enablers of the national development blueprint, the Kenya Vision 2030.<sup>1</sup> Mineral resources are, among other extractives, expected to be a major foreign exchange earner for the country.<sup>2</sup> It has been observed that minerals will be the next economic frontier for Kenya and the Mining Ministry envisages a growth target for the mining sector to account for 10 per cent of the country's GDP by 2030.<sup>3</sup> In the last eight years, the country has made discoveries of commercially viable quantities of mineral resources in various parts of the country, including, among others; coal in Mui Basin in Kitui County, oil in Lokichar Basin in Turkana County, natural gas in Lamu County, and rare earth elements in Kwale County.<sup>4</sup> Exploitation of rare earth elements in Kwale, worth of USD 62.4 billion in estimates, is envisaged to place Kenya among the world leaders in rare earth deposits.<sup>5</sup> Prospects for more discoveries of extractives exist in other parts of the country.<sup>6</sup>

The government has intensified mineral exploration activities around the country in the last five years. In early 2013, the government awarded Fenxi Mining Industry Company of China rights to develop blocks C and D at Mwingi. Fenxi was expected to start mining coal in

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1. The Kenya Vision 2030, Government of the Republic of Kenya, 2007, Ministry of Planning and National Development and the National Economic and Social Council (NESC), Office of the President (As revised in 2012). Government Printer, Nairobi.
  2. Kariuki Muigua, Didi Wamukoya and Francis Kariuki, 'Natural Resources and Environmental Justice in Kenya' (Nairobi, Glenwood Publishers Limited, 2015), P 245.
  3. John Ngumi, 'Mining the next economic frontier for Kenya, so get on board and be part of the mining boom', Daily Nation (Nairobi, 17 August 2017) Available at <https://www.google.com/search?q:mining+the+next+economic+frontier%2C>. Accessed on 18 August 2017.
  4. National Energy Policy, August 2015. Available at [www.erc.go.ke/images/docs/National-Energy-Petroleum-Policy-August2015.pdf](http://www.erc.go.ke/images/docs/National-Energy-Petroleum-Policy-August2015.pdf). Accessed 8 August 2017.
  5. Republic of Kenya (2015), Kenya Minerals Investment Handbook, Ministry of Mining Kenya. Available at [file:///C:/Users/USER/Downloads/kenya%20mining%20investment%20handbook%20\(2\).pdf](file:///C:/Users/USER/Downloads/kenya%20mining%20investment%20handbook%20(2).pdf). Accessed 13 November 2017.
  6. supra note 2.

Mwingi in mid-September 2016. The government intends to use coal from Mwingi in a power plant to be put up in Lamu.<sup>7</sup> Mining has, however, not commenced due to stakeholder resistance by the local community and the county government of Kitui demanding fair and adequate compensation for compulsory land acquisition and other benefits before commencement of the project.<sup>8</sup>

In the oil and gas sector, major exploration and drilling activities have been carried out in various parts of the country since the year 2013. These include, among others; drilling by Tullow Oil in Turkana county of the Etuko – 1 and Ekales -1 wells at block 10 BB and Block 13T, respectively; drilling by Anadarko Petroleum Company of America of the Kubwa well at block L-T and at block L11 in Lamu county; and drilling by BG Group of England at block L10A and L10B in Lamu county.<sup>9</sup> These discoveries and the ongoing exploration activities in various parts of the country have boosted the flow of extractive FDI in the country and Kenya has become a favourable destination for: minerals, oil and gas exploration. Fifty five extractive projects were carried out in Kenya in the year 2011 most of which involved exploration of coal and natural gas. In 2014, the country was rated sixth in Africa for attracting extractive FDI worth of 3.6 billion USD into the country.<sup>10</sup> Kenya needs to attract more extractive FDI into the country to exploit these mineral resources. This is because, like other developing countries endowed with mineral wealth, the country is constrained by lack of: access to world markets, industry skills, and the technical expertise required to exploit these resources .<sup>11</sup> FDI will also create development opportunities for the country. These include; income from exports, revenues, and job creation. FDI may also promote economic growth in Kenya through trickle – down effects. It may also create employment for Kenyans

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7. Thoma Yager (2013), 'The Mining Industry in Kenya', United States Geological Survey 2013 Mineral Yearbook .Available at <http://minerals.usgs.gov/minerals/pubs/Country/2013/myb3-2013-ke.pdf>. Last accessed on 16 April 2016.

8. George Wachira, 'Mining firm ejected from disputed land', Daily Nation (Nairobi, 25 November 2014). Available at <http://www.nation.co.ke/counties/miningfirm-ejected-from-disputed-land/-/1107872/2534998/-/1O1myoz/-/index.html>. Accessed on 20 January 2015.

9. supra note 7.

10. FDI Intelligence Report 2014: Global Greenfields Investment Trends. Available at <http://www.fdiintelligence.com/Landing-Pages/fDi-report-2014/The-fDi-Report-2014>. Accessed on 17 January 2017.

11. Michael Hansen, Lars Buur, Ann Kjaer and Ole Therkildsen (2015), 'The Political Economy of Local Content in African Extractives: Lessons from Three African Countries'. Available at <https://www.hks.harvard.edu/m-rcbg/CRSI/publications/report-18-EO%20>. Last accessed on 26 July 2017.

and generate income in industry services and agriculture through industry linkages and spill -overs.<sup>12</sup> In Kenya, both exploration and mining operations have traditionally been undertaken by foreign private and public companies. By 2013, 29 out of the 46 oil exploration blocks had been licensed to 14 public and private foreign oil and gas exploration companies.<sup>13</sup>

Kenya has developed the local content policy and legal framework in order to benefit from broad based economic development through linkages and spill-overs.<sup>14</sup> To attain maximum local content benefits, however, the country has to induce extractive FDI to link up with the local economy. The success of the local content strategy will be determined by the extent to which foreign investors in the mining sector will buy inputs and services locally. The country intends to leverage the local content policy and legal frameworks as a strategy for enhancing benefits to Kenyans and for broad-based social and economic development.<sup>15</sup>

All the major mineral discoveries in Kenya have occurred in the arid and semi-arid counties of the country that have since colonial times been characterized by: marginalization, poverty and under-development. Traditionally, public service delivery and government presence in these areas have been weak. The multinational corporations (MNCs) engaged in mining in these areas are expected to fill the gap and catalyze the much needed social and economic development.<sup>16</sup> Apart from: creating employment for Kenyans, promoting local skills development, and enhancing technology transfer, these MNCs are expected to enhance social and economic lives of the local communities through corporate social responsibility programmes.<sup>17</sup> This will bridge the essential public service provision gaps created by: absent,

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12. Mike Morris, Raphael Kaplinsky and David Kaplan, (2011a), 'One Thing Leads to Another: Commodities, Linkages and Industrial Development-A Conceptual Overview'. MMCP Discussion Paper. Mutton Keynes and Capetown, The Open University and University of Capetown. Available at <https://id/-bric-idrc.dspace.org/handle/10625/47511>. Accessed on 22 August 2017.

13. Ministry of Mining, Government of Kenya. Available at [www.ministryofmining.go.ke](http://www.ministryofmining.go.ke) Accessed on 7 April 2016.

14. The Mining Act ( No. 12), 2016, ss. 46, 47, and 50.

15. supra note 12.

16. World Bank, Mining Foundations, Trusts, and Funds. A sourcebook, Washington, D. C. 2010, P. 7, available at <http://openknowledge.worldbank.org/handle/10986/16965>. Accessed on 14 November 2015.

17. The World Bank, Examining Foundations, Trusts and Funds (FTFs) in the Mineral Sector. Part 1, P 17. Available at <http://siteresources.worldbank.org/EXTOGMK/Resources/Sourcebook;part1MainFindings.pdf>. Accessed on 14 November 2015.



weak, corrupt and poorly capacitated government institutions in those areas. The compensation and mitigation undertakings by MNCs will further benefit local communities through improvement of their social and economic lives. Local communities will also benefit from the trickle-down of social investment programmes by investors in the mining sector.<sup>18</sup> A 2002 joint World Bank /IFC report has urged for policies and programmes that create good stakeholder relations and that promote tri-lateral dialogue between: mining companies, communities and the government to give legitimacy to mining companies through both legal and ‘social license’ to operate.<sup>19</sup>

The local content legal framework in the Mining Act, 2016, particularly provides for sub-national local content in Kenya by recognizing that communities that host mining operations are entitled to be beneficiaries of the local content policy by being given preference in: employment, training, and access to business opportunities, among other Kenyans.<sup>20</sup> This raises expectations of the communities that extraction of minerals that occur within their localities will alleviate the poverty which is rampant in these areas. They expect that alleviation of poverty will be achieved through: creation of employment opportunities, skills transfer, better education and health standards, improved infrastructure, and business growth.<sup>21</sup> The national equalization policy developed according to the criteria set out in the constitution has categorized most of the counties where mineral resources occur as marginalized for purposes of sharing out the equalization fund as provided for under the constitution.<sup>22</sup>

## **1.2 The Local Content Policy in Kenya.**

Local content has been defined as the measure or quantum of inputs in form of: goods,

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18. *ibid.*

19. World Bank and International Finance Corporation (IFC) (2002), ‘Large Mines and Local Communities: Forging Partnerships Building Sustainability’. Available at <http://www.ifc.org/mining>; <http://www.worldbank.org/mining>. Accessed on 22 August 2017.

20. The Mining Act (No. 12), 2016, ss. 47 and 50.

21. Norwegian Church Aid (2016) ‘Local Communities in Kenya’s Extractive Sector: From Paternalism to Partnership’. Available at <https://www.kirkensnodwel.p.no/contentassets/2928ebbac.27d47e14647844633586d5/...local-communities-in-Kenya’s-extractive-sector-from-paternalism-to-partnership>. Last accessed on 17 January 2017.

22. Constitution of Kenya 2010, Article 204.

services and workforce procured from the host country by foreign producers.<sup>23</sup> In regard to extractives, the inputs are procured differently along the cycle of investment. It may involve different inputs, including, among others; maintenance, security, engineering, training and transport.<sup>24</sup> The implementation of the local content policy has achieved mixed results in developed and developing countries; ranging from up to 75 per cent in developed resource rich countries like Australia, Canada and Norway, and to almost 0 per cent in some developing countries.<sup>25</sup> Local content has further been defined as the quantum of benefits generated in the local economy by the extractive industry beyond direct contribution to value addition through linkages with the other sectors of the economy. It is measured by both project and aggregation of projects within a country and effected through several strategies, including; creation of jobs and workforce training, skills development, procurement of goods, and provision of services locally.<sup>26</sup>

Enhancing the social and economic lives of host communities where extractive companies operate and for countries endowed with mineral resources, such as Kenya, has become a commercial necessity.<sup>27</sup> This imperative is increasingly becoming mandated in law in many developing resource rich countries.<sup>28</sup> In Kenya, the legal framework of local content is contained in the Mining Act, 2016 and the mining local content regulations, 2017.<sup>29</sup> The Local Content Bill, 2016 has also been published by the Senate to provide a legal and

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23. Michael Hansen et al (2015) (supra note 11).

24. *ibid.*

25. Rabi Ado (2013), 'Local Content Policy and WTO Rules on Trade Related Investment Measures (TRIMs): The Pros and Cons', *International Journal of Business and Management Studies*, 2 (1) : 137-146 (2013). Available at <https://www.universitypublications.net/ijbms/0201/html/RH405.xml>. Accessed on 18 August 2017.

26. IPIECA (2011), 'Local Content Strategy: A Guide Document for Oil and Gas Industry', IPIECA London. Available at [www.ipieca.org/resources/good-practice/local-content-strategy-a-guidance-document-for-the-oil-and-gas-industry-1st-edition/](http://www.ipieca.org/resources/good-practice/local-content-strategy-a-guidance-document-for-the-oil-and-gas-industry-1st-edition/). Accessed on 29 August 2017.

27. BSR (Michael Hackenbrunch and Jessica Pluess) (2011), 'Commercial Value from Sustainable Local Benefits in the Extractive Industries: Local Content'. BSR, March 2011. Available at [https://www.bsr.org/reports/BSR-LocalContent\\_March\\_2011](https://www.bsr.org/reports/BSR-LocalContent_March_2011) pdf. Accessed on 26 July 2017.

28. *ibid.*

29. *supra* note 14.

regulatory framework of local content requirements in Kenya.<sup>30</sup> The local content policy and legal frameworks have been analyzed in detail in chapter two of this paper, while proposed local content approaches have been discussed in chapter four of this paper. It has been argued that the wealth created in the local economy through local content can be greater than taxes and royalties from extraction.<sup>31</sup>

Companies investing in the extractive industry in Kenya have had to contend with rising expectations from the Kenya Government and local communities to: mitigate the deleterious effects of their operations on the environment, earn the country extractive rent in form of taxes, royalties and fees, and to also act as good neighbours.<sup>32</sup> Additionally, their business success depends on their ability to: build a competitive local supplier base, develop local talent, and deliver sustainable developmental benefits for Kenya and the communities.<sup>33</sup> The ultimate goal of the local content policy is to capacitate Kenya to attain maximum benefits from her extractives in a sustainable manner, while at the same time mitigating the negative impacts associated with their exploitation.<sup>34</sup>

Studies have shown that failure to deliver these benefits have been a major cause of project interruptions due to risks associated with, among others; socio-economic conditions of the local communities, national politics, and stakeholder pressures.<sup>35</sup> Kenya has had several interruptions of extractive projects around the country due to: conflicts with local

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30. The Local Content Bill 2016 has been sponsored by Senator Gideon Moi, the Chair person of the Standing Committee on Energy in the Senate of the 11<sup>th</sup> Parliament whose term expired before enactment of the Bill into law. The Bill will have to be re-introduced for debate in the 12<sup>th</sup> Parliament.

31. Ann- Maria Esteves, Bruce Coyne and Ana Moreno (2013), ‘ Local Content Initiatives: Enhancing the Sub-national Benefits of the Oil, Gas and Mining Sectors’, Natural Resources Governance Institute, New York. Available at <https://www.resourcegovernance.org/sites/default/-files/RWL-Sub-Enhance-Benefits-EN-20131118.pdf>. Accessed on 8 July 2017.

32. BSR ( Michael Hackenbrunch and Jessica Pluess ) (2011) (Supra note 27).

33. *ibid.*

34. Jubilee Easo and Angela Wallace (2014), ‘Understanding Local Content Policies in Africa’s Petroleum Sector. Notes from the Field. An English Law Perspective on the Oil and Gas Market’. Available at [file:///C:/USER/Downloads/14417AKNotes\\_Local\\_Oct2014.pdf](file:///C:/USER/Downloads/14417AKNotes_Local_Oct2014.pdf). Accessed 28 August 2017.

35. Ben Cattaneo (2009), ‘ The New Politics of Natural Resources’, ERM June 2009, at <https://www.above-groundrisk.com/webdocuments/newpoliticsofnaturalresources.pdf>. Accessed on 15 October 2014.

communities, national politics, and demands by the local communities to have their social and economic lives enhanced through: access to employment opportunities, training, acquisition of industry skills, and other benefits.<sup>36</sup> Minerals have been linked to conflicts in Africa in three circumstances, namely; rivalry for benefits accruing from the minerals among local communities or ethnic groups, local communities' mistrust of government policies that may alienate them from potential benefits of the minerals, and political interference in the management of the entire mining process, including awarding of contracts and benefit sharing.<sup>37</sup> The arguments for economic development in developing countries endowed with mineral resources, like Kenya, were ignited by the paradox of under-development and poverty in these countries, amid enormous mineral wealth.<sup>38</sup> Countries that heavily depend on extractives suffer from under-development and post poor economic performance compared to the less endowed countries.<sup>39</sup>

Further studies have argued that sudden growth in mineral resource revenue may, among other setbacks: depress a country's economy, create political instability, impede democracy and create inequalities in society.<sup>40</sup> Davies has posited that the resource curse syndrome can

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36. See for example, 'Mining firm ejected from disputed land', Daily Nation (Nairobi, 25 November 2014). Available at <http://www.nation.co.ke/counties/miningfirm-ejected-from-disputed-land/-/1107872/2534998/-/1O1myoz/-/index.html> 'Kenya: Tullow Oil suspends exploration in Turkana following local protest', all Africa news (28 October 2013). available at <http://allafrica.com/stories/201310290098.html>; 'Fresh efforts to negotiate deal on Mui coal basin project,' Daily Nation (Nairobi, 24 December 2014). Available at [http://www.businessdailyafrica.com/fresh\\_efforts\\_to\\_negotiate\\_deal\\_on\\_Mui\\_Coal\\_basin\\_project/-/539552/2070672/-/da1502/-/index.html](http://www.businessdailyafrica.com/fresh_efforts_to_negotiate_deal_on_Mui_Coal_basin_project/-/539552/2070672/-/da1502/-/index.html); 'Tullow Oil facing worker unrest at Kenya oil exploration blocks', Reuters (10 October 2014). At [www.reuters.com/article/Kenya-tullow-ldUSL654VE20141010](http://www.reuters.com/article/Kenya-tullow-ldUSL654VE20141010). All accessed on 14 March 2017.

37. Abiodun Alao (2007), 'Natural Resources and Conflict in Africa: the Tragedy of Endowment' (University of Rochester Press, 2007), P113. Available at [http://www.personales.ulpgc.es/gdelgado.dgeo/Africa/docs/Natural-Resources\\_Conflict-Africa.pdf](http://www.personales.ulpgc.es/gdelgado.dgeo/Africa/docs/Natural-Resources_Conflict-Africa.pdf). Accessed 13 November 2017.

38. Rabiú Ado (2013) (supra note 25).

39. Terry Karl (1997), 'The Paradox of Plenty: Oil Booms and Petro-states' (Berkeley, CA; University of California Press). Available at [www.ei.sourcebook.org/405-KarlTheParadoxofPlentyOilBoomsandPetrostates.html](http://www.ei.sourcebook.org/405-KarlTheParadoxofPlentyOilBoomsandPetrostates.html); Michael Ross (1999) 'The Political Economy of the Resource Curse', 6(b) World Political. 51 (2), 297-323. Available at <https://www.sscnet.ucla.edu/polisci/faculty/ross/papers/articles/political%20Economy%20of%20Resource%20Curse.pdf>. References accessed on 17 August 2017.

40. Michael Ross (2001), 'Extractive Sectors and the Poor'. An Oxfam American Report (Los Angeles, Oxfam America). Available at <https://www.oxfamamerica.org/static/media/files/extractive-sectors-and-the-poor.pdf>; Graham Davies (1995), 'Learning to Love the Dutch Disease', World Development 23.10; 1765-80. Available at <https://ideas.repec.org/a/eee/wdevel/v23y1995i10p1765-1779.html>. References accessed on 18 August 2017.

be alleviated through sustainable management of mineral wealth.<sup>41</sup> To avoid the resource curse, Kenya has through her new mining laws and policies designed mechanisms for enhancing the benefits of her extractive industry for her citizens, through: job creation, training, skills development, technology transfer, and local industrial capacity building. These benefits include, among others; benefit sharing, corporate social responsibility (CSR), socially responsible investments (SRI), and local content. This paper has focused on the local content policy in Kenya under the framework in the Mining Act, 2016 and the mining local content regulations, 2017, that seek to ensure that extractive FDI: creates jobs, promotes skills development, enhances transfer of technology, and creates linkages and spill overs.<sup>42</sup>

Around the world, the local content policy has been in use in other sectors of the economy such as: automobiles, tobacco and electronic industries since the beginning of industrialization in Europe and North America.<sup>43</sup> However, local content in extractive industries was first introduced in the North Sea region in 1970's. It's implementation took the form of: import restrictions and creation of national oil corporations. The goals of its development and application were: creation of jobs locally, technology transfer, increase in ownership and control, and creation of forward and backward linkages.<sup>44</sup> These are similarly the objectives that the local content policy in the mining industry in Kenya hopes to achieve<sup>45</sup>. Local content in the mining industry is envisaged to: enhance jobs creation and training of Kenyans, promote skills development, and enhance the local industrial capacity building. These are envisaged to contribute to broad based economic development of the country, akin to the economies of other developing countries that have implemented the policy successfully.<sup>46</sup>

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41. Graham Davies (1995) (ibid), p 1765.

42. The Mining Act (No. 12) 2016, ss. 46, 47, 50, 61,68,72,78,86, 101, 103, and 106.

43. Rabiun Ado. (2013) (supra note 25), P. 138.

44. Stanislaw Lec (2011), 'The petroleum sector value chain'. Available at [Siteresources.worldbank.org/INTOGMC/Resources/noc\\_chapter\\_1](http://Siteresources.worldbank.org/INTOGMC/Resources/noc_chapter_1). Pdf. Accessed on 18 August 2017.

45. supra note 42.

46. UNCTAD (1991); In Francisco Veloso (2006), 'Understanding Local Content Decisions: Economic Analysis and an Application to the Automobile Industry', *Journal of Regional Science*, 46 (4), 747. Available at [onlinelibrary.wiley.com/doi/10.1111/j.1467-9787.2006.00476.x/pdf](http://onlinelibrary.wiley.com/doi/10.1111/j.1467-9787.2006.00476.x/pdf). Accessed 17 June 2017.

Kenya needs to apply local content approaches that have worked in other countries and that will, among others; create employment for Kenyans directly generated by the extractive companies, nurture skills development through training and knowledge transfer to benefit the Kenyan workforce, and enhance the local industry through measures taken to increase participation of Kenyan companies along the value chain.<sup>47</sup>

### **1.3 Statement of the Problem.**

It is the expectation of the government of Kenya, Kenyan citizens, and local communities in particular that the Kenyan local content policy in the mining industry will, on successful implementation, contribute to broad based social and economic development of Kenya. The expectation of the stakeholders is that local content will among others; create employment for Kenyans directly generated by extractive companies, nurture skills development through training and knowledge transfer to the Kenyan workforce, and enhance the local industry through participation of Kenyan companies along the value chain. However, for these opportunities to inure to Kenya's benefit, the country has to adopt, develop and apply local content policies, approaches and strategies that are: effective, appropriate and sustainable for the country.

The country has, however, adopted inadequate and unsustainable local content approaches, strategies and initiatives that failed to take into account: the absorptive capacity of the local industry, the local institutional capacity, and the strategies and capabilities of foreign investors. Therefore, implementation of the local content strategies in the Mining Act, 2016 and the mining local content regulations, 2017 will be ineffective in: creating employment for Kenyans, enhancing development of skills through training, promoting technology and knowledge transfer to the Kenyan workforce, and enhancing the local industry through participation of Kenyan companies along the value chain. Implementation of inadequate and inappropriate local content approaches may result in double market failure, where local content will not only fail to correct market failure related to infant industry and market power of foreign buyers but also end up creating inflated prices and inefficiencies in production.

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47. Elijah Mushameza and John Okiira (2016), 'Local Content Frameworks in the African Oil and Gas Sector: Lessons from Angola and Chad', Ella Regional Evidence Papers. Available at [ella-practicalaction/wp-content/uploads/2016/07/REP-ACODE-Local-content-and-gas.pdf](http://ella-practicalaction/wp-content/uploads/2016/07/REP-ACODE-Local-content-and-gas.pdf). Last accessed 26 July 2017.

Moreover, the low absorption capacity of the local industry may hinder linkage formation, impeding local content.

Questions abound as to; whether the legal, regulatory and institutional framework of local content under the Mining Act, 2016<sup>48</sup> and the mining local content regulations, 2017, lay a firm foundation for the development of a legal and regulatory mechanism of local content rules and approaches for effective implementation of the local content policy in Kenya. This study examines generally the root causes of the failure by many developing countries endowed with mineral resources to achieve their local content policy objectives, and more particularly the efficacy or otherwise of the local content legal, regulatory and institutional framework in the mining industry in Kenya to achieve its local content policy objectives. This study considered various other jurisdictions which have successfully implemented their respective local content policies. Finally, based on the comparative analysis from the selected countries, the study proposes legal, regulatory and institutional reforms to address the impediments to effective and sustainable implementation of the local content policy in the mining industry in Kenya.

#### **1.4 Objectives of the Study.**

##### **1.4.1 Principal Objective.**

The main objective of the study is to identify weaknesses and strengths of the local content legal, regulatory and institutional framework in the Mining Act, 2016 and the mining local content regulations, 2017 and analysis of emerging trends in local content industry good practices in the selected countries to address the weaknesses in the Kenyan model in order to attain an effective local content legal, regulatory and institutional framework in Kenya.

##### **1.4.2 Specific Objectives.**

This study has four core objectives:

- (i) To examine the local content, legal and regulatory framework in the Mining Act 2016 and the mining local content regulations, 2017, with a view to identifying gaps and loopholes and testing the efficacy of the Act;

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48. Supra note 42.

- (ii) To analyze the impediments to and opportunities for local content development in the mining industry in Kenya.
- (iii) To identify and analyze cases of emerging local content industry good practices from the selected countries, with a view to benchmarking and assessing the adequacy of the Kenyan local content model, and;
- (iv) To identify lessons that Kenya can learn from the forms of the local content legal and regulatory frameworks in the selected countries.

### **1.5 Research Questions.**

The questions addressed by this study include;

- i) What is the current legal and regulatory measure put in place to address concerns raised by the need to develop local content by extractive industries in Kenya?.
- ii) What are the impediments to and opportunities for the implementation of the local content policy in Kenya? Is the local content legal and regulatory framework under the Mining Act, 2016 adequate to address the impediments?.
- iii) What lessons can Kenya learn from the forms of local content: policies, legal and regulatory frameworks in: Nigeria, South Africa, Ghana, Philippines and Australia, and how can the lessons learned be used to enrich the Kenyan local content model?
- iv) What reforms can be made towards attaining an effective and sustainable local content, legal, regulatory and institutional framework in Kenya?

### **1.6 Research Hypothesis**

This study is based on the hypothesis that;

- (i) Effective implementation of the local content legal and regulatory framework in Kenya is constrained by weaknesses and loopholes in the Mining Act, 2016 and the mining local content regulations, 2017.
- (ii) Comparative parallels drawn from the local content policy, legal and institutional frameworks in: Nigeria, South Africa, Ghana, Philippines and Australia can be helpful in addressing the weaknesses in the Kenyan local content model.
- (iii) The impediments curtailing effective implementation of the local content policy in Kenya can be addressed through: legal, regulatory and institutional reforms.



## **1.7 Literature Review.**

The literature reviewed provide the background to and justification for this research by analyzing available literature, while identifying gaps in the local content legal framework in mining in Kenya. This section reviews available literature only in an indicative manner, while a comprehensive review of literature on local content features in the succeeding chapters of this paper.

### **1.7.1 Strategies for Enhancing Local Content.**

Terje Vaaland, Alabi Soneye and Richard Owusu examine strategies for enhancing local content in the oil and gas industry in Nigeria. They argue that indigenous extractive companies encounter barriers of access to the industry. They posit that these barriers relate to several capabilities, namely: delivery, capital, and competence. They argue that one way of overcoming these barriers is to recognize the inter-dependence of the actors associated with these possibilities. They identified these actors to include: foreign companies, local companies, educational and R & D institutions, industrial regulators and providers of infrastructure, financial institutions, and legal system. The study concludes by urging for an understanding of the strategies and operations that characterize the oil industry in Nigeria.<sup>49</sup> The study is relevant to this paper in terms of the interface between capabilities, the barriers they encounter, and the actors the mining industry has to involve to effectively implement the local content policy in Kenya. The reviewed study has, however, concerned itself with the Nigerian content in the country's oil industry. This paper examines the ability of the local content legal framework in Kenya to: regulate the capabilities, overcome barriers to the capabilities, and enhance the interaction of the actors in the mining sector in Kenya, and hence successfully implement the local content policy.

### **1.7.2 The Political Economy of Local Content.**

Michael Hansen, Lars Buur, Anne Mette Kjaer and Ole Therkildsen argue that extractive FDI has emerged as one of the major drivers of social and economic development in Africa. They, however, further argue that for extractive FDI to contribute to the much needed development in the developing countries of Africa that are endowed with mineral resources, foreign

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49. Terje Vaaland, Alabi Soneye and Richard Owusu (2011), 'Local Content and Struggling Suppliers: A Network Analysis of Nigerian Oil and Gas Industry'. Available at <http://www.academicjournals.org/article/articles1380718357-vaaland%20et%aL.pdf>. Accessed on 18 July 2017.

investors have to create local content through linkages with the local industry. African host countries, they argue, have to devise mechanisms for promoting local content. They examined the state of linkage formation in Tanzania, Uganda and Mozambique and concluded that local content in the three countries is: shallow, limited, and inefficient. They posited that additional to the economic explanations of market failures and weak institutions, politics have additionally been responsible for the: shallow, limited and inefficient local content in the three countries.<sup>50</sup>

Their study is of critical relevance to the Kenyan local content policy. The studied countries are developing African countries. Two of them, namely; Uganda and Tanzania are Kenya's immediate neighbours and together with: Kenya, Rwanda, Burundi and South Sudan, are also members of the regional economic block, the East African Community (EAC). Moreover, Kenya, like Uganda and Tanzania, is an emerging extractive economy and has huge expectations for extractive based economic development. Their political systems, particularly in Uganda and Tanzania, closely resemble the Kenyan political system. This study, while analyzing the economics of local content, will also delve into the political economy of local content in Kenya; and whether and how it is likely to impede effective implementation of the local content policy in Kenya.

### **1.7.3 Enhancing SME Procurement by Incorporating Impact Assessment Strategy.**

Maria Esteves and Anne Barclay argue that there are mutual benefits to be gained in the mining, and oil and gas industries, if among other outcomes: the affected communities benefit from their proximity to an extractive operation, and if local companies fairly and equitably access and compete for the business opportunities within the industry. They argue that these can be gained through local SME procurement strategies devoid of adverse social impacts and that enhance local business growth and diversification of the economy. To achieve optimal outcomes, they further argue, local procurement strategies have to be supported by: the industry, the public sector, and other private sector development institutions, all working in collaboration to enhance SME sector development. They concluded, therefore, that benefits of local content can be enhanced through incorporation of impact assessment into SME

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50. Michael Hansen et al (2015) (supra note 11).

procurement strategies.<sup>51</sup> Kenya is a developing country that can immensely benefit from this analysis. This study uses the authors' analysis to understand how benefits of local content to the local industry and local communities in Kenya can be enhanced through application of SME local procurement strategies that integrate social and economic impact assessment (SEIA).

#### **1.7.4 The Interface Between Local Content, Local Industry and Local Jobs.**

Abdulkabir Adedeji, Shaufique Siddique, Azwamani Rahman and Law Hook seek to explain the interface between: the local content policy, the local industry and job creation in the oil industry in Nigeria. They argue that unemployment is an intractable economic challenge to Nigeria, akin to other developing countries. They argue that local content has been developed in the oil industry in Nigeria to enhance local oil companies' role as players in the industry to create jobs locally. Therefore, they argue, there is a causal connection between the Nigerian content in the country's oil industry and the local oil companies' role in the industry. According to them, where the interaction between the actors fails to produce jobs, the policy objectives to create jobs for Nigerians and to add value to the Nigerian domestic economy may not be achieved. They concluded by proposing that due regard be had to the effect of the Nigerian content policy on job creation. They also urge for evaluation of contracts and monitoring of the development of local content if the policy is to achieve its targets. Finally, they urge for flexibility of the local content policy to promote transfer of technology by foreign oil companies and to enhance competence of the local industry. They argue that this will, among others; enhance local skills development, create more jobs, and promote the local industry.<sup>52</sup>

Their study, even though examining the Nigerian content in the country's oil sector, is relevant to this paper. Like it's Nigerian counterpart, the goals of the development of local

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51. Maria Esteves and Mary- Anne Barclay (2011), 'Enhancing the Benefits of Local Content: Integrating Social and Economic Impact Assessment into Procurement Strategies'. Available at <https://www.csr.uq.edu.au/.../enhancing-the-benefits-of-local-content-integrating-social-and-economic-impact-assessment-into-procurement-strategies>. Accessed on 2 June 2017.

52. Abdulkabir Adedeji, Shaufique Siddique, Azwamani Rahman and Law Hook (2014), 'Relationship Among Local Content Policy, Indigenous Oil Firms' Participation and Job Creation in Nigeria: A Theoretical Concept', Proceedings of the Australian Academy of Business and Social Sciences Conference, 2014 (In Partnership with the Journal of Developing Areas ISBN 978-0-9925622-0-5). Available at [https://www.aabss.org.au/system/files/published/AABSS2014\\_081.pdf](https://www.aabss.org.au/system/files/published/AABSS2014_081.pdf). Accessed on 18 August 2017.

content in Kenya's mining industry, include; enhanced job creation, promotion of skills development, and enhanced local industry participation. Local content has to be created for the policy to be effective. This study, however, focuses on how linkages between foreign investors in Kenya and the local industry can be enhanced in order to: create jobs, promote skills development, and enhance local industry participation.

### **1.7.5 The Nexus Between Local Content (LC), Corporate Social Responsibility (CSR) and Social Responsible Investments (SRI).**

Rabiu Ado argues that the idea behind corporate social responsibility (CSR) and local content (LC) is to promote welfare and sustainable social and economic development for the resource-rich nations. He, however, argues that there is a distinction between the two concepts, namely; that CSR is voluntary and essentially focuses on philanthropic and environmental issues, while LC is often mandatory and includes, among others; job creation, technology transfer, local sourcing of inputs by companies operating in the host country, and creation of industrial clusters. He further argues that both concepts are justified on the basis of corporate legitimacy and license to operate. He concludes that companies acquire social license to operate and also maximize their legitimacy for obeying the law, rules, and regulations of their host. If they do not, they lose legitimacy among both local communities and the country that has hosted them.<sup>53</sup> His work is relevant to this study in so far as it discusses the concept of LC which is the subject matter of this paper. This study discusses the local content legal and regulatory framework in Kenya, and what mining companies need to do in order to: create jobs, transfer technology, source local inputs, and create industrial clusters, and thereby maximize: their benefits to Kenyans, obtain legitimacy and acquire a 'social license' to operate in Kenya.

Abel Diale argues that corporate social responsibility has gained momentum as business practice in Africa. However, it remains an ambiguous construct that means different things to different people. He argues that corporate social responsibility is important to the mining sector due to mining's: social and environmental concerns, sustained local and international challenges to its legitimacy, bias towards risk management and social responsibility over

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53. Rabiu Ado (2014), 'In Search of the Link Between Local Content (LC) and Corporate Social Responsibility (CSR) in Petroleum Operations', *International Journal of Management Studies*, 3(1); 207-218. Available at [www.universitypublications.net/ijbs/0301/html/ijbs-0301-cont.pdf](http://www.universitypublications.net/ijbs/0301/html/ijbs-0301-cont.pdf). Accessed on 6 June 2017.

social responsible investing (SRI), and the enduring challenge to the concept of a ‘licence to operate’. He posits that at optimal application, CSR should reflect positively on the corporate attitude through concern of all stakeholders. These include; shareholders, customers, employees, local communities and the general public.

According to him, CSR should mean more than philanthropic community investments and mitigation of environmental impacts. It should also comprise of corporate ethical behaviour by being integrated into the core of corporate activities and decision-making, embracing social, economic and environmental sustainability through constructive engagement with stakeholders. He, further, posits that mining firms have to perfect CSR by adopting socially responsible practices. These include CSR playing a role in: risk management, reputation management, external pressures management, and avoidance of additional regulatory requirements. To achieve this, he further argues, they have to engage in socially responsible investments in order to become good corporate citizens by: operating ethically, meeting legal requirements, and showing consideration for: society, communities and the environment. He argues that, socially responsible investments comprise of outward looking mining projects that are: sustainable, social and developmental for the benefit of the communities. Finally, he argues that the notion of socially responsible investments makes business external to development.<sup>54</sup>

This study is relevant to his paper because Kenya has mandated socially responsible investments under the Mining Act, 2016. Mining firms are, therefore, required to create local content through socially responsible investments, that are: sustainable, social and developmental for the benefit of the local communities.

### **1.7.6 Foreign Direct Investment and Local Linkages.**

Vito Amendolaigne, Boly Amadou, Nicola Daniele Coniglio, Francesco Prota and Seric Adnan argue that from an economic perspective, local content strategies and designs have to factor in two considerations. Firstly, having the appropriate: laws, policies and institutions of governance established, and secondly, the actual state of the local industry. They posit that

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54. Abel Diale (2014), ‘Corporate Social Responsibility in the South African Mining Industry: Necessity, Conformity or Convenience?’. Available at [http://www.ijbed.org/admin/content/pdf/i-4\\_c-35](http://www.ijbed.org/admin/content/pdf/i-4_c-35). pdf. Accessed on 30 April 2018.

local content is meaningless without the local industry. Therefore, they argue, an effective local content policy has to establish a framework that enhances the capacity of the local industry. In their view, development of local content in many African countries has been impeded by two major challenges, namely; absence of capable local supply industries, and the: technology, productivity and organizational gap between the local industry and that of MNC's that is too huge to bridge. Due to this gap, they further argue, the capabilities of the local companies is limited in participation to only making inputs at the lower end of the extractive industries' value chain. These require low skills and technology such as: security, transport and catering. They conclude the study by positing that due to the weak local industrial capacity, local content development in many African countries would remain a very long term process.<sup>55</sup> Their work is relevant to this study because Kenya is a developing African country whose extractive sector is just emerging. This study focuses on the state of the local industry and the policies, the legal framework and the governance institutions that Kenya has put in place to enhance linkage formation between extractive FDI and the local industry to promote local content development.

### **1.8 Justification of the study.**

The relevance of this study is that it comes just after Kenya has adopted the local content policy which has been anchored by the local content legal and regulatory framework in the Mining Act, 2016 and the mining local content regulations, 2017. This study assesses; whether the local content legal framework established under the Mining Act, 2016 is, in its current form, adequate to enhance local content development in the mining industry in Kenya. This study further assesses the strengths and weaknesses of the local content legal and regulatory framework in Kenya. It also compares the local content in Kenya with established local content legal and policy frameworks in selected countries, and proposes incorporation of lessons learned to reform the Kenyan local content legal framework. The Mining Act, 2016 was operational in May 2016, while the mining local content regulations, 2017 entered force in May 2017. Little scholarly work, if any, has been done so far to assess the effectiveness or otherwise of the local content legal framework under the Mining Act. This study will,

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55. Vito Amendolaigine, Boly Amadou, Nicola Daniele Coniglio, Francesco Prota and Seric Adnan (2013), 'FDI and Local Linkages in Developing Countries: Evidence from sub-saharan Africa', World Development. 50:41-56. . Available at <https://www.hks.harvard.edu/m-/rcbg/CRSI/publications/report-18-EO%20>. Last accessed on 26 July 2017.

therefore, add knowledge which can contribute to policy and legislative reforms in the area of local content in the mining industry in Kenya.

## 1.9 Theoretical Framework.

This study has been guided by the legitimacy theory to explain the local content policy in Kenya. Chiu and Sharfman argue that corporations are compelled by legitimacy to conform to their institutional environment.<sup>56</sup> In support of this proposition, Suchman posits that legitimacy perceives or assumes the: appropriateness, propriety, and desirability of principles, values and normative structure of an organization.<sup>57</sup> Although legitimacy is a derivative of the political economy theory,<sup>58</sup> Parker argues that its prominence has mostly been within the realm of social and environmental accounting.<sup>59</sup> In theory, legitimacy is ordinarily understood to explain concepts normally regarded as voluntary such as CSR and its reporting. However, Campbell views legitimacy and regulations as ‘inter-dependent products of legal processes’.<sup>60</sup> He, therefore, argues that due regard should be had to such issues as dysfunctional institutions of governance, and political incapacity and inability of governments to mandate effective regulation that facilitates the establishment of legitimate regulatory terms. This indicates, he argues, that the legitimacy theory can be used to justify the mandatory LC practices by mining firms.<sup>61</sup>

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56. Shih-Chiu and Mark Sharfman (2011), ‘Legitimacy, Visibility and the Antecedents of Corporate Social Performance on Investigation of the Instrumental Perspective’. *Journal of Management*, 37 (6), 1558-1585. Available at <https://www.share.ok.org/bitstream/handle/11244/24989/10.1177.014920609347958>. pdf. Accessed 15 May 2017.

57. Mark Suchman (1995), ‘Managing Legitimacy: Strategic and Institutional Approaches’. *Academy Management Review*, 20, 571 -610, P. 574. Available at <https://www.jstor.org/stable/2587>. Accessed on 14 July 2017.

58. Rob Gray, Dave Owen and Carol Adams (1996), ‘Accounting and Accountability: Changes and Challenges in Corporate Social and Environmental Reporting’, Prentice Hall; London. Available at <https://www.sciepub.com/reference/60716>. Accessed on 16 August 2017.

59. Lee Parker (2005), ‘Social and Environmental Accountability and Research: a view from the Commentary Box, Accounting, Auditing and Reporting’, *Accounting Forum*, 18 (6), 842-860. Available at [eprints.gla.ac.uk/128710](http://eprints.gla.ac.uk/128710). Accessed on 7 June 2017.

60. Bonnie Campbell (2012), ‘Corporate Social Responsibility and Development in Africa: Redefining the Roles and Responsibilities of Public and Private Actors in the Mining Sector’, *Resources Policy* 37, 138-143. Available at <https://www.ieim-Uqam.ca/IMG/pdf/BCampbell-2011-Corporate-Social-Responsibility-Resources/-/Policy.pdf>. Accessed 14 August 2017.

61. *ibid.*

Di Maggio and Powell argue that in seeking legitimacy, organizations adopt three fundamental behaviours, broadly categorized as: coercive isomorphism, where companies adopt practices mandated by the law such as LC requirements; normative isomorphism, where certain normative behaviour such as CSR is adopted; and mimetic isomorphism, where organizations copy some acceptable practices among themselves as a response to competitive risks. They argue that to gain legitimacy, organizations may need to incorporate all the three isomorphisms.<sup>62</sup> This paper is concerned with coercive isomorphism which occurs when pressures, both formal and informal, are brought to bear on organizations by their peers on whom they depend and by the norms of the societies that host them.

Di Maggio and Powell argue that these pressures may take the form of force, persuasion, or as invitations. In some instances, they argue, change in organization occurs in response to government mandate in order to conform to regulation and to meet societal expectations. They conclude by positing that a common legal environment affects organizational behaviour and structure and forces organizations to conform to wider institutions.<sup>63</sup> Epstein, however, posits that mere compliance with the law alone may not accord corporate legitimacy. Oil companies, for instance, may additionally gain legitimacy and social licence to operate from the host communities through the social compensation ability of LC.<sup>64</sup> Swamidass argues that companies voluntarily embark on LC even in the absence of government regulation, especially by sourcing labour from within the immediate communities in order to acquire a ‘social licence’ to operate, and hence to gain legitimacy.<sup>65</sup>

This study relies on the legitimacy theory to explain that the government of Kenya has the

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62. Paul DiMaggio and Walter Powell (1983), ‘The Iron Cage Revisited: Institutional Isomorphism and Collective Nationality in the Organizational Field’. *American Sociological Review*, 48, 147-160. Available at [https://www.ics/uci.edu/corps/phase/~corps/phase ii/DiMaggioPowell-IronCageRevisited-ASR.pdf](https://www.ics/uci.edu/corps/phase/~corps/phase%20ii/DiMaggioPowell-IronCageRevisited-ASR.pdf). Accessed on 14 August 2017.

63. *ibid.*

64. Edwin Epstein (1987), ‘The Corporate Social Policy Process: Beyond Business Ethics, Corporate Social Responsibility and Corporate Social Responsiveness’, *California Management Review*, 29, 99-115. Available at [journals.sagepub.com/doi/pdf/10.2307/41165254](https://journals.sagepub.com/doi/pdf/10.2307/41165254). Accessed on 18 August 2017.

65. M. Swamidass (1994), ‘Import Sourcing for Manufacturing: A New Perspective; Proceedings of the Symposium on Emerging Paradigms in Globalization of Technology, Manufacturing and Service Operations’, Goldring Institute, Tulane University, New Orleans L. A: In Rabiou Ado (Supra note 53), p 213.



mandate to regulate local content in the mining industry, through coercive mechanisms such as the local content requirements in the local content legal and regulatory framework in the Mining Act, 2016. However, the local content policy in Kenya will achieve: better, effective and sustainable outcomes for the country if it is supplemented by the application of normative strategies by mining companies through voluntary linkage formation programmes to supplement government measures, such as CSR (normative isomorphism), and if mining firms copy accepted practices from their peers as a response to competitive risks (mimetic isomorphism). The legitimacy theory is useful to this paper to critique the LC legal and regulatory framework in the Mining Act, 2016.

## **1.10 Research Methodology: Design, Methods and Techniques.**

### **1.10.1 Primary Sources**

This study consulted the relevant Kenyan legislation and other national and international laws, including; the Constitution of Kenya 2010, the Mining Act, 2016, the mining local content regulations, 2017, and the Local Content Bill, 2016. For comparative analysis, the study has consulted the national local content legislation in: Nigeria, Ghana, South Africa, Philippines, and Australia; and the relevant international law instruments, namely; United Nations Declaration on the Rights of Indigenous Peoples, C169 Convention on Indigenous and Tribal Peoples Rights and the African Charter on the Rights of Indigenous Peoples.

### **1.10.2 Secondary Sources.**

The study also consulted secondary sources, including; books, journal articles, reports, newspapers, internet sources, and publications.

### **1.11 Limitations of the study.**

Local content was introduced in Kenya through the legal framework in the Mining Act, 2016 which entered force in May 2016. The mining local content regulations entered force in May 2017. The concept is still at its infancy in Kenya. Little has been written on the local content legal and regulatory framework in the Mining Act, 2016. This study, therefore, lacks in-depth analysis of scholarly writings and publications based on the Kenyan mining local content policy, legal and regulatory frameworks.

## **1.12 Organization of the study**

### **Chapter one: Background to the Local Content Policy in Mining in Kenya.**

This chapter provides: the background to the local content policy in mining in Kenya, statement of the problem, objectives of the study, research questions, research hypothesis, literature review, justification of the study, theoretical framework, and research methodology.

### **Chapter Two: The Legal and Institutional Framework of Local Content in Mining in Kenya.**

The Chapter reviews: the laws, regulations, and institutions governing local content in Kenya under the Mining Act, 2016 and the mining local content regulations, 2017; the Income Tax Act and the Finance Act, 2014; the Constitution of Kenya, 2010; the Local Content Bill, 2016, and the international law instruments of relevance to local content.

### **Chapter Three: Impediments to and Opportunities for Local Content Development in the Mining Industry in Kenya.**

This Chapter highlights and analyzes the impediments to and the opportunities for effective implementation of local content in mining in Kenya and proposes how those impediments can be overcome in order for Kenyans to attain: job creation, skills development, and enhanced access by the local industry to business opportunities along the mining industry value chain.

### **Chapter Four: Analysis of Local Content Policy Designs and Approaches in Selected Countries.**

This chapter analyzes the local content policies and legal and regulatory frameworks in selected countries that have implemented the local content policy. The lessons that the Kenyan local content model can learn from them have also been analyzed, and how the lessons learned can be applied to improve upon it through: policy, legal and institutional reforms. These include: Nigeria, South Africa, Ghana, Philippines, and Australia.

### **Chapter Five: Conclusion and Recommendations.**

This chapter gives the conclusion of the study as deduced from the findings of the study, and gives recommendations on the way forward for local content development in the mining industry in Kenya.

### **1.13 Conclusion**

This Chapter gives the background to the subject of the local content policy in the mining industry in Kenya. It is comprised of: statement of the problem, objectives of the study, research questions, research hypothesis, literature review, theoretical framework, research methodology, and limitation of the study. The following chapter analyzes the legal, regulatory, and institutional framework of local content in the mining industry in Kenya.

## **CHAPTER TWO: THE LEGAL, REGULATORY AND INSTITUTIONAL FRAMEWORK OF LOCAL CONTENT IN THE MINING INDUSTRY IN KENYA.**

### **2.1 Introduction**

Different countries have designed and adopted different local content strategies and approaches. Their implementation depends on each country's individual development priorities. Secondly, positive local content policy outcomes take time to realize, particularly in developing countries like Kenya, because of the constraints they have to contend with that include, among others; poor operating environment, a struggling local industry, limited industry skills, and an unfavourable business environment.<sup>66</sup> Whether Kenya rapidly moves from realizing gains of low value addition in the short term, to attaining opportunities of greater economic value through her local content policy in the long term, depends largely on the design of her legal and policy approaches and strategies. The local content regulatory approaches that Kenya designs need to take into consideration that the local content policy in Kenya is being implemented in an environment where the local industrial capacity is constrained. It is in this context that the laws and institutions governing local content in the mining industry in Kenya are analyzed.

### **2.2. The Legal, Regulatory and Institutional Framework of Local Content in Mining in Kenya.**

The laws governing local content in Kenya are anchored in: the Constitution of Kenya, 2010, the Mining Act, 2016 and the mining local content regulations, 2017. Secondly, this study considers that the fiscal policy in Kenya and the fiscal incentives given to investors in the mining sector are relevant to successful implementation of the local content policy. Therefore, this paper analyzes the fiscal laws of mining in Kenya that are found in the Ninth Schedule to the Income Tax Act<sup>67</sup>, as revised by the Finance Act, 2014.<sup>68</sup>

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66. Maria Esteves and Mary –Anne Barclay (2010), 'Procuring from SMEs in Local Communities: A Good Practice Guide for Australian Mining, Oil and Gas Sectors'. Brisbane Centre of Social Responsibility in Mining. Sustainable Minerals Institute University of Queensland. Available at [www.csr.uq.edu.au/docs/4361%20CSR%20SME%20Report%20Email%20V2.pdf](http://www.csr.uq.edu.au/docs/4361%20CSR%20SME%20Report%20Email%20V2.pdf). Accessed on 28 August 2017.

67. Income Tax Act, Chapter 470 Laws of Kenya.

68. Kenya Finance Act (No. 16) 2014. Available at [Kenyalaw.org/KI/fileadmin/pdfdownloads/Acts/Finance\\_Act\\_16\\_of\\_2014Final.pdf](http://kenyalaw.org/KI/fileadmin/pdfdownloads/Acts/Finance_Act_16_of_2014Final.pdf). Accessed on 28 August 2017.

This Chapter also analyzes the international laws that are applicable to community development agreements, with a view to locating the: basis, the legal justification and the place of community development agreements in Kenya. Thirdly, Kenya is a member state of the WTO. This study will analyze the implications of the National Treatment Obligation clause in the 1994 GATT and the 1995 TRIMs on local content development in Kenya.

### **2.3 Equitable Sharing and Maximizing Benefits of Mineral Resources for Kenyans Through Local Content.**

The preamble to the Mining Act, 2016, indicates that the mining laws in Kenya were enacted to give effect to, among others; Articles 66(2) and 69 of the constitution of Kenya. Article 69 mandates the state to, among others; ensure that Kenyans: exploit, conserve, manage, and utilize natural resources sustainably. The state is also required to observe the principle of equity in the sharing of benefits that accrue from the utilization of natural resources for Kenyans' benefit.<sup>69</sup> The constitution, therefore, requires the state to ensure that: natural resources are equitably shared among all Kenyans, and that they are sustainably utilized for the benefit of all Kenyans. The local content policy is one of the mechanisms that the country has put in place to ensure that benefits arising from the exploitation of Kenya's mineral wealth are equitably shared among all Kenyans.

Local content seeks to maximize the benefits arising from utilization of mineral resources through: job creation, promotion of skills development and the local industry participation in business opportunities along the mining industry value chain. These benefits would accrue from the linkages formed between extractive FDI and the local industry. The constitution, further, mandates parliament to enact laws which guarantee that local inhabitants and their economies benefit from property investments.<sup>70</sup> The local content legal framework in the Mining Act, 2016 and the mining local content regulations, 2017 are the local content laws that the country has put in place to maximize benefits of the mining industry to: Kenyan citizens, host communities, and local economies. It is aimed at benefiting local communities and their economies through: enhanced employment opportunities for members of the communities; promotion of skills development; and enhanced local industry participation.

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69. Constitution of Kenya 2010, Article 69 (1) (a) and (h).

70. *ibid*, Article 66(2).

## **2.4 Job Creation, Skills Development and the Local Industry Participation in the Mining Industry in Kenya.**

The Mining Act, 2016, requires an applicant of a license for large scale mineral rights, namely; reconnaissance, exploration, retention, and mining, to submit his proposal to recruit and train Kenyans as prescribed. This requirement is intended to promote industry skills and enhance the capacity of Kenyans. Submission and approval of a plan to employ and train Kenyans is a condition for granting of a mineral right.<sup>71</sup> The Cabinet Secretary for mining is empowered to: regulate the replacement of expatriates, determine years of their service, and promote partnerships between the government , the industry, universities and other research bodies to equip Kenyans with industry skills.<sup>72</sup> This provision is geared towards enhancing opportunities for: employment of Kenyans, skills development, and replacement of foreigners with Kenyans for jobs created throughout the entire value chain.

The Act, further, requires a licensee to prefer employment of community members where resource extraction operations occur. Mineral rights holders are required to: train the employees, build capacity, engage foreign technical experts in accordance with Kenyan standards, replace trained foreign workers with Kenyans in a timely manner, enhance partnerships with universities to promote research and innovation, protect the environment, undertake investments that are socially responsible among the host communities, and enter into development agreements with the communities.<sup>73</sup> This capacity building approach of local content recognizes that certain jobs in the mining sector require Kenyans to have certain competences and skills to access them. To replace the expatriates Kenyans have to be trained to acquire the required skills in order to gain employment. The legal framework of local content in the Mining Act, 2016 has, therefore, provided for training of Kenyans and imparting of appropriate industry skills as a design and a strategy of enhancing local content in the mining industry in Kenya.

The Mining Act 2016, further, requires the licensee to, where feasible and practicable, prefer goods supplied and services provided by Kenyan citizens, the communities, and Kenyan

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71. The Mining Act (No. 12) 2016, s 46.

72. *ibid*

73. *ibid* s 47.

companies and businesses owned by Kenyans.<sup>74</sup> This preferential treatment approach requires investors in the mining sector to give preferential treatment to local: suppliers of goods, service providers and workforce.

This strategy is comprised of a broad policy framework approach aimed at increasing the visibility of the mining companies, and enhancing access of Kenyan firms to business opportunities in the mining industry in Kenya. The approach appears to have been informed by Kenya's obligations under the International Trade and Investment Law (Article III), under the (NTO) clause under the 1994 GATT on performance measures. The Cabinet Secretary, on the recommendation of the Mineral Rights Board (MRB), is required to grant a reconnaissance licence, conditional upon submission of an acceptable: local product plan, proposing to procure Kenyan goods and services, and a local employment plan, proposing to employ and train Kenyans. This requirement is intended to ensure that a reconnaissance licence would not be granted if the cabinet secretary and the Mineral Rights Board are not satisfied that the applicant has an acceptable: local product plan, and local employment plan.<sup>75</sup>

The Act requires the reconnaissance licence to include, among others; a duly approved plan to procure Kenyan goods and services, and a duly approved plan to employ and train Kenyans.<sup>76</sup> An application for a prospecting licence is required by the Act to furnish information on: a duly approved plan to procure Kenyan goods and services, and a duly approved plan to employ and train Kenyans.<sup>77</sup> A retention license holder is required to furnish the cabinet secretary with information on, among others; a detailed plan with proposals to: employ and train Kenyans, and a detailed plan with proposals to procure Kenyan goods and services.<sup>78</sup> A retention license would be granted subject to acceptance of the applicant's proposals to procure local goods and services, and to employ and train Kenyans.<sup>79</sup> A prospecting licence holder is required to submit a detailed plan proposing to: employ and train

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74. *ibid*, s. 50.

75. *ibid* s.61 (3) ( c) and (d).

76. *ibid* s. 68 (1) (b) and (c ).

77. *ibid* s. 78 (b) and (c ).

78. *ibid* s. 86 (2) (f) and (g).

79. *ibid* s. 86 (3) (d) and (e).

Kenyans, and procure Kenyan goods and services.<sup>80</sup> A mining licence would be granted conditional upon acceptance of a detailed plan to: employ and train Kenyans, and procure Kenyan goods and services.<sup>81</sup> A mining licence has to contain information on: the approved plan to procure Kenyan goods and services, and to employ and train Kenyans.<sup>82</sup>

### **2.5.0 The Regulatory framework of Local Content in the Mining Industry in Kenya.**

Kenya has been classified as an insignificant producer and exporter of minerals.<sup>83</sup> The extractive sector in Kenya is currently contributing one percent to GDP and two percent of Kenya's export earnings.<sup>84</sup> In the year 2014/2015, the extractive industry earned the country Kshs 20.9 billion in export earnings and Kshs 1.25 billion in taxes, royalties and other payments.<sup>85</sup> The Base Titanium company mining project in Kwale commenced exports in 2014, and is currently contributing up to 60 percent of the country's total export earnings. Indeed, the government has declared it a flagship project of the Kenya Vision 2030. By 2017, the mine supported 3,500 direct and indirect jobs.<sup>86</sup> It is against this background that the government has developed the local content policy. The new local content regulatory frameworks on mining are geared towards enhancing: employment opportunities for Kenyans, local workforce development, local supplier development, and local community development agreements. They regulate: skills and workforce development,<sup>87</sup> local supplier development<sup>88</sup>, and community development agreements.<sup>89</sup> The mining local content regulatory frameworks

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80. *ibid* s. 101 (2) (g) and (h).

81. *ibid* s. 103 (d) and (e).

82. *ibid* s. 106 (f) and (h).

83. Mayer Brown (2015), 'Mining in Kenya: The Start of a New Era'. Available at [https://www.Mayerbrown.com/files/uploads/Documents/PDFs/Mining\\_in\\_Kenya2](https://www.Mayerbrown.com/files/uploads/Documents/PDFs/Mining_in_Kenya2). pdf. Accessed on 5 May 2017.

84. African Development Bank (ADB)-Information Centre for the Extractive Sector-Kenya (undated). Available at [https://www-afdb-org/fileadmin/uploads/afds/Documents/Project-and-operations/Kenya\\_Information\\_Centre\\_for\\_the\\_extractive\\_Sector](https://www-afdb-org/fileadmin/uploads/afds/Documents/Project-and-operations/Kenya_Information_Centre_for_the_extractive_Sector). pdf. Accessed on 5 July 2017.

85. Andrew Mugambi (2015), 'Legislative Developments in Kenya'. Available at <http://www.elexica.com/~media/files/training/2015/09%20september/miningconference2015/legislative%20developments%20in%20kenya.pdf>. Accessed on 28 May 2018.

86. James Muchai, 'State declares Base Titanium Mine Vision 2030 Flagship project', Kenya News Agency (Nairobi, 11 November 2017). Available at <http://Kenyanewsagency.go.ke/en/?p=118834>. Accessed on 23 April 2018.

87. The Mining (Employment & Training) Regulations, 2017, Legal Notice No 82 of 19 May 2017.

88. The Mining (Use of Local Goods and Services) Regulations, 2017, Legal Notice No. 81 of 19 May 2017.

89. The Mining (Community Development Agreement) Regulations, 2017 Legal Notice No. 418 of 28 July 2017.



in Kenya, and the constraints that may impede their effective implementation are analyzed herein below.

### **2.5.1 Skills and Workforce Development in the Mining Industry in Kenya.**

The employment and training local content requirements seek to: promote job creation by training and retaining Kenyan skills, develop Kenya's capacity through education, promote skills, technology and knowledge transfer, promote research and development, and achieve the minimum local content employment threshold along the mining industry value chain. Granting of a large scale mineral right is made conditional upon submission of an acceptable employment and training plan to the government, containing proposals for employment and training of Kenyans. The plan should: justify employment of expatriates and comprise a programme of: their replacement with Kenyans, specification of the required skills, the number of Kenyans proposed for employment, employment of special interest groups, including; the marginalized people, women, persons living with disability, and members of the local community, and the proposed expenditure under the plan.<sup>90</sup>

The mineral right holder is also required to submit an employment succession plan that corresponds with the work programme or programme of mining operations, accompanying the application for a mining licence. The regulations reserve (carve out) middle and junior level jobs for Kenyans. A data base of Kenyans with relevant skills is required to be maintained and made public. The government is required to enter into collaborations with the industry and universities in developing guidelines for: training, and research and development. The Director of Mines is empowered to: monitor, verify and enforce compliance.<sup>91</sup>

#### **2.5.1.2 Constraints to Skills and Workforce Development in the Mining Industry in Kenya.**

The mining industry in Kenya, like elsewhere in the mining economies, tends to be capital intensive and technologically based. These attributes weaken the industry's link to the local economy.<sup>92</sup> Mining projects in Kenya have tended to be enclaves, generating limited direct

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90. The Mining (E&T) Regulations, 2017, regulation 5.

91. *ibid*, regulations 6, 7, 8, 9, 10 and 11.

92. International Finance Corporation-IFC (2015), Discussion Paper-'The Art and Science of Benefit Sharing in the Natural Resources' Sector'. Available at <https://comdev-org-wp-content/uploads/2015/07/IFC-art-and-science-of-benefit-sharing-Final.pdf>. Accessed on 13 May 2017.

employment opportunities. Further, there is a shortage of industry skills in Kenya which calls for massive investment in training of the Kenyan workforce and in capacity building.<sup>93</sup> A recent study by UK's - DFID on Kenya's extractive industry, estimates that in both the exploration and extraction phases of the mining sector, more indirect and induced jobs are projected to be created by the mining industry in Kenya, compared to the direct jobs that are expected to be created by the sector. Indirect jobs are those that support the activities of the sector, while induced jobs are those created as a result of the economic impact of direct and indirect activities, further along the value chain. Jobs in the three categories are expected to be created in the greater economy in the proportions of, 1: direct jobs; 3: indirect jobs; and 6: induced jobs.<sup>94</sup>

Hence, jobs created by main and sub-contractors supplying goods and services, for instance, are expected to be more than those to be created by mining companies. For instance, the exploration phase is estimated to reach a peak of: 1,160 direct and indirect jobs, and 6,954 induced jobs, respectively. In the construction sector, the estimates are: 8,316 direct and indirect jobs, and 49,890 induced jobs, respectively. This scenario depicts a potentially high demand for skills in the indirect and induced job categories. Kenya is, therefore, staring at a severe shortage of the skills required by the mining industry in the induced jobs' category.<sup>95</sup>

Local supplier companies require trained and skilled workers. Kenyans need to access business opportunities created by foreign buyers of goods and services. There is need, therefore, to have a programme for local SME's training. This requires integration of local workforce development initiatives and local supplier development interventions. Greater efforts need to be directed towards training of skilled and semi-skilled workers to service indirect and induced employment. Additional to the proposed training of skilled workers, focus should also target technical and vocational training. The government of Kenya has to invest in technical and vocational training institutions, whose education the government has

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93. International Finance Corporation – IFC (2014), 'Sustainable and Responsible Mining in Africa: A Getting Started Guide. Available at [http://www.srk.com/files/pdfs/AfricaGuide2014\\_lores.pdf](http://www.srk.com/files/pdfs/AfricaGuide2014_lores.pdf). Accessed 28 May 2018.

94. UK-DFID (2015), 'Extractives Industry: Local Content Early Gap Analysis', Kenya's Extractive Industries Development Programme. Available at [https://www.adamsmithinternational.com/documents/resource\\_uploads/Gap\\_Analysis\\_Report\\_07\\_10\\_15.pdf](https://www.adamsmithinternational.com/documents/resource_uploads/Gap_Analysis_Report_07_10_15.pdf). Accessed on 8 May 2018.

95. *ibid.*

largely neglected in the past. It is from these institutions that local suppliers can source skilled workers.<sup>96</sup>

Development of the required skills calls for collaborations between: training institutions, the local industry, and workforce development initiatives. These collaborations need to: ensure that training responds to the market needs, enhance market awareness of where to source skilled workers, and enhance awareness by the workforce on where to access additional training. Skills and workforce development in Kenya also needs to be linked to local supplier development interventions. Shortage of the required industry skills could present the country with several challenges. These include; compromised or delayed implementation of mining projects and inflated cost of labour, raw materials and assets.<sup>97</sup>

### **2.5.2 Supplier Development in the Mining Industry in Kenya.**

‘Kenyan content’ is defined as the quantum or the measure of the aggregate value added or created in the Kenyan economy by building local capacity through use of Kenyan: workforce, goods and services in Kenya’s mining industry value chain. The Kenyan content seeks to: promote job creation through the use and retention of Kenyan: workforce, goods and services, attain minimum threshold spend for goods and services in the Kenyan mining industry value chain, enhance capacity of the local industry, create mining industries to provide Kenyans with jobs and sustainable economic development, promote access of Kenyan businesses/firms to business opportunities, and enhance: transparency, monitoring and reporting systems in regard to Kenyan goods and services.<sup>98</sup>

The holder of a mining licence, its contractors and sub-contractors are required, to the maximum extent possible, to prefer Kenyan goods and services. However, such goods must be internationally competitive in terms of: quality, delivery and price. Granting of a mining licence is made conditional upon submission to the government of an acceptable procurement plan for the purchase of Kenyan goods and services. The plan is required to disclose: particulars of goods proposed to be procured in Kenya, the proposed procurement

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96. *ibid.*

97. *ibid.*

98. The Mining (ULGS) Regulations, 2017, regulation 3.

expenditure, gender, the span of the plan, targets for procurement, support to local providers and suppliers, proposals for enhancing access to business opportunities, and technical support.<sup>99</sup>

Mining firms are required to give priority to Kenyan companies or companies with majority Kenyan shareholding in the award of tenders for supply of goods and provision of services with proven capacity to perform. This would be enhanced through maintenance and publication of a register of local businesses to be kept by the Director of Mines. The holder of a large scale mineral right is required to submit to the government a list of all contracts awarded in the previous half year, whose value exceeds Kenya Shillings One Hundred Million. The list must disclose: a list of all items and services procured, value of contract, successful contractor or vendor, location of work, estimates of Kenyan content, and commencement and completion dates. The Cabinet Secretary is empowered to publish guidelines on the content level of Kenyan goods and services.<sup>100</sup>

Professional services, including: engineering, insurance, legal and accounting are required to be procured from Kenyan firms, and foreign firms would only be authorized to provide these services jointly with Kenyan registered firms with the approval of the relevant regulatory professional bodies in Kenya. The regulations incorporate reporting requirements that obligate mining firms to submit an annual report on Kenyan content to the government, disclosing: a list of local companies/firms that procure goods and provide services, a list of all contracts exceeding Kenya Shillings One Hundred Million awarded in the previous half year, and a list of all companies which offered insurance services, the classes of cover, and the premium paid. Procurement details of contracts in excess of Kenya Shillings One Hundred Million have to be sufficiently reported to the government. The Director of Mines is empowered to assess and review the reports on the Kenyan content, as submitted, and to verify and monitor compliance. The verification exercise entails access to the mining firms': facilities, documents, and information at the discretion of and on request by the Director of Mines.<sup>101</sup>

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99. *ibid*, regulations 5 and 6.

100. *ibid*, regulations 8, 9 and 11.

101. *Ibid*, regulations 13, 14 and 15.

### **2.5.2.1 Constraints to Supplier Development in the Mining Industry in Kenya.**

The supplier development strategies deployed in the mining industry in Kenya have to target the sectors with premium value opportunities for local businesses. The projected injection of Kshs 100 billion into the national economy by Base Titanium mining company in Kwale county for the life of the mine, for instance, should target these high value sectors.<sup>102</sup> The sectors have tremendous capacity to increase local content with massive impact on the national economy. The sectors include; energy services, equipment maintenance, management and technical services maintenance, electrical equipment supplies, and hospitality services. The domestic supply industry is, however, bound to encounter industry inhibitions in doing business with these sectors, on both the demand and supply matrices.<sup>103</sup>

### **2.5.2.2 Inhibitions to Demand -Side Supplier Development in the Mining Industry in Kenya.**

Buyers in the mining industry in Kenya have inadequate information about the capacity of Kenyan SMEs to supply certain goods and services. Even where a list of local suppliers is provided, it is time consuming to screen it to determine their technical capacity. Buyers also have to deal with local suppliers whose experience and technical competence has not been vetted. There is, therefore, need to create a forum for buyers to access: market information and a list of pre-screened local suppliers, that discloses: each local firm's structure, their management systems, and technical and financial capacity.<sup>104</sup>

Further, there is limited exchange of information between the buyers and local manufacturers. This means that mining firms import goods and services that are locally available. There is need for a forum through which the buyers and local manufacturers can exchange information on buyers' requirements and increase their visibility. Some of the buyers' procurement policies may also be inappropriate for local enterprise development. Foreign buyers also have limited knowledge of the business environment in Kenya and the skills required to engage

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102. James Ngunjiri, 'Titanium Mining now projected to inject Kshs 100bn to the economy', Daily Nation (Nairobi, 21 November 2017). Available at <https://www.pressreader.com/Kenya/daily-nation-Kenya/12171121/282278140633100>. Accessed on 23 April 2018.

103. UK - DFID (2015)(supra note 94).

104. *ibid.*

local companies.<sup>105</sup> Ordinarily, contracts and/or agreements developed and in use by foreign buyers are fit for business with large companies. This is a major impediment to local SMEs. While goods sourced from local suppliers can be cost effective, failure to factor them at the project planning stage attracts additional costs. These costs make them unattractive to foreign buyers. It also keeps newcomers out of the supply chain.<sup>106</sup>

Unbundling of large contracts into smaller agreements enables many local suppliers to access business opportunities. However, buyers prefer to deal with single big contractors to several small contractors because it is easier to deal with them and its time saving. Local suppliers' inability to meet the required quality standards and quality management systems is another inhibition to supplier development in Kenya. Local suppliers are also prone to risk management challenges, including; cost, time, quality, occupational health and safety, and environmental performance.<sup>107</sup>

### **2.5.2.3 Inhibitions to Supply-Side Supplier Development in the Mining Industry in Kenya.**

There are supply-side inhibitions that impede the ability of Kenyan firms to compete along the mining sector supply chain. Local enterprises suffer from poor implementation of quality standards and poor understanding of buyers' requirements. This hinders their ability to competitively supply imported products. Therefore, there is need for: training on quality standards, enhanced access to finance, upgrading of technology and technical assistance.<sup>108</sup> Kenyan companies also suffer from inability to meet foreign firms' pre-qualification requirements. This is due to their inadequate operational systems. There is need, therefore, to train local suppliers on how and where to access the buyers' requirements. Kenyan companies are also incapable of servicing large contracts by foreign buyers. This is due to lack of: relevant experience, technical know-how, and access to finance. To address this challenge, there is need to form partnerships and consortia. Unless contracts are otherwise unbundled, Kenyan companies stand to lose opportunities to service large contract.<sup>109</sup>

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105. *ibid.*

106. *ibid.*

107. *ibid.*

108. *ibid.*

109. *ibid.*

Kenyan companies also suffer from inability to service their contracts on time. They need to improve their: management systems, customer service, and other processes. Local suppliers also suffer from workforce development inhibitions, including: technical qualification, inability to hire skilled and semi-skilled employees, and certification. Kenya as a country suffers from a shortage of skilled technical and vocational cadre of workers in the mining industry. This presents a challenge to the budding mining sector in Kenya.<sup>110</sup>

In view of these challenges, it is imperative that the best commercial opportunities be identified and prioritized in order to maximize the benefits of local content in Kenya's mining industry through local supplier development. The factors to be taken into consideration, include; budget allocation, linking business opportunity to the feasibility of winning contract, identification of the best business opportunities for local content development in Kenya, and carrying out of feasibility studies for industry uptake against suitability for development.<sup>111</sup>

To attain the goals of local supplier development, the government of Kenya, in collaboration with the local industry, has to develop several strategies, including; strengthening and expanding markets, maximizing commercial advantages, formation of partnerships among local suppliers, and ensuring supplier continuity. These goals will be best achieved through the establishment of a local supplier development programme in Kenya, to be driven by a supplier development centre.<sup>112</sup>

### **2.5.3 Community Development Agreements**

A community development agreement, entered into between a mining firm and the host community, aims to achieve: benefit sharing between the holder of a mineral right and the community; economic, social and cultural viability of the community; improved economic, social and cultural well being of the community; and accountability and transparency in mine –related community development<sup>113</sup>. A community or communities are to be identified through a social and environmental impact assessment carried out under the Environmental Management and Co-ordination Act (EMCA), for purposes of entering into a community development agreement with

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110. *ibid*

111. *ibid*.

112. *ibid*.

113. The Mining (CDA) Regulations, 2017, regulation 3.

the mineral right holder.<sup>114</sup> A community development agreement committee, with wide representation of all stakeholders, has been established and empowered to act as a trustee and the custodian of community's interests, and to: monitor and evaluate compliance, provide a forum for stakeholder engagement, sue for transparency, promote continuous consultations with and participation of the community in decision-making, and to settle disputes. The participation and consultation process with the community incorporates some form of an FPIC process, involving land acquisition outside compulsory acquisition, which crystallizes with the signing of a CDA. The FPIC process provided for under the CDA regulations is, however, limited in scope and application comparative to the FPIC standards for indigenous communities established by the relevant international law instruments, namely; The Indigenous Peoples' Declaration,<sup>115</sup> the Indigenous Peoples' Convention,<sup>116</sup> and the African Charter on Human and Peoples' Rights.<sup>117</sup> The FPIC concept has also been used to address the interests of other groups that have suffered from negative impacts of extractive projects.<sup>118</sup>

A community development agreement is required to provide for: educational scholarships, apprenticeship, technical training and employment opportunities for the members of the community; financial support/assistance for infrastructural developments, including; education, health, roads and water, financial support/assistance for small and micro enterprises; development programmes for special interest groups, including; women, the youth, persons living with disability; marketing of agricultural produce; protection of the: environment, natural resources and ecological systems; support for culture, heritage and sports; overseeing transparency and accountability in funds' utilization, and dispute resolution.<sup>119</sup>

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114. *ibid*, regulation 5.

115. United Nations Declaration on the Rights of Indigenous Peoples. Available at [www.Un.org/esa/Socder/Unpfi/documents/DRIPS\\_en](http://www.Un.org/esa/Socder/Unpfi/documents/DRIPS_en) pdf. Accessed on 23 August 2017.

116. C 169 Indigenous and Tribal Peoples Convention, 1989. Available at [Libraryarchicportal.org/1869/1/OLAW1309%20Cambou-The%20ILO%20Convention%20169pdf](http://Libraryarchicportal.org/1869/1/OLAW1309%20Cambou-The%20ILO%20Convention%20169pdf). Accessed on 23 August 2017.

117. Minority Rights under the African Charter on Human and Peoples Right's. Available at <https://www.ohchr.org/Documents/Publications/GuideMinorities6en.pdf>. Accessed on 25 June 2018.

118. Christina Hill, Serena Lillywhite and Michael Simon (2010), 'Guide to Free Prior and Informed Consent', Carlton Vic: Oxfam Australia. Available at [https://www.CulturalSurvival.org/sites/default/files/guidetofreepriorinformedconsent\\_Opdf](https://www.CulturalSurvival.org/sites/default/files/guidetofreepriorinformedconsent_Opdf). Accessed on 23 August 2017.

119. The Mining (CDA) Regulations, 2017, regulation 7.



The regulations require wide consultation and engagement of all the stakeholders, which has to be published in a timely manner. Participation and wide stakeholder representation and engagement of the community in the negotiations and consultations are critical to the agreement-making process. The mineral right holder is required to fund the community to enhance its capacity in: consultation, participation and engagement in CDA making process.<sup>120</sup> The holder of a mineral right is required to spend a minimum of at least one per cent of the gross revenue from the sale of minerals annually to finance the projects under the agreement. The holder of a mineral right is required to, within sixty days of the end of the year, submit an annual report to the national and county governments, showing the expenditure of all projects undertaken pursuant to the agreement. The report should also be made public to enhance transparency<sup>121</sup>.

### **2.5.3.1 Community Development Agreement Making Process.**

CDAs have immense potential to deliver tangible benefits from mining concessions to affected persons and communities in Kenya. To be effective, however, the agreements have to be aligned to the local context. Further, communities need to be facilitated to meaningfully take part in the negotiations between a community and an investor. This facilitation needs to be effected through: access to information, capacity building, and effective preparation prior to engagement. The CDAs envisaged by the mining CDA regulations in Kenya are expected to set out how the benefits of large scale mining projects in Kenya are to be shared with the local communities. The agreements are intended to enhance self-determined development of local communities in Kenya, and to guarantee sustainable benefits for the effected communities.<sup>122</sup>

The mining (CDA) regulations mandate consultations and negotiations between the investors in the mining sector and the affected communities to conform to FPIC principles and standards.<sup>123</sup>

This requirement is consistent with international best practice, which mandates

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120. *ibid*, regulations 5, 8 and 10.

121. *ibid*, regulations 16 and 17.

122. OECD (2015), 'Due Diligence Guidance for Meaningful Stakeholder Engagement in the Extractives' Sector'. Available at <https://www.oecd.org/daf/inv/mne/OECD-Guidance-Extractives-Sector-Stakeholder-Engagement.pdf>. Accessed on 8 June 2018.

123. The Mining (CDA) Regulations, 2017, regulation 4.

protection of the local communities right to FPIC.<sup>124</sup> The mining (CDA) regulations in Kenya also conform to the United Nations Committee on Economic, Social and Cultural Rights plea to states that the right to FPIC be accorded to communities impacted by mining projects<sup>125</sup>, and those affected by displacement.<sup>126</sup> Mining Companies in Kenya are legally obligated to engage local communities in meaningful consultations. They are also required to furnish the communities with all the necessary information and to provide them with all the resources necessary to capacitate them to negotiate an agreement that conforms to their developmental needs and priorities.<sup>127</sup>

The making of a CDA generally involves 3 stages, namely; the pre-negotiation stage, the research and consultation stage, and the negotiation process and endorsement of the final agreement.<sup>128</sup> A determination of who stands to be affected by the project has to be made, through an environmental and social impact assessment (ESIA), which is legally mandated in Kenya.<sup>129</sup> An EIA process is a critical tool for ensuring that environmental risks are taken into consideration at the level of project design. In Kenya, an EIA has to be carried out in accordance with: EMCA, EIA regulations and World Bank Standards. EIA standards are enforced by NEMA, to facilitate both EIA and mining licences to issue to the investor.<sup>130</sup>

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124. China Chamber of Commerce and Metals, Mineral and Chemicals Importers and Exporters Guidelines for Social Responsibility in Outbound Mining Investments. Available at. <https://www.business-humanrights.org/en/guidelines-for-social-responsibility-in-outbound-mining-investments>. Accessed 14 June 2018.
125. Committee on Economic, Social and Cultural Rights, 49<sup>th</sup> Session, Mauritania, 12-30<sup>th</sup> November 2012, UN Doc.E/C.12/MRT/CO/1, paragraph 8. Available at [http://repository.un.org/bitstream/handle/11176/304495/E\\_2013\\_22%3BE\\_C.12\\_2012\\_3-EN.pdf?sequence=3&isAllowed=](http://repository.un.org/bitstream/handle/11176/304495/E_2013_22%3BE_C.12_2012_3-EN.pdf?sequence=3&isAllowed=). Accessed on 14 June 2018.
126. Committee on Economic, Social and Cultural Rights, 9 June 2006, Mexico, UN Doc. E/C. 12/Mex/CO/4. Available at <http://www.refworld.org/docid/45377fa20.html>. Accessed on 14 June 2018.
127. The Mining (CDA) Regulations, 2017, regulation 10.
128. Jennifer Loutit, Jacqueline Mandelbaum and Sam Szoke-Burke (2016), 'Emerging Practices in Community Development Agreements'. Available at [ccsi.columbia.edu/files/2016/07/Emerging-Practices-in-Community-Development-Agreements.-pdf](https://ccsi.columbia.edu/files/2016/07/Emerging-Practices-in-Community-Development-Agreements.-pdf). Accessed on 8 June 2018.
129. Environmental Management and Coordination Act (EMCA), s 59; Environmental Impact Assessment Regulations, 2003; The Mining (CDA) Regulations, 2017, regulation 5.
130. J.O.Z Abuodha (2002), 'Environmental Impact Assessment of the Proposed Titanium Mining Project in Kwale District, Kenya. Available at [https://www.researchgate.net/publication/248988693\\_Environmental\\_Impact\\_Assessment\\_of\\_the\\_Proposed\\_Titanium\\_Mining\\_Project\\_in\\_Kwale\\_District\\_Kenya](https://www.researchgate.net/publication/248988693_Environmental_Impact_Assessment_of_the_Proposed_Titanium_Mining_Project_in_Kwale_District_Kenya). Accessed on 23 April 2018.

The roles of an EIA process in Kenya, include; mitigation of social, economic and environmental impacts of a mining project, maximizing the benefits of a mining project, and identification of a community or communities to be affected by a mining project. The agreement –making process also entails: capacity building to facilitate community participation and ownership of the project, and education to the affected community about the proposed project.<sup>131</sup> After signing the agreement, continuous monitoring, evaluation and implementation of the project is critical to: guarantee compliance by the investor with its obligations under the agreement, and ensure that the community realizes the CDA benefits.

### **2.5.3.2 Trends in Community Development Agreement Practices.**

The implementation context of a CDA varies from one agreement to the other.<sup>132</sup> Therefore, no one agreement would be desirable or suffice implementation in all situations. This is because the benefit content in all CDAs is largely informed by the extent to which a mining project impacts the affected community.<sup>133</sup> Therefore, this paper analyzes the trends in CDA practices in selected jurisdictions as here below. Kenya has a lot to learn from these practices in the making of CDAs between the mining company and the communities.

### **2.5.3.3 Identification of Affected Communities.**

The identification of a community, communities or individuals who are likely to be affected by a mining project is very critical.<sup>134</sup> These include; land owners, proximate communities, and ‘downstream impact’ communities. The Mining (CDA) regulations in Kenya require that this identification be done through an environmental and social impact assessment (ESIA).<sup>135</sup> The ESIA studies envisaged by the CDA regulations, include; environmental, human rights, health, cultural, and social impacts. Consultation and negotiation with those with rights and interests likely to be affected is necessary through the ESIA process.<sup>136</sup> The most important

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131. Jennifer Loutit et al (2016) (supra note 128).

132. *ibid.*

133. *ibid.*

134. *ibid.*

135. The Mining (CDA) Regulations, 2017, regulation 5.

136. International Council of Mining and Metals (2010). Available at [http://www.un.org/esa/socdev/unpfii/documents/session\\_10\\_crp\\_1.pdf](http://www.un.org/esa/socdev/unpfii/documents/session_10_crp_1.pdf). Accessed 14 June 2018.

consideration, however, entail ensuring that all relevant interests are: identified, represented, and consulted during the agreement negotiation ahead of the signing of a CDA.<sup>137</sup>

It is imperative that all affected persons are involved in the making of the agreements, including those who have no legal interest in the land.<sup>138</sup> Mining companies would be best advised to research on the cultures of the impacted persons to minimize intra-communal conflicts over the benefits to be conferred by the agreement.<sup>139</sup> The mining CDA committee as established in Kenya appears to engender inclusive representation of the local communities' interest groups. The consultation process, however, needs to: respect local culture and procedures put in place for decision-making, and reflect democratic principles.<sup>140</sup> Effective consultation and inclusive stakeholder engagement in a particular project area will also mitigate intra-communal conflicts.<sup>141</sup>

#### **2.5.3.4 Facilitation of Community Participation in Negotiations**

The entire CDA making process needs to be underpinned by a fair and inclusive process.<sup>142</sup> The CDA regulatory framework in Kenya does not require the making of a preliminary agreement before the making of a CDA. However, such a preliminary agreement has, as a matter of practice, been considered critical for effective CDA – making process.<sup>143</sup> It sets out the framework for future negotiations. The process addresses issues relating to: identification

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137. Ciaran O' Fairchaellaigh (2000), 'Negotiating Major Project Agreements: The 'Cape York Model'', AIATSIS Research Discussion Paper 11. Available at <https://aiatsis.gov.au/research/research-themes/native-title-and-traditional-ownership/publications/discussion-paper>. Accessed 14 June 2018.

138. Centre for Social Responsibility in Mining (2012), 'Agreement Making with Indigenous Groups: Oil and Gas Development, Australia. Available at <https://www.csrn.uq.edu.au/publications/agreement-making-with-indigenous-groups>. Accessed 14 June 2018.

139. Jennifer Loutit et al (2016) (supra note 128).

140. ICMM (2010) (Supra note 136).

141. Papua New Guinea LNG Project Umbrella Benefits Sharing Agreement, Art 5. Available at <http://ccsi.columbia.edu/files/2016/11/PNG-Landowners-LNG-Project-Companies-2008-agreement.pdf>. Accessed 14 June 2018.

142. Centre for Social Responsibility in Mining (2012), World Bank Extractive Industries Sourcebook: Good Practice Notes. Available at <https://www.csrn.uq.edu.au/Portals/0/docs/CSRM-CDA-report.pdf>

143. Ramanie Kunanayagam and Kathryn Tomlinson(2011), 'Indigenous Peoples and Extractive Projects: Success Factors in Compensation and Benefit Sharing Agreements' , 9(4) Oil, Gas and Energy Law Intelligence. Available at <https://www.ogel.org/article.asp?key=3140>. Accessed 14 June 2016.

of the parties to the proposed CDA; parties' project goals; methods of communication; time-frame for negotiations; agreement on the requirements to facilitate CDA negotiations; establishment of parties' expectations; and funding of the negotiation process.<sup>144</sup>

Some of these issues, however, are envisaged to be addressed by the CDAs' provided for under the mining (CDA) framework in Kenya. These include; identification of the community through the ESIA process, funding of CDA negotiation process, methods of communication, time-lines, and project goals.<sup>145</sup> Representation of the national and county governments in the CDA committee is critical to facilitation of negotiations between the mining company and the community, and to act as guarantors of the process.

#### **2.5.3.5 Facilitation of Community's Negotiating Capacity.**

It is through its participation in CDA negotiations that a community develops a negotiating position by expressing its expectations from the project. This clarifies to the mining company the business and development priorities and interests of the community.<sup>146</sup> It is through this process that a mining company acquires FPIC and a 'social licence' to operate if its proposals conform to the business and development priorities and interests of the community. The Mining (CDA) regulations in Kenya require mining companies to fund and capacitate the communities' negotiation process. This facilitates communities in their: outreach, coordination and research programmes, to enhance their negotiating capacity. A community's negotiating position is informed by the priorities and issues identified by the ESIA process.<sup>147</sup>

#### **2.5.3.6 Facilitation of Informed Decision-making by the Community.**

The legal tool for facilitating informed decision-making by the community is the carrying out of an Environmental and Social Impact Assessment (ESIA). This is a legal requirement in Kenya. The ESIA process has, as a matter of law, to be carried out in a consultative manner. Such consultation has to involve the participation of all communities likely to be affected by

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144. Argyle Diamond Mine Participation Agreement, Indigenous Land Use Agreement 2015, Schedule 1, ILUA. Available at <http://ccsi.Columbia.edu/files/2015/01/Australia-Native/Titleholders/Argyle/2005/Agreement>. pdf. Accessed 14 June 2018.

145. The Mining (CDA) Regulations, 2017, regulations 5, 8, 9 and 10.

146. Ciaran O' Fairchaellaigh (2000) (supra note 137).

147. *ibid.*

the project.<sup>148</sup> The mining company can also facilitate community participation and informed decision making, through dissemination of relevant information to communities. The information provided should be: timely, culturally sensitive, and accessible by community members.<sup>149</sup>

Community participation and informed decision making: benefit community members, and improves projects' financial performance.<sup>150</sup> Conversely, it has been argued, there is a direct link between company-community conflicts associated with social and environmental risks, and escalation of business costs for the mining company.<sup>151</sup> Community participation and informed decision making in the early stages of a mining project have been identified as a means for managing social and environmental risks.<sup>152</sup> Therefore, mining companies need to ensure that there is community participation in informed decision making in the early stages of a project to enable it shape its negotiating capacity and consent to the decisions made. Early community involvement: enhances savings on costs, mitigate conflicts, secures sustainability of the project, and improves company-community relationship.<sup>153</sup>

#### **2.5.3.7 Community Benefits to be extended Beyond Financial Compensation.**

It has been recognized that monetary compensation is not sufficient to restore livelihoods of affected communities. The social, economic and cultural risks associated with displacement, for instance, cannot be quantified in monetary terms. CDAs, therefore, should be designed to promote both financial and non-financial benefits. This enhances both broader long term and short term mining project participation by the community.<sup>154</sup> The benefits include: payment of

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148. supra note 129.

149. ICMM (2010) (supra note 136).

150. Jennifer Loutit et al (2016) (supra note 128).

151. Daniel Franks, Rachel Davis, Anthony Bebbington, Saleem Ali, Deanna Kemp, and Martin Scurrah (2014), 'Conflicts Translates Environmental and Social Risk into Business Costs'. Available at <http://www.pnas.org/content/111/21/7576>. Accessed 14 June 2018.

152. *ibid.*

153. Jennifer Loutit et al (2016) (supra note 128).

154. Centre for Social Responsibility in Mining (2012) (supra note 142).

royalties, local employment opportunities, and procurement of local goods and services. This enhances community's self-determined development through promotion of its: economic, physical and human capital.<sup>155</sup>

### **2.5.3.8 Integration of Community's Well-being to the Project Sustainability, Skills Transfer, and Sustainable Development.**

The Mining (CDA) regulatory framework in Kenya provides for both monetary and non-monetary benefits. The non monetary benefit sharing provides for several benefits, namely; business development, infrastructure, training, employment, and provision of social services.<sup>156</sup> A combination of both monetary and non-monetary benefits enhances the sustainability of the CDA itself.<sup>157</sup>

### **2.5.3.9 Accountable Governance, Effective Implementation, Monitoring, Evaluation and Review of Community Development Agreement.**

The governance mechanism provided for under the Mining (CDA) regulatory framework in Kenya comprises of a CDA committee with powers to: resolve disputes, and oversee monitoring, evaluation and review of a CDA. The CDA committee is also charged with oversight responsibilities for the implementation of the CDA agreement. It also operates as a trust and the link between the company, the community, and other stakeholders. The representation of the civil society organizations in the CDA committee was informed by the need to enhance monitoring the implementation of the agreement by holding the mining company to account for its contractual obligations under the CDA.<sup>158</sup>

Continuous monitoring, evaluation of compliance and review of agreement's implementation maximize community benefits from a mining project. It also enhances: accountability, transparency, and community's control and ownership of the project.<sup>159</sup> Emerging practice advocates for empowerment of the CDA committee to monitor the mine's progress and its

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155. ICMM (2010) (supra note 136).

156. The Mining (CDA) Regulations, 2017, regulation 8.

157. ICMM(2010) (supra note 136).

158. The Mining (CDA) Regulations, 2017, regulation 7.

159. Jennifer Loutit et al (2016) (supra note 128).

social and environmental impact.<sup>160</sup> The dispute resolution mechanism provided for in Kenya comprise of three dispute resolution organs, namely; the CDA committee, the cabinet secretary for mining, and the Environment and Land Court.<sup>161</sup> There is, therefore, need to enhance the efficiency of the Kenyan legal system to facilitate quicker resolution of disputes between mining companies and communities.

#### **2.5.3.10 Planning for Closure of a Mine and Project Legacy.**

CDAs' effectiveness needs to be judged against their sustainability beyond closure of the mine. Sustainability, in this context, entails: remediation of the project's environmental impacts, and the community's continued socio-economic development. mine closure, on the other hand, entails: making available a timetable for determining the expected mine closure date; engagement of the community on the expected impact of mine closure; facilitation of the community in the development of alternative local economies; development of low-technology infrastructure for maintenance by the community or the county government after the mine closure, and building capacity of the community governance systems to address issues arising after mine closure.<sup>162</sup>

The mining laws in Kenya robustly provide for mine closure and environmental rehabilitation.<sup>163</sup> Rehabilitation should be given consideration throughout the life of the mine. Further, engaging the communities in the mine closure and environmental rehabilitation process is critical for: rehabilitation of the project area, and enhancing local community development sustainability. The requirement under the Mining (CDA) regulations in Kenya for publication of the agreement is consistent with the industry trends. This enhances the capacity of the local community to communicate with the media and other stakeholders for advise and support.<sup>164</sup>

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160. *ibid.*

161. The Mining (CDA) Regulations, 2017, regulation 11.

162. ICMM (2010) (*supra* note 136).

163. The Mining Act, 2016, ss 180 -181.

164. Ahafo Social Responsibility Agreement between Ahafo Mine Local Community and Newmont Ghana Gold Limited (2008), Schedule 4. Available at <http://ccsi.columbia.edu/files/2015/01/Ghana-Ahafo-mine-Local-Community-Newmont-Ghana-Gold-Ltd-2008-Social-Responsibility-Agreement>. pdf. Accessed 14 June 2018.



### **2.5.3.11 Conclusion**

An effective CDA has to ensure: meaningful community participation in its making, and in decision making in regard to a mining project. This should be done in accordance with the FPIC norms to ensure that the CDA and the decision making process respond to community needs and aspirations. This enhances community's self-determined development. An effective ESIA process should be carried out to enhance: identification of the: community, communities or individuals to be impacted by the mining project, with a view to entering into a CDA agreement with the mining company, and to mitigate the: social, economic, cultural, and environmental impacts of the project.

The mining company should integrate the CDA into its business process with a keen eye on meeting its obligations to the community. This will mitigate conflict with the community and enhance reduction of the financial costs of the project. Public disclosure of CDAs' enhances their effectiveness. The government of Kenya, on its part, needs to robustly enforce the mining (CDA) laws and also enhance communities' access to expert advice and consultancy. Mining companies need to make sufficient funding available to facilitate communities' engagement in decision making processes. Finally, identification of communities' business and development priorities and negotiating positions, through democratic processes, are key to effective CDA making in Kenya's mining industry.

### **2.5.4 A Contemporary Perspective of Mining Companies-Local Communities' Engagement in Kenya.**

Since the discovery of minerals with potential for commercial exploitation in Kenya, the relationships between the mining companies and the local communities have been strained. Tensions have been intractable, and invariably revolve around: land acquisition; displacement; environmental, social, cultural and economic impacts; local content; loss of livelihoods; and inadequate compensation.<sup>165</sup>

The titanium mining project in Kwale is the biggest mining project in Kenya since 1911. The engagement between the Base Titanium company and the local communities, both before and after the commencement of the project, has been hostile. It could be a predictor of how tensions are likely to play out in other mining projects around the country. The effectiveness

of the new local content laws will be put to severe test, in regard to how mining companies address the grievances of local communities. It took many years of locals' struggle against the mining project in Kwale, before the interests of the local community were addressed. Mining eventually commenced in 2013 and exports to China started in 2014. Locals have had major misgivings about the project, grounded on: desecration of ancestral graves; destruction of sacred forests; loss of livelihoods; environmental degradation and marine pollution; inadequate compensation for compulsorily acquired land; and at some point, the government irregularly granted a mining lease without an EIA licence.<sup>166</sup> The project witnessed sustained locals' mobilization against mining operations in form of: court cases; official complaints; street protests; and public campaigns. By the time the project commenced in 2013, most of these concerns had, however, been substantially addressed.<sup>167</sup>

Minerals in Kenya vest in the national government for the benefit of the people of Kenya.

However, after the introduction of the devolved system of government under the Constitution of Kenya, 2010, the coastal counties of: Lamu, Kwale and Taita Taveta have sought, though unsuccessfully, to create county laws to levy tax on mining companies operating within their jurisdiction. They have argued that levying tax on minerals would capacitate them to enhance lives of the local communities through socio-economic development programmes. Sharing of benefits from extractives has been a major sticking point around the country between: the national government; the county governments; and the local communities.<sup>168</sup>

The Base Titanium mining company has argued that it has, since the commencement of mining operations in Kwale, made a major economic contribution to: the national economy, through: taxes, royalties, and export earnings; the county government of Kwale, through local socio-economic development programmes; and the local communities, through local content, in form of: procurement of goods and services, skills and workforce development, community

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165. Environmental Justice (2015), 'Titanium Mining in the Kwale District, Kenya'. Available at <https://ejatlas.org/conflict/titanium-mining-in-the-Kwale-district-Kenya>. Accessed on 23 August 2018.

166. World Forest Movement (2003), 'Kenya: Canadian titanium mining challenged by new government'. Available at <http://wrm.org.uy/oldsite/bulletin/69/kenia.html>. Accessed on 4 June 2018.

167. *ibid.*

168. 'County mining tax plans anger Kenya government', Business Daily, Daily Nation (Nairobi 15 October 2014). Available at <http://www.businessdailyafrica.com/Mining-tax-plans-anger-Kenya-central-government/-539546/2486922/-/89h692z/-/index.html>. Accessed on 4 June 2018.

development programmes, and a mine-closure rehabilitation programme.<sup>169</sup>

The local content development programmes by Base Titanium, however, appear not to have met the expectations of the local communities. Tensions still persist between the local communities and the mining company. The locals argue that almost 5 years after the commencement of the project, they have not substantially benefited. Indeed, they are currently resisting the intended opening up of exploration zones to new areas in Kwale county, on account of: displacement, social, cultural, and environmental impacts, disregard of EIA laws, consent from affected land owners, employment, and access to business opportunities.<sup>170</sup>

The national government on its part, sees the base titanium project as a game changer for: the national government, the county government of Kwale, and the local communities. Indeed, the national government has declared it a Kenya Vision 2030 economic pillar flagship project. It is particularly satisfied that the project has performed well in the area of local content.<sup>171</sup> The conflicting positions taken by the stakeholders as to; whether the project has succeeded in creating local content, among other benefits, make a compelling case for: management of the expectations of the local communities; maximization of the benefits of local content to the local communities; mitigation of the social, economic and environmental impacts; and the need to address the concerns of the local communities in a timely manner to avoid conflicts.

### **2.5.5 Artisanal Mining and Local Content Development in Kenya.**

Artisanal mining has been formalized in Kenya by the Mining Act, 2016 and reserved for Kenyans. It is envisaged to increase direct and indirect employment of Kenyans, especially in: Taita Taveta, Migori and Kakamega counties. It is expected to sustain many livelihoods among communities through: job creation, alleviation of poverty, and in complementing other

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169. Base Titanium (2018), Kwale Project: Project Economic Contribution. Available at <http://basetitanium.com/kwale-project/project-economic-contribution>. Accessed on 23 April 2018.

170. Chari Suche, 'No jobs no mining, Kwale residents tell Base Titanium', The Star (Nairobi, 27 December 2017). Available at <https://www.star.co.ke/news/2017/12/17/no-jobs-no-mining-kwale-residents-tell/base-titanium-c1689847>. Accessed on 23 April 2018; Fadhili Fredrick, 'MP opposes mining firm's plans,' Daily Nation (Nairobi, 15 June 2018). Available at <https://www.pressreader.com/kenya/daily-nation-kenya/20180322/281827169303323>. Accessed on 20 June 2018.

171. James Muchai, 'State Declares Base Titanium Mines Vision 2030 Flagship Project' Kenya News Agencies (Nairobi, 11 November 2017). Available at <http://kenyanewsagency.go.ke/en/?p+118834-23/4/18>. Accessed 23 April 2018.

economic activities. It is also expected to have a major impact on the national economy, through: taxes and foreign earnings, and to promote growth of artisanal mining firms in Kenya. These will: enhance job creation, promote skills development, and enhance local supplier development. Artisanal mining will contribute to: the fight against poverty, and enhanced equity and socio-economic development of the country. However, artisanal mining firms are likely to be crowded out of business by the superior: productivity, technological, and market power of foreign investors. Backward linkages between foreign investors and local artisanal mining firms, therefore, are likely to encounter business challenges in Kenya.<sup>172</sup>

The artisanal mining laws will need to be robustly enforced if the myriad of challenges that have characterized the sector in the past have to be addressed. These include: health and occupational safety concerns; insecurity; lack of geological and technical skills; an exploitative black market and smuggling; social and environmental impacts; human rights violations; and use of manual labour and rudimentary tools. Other challenges, include; land related conflicts between: squatters, large scale miners and artisanal miners; cultural practices that discriminate against women; remoteness of mining sites; poor road infrastructure; and lack of access to capital.<sup>173</sup> The new laws will need to: mainstream the ASM industry into the national economy; maximize the benefits of ASM to locals; contribute to sustainable development and improve access to mineral resources. The law will also need to: enhance product valuation and marketing skills; enhance access to markets through technology; strengthen price bargaining; enhance access to credit; and promote economies of scale. It will also need to: enhance removal of brokers and middle men from the ASM supplier chain to enhance miners' earnings; enhance accountability and transparency; and promote good governance in the mining sector.<sup>174</sup>

The sector has also been characterized by conflicts relating to rights of tenure and access to land in Taita Taveta. These include, conflicts between: different groups of miners over land

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172. UNDP (2014), 'Economic and Job Creation Potential of Artisanal and Small-Scale Mining in Taita Taveta county, Kenya, Natural Resources Management for Sustainable Development in Kenya's Extractive Industry. Available at <http://www.jkuat.ac.ke/departments/mining/wp-content/uploads/2017/10/Small-Scale-Mining-n.Taita-Taveta-County-Kenya.pdf>. Accessed on 23 April 2018.

173. *ibid.*

174. *ibid.*

and minerals, large-scale miners carrying out mining without the consent of the local people, large-scale miners being issued with exclusive prospecting license leading to eviction of locals from mining land. There also exist: politics surrounding licensing of foreigners and wealthy land owners to mine at the expense of the local communities, exploitation of the local people by mining companies and wealthy land owners, and the fact that local communities have not benefited from the mineral wealth occurring on their ancestral land.<sup>175</sup>

There is need for collaboration between the national and county governments to facilitate: inclusive mining by all prospectors, including artisanal miners; resolution of land disputes; access to capital; access to education to enhance literacy levels, and improved road infrastructure. In regard to local content, there is need to: promote linkages between large-scale miners and artisanal miners; and enhance training. The national government in collaboration with the county governments will also need to: facilitate the establishment of cottage industries for: value addition through processing of minerals, job creation, and enhanced household incomes for the local people. There exists a compelling case for: diversification of economic activities to: formation of small enterprises, agri-business and livestock farming; strengthening of the cooperative movement in the ASM sector which is currently affected by poor management and leadership wrangles.

The two levels of government will also need to: set up forums for accountability among the stakeholders in the mining industry; put in place mechanisms to promote local communities' participation in decision making; and enhance mechanisms to mitigate environmental impacts on the local communities. Linkages between large-scale mining companies and artisanal mining firms are expected to create economic opportunities for artisanal miners, through: sub-contracting, purchasing, employment creation, enhanced supplier development, and transition to alternative business opportunities through diversification of income, and generation of markets.<sup>176</sup>

## **2.6.0 Local Content Legislative Approaches in Kenya.**

The legal and regulatory framework of local content under the Mining Act, 2016 provides for

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175. *ibid.*

176. *ibid*

five local content approaches in Kenya. These include; preferential treatment of Kenyan goods, services and workforce; capacity building; broad-based local content policy approach; community development agreements, and submission of local content plans.

### **2.6.1 Preferential Treatment of Kenyan Goods, Services and Workforce.**

Mining companies are required to prefer Kenyan: goods, services and workforce. The Kenyan content does not, however, set a maximum price preference margin in favour of Kenyan goods and services. This approach requires that a contract be awarded to local suppliers or providers, if they have capacity to deliver, even though their bids are not the lowest. The idea behind preferential treatment is to facilitate the: Kenyan workforce, supplier companies and providers of services to do business with mining firms and their contractors, and to benefit from training and transfer of technology.<sup>177</sup>

### **2.6.2 Capacity Building**

The local content legal framework in the Mining Act, 2016 and the mining local content regulations, 2017 recognize that there exist capacity gaps in Kenya that are a major obstacle to the ability of Kenyans to participate in the industry. Therefore, additional to the requirement to create employment, mining companies are also required to enhance the local industrial capacity through training of Kenyans and transfer of knowledge and technology to Kenyans. To enhance the implementation of this approach, Kenya has mandated formation of partnerships and collaborations between: the public sector, universities and the industry to ensure that foreign firms transfer: technology, knowledge and skills to Kenyans.<sup>178</sup>

### **2.6.3 Broad-based Local Content Policy Approach.**

The local content legal framework in Kenya has adopted a broad-based local content policy approach as one of the country's local content strategies. It is a liberal approach that sets out general guidelines for preferential treatment of local: suppliers of goods, service providers and workforce. It does not prescribe any sanctions for non-compliance. The mechanism is consistent with the GATTs /NTO clause. Large scale mineral right holders in Kenya are required, to the maximum extent possible, to prefer Kenyan: workforce, goods and services

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177. The Mining Act, 2016, s 50.

178. The Mining Act, 2016, ss 61, 68, 72, 78,86,101,103 and 106; The Mining (ULGS) Regulations, 2017.

along the extractive value chain.<sup>179</sup>

#### **2.6.4 Submission of Local Content Plans.**

Large scale holders of mineral rights in Kenya are required to submit local content plans for approval before a mining right can be granted. It is the most pervasive local content enhancing mechanism under the mining laws. The local content plans are reinforced by periodic reporting requirements to facilitate monitoring and enforcement of compliance. The local content plans are required to indicate how mining companies propose to engage the local industry and workforce to enhance their participation in the mining sector. The local content plans provided for under the Mining Act, 2016 and the mining local content regulations, 2017, include; a local employment and training plan, containing proposals to employ and train Kenyans; a local product plan, containing proposals to procure Kenyan goods and services; a procurement plan, containing proposals for preferential treatment of Kenyan firms in the procurement of goods and services; and a succession plan, containing proposal for gradual replacement of expatriate workers with Kenyans.<sup>180</sup>

Kenya proposes to use these local content mechanisms to: enhance job creation, promote skills development, and enhance local supplier development. There are, however, many other strategies and approaches that Kenya needs to incorporate in her local content strategies to: enhance job creation, promote skills development, and enhance local supplier development. These include; collaborations/partnerships between the government and mining companies; voluntary local content development programmes by the industry to supplement government measures; and state participation in local content development. This study has also considered emerging trends in local content industry good practices in the selected countries with a view to proposing them for implementation in Kenya.

#### **2.7.0 Kenya's Fiscal Policy on Mining.**

Kenya requires a conducive fiscal regime in order to attract extractive FDI into the country. Taxation of mining in Kenya is governed by the Income Tax Act.<sup>181</sup> The country's fiscal

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179. The Mining Act 2016, s 50; The Mining (ULGS) Regulations, 2017.

180. The Mining Act 2016, ss 61, 68,72,78,86,101, 103 and 106; The Mining (E&T) Regulations, 2017; The Mining (ULGS) Regulations, 2017.

181. supra note 66.

policy was reviewed by the Finance Act 2014,<sup>182</sup> which introduced drastic fiscal changes to the Income Tax Act in regard to the mining sector by enhancing fiscal incentives to attract FDI in the mining sector . These developments were informed by the role the mining sector is envisaged to play in the economic development of the country after it was categorized by the government of Kenya as the seventh enabler of the economic pillar of the Kenya Vision 2030.<sup>183</sup>

### **2.7.1 Limitations of Deductions Relating to Mining Operations.**

Under the Finance Act 2014, all expenditure is required to be utilized against revenues realized within the location of the licence, through a taxation policy known as ring fencing. Secondly, tax losses incurred in a licence area can be carried forward by the licensee indefinitely. Losses incurred are deductible from future income that is realized within the locality of the licence. This requirement may be varied if mining operations close and the incurred losses may be transferred to another locality, provided that the new mining area is covered by the first licence. The licensee has the option to spread the losses incurred within the same licence area for a maximum period of three years .<sup>184</sup>

### **2.7.2. Prospecting Expenditure**

Prospecting expenditure may be deducted in full in the income year it occurred. The deduction is, however, recoverable from disposal of a mineral right in the income year of disposal of the mining interest or of the recovery of the amount. Machinery used for prospecting operations is subject to one hundred per cent depreciation in the year of prospecting operations.<sup>185</sup>

### **2.7.3 Extractive Expenditure**

Extractive expenditure is recoverable and equally spread over a period of five years. Where expenditure is incurred within the year of income, deduction is done proportionately. Extractive expenditure that precedes actual production is deemed to have been incurred within the year of commencement of production. If a licensee transfers an interest in mining that enjoys deduction of expenditure, deduction will not be allowed in the year of transfer.

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182. supra note 67.

183. supra note 1.

184. supra note 67 (section 3).

185. ibid (section 4).



Similarly, where the transfer value exceeds the written value of the mining interest on the date of transfer, the difference is deemed to be income and vice versa .<sup>186</sup>

#### **2.7.4 Rehabilitation Expenditure**

Where expenditure is incurred to rehabilitate a licence location, the amount incurred is exempt from tax. The intention is to give incentives to the holder of the licence to rehabilitate the licence area and to address environmental impacts in the locality at the expiry of the mineral rights.<sup>187</sup>

The fiscal incentives introduced to the Income Tax Act by the Finance Act 2014 were far reaching. They are intended to attract FDI to the mining sector in Kenya. It is through extractive FDI and its linkage formation with the local industry in Kenya and spill overs to the other sectors of the economy that local content will thrive through: job creation, skills development, and local industry participation. Favourable and progressive fiscal incentives have won admiration among African countries for the impressive outcomes of the Angola content in the country's oil industry.<sup>188</sup>

### **2.8 The Interface Between Local Content and Kenya's International Trade and Investment Law Obligations.**

Kenya is a member state of the WTO. The country is technically obligated by the National Treatment Obligation (NTO) clause in the 1994 GATT not to compel or force foreign companies to buy Kenyan goods and services if foreign goods are available at comparatively favourable trading terms .<sup>189</sup> Import restrictions, foreign exchange balancing and domestic sales are also prohibited because they also violate the provisions of GATT.<sup>190</sup> Kenya is, as a developing country, required by the WTOs Trade-Related Investment Measures (TRIMs) of

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186. *ibid* (section 5).

187. *ibid* (section 6).

188. Elijah Mushameza et al (2016) (*supra* note 47).

189. The 1994 General Agreement on Tariffs and Trade (GATT), article III. Available at [https://www.org/english/docs\\_e/legal\\_e/06-gatt\\_e.htm](https://www.org/english/docs_e/legal_e/06-gatt_e.htm). Accessed on 29 August 2017.

190. The 1994 GATT, article IX.

1995<sup>191</sup>, to do away with certain performance requirements within a given period<sup>192</sup> at the risk of sanctions for non-compliance by other member states before the WTO Dispute Settlement Panels.<sup>193</sup> Under the WTO/ TRIMs, a purchase locally mandated to be from a local firm offends WTO/GATT non-discriminatory measures.<sup>194</sup> These performance requirements include local content. The NTO clause has a bearing on the design of the legislative and regulatory mechanisms that Kenya adopts to implement her local content policy. A design commonly adopted by WTO member countries to implement local content, while at the same time circumventing the NTO clause in order to avoid sanctions for non-compliance, is to adopt regulatory mechanisms that do not impose sanctions for non-compliance.

Examples of the broad policy framework approach include, among others; the Australian Industry Participation National Framework (AIPF) 2001, which comprises an agreement between the national government in Australia and the state governments to collaborate and collectively articulate the nationally agreed local content approaches and to enhance the country's involvement in major investment programmes locally.<sup>195</sup> Ghana, a developing country like Kenya, has similarly adopted a broad policy framework approach through the Local Content Participation Policy Framework, (LCPPF) 2010, which requires all the players in the oil sector, to the extend possible, to prefer Ghanaian goods and services to foreign suppliers of goods and providers of services. However, the framework requires Ghanaian goods and services to be internationally competitive.<sup>196</sup>

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191. WTO's Trade -Related Investment Measures (TRIMs). Available at [https://www.wto.org/english/tratop\\_e/invest\\_e/invest-info\\_e.htm](https://www.wto.org/english/tratop_e/invest_e/invest-info_e.htm). accessed on 29 August 2017.
192. The time was effective from 1<sup>st</sup> January 1997, though it has since been extended.
193. World Trade Organization (WTOs) 'Dispute Settlement Panels are the dispute resolution tribunals of WTO member states.
194. Michael Warner (2011), 'Do Local Content Regulations Drive National Competitiveness or Create a Pathway to Protectionism?' Solutions Briefing # 5. Available at <https://www.localcontentsolutions.com/resources>. Last Accessed 12 September 2017.
195. Australian Industry participation National Framework, 2001. Available at <https://industry.gov.au/industry/industry/Initiatives/AustralianIndustryParticipation/Pages/Delete-AustralianIndustryParticipationNationalFramework.aspx>. Accessed on 29 August 2017.
196. Local Content and Local Participation in Petroleum Activities Policy Framework, Ghana 2010. Available at [www.eisourcebook.org/cms/December%202015/Ghana%20Local%20Content%20Policy%202010.pdf](http://www.eisourcebook.org/cms/December%202015/Ghana%20Local%20Content%20Policy%202010.pdf). Accessed on 29 August 2017.

The world rankings on economic development categorize Kenya as a developing country. Kenya, therefore, does not enjoy the benefits extended to 31 Least Developed Countries(LDCs) that allow them to deviate from the NTO clause for a specified period on the grounds of their “individual development, financial and trade needs or their administrative capabilities.”<sup>197</sup> The country is deemed, by virtue of her developing country status, to have better linkage formation potential between extractive FDI and the local industry and hence in a better position to adopt, implement and regulate local content without offending the NTO clause. The country is further deemed to be able to: internationally negotiate her national interests, inform her policy decisions, and drive better bargains with foreign mining companies.<sup>198</sup>

This study, however, argues that at her level of industrial and economic development, Kenya has to contend with challenges of linkage formation between extractive FDI and the local industry because her industrial capacity is still weak. The country ought to adopt, develop and implement local content strategies that take into account her industrial capacity and the state of her economic development. Studies have shown that specific local content legislative and regulatory frameworks achieve better outcomes than general ones.<sup>199</sup> Secondly, there is empirical evidence to show that protectionist and discriminatory measures are effective in protecting nascent industries and, in enhancing their level of output protection, they are also capable of, among others; creating jobs, growing the local industrial base, and enhancing value addition.<sup>200</sup> This explains why WTO Rules have been criticized by some scholars as amounting to ‘kicking away the ladder’ by the West, the very ladder that they used to protect their infant industries to attain industrial development.<sup>201</sup>

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197. Under Modification of the Agreement of TRIMs of Annexure F on Special and Differential Treatment of the Doha Work Programme Ministerial Document (2005): in Maria Esteves et al. (2013). Local Content Initiatives Enhancing the Sub-national Benefits of the Oil, Gas and Mining Sectors. Available at <https://www.resourcesgovernance.org/sites/default/files/RWL-Sub-Enhance-Benefits-EN-20131118.pdf>. Accessed on 8 July 2017.

198. *ibid.*

199. Elijah Mushameza et al (2016) (*supra* note 47).

200. Nagesh Kumar (2001), ‘WTO’s Emerging Investment Regimes: Way Forward for Doha Ministerial Meeting’, *Economic and Political Weekly*, 36 (33), August 18. pp. 3151-58. Available at [https://ris.org.in/images/RIS\\_images/pdf/dp\\_14\\_pap.pdf](https://ris.org.in/images/RIS_images/pdf/dp_14_pap.pdf). Accessed on 5 September 2017.

201. Ha- Joon Chang , ‘Kicking Away the Ladder: Development Strategy in Historical Perspective’ (London, Anthem Press, 2002). Available at <http://www.anthempress.com/kicking-away-the-ladder>. Last accessed on 27 September 2017

This study argues that Kenya, as a sovereign state, has national development priorities to pursue for her citizens in accordance with her Kenya Vision 2030. Therefore, she needs not be encumbered by the GATT's / NTO clause imposed on member states by the international trade and investment law. This may impede local content development in Kenya. The country needs to create jobs for Kenyans and to mandate that extractive FDI impart industry skills to her growing and increasingly young and unemployed population. The country's goals of industrial development will be better achieved if the Kenyan: workforce, suppliers of goods and providers of services are facilitated through sustainable economic strategies that enhance national economic growth.

### **2.9.0 Factors to Consider in Designing Local Content Requirements.**

In designing local content requirements, several factors have to be taken into consideration, if their implementation is to effectively attain the objectives of the local content policy, namely; enhance job creation, promote skills development, and enhance local industry participation. These include; conducting a cost- benefit analysis; evaluation of the local industrial capacity; understanding the strategies and capabilities of foreign investors; and evaluation of the local institutional capacity.<sup>202</sup>

#### **2.9.1 A Cost- Benefit Analysis must be Conducted.**

In designing her local content policy and local content strategies, Kenya ought to have ensured, as mandated by the mining regulations, that contracts are awarded on the basis of their competitiveness internationally in terms of: quality, delivery and price. Failure to observe this principle may expose Kenya to double market failure. This occurs where the government fails not only to correct market failure related to infant industry and market power of foreign buyers, but further ends up creating inflated prices and inefficiencies in production.<sup>203</sup>

#### **2.9.2 Evaluation of the Local Industry Capacity.**

In designing her local content requirements, Kenya needed to take into account the absorptive

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202. Silvana Tordo, Michael Warner, Osmel Manzano and Yahya Anouti (2013), 'Local Content Policies in the Oil and Gas Sector', World Bank Publications. Available at [documents.worldbank.org/curated/en/599241468326687019/pdf/7c9940REVISED00box637371B60PUBLICO.pdf](https://documents.worldbank.org/curated/en/599241468326687019/pdf/7c9940REVISED00box637371B60PUBLICO.pdf) Accessed on 21 September 2017.

203. Michael Warner (2011) (Supra note 194).

capacity of the local industry. For Kenya to create deep linkages and spill overs to the other sectors of the economy, she has to target: skills development, technology transfer, and access to financial services by the local industry.<sup>204</sup> Further, to effectively implement the mandatory measures, a relationship towards market prices has to exist, and existing measures have to factor in the absorptive capacity of the local suppliers. Linkage promotion interventions, therefore, have to establish what inputs can be sourced locally and which ones have to be sourced abroad because they are not locally available.<sup>205</sup>

### **2.9.3 Understanding the Strategies and Capabilities of Foreign Investors.**

The local content requirements that Kenya has developed ought to have been weighed against the strategies and capabilities of foreign investors. Capabilities of foreign investors may result in ‘shallowing’, which makes less advanced activities subject to linkages. It may also lead to ‘slowing down’ of the implementation of linkage activities.<sup>206</sup>

### **2.9.4 Evaluation of the Local Institutional Capacity.**

The local institutional capacity in Kenya ought to have been considered when designing the local content requirements. The government has to ensure that the local content measures in place do not exceed its capability to: set targets; put in place support programmes; and establish systems of evaluation and monitoring of compliance. Therefore, the need to correct market failure must be balanced against the capability of the government to correct.<sup>207</sup> It has been established that most of Africa does not have the institutional capacity to manage extractive linkages.<sup>208</sup> For instance, legislation that imposes import tariffs on local supplier

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204. UNECA (2013), ‘Making the Most of Africa’s Commodities: Industrialization for Growth, Jobs and Economic Transformation’, United Nations Publication. Available at [https://www.uneca.org/sites/default/files/publication.files/uneca\\_eng\\_final\\_web.pdf](https://www.uneca.org/sites/default/files/publication.files/uneca_eng_final_web.pdf). Accessed on 11 September 2017.

205. ADB (African Development Bank (2013), ‘African Economic Outlook: Structural Transformation and Extractives’, African Development Bank, the Development Centre of Organization of Economic Co-operation and Development and United Nations. Available at [www.afdb.org/en/knowledge/publications/african-economic-outlook/african-economic-outlook-2013/](http://www.afdb.org/en/knowledge/publications/african-economic-outlook/african-economic-outlook-2013/). Last accessed on 11 September 2017.

206. Mike Morris et al (2011a) (supra note 12).

207. Tilman Altemburg (2011), ‘Linkages and Spill overs Between TNCs and SMEs in Developing Countries’, In UNCTAD, TNC-SME Linkages for Development, UNCTAD, Geneva, pp. 3 – 57. Available at [unctad.org/en/docs/diaeed20091-en.pdf](http://unctad.org/en/docs/diaeed20091-en.pdf). Last accessed 21 September 2017.

208. Vuyo Mjimba (2011), ‘The Nature and Determinants of Linkages in Emerging Minerals Commodity Sectors: A Case Study of Gold Mining in Tanzania’. MMCP Discussion Paper. Milton Keynes and Cape Town. The Open University and University of Cape Town: in Michael Hansen (2014). (supra note 217). Accessed on 26 July 2017.

firms while at the same time giving exemption to foreign investors puts them at a competitive disadvantage, which diminishes their capabilities to engage in linkage formation.<sup>209</sup> There is also need for the government of Kenya to enhance co-ordination of local content strategies between ministries and other government departments, and between the national and county governments to support institutions that enhance local content both at the national and at the county level.<sup>210</sup>

## **2.10 Conclusion**

The local content legal framework in the Mining Act, 2016 and the mining local content regulations, 2017 have provided for local content both at the national level and at the communities' level. The local content strategies and approaches provided for under the Act include: preferential treatment of Kenyan goods, services, and workforce; capacity building; broad-based local content policy approach; submission of local content plans, and community development agreements. There are other approaches, initiatives and strategies that Kenya needs to adopt in order to: enhance job creation, promote skills development, and enhance local supplier development. These include: collaborations/partnerships between the government and the industry; voluntary local content development programmes by the industry to supplement government measures; and state participation in local content development. These strategies have been analyzed in chapter four of this paper.

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209. BSR (Micheal Hackenbrunch and Jessica Pluess) (2011). (Supra note 27).

210. Ibid.

## **CHAPTER THREE: IMPEDIMENTS TO AND OPPORTUNITIES FOR LOCAL CONTENT DEVELOPMENT IN THE MINING INDUSTRY IN KENYA**

### **3.1 Introduction**

Extractive foreign direct investment is envisaged to be a vital fulcrum for the attainment of Kenya's economic development goals in the decade ahead and beyond.<sup>211</sup> However, for extractive FDI to be a major driver of the national economy, foreign investors have to create 'local content'. Local content would be created by foreign investors linking up with the local economy. The local content legal and regulatory framework that the country has established has to enhance local content in Kenya by requiring the mining industry to: employ and train Kenyans, procure Kenyan goods and services, and enhance the local industry participation in the mining sector. To attain these objectives, the country's industrial policies and strategies have to enhance linkage formation between extractive FDI and the local industry and create spillovers to the other sectors of the economy.

This chapter analyzes the roles of the four actors in linkage formation, namely; the government, foreign investors, the local industry, and the donor community. The study analyzes their: interaction, inter-relatedness, and their strategies and capabilities in linkage formation. These factors are useful for informing Kenya on the local content legal and regulatory framework appropriate to anchor and implement her local content policy. Ultimately, a properly designed and effectively implemented local content legal and regulatory framework will aid in: job creation, skills development, and the local industry participation in the mining sector.<sup>212</sup>

### **3.2 Perspectives of Local Content.**

In adopting the local content policy, Kenya intends to leverage linkages in mining projects, additional to the revenues they earn the country in form of: royalties, taxes and licence fees. Local content is the quantum of inputs by foreign buyers and sellers to the host economy from an extractive project in form of: jobs created, skills developed, goods supplied and services

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211. *supra* note 1.

212. World Bank (2013), Conference on Local Content Policies in Oil, Gas and Mining Sectors. Vienna Austria, September 30-October 1 2013. Available at <http://www.worldbank.org/en/events/2013/10/01/local-content-policies-in-oil-gas-and-mining-sector>. Last accessed on 22 July 2017.

provided.<sup>213</sup>

Definition of what constitutes ‘local content’ is, however, not agreed. The emphasis in the definition of the concept varies from country to country, the design generally being informed by, among others; the economic path a country has chosen to pursue, the goals it intends to achieve, the socio-economic priorities of a country, and a country’s foreign investment philosophy.<sup>214</sup> For some countries, local content policies are designed to refer to national content which indicates that inputs can be obtained from anywhere in the country. This is the approach that the Kenyan content in the mining industry has taken. The local content policy and the designs and strategies for the Kenyan content are to be given effect at the national level.<sup>215</sup>

However, by distinctly identifying ‘the communities’ as beneficiaries of local content and by mandating community development agreements, Kenya has clearly incorporated regional input to her local content among communities living where resource extraction activities occur.<sup>216</sup> This has become a common risk management tool in the extractive industry for governments and investors for providing the investors with a ‘social licence’ to operate in countries concerned with lack of extractive developmental effects. It mitigates the social, environmental and cultural impacts of extractive activities on local communities.<sup>217</sup>

This study commends the ‘community content’ approach because it appreciates the need to stem the agitations by local communities that have occurred in various parts of the country causing stoppage of extractive operations in their wake and which, poorly handled, may escalate to major conflicts if local communities are not legally recognized as beneficiaries of

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213. NRG Reader (2015), ‘Local Content: Strengthening the Local Economy and Workforce’, Natural Resources Governance Institute. Available at <https://resourcegovernance.org/sites/default/files/nrgi/Local-Content.pdf>. Last accessed on 8 July 2017.

214. *supra* note 11.

215. *supra* note 14.

216. *ibid.*

217. Michael Hansen (2014), ‘From Enclave to Linkage Economies? A Review of the Literature on Linkages Between Extractive Multinational Corporations and Local Industry in Africa’. Available at <https://www.files.ethz.ch/isn/178095/wp2014-02%20Michael%20Hansen%20for%20web.Pdf>. Accessed on 26 July 2017.



local content in Kenya. Since revenues from mineral resources in Kenya are managed by the national government, the local content legal framework has provided for a mechanism to meet the demands of the communities and hence to give extractive companies both social and legal legitimacy to operate. Another perspective of local content begs these questions; what qualifies as local business? Is it the percentage of the shareholding in a company? Is it the place of registration of a company? What percentage of the workforce must be local? Kenya's local content law is clear about these mandates. It requires foreign extractive companies to: hire local labour, procure local products from Kenyan companies, and hire services from Kenyan providers.<sup>218</sup>

Another perspective of local content is the definition that expresses the term to refer to the requirement that a local component constitutes a finished product.<sup>219</sup> It is, however, generally agreed among economics' scholars that local content is largely an economic concept. Indeed, the objective of any local content policy is to ensure that rents invested locally by foreign mining companies through extractive operations stay in that country. This requirement is intended to promote local economic development and produce spill overs from extractive industries to the other sectors of the economy.<sup>220</sup> These are similarly the goals that local content in the mining industry in Kenya, as discernible from the legal framework in the Mining Act, 2016 and the mining local content regulations, 2017 have sought to achieve.

Yet another perspective of local content refers to it as the measure of goods that have been locally produced for use locally or to be employed within the mining industry and services produced by sub-contractor companies owned by the nationals of the host country.<sup>221</sup> This study finds the definition of local content by UNCTAD most comprehensive and hence adopts it. The UN body defines local content to mean the quantum of inputs created and added to the host country through the use of: local goods, services and workforce at all stages of the

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218. *supra* note 14.

219. Gene Grossman (1981), 'The Theory of Domestic Protection and Content Preference', 96 *Quarterly Journal of Economics* No. 4 (1981), 583. Available at <https://www.jstor.org/stable/1332310>. Last accessed on 7 September 2017.

220. Michael Hansen et al (2015) (*supra* note 11).

221. Norwegian Church Aid (2016) (*supra* note 21).

extractive value chain.<sup>222</sup> The Local content legal and regulatory framework in the Mining Act, 2016 indicates that local content in Kenya constitutes the quantum of the Kenyan inputs and is comprised of: Kenyan goods, services, and workforce. The inputs may take three forms, namely; 1) income accruing to Kenyans; 2) revenue accruing to Kenyan ownership; and 3) dividend accruing to Kenyan shareholders and creditors.<sup>223</sup>

### **3.3 The Economics of Local Content.**

There is no unanimity among scholars as to what are the effects of local content in the extractive industries to the economies of host countries.<sup>224</sup> Liberal trade economists have a negative view of local content. They argue that local content reduces welfare through distortions of trade and FDI.<sup>225</sup> They, further, argue that its requirements can reduce and negatively impact foreign investments and consequently reduce trade and FDI.<sup>226</sup> According to them, the quantum of the effect of local content requirements on all countries and on all sectors of global trade has been estimated at USD 93 billion annually.<sup>227</sup> Liberal trade economists have posited that local content requirements may not conduce to investment as they impede the ability of the local industry to compete with foreign firms which creates economic inefficiencies.<sup>228</sup>

The Local content policy has, however, been robustly defended by its proponents. This study posits that the arguments against local content by liberal economists have been propagated by the proponents of the free market economy which finds favour with the more developed economies of the west. They frown upon performance requirements such as local content

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222. UNCTAD (2012), 'Extractive Industries: Optimizing Value Retention in Host Countries'. Available at [Unctadxiii.org/en/Session Document/Suc 2012/-en.pdf](http://unctad.xiii.org/en/Session Document/Suc 2012/-en.pdf). Accessed on 3 September 2017.

223. *supra* note 14.

224. Oliver Morrissey (2012), 'FDI in Sub-Saharan Africa: Few Linkages, Fewer Spillovers' *European Journal of Development Research*. 24(1) : 26-31. Available at <https://doi.org/10.1057/ejdr.2011.49>. Last accessed 7 September 2017.

225. Gene Grossman (1981) (*supra* note 219).

226. Michael Warner (2010), 'Local Content Optimization: Modelling the Economic Impact of Local Content on Commercial Interests and Public Industrial Policy', *Solutions Briefing # 4*, Available at <http://www.localcontentsolutions.com/index.html>; in Michal Hansen (2014) (*supra* note 217).

227. *ibid*.

228. *ibid*.

because they fetter free trade. It has been shown that local content, properly designed and effectively implemented, can support developing countries like Kenya in their industrial development through transition from protected economies towards integration into the global economy.<sup>229</sup> Local content, for instance, has: enhanced enterprise development in extractive industries in Angola; and created jobs locally and promoted skills development in the oil and gas industry in Nigeria.<sup>230</sup>

Morrissey argues that if local content is properly designed and the actors' strategies and capabilities efficiently deployed and allowed to interact and interrelate seamlessly, deep forward and backward linkages will be created between foreign investors and the local industry. This will lead to creation of spill overs into the other sectors of the economy. This would in turn lead to: enhanced job creation, promotion of skills development, and enhanced access to business opportunities by Kenyan suppliers of goods and providers of services. These benefits of local content would eventually make local industries competitive and enhance their standards.<sup>231</sup>

A further justification of local content in Kenya is that it's a time tested policy for national economic development. It has been argued that most developed countries applied performance measures (including LC) to protect their infant industries and to facilitate industrial take off.<sup>232</sup> Like elsewhere in other developing countries endowed with extractives and who have adopted the local content policy, Kenya intends that local content: nurtures infant industries, promotes skills transfer, bridges the gap in technology between her and the more advanced world economies, enhances the local industry capacity to produce, and creates jobs for Kenyans. The introduction of local content in Kenya is clear indication of the appreciation by the country of the need to protect her infant industry and to direct the market power of foreign investors in the mining sector towards developing linkages.<sup>233</sup>

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229. Elijah Mushameza and John Okiira (2016) (supra note 47).

230. *ibid.*

231. Oliver Morrissey (2012) (supra note 224).

232. Lindsay Whitfield, Ole Therkildsen, Lars Buur and Mette Kjaer (2015), 'The Politics of African Industrial Policy: A comparative perspective', Cambridge, Cambridge University Press. Available at [assets.cambridge.org/97811071/05317/frontmatter/971107105317/-frontmatter.pdf](https://assets.cambridge.org/97811071/05317/frontmatter/971107105317/-frontmatter.pdf). Accessed on 7 September 2017.

233. Michael Hansen et al (2015) (supra note 11).

Ado has argued that local content is necessary for developing countries like Kenya to, among other benefits: nurture infant industry, direct the competitive edge enjoyed by foreign industry towards linkage formation with the local industry, compensate host communities for social, cultural and environmental impacts of extractive activities, promote peaceful co-existence with the communities, and protect the strategic sectors of the economy.<sup>234</sup>

### **3.4 Extractive Foreign Direct Investment and Linkage Formation with the Local Industry in Kenya.**

Kenya, like other developing countries endowed with mineral resources, envisages that extraction of her mineral resources and the availability of foreign markets for these resources will provide her with opportunities to, among other benefits: integrate into the global economy, generate revenues, and plough back these revenues into the domestic economy.<sup>235</sup> Properly designed and implemented, local content has the capacity to grow the revenues that Kenya generates from the exploitation of her mineral resources to broad based economic development of the country. As an economic strategy, local content is expected to aid the country in avoiding the negative consequences of natural resource exploitation, generally referred to as the ‘resource curse’ and associated with: inflation, reduced competitiveness of the manufacturing sector, displacement and movement of skills and investments away from production, aiding dependence, and causing ‘dis-industrialization’<sup>236</sup>

In developing local content, Kenya intends to deploy the extractive rents to enhance her productive capabilities and economic diversification consistent with the recommendations of the World Investment Report (2012) by UNCTAD.<sup>237</sup> UNECA similarly posits that a combination of: appropriate policies, deep linkage formation strategies, and promotion of industry skills can transform extractive based development into broad based development and diversification of the economy.<sup>238</sup> These positive attributes of economic development are what

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234. Rabiun Ado (2013) (supra note 25).

235. Gavin Bridge (2008), ‘Global Production Networks and the Extractive Sector: Governing Resource- Based Development’, 8 *Journal of Economic Geography*, 391. Available at <https://academic.oup.com/joeg/issue/8/3>. Accessed on 7 September 2017.

236. Michael Hansen (2014) (supra note 217).

237. UNCTAD (2012), ‘World Investment Report (2012)- Towards a New Generation of Investment Policies’. United Nations Publications. Available at [www.Vrojasdatabank.info/wir2012-1](http://www.Vrojasdatabank.info/wir2012-1). pdf. Accessed on 7 September 2017.

diversification of the economy.<sup>238</sup> These positive attributes of economic development are what Kenya hopes to achieve through local content. However, to attain these benefits, the country's local content strategies have to be properly designed and appropriate for the country. The development opportunities that Kenya could access through local content in her mining sector have been identified by UNIDO to include, among others; diversification of the manufacturing sector, formation of linkages, and creation of spill overs.<sup>239</sup>

### **3.5 The Role of Extractive Foreign Direct Investment in Kenya's Mining Industry.**

With commercial exploitation of mineral resources envisaged to gather pace in Kenya in the coming years, extractive FDI is envisaged to be a major driver of the national economy. Statistics by the Ministry of Mining of the government of Kenya indicate that by the year 2013, 29 out of the 46 oil exploration blocks in Kenya had been awarded to 15 foreign public and private oil and gas companies mostly from: Europe, America and China.<sup>240</sup> Awarding of mineral rights has taken a trend similar to that of the oil and gas sector.

The technological capacity required in mineral extraction activities, the need to integrate the country into the global market in extractives to sell her extractive goods, and the capital intensive nature of mining operations necessitate that Kenya attracts foreign investors to exploit her mineral resources. This explains why Kenya's extractive resource operations are dominated by foreign investors.<sup>241</sup> Extractive FDI is envisaged to have huge impacts on the economy of Kenya. These include; promotion of capital formation and exports, enhanced government revenues, technology and skills transfer, and direct and indirect employment of Kenyans.<sup>242</sup> However, the interest of this paper is to analyze: what Kenya has to do to ensure that foreign investors who invest in her mining sector; create jobs for Kenyans, promote skills development, transfer knowledge and technology, and enhance local industry participation through linkages and spill overs. These are the objectives that the local content policy in

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238. UNECA (2013) (supra note 204).

239. UNIDO (2012), 'Promoting Industrial Diversification in Resource Intensive Economies', Vienna, UNIDO at <https://www.unido.org/fileadmin/User-media/publications/Pub-free/Promoting%20Industrial%20Diversification%20Report.pdf>. Accessed on 11 September 2017.

240. supra note 25.

241. N.N Assumani, 'Attracting FDI to Kenya. Does the Law Fit the Bill?' Unpublished LL.M Thesis, University of Nairobi,

Kenya has set to achieve.

In Kenya, like elsewhere in other developing countries endowed with mineral resources, linkage within the mining sector has been minimal. The mining sector has been an ‘enclave’ where natural resource seeking FDI created isolated businesses (enclaves) within the national economy.<sup>243</sup> The mining sector in Kenya has had few linkages to local products, labour, and financial markets with minimal contribution to the economic development of the country.<sup>244</sup> The state of affairs can be explained by two factors, namely; first, mining operations in the country are mostly located in remote areas of the country with poor infrastructure and weak industrial capacity. As a result, the industrial capabilities of the country have been unable to relate to the comparative advantages sought by the extractive sector. Secondly, the technical and organizational capabilities of the foreign investors are too superior that the technology gap to local industry is too huge to bridge.<sup>245</sup>

However, steps have been taken both by the government and the industry to address these challenges. First, it has become common practice for foreign investors to alter their strategies towards outsourcing of non-core activities, and hence offering local firms opportunities to link up to the foreign investors in the mining sector. Secondly, some foreign investors have voluntarily adopted CSR and community oriented strategies in a bid to reduce risks and to obtain a ‘social licence’ to operate.<sup>246</sup> Thirdly, Kenya on her part has mandated the CSR strategy in her new mining laws by requiring foreign investors to, where applicable and necessary, facilitate and carry out socially responsible investments for the local communities, submit a plan giving particulars of the applicant’s of mineral licence’s proposal with respect to socially responsible investments for the local community, and acceptance of the applicant’s proposal with respect to engaging in community investments that are socially

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242. Michael Hansen (2014) (supra note 217).

243. *ibid.*

244. Thomas Yager (2013) (supra note 7).

245. Michael Hansen (2014) (supra note 217).

246. International Council of Mining and Metals (ICMM, 2012), ‘The Role of Mining in National Economies: Mining’s Contribution for Sustainable Development’. Brief, October 2012. Available at <http://www.icmm.com/publications>. Last accessed on 3 September 2017.

responsible for granting of a mining licence.<sup>247</sup>

Another recent development in the mining sector with implications on linkage formation is that foreign investors from the Western world's stranglehold on the mining sector in Kenya has been increasingly challenged by extractive investors from Asia, and particularly from China.<sup>248</sup> This has altered the bargaining relations between foreign investors and the government of Kenya which has made it possible for the country to demand that foreign investors in the mining sector foster local linkages. Lastly, gradual improvement in the competencies and skills in the country's manufacturing and service sectors will convince investors in the mining sector to utilize local skills and capabilities through linkages.<sup>249</sup>

Kenya will, however, require partnerships with donors, international organizations, and international financial institutions who have been increasingly supportive of the developing countries in the adoption and implementation of their local content policies to enhance linkages and spill overs to foster industrial development.<sup>250</sup>

### **3.6 The State of Linkage Formation in Kenya.**

The Mining sector's contribution to the Kenyan economy is currently at less than 2 percent of GDP.<sup>251</sup> This can be explained by the fact that Kenya's extractive FDI is mainly extractive in nature which tends to foster few linkages. Where linkages are formed, they produce limited spill overs on the national economy. The FDI in Kenya, like in the rest of the developing

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247. The Mining Act, 2016, ss. 47 (1) (f), 101 (2) (j), and 103 (g).

248. Zeddy Sambu, 'Kenya: Oil Search in Kenya Shifts top gear as gas deposits found'. Available at <http://allafrica.com/stories/201005260109.html>. Last accessed on 4 September 2017; D. Doya (2013), 'Kenya to offer 31 blocks after pact with China's Fenxi', Bloombergnews/December 9. Available at <http://www.bloomberg.com/news/2013-12-08/Kenya-will-offer-31-coal-blocks-after-accord-with-china-fenxi.html>. Last accessed on 4 September 2017.

249. Raphael Kaplinsky and Mike Morris (2009), 'Chinese FDI in Sub-saharan Africa: Engaging with Large Dragons' European Journal of Development Research, 21 (4): 551 -569. Available at <https://links.springer.com/content/pdf/10.1057%2Fejdv.209.24>. pdf. Last accessed on 7 September 2017.

250. UNCTAD (2013), Commodities and Development Report; 'Perennial Problems, New Challenges and Evolving Perspectives', United Nations Publication. Available at [unctad.org/en/publications/suc2011d9\\_en.pdf](http://unctad.org/en/publications/suc2011d9_en.pdf). Accessed on 11 September 2017; ADB (African Development Bank (2013), 'African Economic Outlook: Structural Transformation and Extractives', African Development Bank, the Development Centre of Organization of Economic Co-operation and Development and United Nations. Available at [www.afdb.org/en/knowledge/publications/african-economic-outlook/african-economic-outlook-2013/](http://www.afdb.org/en/knowledge/publications/african-economic-outlook/african-economic-outlook-2013/). Last accessed on 11 September 2017.

251. Kariuki Muigua et al (2015) (supra note 2), P. 239.

countries in Africa endowed with mineral resources, do not enhance linkage formation because foreign Investors' interest in the industry is geared towards extraction rather than production.<sup>252</sup>

Almost all minerals in Kenya are exported in their raw form due to lack of technology and specialized skills. Kenya requires value addition for higher returns from mineral resources extraction through industrialization and economic growth.<sup>253</sup> Lack of linkage formation means that Kenya has been getting fewer benefits from her mining industry, only limited to: direct employment, a small share of export earnings, and some revenues. UNCTAD has argued that extractive FDI has been of limited use to Africa due to limited linkage formation and absorptive capacity in domestic industries.<sup>254</sup> Lack of linkage formation has further been responsible for: limited industry skills, low public investment, and low investment in in-house training by mining firms.<sup>255</sup>

Another challenge to linkage formation in Kenya, like in the rest of Africa, is the 'outsourcing' phenomenon where the 'local firm' is merely an importing firm that creates little local value added.<sup>256</sup> The performance of other African countries that have implemented the local content policy over the last 15 years, however, inspires hope for Kenya that her local content policy will progressively nurture linkage formation between extractive FDI and the local industry and also create spill overs to the other sectors of the economy. Linkage formation and spill overs are expected to: create jobs for Kenyans, promote skills development, and enhance local industry participation. The oil industry in Nigeria has been hailed as one of the local content success stories in Africa, where local content had over a period of 10 years progressively increased by 30 per cent between the years 2000 – 2010 and

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252. Oliver Morrissey (2012) (supra note 224).

253. *ibid.*

254. UNCTAD (2012) (supra note 237).

255. Judith Fessehaie (2011), 'Development and Knowledge Intensification in Industries: Upstream of Zambia's Copper Mining Sector'. MMCP Discussion Paper, University of Cape Town and the Open University. Available at [http://commodities.open.ac.uk/8025750500453F86/\(httpAssets\)48170SE9E70F43A8025787E0039FOOD/&file/Development%20and%20knowledge%20intensification%20in%20industries%20Upstream%20of%20Zambia's%20Copper%20Mining%20sector](http://commodities.open.ac.uk/8025750500453F86/(httpAssets)48170SE9E70F43A8025787E0039FOOD/&file/Development%20and%20knowledge%20intensification%20in%20industries%20Upstream%20of%20Zambia's%20Copper%20Mining%20sector). Accessed 12 September 2017.

256. ADB (African Development Bank (2013) (supra note 205).



where most local firms were locally controlled.<sup>257</sup>

The local content legal and regulatory framework in Kenya has to tap into her potential for linkage formation and to attain her economic development goals. The government of Kenya will also need to tap into her strategies and capabilities to attract productive FDI that creates linkages with the local industry and spill overs to the other sectors of the economy as opposed to extractive FDI, where mineral resources are exported out of the country in their raw form and hence denying Kenyans: jobs, industry skills, and local industrial development.

Kenya, further, needs to create local content in a manner that enhances spill overs within industries as opposed to spill overs between industries. This is because backward linkages within an industry have potential for larger development than linkages between industries.<sup>258</sup> There have been, for instance, no intra-industry spill overs between the artisanal miners in Kenya and foreign investors because foreign extractive FDI abhors competition from artisanal miners.<sup>259</sup> Kenya has created a legal framework for artisanal mining in Kenya in the Mining Act, 2016, the objective being consistent with that of creating local content, namely to: create jobs for Kenyans, promote skills development, and enhance local industry participation in the sector.<sup>260</sup>

The local content regulatory framework in Kenya has to capacitate artisanal miners to shield them from being crowded out of the mining industry by the superior financial and technological capabilities of extractive foreign direct investment in the country. The relatively low linkage formation between foreign investors and artisanal miners in other African countries, has been identified as a major contributor to poor outcomes of their respective local

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257. Ademola Oyejide and Adeolu Adewuyi (2011), 'Enhancing Linkages in the Oil and Gas Industry in the Nigerian Economy'. MMCP Discussion Paper. The Open University and University of Cape Town. Available at [http://commodities.open.ac.uk/8025750500453F86/\(httpAssets\)/6D572F58F7E2A83B8025787E003A7258/\\$file/Enhancing%20linkages%20of%20oil%20and%20gas%20industry%20in%20the%20Nigerian%20economy.pdf](http://commodities.open.ac.uk/8025750500453F86/(httpAssets)/6D572F58F7E2A83B8025787E003A7258/$file/Enhancing%20linkages%20of%20oil%20and%20gas%20industry%20in%20the%20Nigerian%20economy.pdf). Accessed on 17 September 2017.

258. Mike Morris et al (2011a) (supra note 12).

259. Marianne Larsen and Paul Yankson (2009), 'Does FDI Create Linkages in Mining? The Case of Gold Mining in Ghana', *Transnational Corporations and Development Policy: Critical Perspectives*, PP. 247-273. Available at [https://link.springer.com/chapter/10.1057%2F9780230228412\\_12](https://link.springer.com/chapter/10.1057%2F9780230228412_12). Accessed on 20 September 2017.

260. The Mining Act 2016, ss 92-100.

content policies.<sup>261</sup> The lesson for Kenya, therefore, is that her local content regulatory framework has to enhance linkage formation that needs to be deployed to: enhance the capacity of the local industry, create employment and training opportunities for Kenyans, promote skills development, enhance transfer of knowledge and technology, and facilitate procurement of Kenyan goods and services.

### **3.7 Inhibitions to the Mining Industry Value Chain in Kenya.**

This section analyzes the mining sector value chain in Kenya in the context of the project life cycle. A mining project life cycle is divided into two parts, namely; core technical and non-technical activities. It is these activities that are envisaged to enhance employment opportunities for Kenyans and also enhance access of Kenyan companies/firms to business opportunities along the value chain. Local content interventions, therefore, have to focus on these activities. The major mining project activities comprise of: coring, blasting and quarrying.<sup>262</sup> The mining project life cycle, include; mining resource assessment, exploration, mineral deposit appraisal/feasibility assessment, mine complex development, mineral production, and closure and post –closure of the mine.<sup>263</sup>

The services required along a mining project life cycle include; engineering, drilling equipment, construction, supply chain services, environmental services, manufacturing, ICT/communication services, general and site support services, security, manpower management, transport, financial and risk services, legal and regulatory services, training, and energy services.<sup>264</sup> A study of the mining industry value chain in Kenya has established that: local supplier companies prefer to service indirect services. These are the services needed by the other sectors of the economy. The local supplier industry in Kenya considers them to be: better developed, suitable for specialization, and appropriate for local supplier integration. However, lack of buyers' access to information about local suppliers of goods, coupled with lack of knowledge by local suppliers about buyers' requirements is a major inhibition to locals' access to procurement of direct services.<sup>265</sup>

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261. Oliver Morrissey (2012) (supra note 224).

262. UK- DFID (2015) (supra note 94).

263. *ibid.*

264. *ibid.*

265. *ibid.*

A further inhibition to local supplier development in Kenya is the inability of Kenyan companies to provide core-technical services. This is because: these services are highly technical, their procurement is prone to risks, they have least potential for development, and lack of understanding of buyers' technical requirements. Local supplier companies, therefore, need to be facilitated to provide core-technical services through interventions such as: alliances, preferred supplier agreements, sub-contracting, and joint ventures.<sup>266</sup>

Another inhibition to local supplier development relates to constraints to the supply chain. These include local supplier companies': industry inexperience, limited knowledge of international standards, inadequate information on buyers' needs, limited access to finance, and shortage of skilled staff.<sup>267</sup> These constraints can be mitigated through the development of an enterprise development programme, comprising of a host of interventions. These include: timely dissemination of information, training of local SMEs through workshops and conferences, and maintenance of a data base of local suppliers that is accessible to buyers.<sup>268</sup>

The major entry point to local content development in Kenya is the ability of local suppliers to access the procurement processes of foreign companies. Secondly, the new local content laws of mining in Kenya have, through regulation, mandated that contracts be awarded on the basis of their competitiveness internationally in terms of: quality, delivery and price.<sup>269</sup> The right place to source goods should also be taken into consideration. For instance, goods locally procured in Kenya could be supplied without delay. Transportation and administration costs as well as customs duties for goods sourced abroad could also be avoided. However, procurement processes are also subject to external influence such as capture by the political elite, which impacts negatively on procurement outcomes. These include market price distortions, which could make locally procured goods and services more expensive than goods and services sourced abroad. Therefore, procurement decision making has to factor in the political environment, without compromising the business goals.<sup>270</sup>

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266. *ibid.*

267. *ibid.*

268. *ibid.*

269. The Mining (ULGS) Regulations, 2017.

270. UK-DFID (2015) (*supra* note 94).

### **3.8 Impediments to and Opportunities for Local Content Development in the Mining Industry in Kenya.**

Linkages in the mining sector in Kenya will be forged by the interaction of the actors in linkage information, who include; the government of Kenya, foreign investors, the local firms, and donors and international financial institutions.<sup>271</sup> The four actors are interrelated and their capabilities and strategies have to interact with each other in order to create deep linkages between extractive FDI and the local industry and spill overs to the other sectors of the economy. It is these linkages and spill overs that are expected to: create jobs, promote skills development, and enhance local industry participation in the mining industry in Kenya.

#### **3.8.1 Strategies and Capabilities of the Government.**

Successful implementation of the local content strategies that Kenya has adopted, largely depends on the industrial policies that the country has chosen to pursue to attain economic development. The government has to, among other strategies: provide information to the public about linkage opportunities, provide services to support linkage formation, and co-ordinate policy.<sup>272</sup> The government of Kenya has already categorized the mining sector as the 7<sup>th</sup> enabler of the economic pillar of the Kenya Vision 2030.<sup>273</sup> However, for the country to attain her local content goals, she has to identify the linkage formation priorities to be promoted through extractive FDI, coupled with incentives to extractive FDI to enhance spill overs to the other sectors of the economy . Kenya has to pursue an industrial policy that promotes, among others; the establishment of appropriate institutions of governance such as an efficient legal system, while at the same time focusing on strategic intervention measures; strengthening capacity of the local industry; and promotion of industry.<sup>274</sup> Another strategy that the country needs to pursue to attract FDI is by, among others; providing a conducive business environment for investors to operate, and develop supplier capacity and infrastructure.<sup>275</sup> The local content policy in Kenya is targeted at ensuring that extractive FDI

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271. Michael Hansen (2014) (supra note 217).

272. *ibid.*

273. *supra* note 1.

274. Sanjaya Lall (1995), 'Industrial Strategy and Policies on Foreign Direct Investment in East Asia'. *Transnational Corporations*, 4 (3) : 1-26; In Michael Hansen (2014) (supra note 217).

275. *ibid.*

promotes the local industry upgrading. It is, therefore, envisaged to progressively grow the infant industry and hence enable it to form market relations that conduce to the demands of foreign companies. Preferential treatment of Kenyan goods, services, and workforce as a local content strategy inheres in the local content policy and is aimed at curbing the market power of foreign firms by directing it to linkage formation with the local industry. It has been argued that markets, left on their own, will entrench the superiority of foreign firms at the expense of the local industry.<sup>276</sup> Local content is, therefore, intended to aid the local industry in Kenya to participate in higher value business activities through private- public partnerships for industrial growth and economic development of the country.<sup>277</sup>

There are various strategies and capabilities that are available to the government of Kenya to enhance linkage formation between extractive FDI and the local industry in Kenya. These include; strategically attracting FDI into the country, adoption of specific linkage policies, strengthening the absorptive capacity of the local industry, and establishment of an investment climate that is conducive to linkage formation.<sup>278</sup>

### **3.8.1.1 Attracting Strategic Foreign Direct Investment.**

In order to enhance local content, Kenya needs to strategically attract FDI in Kenya by targeting investors with higher linkage potential. Kenya is a developing country with limited resources. Therefore, the available resources need to be directed towards attracting investors with higher potential for linkage formation. The government efforts may also be directed to those investors with the best package to offer. There are several strategies available to the government which include; subsidies, tax exemptions, and regulatory exemptions.<sup>279</sup> As a developing country with budgetary constraints, Kenya has pursued the strategy of offering fiscal incentives, and particularly tax exemptions to attract the right FDI into the country.<sup>280</sup>

### **3.8.1.2. Specific Linkage Policies.**

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276. UNCTAD (2013) (supra note 250).

277. *ibid.*

278. *ibid.*

279. Magnus Blomstrom, Kokko Ari and Muchielli Jean-Louis (2003), 'The Economics of Foreign Direct Investment Incentives', Springer Berlin Heidelberg. Available at <http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.199.188&rep=rep1&type=pdf>. Accessed 15 November 2017.

280. *supra* note 67.

Kenya needs to develop specific linkage policies. In this regard, the country has to introduce measures or incentives to force foreign investors to link up with the local firms. Indeed, local content is one of the linkage policies that the country has developed to force linkage formation between extractive FDI and the local industry. The benefits underpinned by the local content policy in Kenya, include: preferential treatment of Kenyan goods and services, skills development and training of Kenyans, transfer of knowledge and technology, and enhancement of local industry participation.<sup>281</sup> By adopting the local content policy, Kenya intends that the local content rules that have been developed to anchor the local content policy be drivers of linkage formation between extractive FDI and the local industry, akin to the Nigerian local content policy and laws that have progressively increased the Nigerian content in her oil industry.<sup>282</sup>

Kenya has to be careful that the local content rules it has developed do not create undesirable consequences for the country. These include, among others: capture by political elite, state mandarins and vested industry interests; promotion of inappropriate investment policies; inflation; and reduction of FDI level in the country.<sup>283</sup> Kenya's local content and regulatory approaches need to be carefully implemented so that they do not end up scaring away investors. Changes to local content requirements and approaches, where deemed necessary, also need to be carefully and gradually introduced because they can be harmful to foreign investors' businesses.<sup>284</sup>

### **3.8.1.3 Strengthening Local Supplier Capacity.**

Strengthening of the capability of the local industry to access business opportunities is another tool available to Kenya for promoting linkage formation in the country. The government has various options available to it for strengthening the capability of Kenyan supplier companies to do business with foreign investors. The measures for strengthening the local capacity that the government can pursue to promote linkage formation in Kenya, include; development of policies and incentives targeting firms/industries with the largest potential for linkage

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281. *supra* note 14.

282. Ademola Oyejide et al (2011) (*supra* note 257).

283. Michael Warner (2010) (*supra* note 226).

284. *ibid.*

formation with foreign investors, standard capacity development policies, development of local technology, and national research and innovation.<sup>285</sup>

It has been posited that appropriate investment in capacity building for local supply industry enhances the industry's capacity to: access investment capital, enhanced technological capabilities, and create incentives to adopt new technologies. These combined, reduce the risk of market not rewarding their investments.<sup>286</sup> Kenya, in this regard, may opt to build capacity of the local supplier industry by setting up a support facility akin to the Nigerian Content Support Fund, which has been hailed in Africa as a model of a successful supplier development programme.<sup>287</sup> The fund has provided financial assistance for supplier development in Nigeria's oil and gas industry which, jointly with other local content measures provided for under the Nigerian local content laws, raised the country's local content by 30 per cent between the years 2000-2010.<sup>288</sup>

#### **3.8.1.4 Establishment of a Conducive Investment Climate.**

Kenya needs to provide an investment climate that is conducive to linkage formation. UNCTAD has argued that a country has to create linkages between foreign investors and local companies that spill over to the other sectors of the economy if she has to maximize the benefits of local content.<sup>289</sup> Kenya's ability to successfully create linkages and spill overs is highly dependent on the domestic investment climate being conducive to business. Kenya, therefore, has to provide high standard public services, including; good infrastructure, research and development support, education, extension systems, and an efficient legal and regulatory system.<sup>290</sup>

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285. Vuyo Mjimba (2011) (supra note 208).

286. Judith Fessehaie (2011) (supra note 255).

287. Nigerian Oil and Gas Industry Content Development Act, 2010 at [www.eisourcebook.org/cmc/january%202016/Nigerian%20Oil%20and%20Gas%20Industry%20Content%20Development%20Act%202010.pdf](http://www.eisourcebook.org/cmc/january%202016/Nigerian%20Oil%20and%20Gas%20Industry%20Content%20Development%20Act%202010.pdf) Accessed 14 September 2017.

288. A. Otti (2011), 'Financing Local Content Vehicles and Local SMEs in Africa's Extractive Industries: Issues and Challenges': in Michael Hansen (2014) (supra note 217).

289. UNCTAD (2013) (supra note 250).

290. *ibid.*

Additional to a conducive investment environment, Kenya also needs to invest in, among others; an efficient public sector, effective institutions, a working legal system, a stable government, and access to capital and financial services.<sup>291</sup> While Kenya has progressively scaled up her investment in material and human resources to improve in these areas, much more needs to be done to enhance the capacity and efficiency of state institutions. This will promote effective governance that conduces to investment in the country. High standards regulatory environment has been hailed as key to attracting FDI and hence economic growth.<sup>292</sup>

Decisions by foreign investors and local firms as to; whether or not to enter into contractual relations with each other, depend on the ability of the legal system to resolve their disputes efficiently. It has conversely been argued that an inefficient legal system makes the investment environment costly and less conducive, and hence foreign investors will refrain from linkage formation with the local industry.<sup>293</sup> Kenya has made significant progress towards creating a conducive environment for investment in the last four years. The country's improvement in the parameters of: ease of doing business; and global competitiveness have been documented by the World Bank<sup>294</sup> and the World Economic Forum,<sup>295</sup> where Kenya has moved up from position 96 to 90 out of 148 countries.

Kenya, however, has to do more to further improve her investment climate through upgrading of infrastructure and enhanced education standards. Research and development support extension systems in universities and technical and vocational institutes suffer from inadequate state funding. The government in collaboration with her development partners

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291. *ibid.*

292. ADB (2013) (*supra* note 205).

293. Dan Haglund (2008), 'Regulating FDI in Weak African States. A Case Study of Chinese Copper Mining in Zambia' *Journal of Modern African Studies*, 46(4): 547-575. Available at <https://www.cambridge.org/core/journals/journal-of-modern-african-studies/article/regulating-fdi-in-weak-african-states-a-case-study-of-chinese-copper-mining-in-zambia/CE534E1B09E2FF7456C54EC74FA9FBCE>. Accessed on 13 November 2017.

294. World Bank (2013-2014), 'Ease of Doing Business'. Available at <https://openknowledge.worldbank.org/bitstream/handle/10986/11857/DB13-full%20Regard.pdf>. Accessed on 8 September 2017.

295. World Economic Forum (2013-2014), 'Global Competitiveness Report'. Available at [www3.weforum.org/docs/wef.GlobalCompetitivenessReport-2013-2014.pdf](http://www3.weforum.org/docs/wef.GlobalCompetitivenessReport-2013-2014.pdf); World Economic Forum (2015-2016), 'Global Competitiveness Report'. Available at [www3.weforum.org/docs/gcr/2015-2016/Global-Competitiveness-Report-2015-2016](http://www3.weforum.org/docs/gcr/2015-2016/Global-Competitiveness-Report-2015-2016). Both references accessed on 8 September 2017.



needs to increase funding streams to enhance research and development programmes. The government has undertaken legal and judicial reforms since the year 2011 after the promulgation of the new constitution. A lot more needs to be done to create a legal system that is efficient in its adjudicative processes, to enhance resolution of commercial disputes in a timely manner.

### **3.8.2 Strategies and Capabilities of Foreign Investors.**

The strategies and capabilities of foreign investors are envisaged to be a major driver of linkage formation in Kenya. These strategies and capabilities include; growing competition among extractive FDI in Kenya, outsourcing of business by foreign companies to local companies/firms, and involvement of foreign investors in CSR projects.

#### **3.8.2.1 Growing Competition among Foreign Investors.**

Mineral extraction activities are capital intensive in their very nature. This has precipitated increased industry consolidation through: mergers, take overs, and acquisitions.<sup>296</sup> While this consolidation may have the undesirable effect of powerful foreign investors dictating terms to the government of Kenya and local supplier firms, it also engenders a positive outcome. This is increased competition and rivalry within the extractive sector.<sup>297</sup> The mining sector in Kenya has been historically dominated by extractive companies from the West, namely; America and Europe. The West's oligopoly has in the recent past, however, been increasingly challenged in Kenya by Chinese competition. Several Chinese extractive companies have been awarded mineral exploration and exploitation rights for the: oil, natural gas and mining sectors in Kenya.<sup>298</sup> The competition for mineral rights from Chinese extractive companies is bound to strengthen Kenya's bargaining power and the country will gradually become better able to demand linkage formation between foreign investors and the local industry and also create spill overs to the larger economy.<sup>299</sup>

#### **3.8.2.2 Disintegration of Foreign Investors' Value Chains.**

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296. UNCTAD (2013) (supra note 250).

297. *ibid.*

298. *supra* note 248.

299. BSR (2011) (Michael Hackenbrunch and Jessica Pluess) (*supra* note 27).

Value chain disintegration, commonly referred to as ‘outsourcing’, has been increasingly taking root in many extractive endowed economies. It is envisaged to similarly take root in Kenya as mineral extraction as an economic activity continues to expand in the country. Outsourcing comes with several advantages, namely; reduction of costs, specialization, spreading of risks, and gaining from comparative advantages of other companies. It also aids in the: upgrading, identification, negotiations with, and monitoring of prospective providers of services and suppliers of goods.<sup>300</sup> Through outsourcing: competent suppliers are identified, bids for contracts are competitively organized, supplier development and training programmes are developed, and collaboration with government is developed for training, education, and local technical capacity facilitation.<sup>301</sup> Foreign investors have mostly been outsourcing non-core activities which will, like elsewhere in Africa, enable Kenyan companies to do business with foreign investors. This gives hope and optimism that foreign investors in the mining sector in Kenya will create developmental linkages with the local industry.<sup>302</sup>

It has, however, been argued that if the transaction costs become too high, they override the benefits of outsourcing which may produce the unintended consequence of impeding linkage formation.<sup>303</sup> Foreign investors may, therefore, experience difficulties with linkage formation through outsourcing in Kenya because of the country’s weak institutional and industrial capacity. Another challenge to linkage formation by foreign investors is that they are ordinarily not willing to create future competition through outsourcing. Instead, they prefer inter-industry to intra-industry linkages.<sup>304</sup> This means that opportunities for linkage formation through outsourcing in Kenya are vast outside core competencies of foreign investors. Furthermore, Kenya like the other African countries endowed with mineral resources, has paucity of horizontal partnerships which is compounded by the weak protection of intellectual

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300. Michael Hansen and Schaumburg-Muller, Eds (2006), ‘Transnational Corporations and Local Firms in Developing Countries Linking and upgrading’, CBS press: in Michael Hansen (2014) (supra note 217).

301. *ibid.*

302. Mike Morris et al (2011a) (supra note 12).

303. *ibid.*

304. Klaus Meyer and Evis Sinani (2009), ‘When and Where Does Foreign Direct Investment Generate Positive Spillovers? A Meta-Analysis’. *Journal of International Business Studies*, 40: 1075-1094. Available at [http://www.klausmeyer.co.uk/publications/2009\\_Meyer\\_Sinani\\_JIBS\\_spillovers\\_meta.pdf](http://www.klausmeyer.co.uk/publications/2009_Meyer_Sinani_JIBS_spillovers_meta.pdf). Accessed on 15 September 2017.

property rights in the country.<sup>305</sup> Foreign investors also prefer to locate major business operations such as research and development and marketing in countries offering a conducive environment for investment, mostly in the West. On the contrary, they prefer to establish small business operations in developing countries whose business environment is not conducive to investment.<sup>306</sup> Kenya falls under the second category, and consequently most of the mining activities to be outsourced to the local producers by foreign investors in Kenya, like in other developing countries, are of lower value addition.<sup>307</sup>

It has been posited that foreign investors' quest to technically align with the global organization has constrained local procurement in developing countries like Kenya.<sup>308</sup> Even though extractive companies from China have created competition to the oligopoly of the West in the mining sector in Kenya and hence creating opportunities for linkage formation, their participation also has had a negative outcome. Chinese extractive companies have a reputation of only marginally involving themselves in linkage formation. The tendency has mostly been to outsource to other Chinese firms operating locally instead of outsourcing to the local industry. Chinese extractive firms also have had a tendency to import everything with them from China, including; employees, suppliers, supplies and equipment which militates against linkage formation.<sup>309</sup>

### **3.8.2.3 Corporate Social Responsibility Programmes as a Strategy for Linkage Formation in Kenya.**

Many foreign investors in the mining sector consider linkage formation as part of their business strategy, and hence view their involvement in linkage formation as a business imperative and as part of their corporate practice. This strategy of linkage formation by extractive foreign investors has, however, been in use in the mining sector on a more limited

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305. Mike Morris et al (2011a) (supra note 12).

306. Ram Mudambi (2007), 'Offshoring: Economic Geography and the Multinational Firm', *Journal of International Business Studies*, 38 (1): 206 at <https://secure.palgrave-journals.com/jibs/internationalization-SI-call-for-papers.hotmail>. Accessed 12 September 2017.

307. UNCTAD (2013) (supra note 250).

308. BSR (2011) (Michael Hackenbrunch et al (supra note 27)).

309. UNIDO (2012) (supra note 239).

scale comparative to other extractives.<sup>310</sup> However, Kenya has mandated socially responsible investments under the Mining Act, 2016.<sup>311</sup> This mandate, coupled with the need to obtain a ‘social licence’ to operate, will compel foreign investors through such local content instruments as community development agreements to undertake linkage development programmes among the local communities in Kenya. The socially responsible programmes envisaged by the mining laws of Kenya may, therefore, include local supplier development programmes such as: training, information exchange, and technology transfer.<sup>312</sup>

Linkage development as a business strategy accrues several benefits to foreign investors. The local suppliers may provide: reliable, cheaper and higher quality inputs. CSR linkage formation programmes may also be used as a tool of risk management by the investors by providing them with a ‘social licence’ to operate. This is critical in countries like Kenya that are concerned with lack of developmental effect of mineral resource extraction on local communities. The linkage formation programmes come handy to tackle political pressures and stem conflicts with local communities by enhancing goodwill through outreach and support programmes for local communities. CSR linkage formation helps foreign investors to mitigate: social, economic, environmental and cultural impacts of extractive activities on local communities.<sup>313</sup> Linkage development as part of CSR strategy programmes may manifest itself through: development of skills and knowledge to locals on procurement policies; and involvement of locals in building infrastructure.<sup>314</sup>

### **3.8.3 Strategies and Capabilities of the Local Industry in Kenya.**

The local content policy aims at enhancing linkage formation in Kenya. However, the local industry is not expected to be passive in linkage formation by merely responding to the strategies and capabilities of the other actors. It has its own strategies, capabilities and interests to pursue, and linking up with foreign investors would be in its own business interest. These interests

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310. Mike Morris, Raphael Kaplinsky, David Kaplan, (2011b), ‘Commodities and Linkages Industrialization in Sub-saharan Africa’. MMCP Discussion Paper. Milton Keynes and Cape Town, The Open University and University of Cape Town. Available at [http://oro.open.ac.uk/30049/1/MMCP\\_Paper\\_14.pdf](http://oro.open.ac.uk/30049/1/MMCP_Paper_14.pdf). Accessed 17 November 2017.

311. The Mining Act 2016, ss. 47(1) (f), 101 (2)(i), and 103 (g).

312. Mike Morris et al (2011b) (supra note 310).

313. Michael Hansen (2014) (supra note 217).

314. *ibid.*

include; upgrading of their capacity and increasing sale volumes.<sup>315</sup> In pursuit of its interests, the local industry expects to benefit from its interrelation and the interaction of its capabilities with those of the other actors in linkage formation. The local industry is bound to benefit from foreign investors' engagement in local linkage development, and to be promoted by the government of Kenya through local procurement programmes.<sup>316</sup> The local industry will, however, need to improve its financial and technological capabilities in order to link up with foreign investors.<sup>317</sup> Kenya has adopted the local content policy against the background of a: weak, inefficient and poorly capacitated local industry. Therefore, there are barriers that the local industry has to contend with for its linkage formation with foreign investors to pay dividend.

### **3.8.3.1 Impediments to Local Industry Linkage Formation in Kenya.**

The main impediment to linkage formation between foreign investors and the local industry is the capability gaps between the two actors.<sup>318</sup> Technology and productivity gaps are the main impediments to linkage formation in African extractives, including mining in Kenya.<sup>319</sup> Increased competition among foreign investors coupled with the increasing demand by Kenya on them to raise their: health, safety and environmental standards<sup>320</sup>, are likely to widen this capacity and technological gap.<sup>321</sup> Another impediment to the domestic industry's ability to link with foreign investors is that its absorptive capacity, akin to other extractive economies in Africa, is very low.<sup>322</sup> Further, the local supplier firms are financially incapacitated. Most SMEs' sources of financing their businesses are limited which impedes their ability to service foreign buyers. Their linkage formation woes are worsened by the fact that the regulatory and

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315. *ibid.*

316. *ibid.*

317. MCKinsey Global Institute (2011), 'Lions on the move: The Progress and Potential of African Economies' . MCKinsey. Available at [www.un.org/pga/71/wp-content/uploads/sites/40/2017/06/MGI-Lions-on-the-Move-2-ExecutiveSummary-September-2016v2.pdf](http://www.un.org/pga/71/wp-content/uploads/sites/40/2017/06/MGI-Lions-on-the-Move-2-ExecutiveSummary-September-2016v2.pdf). Last accessed on 12 September 2017.

318. Bitrina Diyamett, Prosper Ngowi and Musambya Mutambala (2012), 'Foreign Direct Investment and Local Technological Capabilities in the Manufacturing Sector in Tanzania'. Science and Technology Innovation, Policy Research Organization. Policy Brief. No. 2. Available at [http://www.clknet.or.tz/wp-content/uploads/2014/08/CLKNET-FDI-Tech-Transfer-Cleaned\\_FV.pdf](http://www.clknet.or.tz/wp-content/uploads/2014/08/CLKNET-FDI-Tech-Transfer-Cleaned_FV.pdf). Last accessed 15 September 2017.

319. ADB (African Development Bank) (2013) (*supra* note 205).

320. The Mining Act 2016, ss. 176-181.

321. UNCTAD (2013) (*supra* note 250).

322. Mike Morris, Raphael Kaplinsky and David Kaplan (2011c), 'Commodities and Linkages: Meeting the Policy Challenge'. MMCP Discussion Paper. Milton Keynes and Cape Town, The Open University and University of Cape Town. Available at <http://www.prism.uct.ac.za/Downloads/MMCP%20Book.pdf>. Last accessed 15 September 2017.

tariff policies in place in Kenya do not favour local firms. The government has given fiscal incentives and tax exemptions to foreigners to attract extractive FDI in Kenya.<sup>323</sup> These fiscal incentives, however, are not available to Kenyan supplier firms which puts them at a competitive disadvantage.<sup>324</sup> Further, supplier contracts are dominated in USD and hence fluctuations in prices undermine the competitiveness of local suppliers.<sup>325</sup>

Local suppliers are also exposed to transactional risks that may discourage them from entering into contracts and hence from linkage formation. The transactional risks they are exposed to include, among others; poor enforcement of contracts, weak institutions, uncertain regulatory environment, and high asset investment costs by foreign investors which impede linkage formation with the local industry.<sup>326</sup> Local investors have different capacities, abilities and interests in the industry. While some local suppliers view foreign firms as their business competitors, others see them as partners from whom to acquire skills and as pathways to market access. As a result, local suppliers have differing interests in linkage formation.<sup>327</sup> Similarly, while some local suppliers prefer horizontal linkages, others prefer vertical linkages. The establishment of a regulatory framework on artisanal mining, for instance, is likely to give rise to artisanal extractive firms in Kenya.<sup>328</sup> Such local firms are bound to have significant capacity to create jobs and incomes for Kenyans.<sup>329</sup> However, they are likely to be crowded out of the industry by foreign investors who have: better technology, financing, and access to government. Under such circumstances, linkages between local artisanal extractive

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323. *supra* note 67.

324. Vuyo Mjimba (2011) (*supra* note 208).

325. ADB (African Development Bank) (2013) (*supra* note 205).

326. United Nations Conference on Trade and Development, 'Embedding FDI through TNC-SME Linkages' – UNIDO. Available at [http://www.unido.org/fileadmin/import/75380\\_070912\\_Sess0901\\_FaranelliUNCTADLINKAGES.pdf](http://www.unido.org/fileadmin/import/75380_070912_Sess0901_FaranelliUNCTADLINKAGES.pdf). Accessed on 15 September 2017.

327. Michael Hansen, Kaja Tredten and Soren Jeppeson (2013), 'Understanding the Rise of African Business', CBS Working Paper, Copenhagen Business School. Available at <https://www.cbs.dk/files/cbs.dk/tvedten.pdf>. Accessed 15 September 2017.

328. The Mining Act 2016, ss. 92-100.

329. Antonio Pedro (2006), 'Mainstreaming Mineral Wealth in Growth and Poverty Reduction Strategies: Minerals & Energy-Raw Materials', Report, 21 (1): 2-16. Available at <http://repository.uneca.org/bitstream/handle/10855/5565/Bib-39857.pdf?sequence=1>. Accessed on 15 September 2017.

firms and foreign investors are hard to establish.<sup>330</sup> On the other hand Kenya, like other mineral resource endowed developing countries, has a very small conglomerate of local suppliers and local entrepreneurship firms that can collaborate with foreign investors in linkage formation.<sup>331</sup>

In conclusion, the government of Kenya needs to: give fiscal incentives to the local industry and especially the SMEs, and facilitate their access to finance to fully participate in the extractive industry. The local industry also needs to be facilitated by the government to access skills development and technology transfer to enable it engage in linkage formation with foreign investors.

### **3.8.4 Strategies and Capabilities of the Donor Community.**

The donor community has a role to play in extractive FDI linkage formation with the local industry in Kenya. This conclusion has been informed by the heightened interest and engagement of the donors in extractive resources development in the developing countries over the last twenty years. The participation of the donors in the extractive sector, mainly the World Bank and the IMF, can be traced back to the 1980s and 1990s through their liberalization and structural adjustment programmes (SAPs) and policies. These led to the privatization of state corporations engaged in extraction operations which opened the industry to extractive FDI in Africa.<sup>332</sup>

However, a lot of changes have taken place in the industry, which have necessitated that the donors review their strategies in the extractives sector. These changes have largely been informed by lack of development from extractive FDI for the host countries. This has been compounded by the negative impacts that FDI in extractives have had on African economies. Therefore, in 2003 the World Bank in a report titled ‘The Extractive Industries Review’,

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330. Josaphat Kweka (2009), ‘The Role of TNCs in the Extractive Industry of the United Republic of Tanzania’ *Transnational Corporations*, 18 (1): 93; in Michael Hansen (2014) (supra note 132).

331. Michael Hansen (2014) (supra note 217).

332. Nathan Jensen and Leonard Wantchekon (2004), ‘Resource Wealth and Political Regimes in Africa’. *Comparative Political Studies*, 37(7): 816-841. Available at [https://scholar.princeton.edu/sites/default/files/1wantche/files/resource\\_wealth\\_and\\_politics\\_in\\_africa\\_jensen\\_wantchekon.pdf](https://scholar.princeton.edu/sites/default/files/1wantche/files/resource_wealth_and_politics_in_africa_jensen_wantchekon.pdf). Accessed on 12 September 2017.

changed strategy and in the report the bank broadly set out the principles set to guide its future engagement in extractives in Africa. Its engagement with the industry was henceforth to advocate for: transparency, management of social and environmental impacts, institutional capacity building, and stakeholder participation in the industry.<sup>333</sup>

Kenya has scaled up her extractive exploration activities in the hope that commercial exploitation of the resources will make substantial contribution to broad based development of the country. The donors are likewise expected to scale up their engagement with Kenya. Unlike during the era of SAPs and the free market policies imposed on the developing countries by international financial institutions, Kenya is today in a better position to leverage her micro-economic stability to engage the donors in a manner that ensures that their engagement in Kenya's extractive industry maximizes Kenya's benefits from her mineral resources.<sup>334</sup> Some of the roles the donors are expected to play in the extractive FDI in Kenya, include; technical assistance, promotion of best practices in extractive resource management, enhancement of institutional, infrastructural and absorptive capacity of Kenya, facilitation of specific extractive projects, and mediation between foreign investors and the government of Kenya.<sup>335</sup> The World Bank has in its engagement with extractives conditioned her development loans to extractive industries on the establishment of transparent mechanisms for revenue management.<sup>336</sup>

The donors have also lent their support to the UK- sponsored EITI which advocates for: support for institutions that manage extractives, prevention of fraud, and increasing transparency.<sup>337</sup> On her part, the IMF has set up the 'Multi-Donor Tropical Trust Fund on Managing Extractive Wealth' to assist resource rich developing countries like Kenya to manage conditions in their economies that reduce extractive income by stabilizing the

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333. World Bank (2003), 'Mining Reform and the World Bank: Providing a Policy Framework for Development', Washington, World Bank/IFC. Available at [siteresources.Worldbank.org/INTOGMC/Resources/miningreformandworldbank.pdf](http://siteresources.Worldbank.org/INTOGMC/Resources/miningreformandworldbank.pdf). Accessed on 12 September 2017.

334. Michael Hansen (2014) (supra note 217).

335. *ibid.*

336. Kevin Morrison (2007), 'Natural Resources Aid and Democratization: A Best –Case Scenario', *Public Choice* 131 (3-4): 365-386. Available at <http://www.pitt.edu/~kmm229/bestcase.pdf>. Accessed on 15 September 2017.

337. *ibid.*



economy.<sup>338</sup> This paper, however, focuses on the engagement of donors in linkage formation. Donors have been proactively engaged in linkage formation through lending their capabilities to: growth and employment linkage formation between foreign investors and the local communities, and on improvement in their fiscal linkages with host countries.<sup>339</sup>

Donors' linkage formation is envisaged to enhance local content in Kenya. However, it has been argued that donors' ability to enhance local content is limited in a significant manner because linkage formation is largely an 'industrial policy', which the donors have traditionally shied away from.<sup>340</sup> The areas of engagement by the donors in linkage formation include; organizing extractive industries training programmes for tertiary and vocational institutions, identifying opportunities for linkage formation, developing both the institutional and physical infrastructure to enhance linkages in extractives, and promotion of specific FDI- local industry linkages.<sup>341</sup>

### 3.9 Conclusion

The local content policy offers Kenya massive development opportunities through creation of linkages and spill overs. Linkages and spill overs from extractive FDI are, therefore, envisaged to be major drivers of industrial development in Kenya. The country needs to be conscious of the limitations to linkage formation in many mineral resource endowed developing countries. These limitations include the fact that many extractive rich developing countries have experienced mixed outcomes with their local content policies, most of them negative. Linkages and spill overs are in many developing countries and sectors: few, short term, and mostly associated with low value –added activities. As a result, they offer limited opportunities for learning and upgrading.

In order to overcome these challenges, all the actors in linkage formation in Kenya need to understand the conditions in which linkages are formed. On her part, Kenya has to: adopt the

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338. *ibid.*

339. France Bourgoïn (2011), 'A Missed Opportunity: Mining for Sustainable Development'. Danish Institute for International Studies, Policy brief. Available at <https://www.diiis.dk/node/1628>. Accessed on 15 September 2017.

340. Michael Hansen (2014) (*supra* note 217).

341. *ibid.*

right industrial policies, strengthen her institutional capacity and governance mechanisms with the assistance of the donor community; understand the market power of foreign investors; and strengthen the absorptive capacity of the local industry. The low absorptive capacity of the local industry, for instance, requires the government to avoid adopting local content requirements that may lead to price hikes which undermines profitability of investments leading to reduction of extractive FDI in Kenya.

Finally, the linkage formation measures put in place and the local content requirements that Kenya has devised to enforce them, can only thrive in an environment that is conducive to investment both for foreign investors and the local industry in Kenya. Good linkage formation between foreign investors and the local industry will also create spill overs to the other sectors of the Kenyan economy. This will enable the country achieve the objectives of the local content policy, by adding value to the local economy through: job creation, skills development, and enhanced access to business opportunities by local companies/firms along the mining industry value chain.

## **CHAPTER FOUR: ANALYSIS OF LOCAL CONTENT POLICY DESIGNS AND APPROACHES IN SELECTED COUNTRIES.**

### **4.1 Introduction**

Chapter three analyzed the impediments to and opportunities for local content development in Kenya. The analysis has disclosed that there are major impediments to local content development that Kenya will have to contend with. These challenges include; the under-developed domestic industry, the weak institutional capacity, and the massive market power of foreign mining companies. Further challenges present themselves in the manner in which the local content strategies and approaches in the Mining Act, 2016 and the mining local content regulations, 2017, have been designed. They have failed to take into account: the strategies and capabilities of foreign investors; and to balance the benefits of local content against the cost of monitoring and enforcement of compliance. The end result is that Kenya is faced with real possibility of double market failure. That is to say that the country's local content policy may not only fail to achieve its principal objective to correct market failure related to infant local industry and market power of foreign investors, but may also result in inflated prices and inefficiencies in production.

In designing her local content requirements, Kenya ought to have taken several factors into consideration, including: balancing the benefits of local content against the costs of effectively deploying strategies to correct market failure; evaluating the local industrial capacity; understanding the strategies and capabilities of foreign investors; and evaluating the local institutional capacity.<sup>342</sup> This chapter considers other jurisdictions of the world; mining economies which have had a history of having designed and implemented local content strategies and approaches with considerable degrees of success, respectively. This comparative study is a quest to enhance the benefits of local content in Kenya. The countries considered include: Nigeria; South Africa; Ghana; Philippines; and Australia.

Nigeria; South Africa; Ghana; and Philippines have been selected for the purposes of this study for the following reasons. All of them, like Kenya, are developing countries endowed with mineral resources. Arguably, the capacities of their respective local industries, and

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342. Silvana Tordo et al (2013) (supra note 202).

institutional capacities are comparable to Kenya's.

This comparison is based on the fact that local content is basically an industrial policy. The capacity of the local industry is a major determinant of linkage formation. Therefore, local content approaches and strategies which have worked in these countries, arguably, also have a high likelihood of success in Kenya. Finally, many reports by UN bodies as analyzed in chapter three of this paper, indicate that: the state of linkage formation; and local industrial capacities of most of sub-Saharan Africa are fairly comparable.

The selected countries have individual strengths as well. Nigeria has progressively increased local content in the Nigerian oil and gas since 1999. The local industry has been strengthened through several strategies, including; award of contracts to Nigerian firms, farming out of oil fields to Nigerian oil companies, facilitation of technology transfer, and holding of Local Content Development Fairs.<sup>343</sup> On her part, South Africa has a strong trade union movement that has been instrumental in advocating for workers' rights. The country has a progressive Mining Charter comprised of a strong local content framework that provides for meaningful economic participation of special interest groups, including; women and the historically disadvantaged South Africans (HDSA) in the country's mining industry.<sup>344</sup>

Ghana has also been selected for being one of the few African countries that have developed a comprehensive local content framework for the mining sector. Her local content law focuses on: local employment and national industry participation. The country has achieved significant progress in these two areas. Under the law, the Ghanaian government plays a major role in providing an enabling environment.<sup>345</sup> It is, therefore, a good comparative study for Kenya. In Philippines, local content policies have been very successful in increasing participation of the communities, indigenous peoples, and other vulnerable groups in oil, gas

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343. Alonso Vasi, Walter Zarate, Gonzalo Pastor and Ulrich Klueh (2007), 'Inter-sectoral Linkages and Local Content in Extractive Industries and Beyond- The Case of Sao Tome and Principe'. Available at <https://www.imf.org/en/Publications/WP/Issues/2016/12/31/Inter-sectoral-Linkages-and-Local-Content-in-Extractive-Industries-and-Beyond-The-Case-of-So-21123>. Accessed on 18 April 2018.

344. Cliffe Hofmeyr (2016), 'Local Content Requirements in the Extractive Industry: A Double-Edged Sword'. Mining and Minerals and International Arbitration; Available at <https://www.cliffedekkerhofmeyr.com/export/sites/cdh/en/news/publications/2016/dispute/downloads/Mining-and-International-Arbitration-Alert-22-June-2016>. Accessed on 1 August 2017.

345. Elijah Mushameza et al (2016) (supra note 47).

and mining projects.<sup>346</sup>

Australia, on the other hand, was selected to represent international best practice. The country, together with Norway and Canada, have been hailed the world over as the epitome of how to sustainably manage mineral resources and to design and implement local content, both at the national and sub-national levels. Australia has been particularly effective in her application of soft local content approaches by encouraging locals' participation in mining projects. This has been achieved through facilitation of project developers and the local industry. The strategies used include; making public information on Australian suppliers to local operators, encouraging local companies to form joint ventures to enhance their competitiveness, and assisting Australian companies with the tendering process.<sup>347</sup> It is a good case study of where local content in the mining sector in Kenya should aspire to be in the medium to the long term.

Implementation context, however, varies from country to country. This explains why different countries have experienced different outcomes from their local content policies. This comparative study is conscious of this reality. The comparative analysis is, therefore, subject to Kenya aligning her mining local content legislation with her: social, economic and political context and by laying emphasis on stakeholder involvement in decision making.<sup>348</sup> Analysis of case studies of good industry practices from the selected countries proceeds as here below.

#### **4.2 Analysis of Local Content Policy Designs and Approaches in Selected Countries.**

This study takes cognizance that local content implementation context varies from country to country. This means that local content designs, strategies, and approaches may produce different outcomes in different countries. The outcomes are usually determined by and dependent on the local industrial capacity. Therefore, an economy whose industry is constrained in: absorptive capacity and shortage of industry skills should be cautious when legislating a local content regime that is comprised of setting of targets. Such targets may not only fail to correct market failure but may also create inefficiencies in the economy and

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346. Ana-Marie Esteves et al (2013) (supra note 31).

347. Alonso Vasi et al (2007) (supra note 343).

348. Elijah Mushameza et al (2016) (supra note 47).

increase corruption.<sup>349</sup> The selection of the case studies analyzed in this paper has been informed by their success in enhancing local content in the selected countries. The approaches are a combination of: mandated local content measures; industry-voluntary local content strategies to supplement government measures; partnerships between the government and the industry to increase local content; and state participation in local content development.

#### **4.2.1 Broad-Based Local Content Policy.**

Kenya is a WTO member state. Therefore, the country is technically bound by the GATTs/NTO clause not to compel foreign firms to procure goods from or engage services offered by Kenyan firms if the goods to be supplied and the services to be provided are available abroad at favourable trading terms.<sup>350</sup> Indeed, local content requirements in the extractive industry have been described as a double-edged sword.<sup>351</sup> There is, therefore, need to balance the need for regulation to promote sustainable economic development through extractive FDI against compliance with Kenya's international law obligations by virtue of her WTO membership, which require the country not to impose import restrictions on foreign goods and services.<sup>352</sup>

In order to comply with her obligations under the international trade and investment law, Kenya has, among other strategies, opted to develop a broad-based local content policy approach that does not enforce sanctions for non-compliance. Section 50 of the Mining Act, 2016, and the mining local content regulations, 2017, require a mineral right holder, where practicable, to prefer Kenyan goods and services to foreign goods and services for all business opportunities along the extractive value chain. Kenyan goods and services are required to be internationally competitive in terms of: quality, delivery and price.

Kenya can, however, borrow from a better broad based local content policy and regulatory design and strategy from the Local Content and Participation Policy Framework on petroleum activities in Ghana. The LCPPF, 2010 requires all players in the oil sector in Ghana to, where practicable, prefer Ghanaian goods and services to foreign supplies and provisions. Locally

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349. Ana-Maria Esteves et al (2013) (supra note 31).

350. Article III, GATT, 1994 (supra note 189).

351. Cliffe Hofmeyr (2016) (supra note 344).

352. Article III, GATT, 1994 (supra note 189).

procured goods and services are required to be internationally competitive in terms of: quality, delivery and price.<sup>353</sup>

#### **4.2.1.1 Lessons for Kenya**

This design is good for Kenya because it has the potential to increase procurement of Kenyan goods and services and enhance employment opportunities for Kenyans without incurring sanctions for non-compliance with the GATT/ NTO clause. Secondly, it requires that awarding of contracts for goods to be procured and services to be provided to be internationally competitive in terms of: quality, delivery and price.<sup>354</sup> Kenya should also consider incorporating the place of sourcing of goods in the golden thread principle. The strategy also takes into account the absorptive capacity of the local industry so that preference for Kenyan: goods, services and workforce will be to the extent that the local industry has capacity to deliver. The weakness inherent in this strategy, however, is that these provisions rely on moral persuasion as opposed to legal enforcement.

#### **4.2.2 Legislation Prescribing Minimum Local Content Targets.**

Kenya is a developing country. Therefore, she does not enjoy the leeway granted by WTO to a group of 31 Least Developed Countries (LDCs) who have been granted a deferral of the application of the NTO clause within their jurisdictions to a future date for the reason of their “individual development, financial or trade needs, or their administrative and institutional capabilities”<sup>355</sup> This accommodation of LDCs by WTO has been informed by the fact that these countries have: weak industrial bases, and few skilled workers. As a result, in the short term, they have no capability to achieve local content objectives, whether legislated or not. Even though Kenya has legislated local content, she has avoided prescribing local content targets. This can be attributed to two reasons: first, the country still suffers from a major gap between the high business standards set by foreign investors, and secondly, the local firms’ inability to deliver on those standards due to their constrained capacity and the prohibitive cost of monitoring and enforcement of compliance with set targets.

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353. LCPPF, 2010 Ghana (supra note 196).

354. Michael Warner (2010) (supra note 226).

355. Under Modification of the agreement of TRIMS (supra note 197).

However, this study argues that by legislating local content, Kenya has chosen to deviate from the NTO clause. This study proposes that Kenya sets specific but realistic targets in her local content legislation as a long term local content strategy. The targets set should take into account the absorptive capacity of the local industry and the local institutional capacity. These are targets on local: goods, services and workforce. This proposal is informed by the impressive performance by the target setting Nigerian local content law in: job creation, skills development, and participation of Nigerian firms in the country's oil sector.

The NOGICD Act, 2010 provides for Nigerians' participation in all oil operations. It has prescribed targets for Nigerian: goods, services and workforce that have to be met by the oil and gas operators in the country. In this regard, section 42 of the Act requires that: 65 per cent of divers, 60 per cent of steel ropes, and 50 per cent of the equipment in use must be sourced in Nigeria. Nigeria is already reaping benefits from this target setting local content strategy. Nigerian content had increased from five per cent before the year 2000 to 35 per cent in 2010.<sup>356</sup> The industry was estimated to have employed over 5,000 engineers, geologists, welders and workers in other skills' categories in the industry by 2013, just a few years after the enactment of the NOGICD Act, 2010.<sup>357</sup>

#### **4.2.2.1 Lessons for Kenya.**

This local content strategy has potential to: enhance job creation; promote skills development; and enhance local supplier development in Kenya. Kenya, however, has to put in place an effective system of monitoring and enforcement of compliance to attain maximum benefits from this strategy. In this regard, the country should borrow from Nigeria's monitoring and enforcement of compliance mechanism under the NOGICD Act, 2010. Nigerian oil firms are required to submit a plan giving details of how they intend to meet the local content targets, ahead of the commencement of their operations. They are also required to periodically report to the authorities about compliance with set targets. The Petroleum Inspectorate established under the Act has powers to cancel licences of oil firms that default on their commitment to the Nigerian content. For this strategy to be effective, Kenya has to: strengthen the absorptive

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356. Ademola Oyejide et al (2011) (supra note 257).

357. Peter Olusegun (2014), 'Driving Local Content in the Extractive Industry: Opportunities and Challenges'. Available at <http://www.csrinaction.org/images/cia/Adeyeye%20Peter%20Olusegun.docx>. Last accessed on 14 October 2015.



capacity of the local industry and the local institutional capacity.

### **4.2.3 Legislation Requiring Submission of Local Content Plans**

One of the strategies employed by many countries to enhance local content is to require mining companies, as a pre-condition for granting of mineral rights, to submit local content plans, proposing to enhance: employment and training of locals, procurement of local goods, and provision of services by the domestic industry. The legal and regulatory framework of local content in the Mining Act, 2016, has provided for submission of four types of local content plans, namely: a local employment and training plan, that proposes to employ and train Kenyans; a local product plan, that proposes to procure Kenyan goods and services, a procurement plan, that proposes preferential treatment of Kenyan firms in the procurement of goods and services, and a succession plan, that proposes replacement of expatriates with Kenyan workers.<sup>358</sup>

In the development of effective local content plans, Kenya should borrow a leaf from South Africa's MPRD Regulations which provide for submission of a social and labour plan. The plan has to disclose: statistics proposing employment of special interest groups, and mine's roadmap to meet the regulation that: 10 per cent of the persons employed must be women, and that 40 per cent of the managers must be Historically Disadvantaged South Africans (HDSA), within five years of acquisition of the mining licence. The social and labour plan is required to comprise of an economic development programme for the local economy. The programme is required to give preferential treatment to HDSA firms in regard to procurement of goods and services.<sup>359</sup>

#### **4.2.3.1 Lessons for Kenya**

The South Africa's social and labour plan and its economic development programme are similar to the plan in Kenya's mining employment and training regulations, which provide for local content targeting special interest groups, namely: women; the youth, persons living with

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358. The Mining Act, 2016, ss 61, 68, 72, 86, 101, 103 and 106; The Mining (E&T) Regulations , 2017; The Mining (ULGS) Regulations, 2017.

359. The Mineral and Petroleum Resources Development Act (MPRDA), 2002 of South Africa. Available at [file:///c:/USER/Downloads/mineraland\\_petroleum\\_resources\\_development\\_actmprda%20\(2\).pdf](file:///c:/USER/Downloads/mineraland_petroleum_resources_development_actmprda%20(2).pdf). Last accessed on 21 September 2017.

disability, and local communities. However, borrowing from the social and labour plan of South Africa, Kenya should reserve a quota of: employment vacancies, training, business opportunities, and provision of services for these special interest groups. Kenya's local content plans can learn from the South African one by: aligning them to county development plans; setting targets for the employment of the marginalized and special interest groups; and locals' preference in procurement of goods and services. The strategy will go a long way towards fighting poverty and consolidating equity in Kenya. A Major weakness of this local content strategy, however, is that monitoring local content plans, akin to monitoring environmental and social performance, requires a high degree of government capacity and is also costly to implement. Therefore, having legislated local content plans, Kenya ought to put in place measures to monitor and enforce compliance. Secondly, Kenya needs to enhance her institutional capacity and to build local suppliers' capability.<sup>360</sup>

#### **4.2.4 Local Content Programmes that prefer the Local Industry Without Setting Targets.**

In view of Kenya's international obligations under the international trade and investment law, the country has to consider adopting local content policies and strategies that are consistent with the international trade and investment agreements. Such policies should be geared towards: enhancing procurement of Kenyans goods and services and employment of the Kenyans workforce, without prescribing local content targets through legislation and regulations. Enforcement of these types of local content policy tools relies on the mechanisms embedded in the agreements entered into between the government and mining companies. Such agreements may provide for commitments by mining firms to support local content, without the government imposing sanctions on the mining companies.<sup>361</sup>

These interventions may be initiated and driven by either: the government; the mining companies; or even the NGOs operating locally within the communities where mining occur.

This strategy is appropriate where: mining companies' information on the ability of local firms to deliver is limited; locals' access to employment and procurement opportunities in the mining companies is limited; and there is uncertainty on the part of the government; whether

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360. Ana-Maria Esteves et al (2013) (supra note 31).

361. *ibid.*

mandated local content would be beneficial to the local industry.<sup>362</sup>

Kenya should borrow this local content strategy from the joint initiative between the national and regional governments in Australia which advocates for maximum access to business opportunities by the local industry. This is provided for in the Australian Industry Participation National Framework (AIPNF) of 2001.<sup>363</sup> Under this strategy, mining companies are required to break down large contracts (unbundling of contracts) into small agreements that locals have the ability to deliver.<sup>364</sup>

#### **4.2.4.1 Lessons for Kenya**

This initiative is recommended for Kenya by this study because it will enhance the participation of the Kenyan: workforce, suppliers of goods, and providers of services. Secondly, the initiative is usually industry driven between local communities and mining companies, as opposed to compliance with government mandate. It has higher chances of success, even without enforcement, because it is inspired by the desire of mining companies to obtain a ‘social licence’ to operate and to gain legitimacy. The strategy of unbundling of large contracts into smaller agreements is particularly recommended for Kenya. It has great potential to create business opportunities for Kenyan supplier firms and providers of services. Smaller agreements are capable of delivery by Kenyan businesses.<sup>365</sup>

Finally, such initiatives are designed to adjust to local economic concerns and foreign extractive firms’ business requirements. They are capable of implementation even without enforcement through the instrument of legal mandate. Two major drawbacks, however, associated with these types of local content initiatives, are that: for them to be effectively implemented, a pool of competitive potential local suppliers has to be in existence which maybe a challenge in Kenya; and non-compliance cannot be legally enforced.<sup>366</sup>

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362. *ibid.*

363. AIPNF, Australia 2001, (*supra* note 195).

364. “Briefing Note: Maximizing the Contributions of Local Enterprises to the Supply Chain of Oil, Gas & Mining Projects in Low Income Countries”. Engineers Against Poverty. Available at <http://www.engineersagainstopoverty.org/-db/-documents/EAP-Briefing-Note-Local-Enterprises-Participation>. pdf. Accessed 17 September 2017.

365. *ibid.*

366. Ana-Maria Esteves et al (2013) (*supra* note 31).

#### **4.2.5 Communicating Opportunities to Communities through Regulations.**

Reporting requirements are important local content tools for encouraging extractive firms to enhance their visibility and for communicating business opportunities to host communities.<sup>367</sup> Kenya can borrow this initiative from South Africa's MPRD Regulations that require mining firms to produce a plan annually to the manager of the mining region. The manager is also a member of the committee responsible for mining and environmental management in the region (RMDEC), established under the MPRD Act, 2002.<sup>368</sup> The committee draws its membership from all levels of the South African government. Mining firms are required to submit an employment plan comprising a report containing statistics on: training of workers, the mine's inability to fill available vacancies for over a year, employees' career progression, mentorship, apprenticeship, and education.<sup>369</sup>

##### **4.2.5.1 Lessons for Kenya**

Borrowing from the South African model, Kenya needs to improve its employment and training regulations to require mining companies to report to the government both at the national and county levels through annual plans. The annual plan should incorporate a human resource development plan giving statistics on: the number of workers employed; workers' training; and the mining firm's inability to recruit to fill available vacancies for over a year. Mining firms should also be required to submit a plan on: workers' career progression, mentorship, apprenticeship and scholarship.

#### **4.2.6 Regulations to Capacitate Local Businesses and to Build Local Workforce Capability to Enhance Local Content.**

In many jurisdictions, strategies designed to enhance locals' access to business opportunities have not been effective in promoting: local suppliers of goods, service providers, and local workforce training.<sup>370</sup> Therefore, some countries have developed policies to complement the existing ones, with a view to enhancing the capacity of the local industry and building of the local workforce capacity. These types of policies include those aimed at increasing

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367. *ibid.*

368. *ibid.*

369. *ibid.*

370. *ibid.*

participation of locals through the requirement that: relevant skills be transferred to local workers, and formation of business collaborations between local private and public firms to demand that foreign firms transfer knowledge and technology to the local industry.<sup>371</sup>

Kenya may opt to get actively involved in this local content initiative, through the mining state participation regulations, 2017. Brazil and China, for instance, have become active economic players in the industry by increasing the share of public ownership of mine-related industries.<sup>372</sup> Similarly, Kenya should increase or enhance its equity participation in the mining firms in Kenya, through the National Mining Corporation, with a view to increasing public ownership of mine related industries.<sup>373</sup> The state should use that ownership to demand that mining firms increase local content in favour of Kenyan: goods, services and workforce. Care should, however, be taken to ensure that Kenya's equity participation in mine related industries is not captured and expropriated by the political elite and vested industry interests at the expense of the Kenyan public.<sup>374</sup>

These types of initiatives may also be undertaken by the industry and NGOs by designing and supporting programmes to support private businesses. This local content strategy has been employed by: the Anglo- Zimele in South Africa. The Small Business Initiative was a voluntary enterprise development and empowerment drive by the Anglo-American mining company in South Africa. Its objectives were: to enhance access to business opportunities by HDSA, create sustainable businesses, contribute to sustainable development of mining communities, promote micro-finance locally, generate livelihoods, and support community development programmes.

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371. *ibid.*

372. Available at <http://www.angloamerican.com/development/social/socio-economic-development/enterprise-development>. Accessed on 20 September 2017.

373. The Mining (State Participation) Regulations, 2017, Legal Notice No. 84, 19 May 2017.

374. Muna Wahome ' Was mining law setting stage for the politically correct to fatten pockets? ', business daily, Daily Nation (Nairobi, 10 July 2013). Available at <https://www.businessdailyafrica.com/news/mining-law-setting-stage-for-politically-correct-fatten-pockets/539546-1911314-12v4s04/index.html>. Accessed on 23 April 2018.

375. Available at [http://www1.ifc.org/wps/wcm/connect/corp\\_ext\\_content/ifc\\_external\\_corporate\\_sites/ifc+news](http://www1.ifc.org/wps/wcm/connect/corp_ext_content/ifc_external_corporate_sites/ifc+news). Accessed on 20 September 2017.

The Newmont Business Link/IFC business partnership in Ghana is another example of voluntary initiatives by mining companies to support business growth by increasing local content among the host communities, in partnership with donors. The partnership engaged in various local content enhancing activities, including; community development programmes, SME linkage programmes to enhance sustainable development, supply chain development, marketing, diversification of the local economy, and creating an enabling environment for business growth. The projects were undertaken through IFC funding.<sup>376</sup>

However, for this initiative to have the intended impact on the local supply of goods, services and labour, timely co-ordination of complementary policies on: industry, technology, education, and local content will be required in Kenya.<sup>377</sup> Identifying and training of suitable local workers, for example, will require significant investment in relevant education. Secondly, the needs of the local industry have to be sustained based on their ability to meet international business standards.<sup>378</sup> A major challenge to this type of initiative is that if the local industry is weak in terms of capacity, even co-ordination efforts by the players and injection of revenue into the strategy may fail to respond to local content initiatives by remaining uncompetitive.<sup>379</sup> Therefore, in order to create local content through this initiative, Kenya needs to strengthen the absorptive capacity of the local industry.

Kenya may also borrow from the Philippines by creating local content among the host and neighbouring communities. The Philippines mining law requires mining firms to submit plans that propose community development programmes for the local communities and neighbouring communities. They are also required to contribute to sustainable development programmes to promote income generation, including; reforestation, and production of the goods and services required by the mine and the community. Finally, the law also requires mining companies to put in place a programme that meets the social and economic needs of the communities, with an allocation of one percent by the mining firm to fund the local

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376. *ibid.*

377. *ibid.*

378. *ibid.*

379. *ibid.*

development programme.<sup>380</sup>

#### **4.2.6.1 Lessons for Kenya.**

Kenya has several lessons to learn from the local content initiatives in: South Africa, Ghana and Phillipines. Borrowing from the Anglo-Zimele in South Africa, mining companies in Kenya should undertake voluntary small business initiatives by: enhancing access to business opportunities by special interest groups in Kenya, including; women, youth and persons living with disability, creating sustainable businesses, contributing to sustainable development of mining communities, promoting SME's access to finance, generating livelihoods for the local people, and funding community development programmes.

The lesson to learn from Newmont Business Link/IFC partnership in Ghana is that mining companies in Kenya should enter into voluntary partnerships with donors to support local content development within the host communities. They should do so by: supporting SME's to access finance, supporting community development programmes, enhancing supply chain development, promoting marketing, providing advisory services, promoting diversification of the economy, and enhancing sustainable development. Kenya's lesson from the Phillipines is the need to create local content by increasing participation of the host and neighbouring communities.

#### **4.2.7 Government – Led Initiatives and Voluntary Industry Participation.**

Kenya may enhance local content initiatives at the local level that are government led but industry- voluntary in nature. This strategy involves public-private sectors' collaborations. This strategy aims at increasing the visibility of the mining companies and enhancing access of local communities to business opportunities. A good example of this initiative is the collaboration between C-Res of Queensland, Australia and BHP Billiton Mitsubishi Alliance. The main goal of the programme is to, among others; enhance access to business opportunities by micro-enterprises with less than 25 permanent workers by enabling them to do business with BMA in all the small towns within the Bowen Basin region of Australia. The programme

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380. Revised Implementing Rules and Regulations of Republic Act No. 7942, Phillipines, Section 136, Development of Host and Neighbouring Communities. Available at [www.mgb10.com/policies/REVISED%20IRR%20OF%20Mining%20ACT%20OF%201995](http://www.mgb10.com/policies/REVISED%20IRR%20OF%20Mining%20ACT%20OF%201995). Last accessed on 20 September 2017.

entails: implementation of social and economic projects within the communities; building local enterprise capacity; and community development programmes. A community foundation was also established to enhance economic viability of the region, through programmes targeting both existing and new businesses and employment creation for community members.<sup>381</sup>

#### **4.2.7.1 Lessons for Kenya**

Kenya should incorporate this initiative in its local content framework. Collaboration and voluntary partnerships between the Kenya government and the mining companies will increase visibility of the mining companies in Kenya. It will also facilitate the host and neighbouring communities to: access business opportunities to supply goods and services; build local workforce capacity; benefit from community development programmes; and enhance sustainable development.

#### **4.2.8 Community Development Agreements.**

This initiative has been provided for under the mining (CDA) regulations in Kenya. The regulations in Kenya provide for a limited form of FPIC, outside compulsory acquisition of land, comparative to the FPIC norms established under international law.<sup>382</sup> FPIC recognizes the right of communities to benefit from and earn livelihoods from natural resources occurring within their regions. It has been incorporated by IFC in its collaborations with the industry. The concept has also been applied to other groups that are culturally, socially and environmentally impacted by extractive operations.<sup>383</sup>

In the development of community development agreements, Kenya should borrow a leaf from the agreement between Rio Tinto Argyle Diamond Mine and the local communities in Western Australia. The mine participation agreement between the mining company and the communities comprised of a management plan. Under the agreement, the mining company committed itself to: enhance business opportunities for local communities and their

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381. C-Res Queensland and BHP Billiton Mitsubishi Alliance Initiative. Available at <http://C-res.com.au>; also see the e-pilbara initiative by Pilbara Development Commission, Western Australia. Available at [www.epilbara.com.au](http://www.epilbara.com.au). Both references accessed on 20 September 2017.

382. Supra notes 115, 116 and 117.

383. Christina Hills et al (2010) (Supra note 118).



businesses; engage the local business development taskforce in procurement; build local workforce capacity; and give preference to firms that maximize socio-economic opportunities for the local communities through local content initiatives.<sup>384</sup>

#### **4.2.8.1 Lessons for Kenya.**

Borrowing from the Rio Tinto Argyle Diamond Mine experience, Kenyan mining companies should ensure that the CDAs they enter into with the local communities: enhance proper identification of affected communities; facilitate communities' participation in negotiations; facilitate communities' negotiating capacity; facilitate informed decision making by the communities; ensure that communities' benefits extend beyond financial compensation; integrate communities' well being to project sustainability, enhance skills' transfer, and sustainable development; ensure accountable governance, effective implementation, monitoring, evaluation, and review of CDAs; and plan for closure of a mine and project legacy. The mining firms in Kenya should commit under the CDA's to: enhance business opportunities for local businesses; provide social services, build local workforce capacity; and give preference to firms that maximize opportunities to the local communities through local content.<sup>385</sup>

#### **4.3 Emerging Trends in Local Content Industry Good Practices.**

The analysis of case studies of local content designs, strategies and initiatives from the selected countries disclose certain trends in local content. The initial motivation by the actors, namely; the host governments; the investment partners; and the host communities, was to comply with local content requirements. The mining companies' motivation, on the other hand, was to: acquire a 'social license' to operate, gain legitimacy, and hence access to resources. The motivation as this study has shown, and especially among the mining companies, has drastically changed. The desire of the mining companies has lately been geared towards establishment of enduring partnerships with local suppliers for mutual benefit. They have, therefore, been actively involved in strategies aimed at increasing local

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384. Ana-Maria Esteves et al (2013) (supra note 31).

385. Jeniffer Loutit et al (2016) (supra note 128).

procurement to enhance access of the local industry to business opportunities.<sup>386</sup>

These strategies entail: preference of local firms during bidding processes and procedures, exclusively sourcing goods and services from local firms, unbundling of contracts, price matching, requiring foreign firms to engage local firms in business through partnerships, mentorship, and promotion of technical education. Other strategies include; creation of linkages between local enterprises and foreign firms, technology transfer, and enhanced access to finance. It has been posited that joint ventures between the local industry and international mining companies have been effective at promoting technology transfer and enhanced business acumen.<sup>387</sup> Government support, working in collaboration with international companies in research and development, is also critical in building local companies' business capacity and labour skills to enhance their international competitiveness.<sup>388</sup>

The mining companies in Kenya have a lot to learn and to borrow from the local content approaches by their peers in the selected countries. Some of the voluntary local content initiatives that mining companies in Kenya should include in its local content strategies, include; enhancing local firms' access to business opportunities, through: preferential treatment, communicating contract opportunities, price preferences, and adaptation to procurement systems. The mining firms in Kenya should also enter into partnerships and participation agreements with local firms to increase local content through programmes that enhance local communities': income, employment opportunities, capacity building and business environment.

The mining firms in Kenya should also engage local SMEs by assisting them to: establish businesses, access finance and identify business opportunities. They should also engage in: identifying locals' capacity to produce, through; business classification of commercial, industry and services sectors, developing business plans and identifying local firms' procurement challenges. Finally, mining firms in Kenya should support local enterprise

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386. Ana- Maria Esteves et al (2013) (supra note 31).

387. Shirley Neff (2005), Nigeria National Stakeholders Working Group, 'Memorandum on International Best Practice in Development of Local Content in the Energy Sector'. Available at <http://www.neiti.org/sites/default/files/page/uploads/local-content-5-9-051.pdf>. Accessed on 17 September 2017.

388. Ibid

development, through: consultancy, financial assistance, SMEs' procurement, capacity building, training, business development, establishment of new enterprises, and mentorship.<sup>389</sup>

#### **4.4 Conclusion.**

Consistent with the theoretical framework on which this study is based, the case studies analyzed in this paper present Kenya with a wide array of local content approaches, comprising of: mandated local content requirements, voluntary local content development programmes by the industry to supplement government measures, collaborations and partnerships between the government, the industry and donors to enhance local content, state participation in local content development, and community development agreements.

This paper, therefore, recommends a blend of local content approaches in Kenya that comprise of: mandated local content requirements, voluntary local content development programmes by the industry to supplement government measures, partnerships between the government, the industry and donors to increase local content, state participation in local content development, and community development agreements. Finally, Kenya needs to reflect on the local content approaches in place in Kenya and weigh them against the positive outcomes of the local content approaches in the selected countries. Kenya needs to put in place a mining local content legal framework that is: effective, sustainable, and ideal for the country to drive the country's local content policy in the mining industry.

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389. Ana-Maria Esteves et al (2013) (supra note 31).

## **CHAPTER FIVE: CONCLUSION AND RECOMMENDATIONS.**

### **5.1 Conclusion.**

The local content policy holds great promise for Kenya's socio-economic development. If successfully implemented, local content is envisaged to: enhance job creation; promote skills development; and enhance local supplier development. The local content approaches in the Mining Act, 2016, and the mining local content regulations, 2017, are a major milestone towards the realization of the objectives of the local content policy in Kenya. This study has concluded that, as a sovereign state, Kenya is entitled to develop the local content policy and anchor it in legislation to promote consolidation of the country's economic development. The local content policy is aimed at broadening avenues for national benefits from mineral resources extraction through productive FDI. This will be achieved through promotion of linkage formation strategies that create spill overs to the other sectors of the economy. Local content has great potential to enable the country attain these objectives.

Chapter one has addressed the contemporary state of the mining sector in Kenya and the background to local content development. The country has made significant discoveries of minerals with potential for commercial exploitation in various parts of the country. Therefore, the extractive sector's contribution to GDP is envisaged to substantially grow in the decade ahead. The country expects to earn more revenue from mineral resources exploitation in form of: taxes, royalties, and licence fees. But more importantly, the country hopes to attain broad-based economic development through: job creation; skills development; and enhanced local industry's access to business opportunities along the mining industry value chain.

Chapter two analyzes the local content legal framework in the Mining Act, 2016, and the mining local content regulations, 2017. The local content strategies and approaches provided for under the Act, include; preferential treatment of Kenyan: goods, services and workforce. This entails such strategies as: setting of a maximum price preference margin in favour of Kenyan goods and services, and setting of targets in favour of Kenyan: suppliers of goods, providers of services, and workforce. The local content legal framework also provides for capacity building through training and technology transfer to enable Kenyans to access business opportunities in the mining industry. This is in recognition that there are obstacles to consolidation of the policy objectives that require local content to be properly conceived to

attain its objectives. Therefore, mining companies are required to enhance the capacity of Kenyans to participate in the industry

through: skills development, technology transfer, technical training, and access to business opportunities. The Mining Act requires formation of partnerships between: the government, universities and the industry to ensure that mining firms promote and enhance research and development initiatives in the industry.

The Act has also provided for broad-based local content policy approach. This is a liberal approach that sets out broad guidelines on local content strategies and approaches. Fourthly, the Act requires mining firms to submit local content plans to the government as a pre-condition for granting of a large scale mineral right in Kenya. The local content plans are required to indicate how mining companies propose to engage the local industry and workforce in Kenya to enhance their participation in the mining sector. Four local content plans are provided for, namely; a local employment plan, proposing to employ and train Kenyans; a local product plan, proposing to procure Kenyan goods and services; a procurement plan, proposing to prefer Kenyan firms in the procurement of goods and services, and a succession plan, proposing gradual replacement of expatriates with Kenyan workers. The mining local content regulations also provide for community development agreements between mining companies and local communities to enhance local content among host communities.

Chapter three analyzes the impediments to and opportunities for local content development in Kenya. Linkage formation between the local industry and foreign investors has clearly come out as the major determinant of successful implementation of the local content policy. The study has also established that linkage formation is determined by the extent to which the actors in linkage formation interact and interrelate with each other. These actors, include; the government, foreign investors, the local industry, and the donor community. The government of Kenya has in the deployment of local content strategies, and in the implementation of the local content approaches to be informed by the strategies and capabilities of all the actors in linkage formation.

The study has established that, currently, Kenya's FDI is of the extractive type which tends to foster few linkages and which produces few spill overs to the other sectors of the economy. The absorptive capacity of the local industry is very low. Consequently, Kenya gets fewer

benefits from her mining industry, limited only to: a few direct jobs, limited export income, and royalties. Limited linkage formation has also contributed to: poor industry skills, low public investment, and low investment in in-house training by mining firms. Another impediment to linkage formation in Kenya has been outsourcing where the local firm is merely an importing firm that creates little value added.

The study has concluded that the formalization of artisanal mining by the Mining Act, 2016 is unlikely to create vertical linkages in the sector which have potential for broader developmental outcomes than horizontal linkages. This is because artisanal miners are bound to be crowded out of the industry by foreign investors' superior: financial, productivity and technological capabilities, which may be used to fend off competition from artisanal miners.

Chapter four has analyzed emerging trends in local content industry good practices in place in: Nigeria, South Africa, Ghana, Philippines, and Australia. These approaches and strategies have been designed and implemented at all levels of government in the respective countries and within communities, even though policy coordination and implementation takes place at the national level. The local content approaches reviewed include: broad-based local content policy; legislation prescribing minimum local content targets; legislation requiring submission of local content plans; local content programmes that prefer the local industry without setting targets; communicating opportunities to communities through regulations; legislation promoting the local industry's access to opportunities and building of the local workforce capacity; government-led initiatives and voluntary industry participation; and community development agreements between mining companies and the host communities.

This study concludes that the government of Kenya has a critical role to play not only in bringing its strategies and capabilities to bear upon linkage formation between the local industry and mining companies, but to also: mandate local content, enforce regulations, and monitor its compliance. It is only by accomplishing these undertakings that the objectives of the local content policy will maximize benefits for Kenyans. It should also enter into partnerships and collaborations with mining companies to increase local content in Kenya. The state should also enhance its equity participation in mining companies to increase public ownership of mine related industries. Mining companies on their part should engage in voluntary local content development programmes to supplement government measures.

The industry, the government and the donors, should collaborate to increase local content in Kenya.

The study has also established that the traditional motivation among mining companies for engagement in local content initiatives has been to obtain a ‘social license’ to operate, gain legitimacy, and access to extractive resources. However, the reviewed case studies have revealed that there has been a change of strategy and the desire on their part has changed towards building enduring partnerships with local suppliers for mutual benefit.

This study envisages that as the extractive sector progressively grows its share of contribution to the national economy, mining companies in Kenya will need to borrow from their peers in the countries selected and reviewed by this paper. They need to voluntarily undertake interventions aimed at increasing local content in Kenya. Chapter five concludes the study and proposes: legal, institutional and policy reforms to enhance local content in Kenya.

This study, therefore, concludes that the local content approaches in the legal framework in the Mining Act, 2016 and the mining local content regulations, 2017, fall short of a solid foundation to anchor and consolidated the local content policy in Kenya. This impedes attainment of its objectives. The local content strategies and approaches in Kenya, as currently designed, are inadequate to maximize: job creation, skills development, and local supplier development. The shortcomings in the local content legal framework in the Mining Act, 2016 and the mining local content regulations, 2017, can be addressed through incorporation of the local content strategies in force in: Nigeria, South Africa, Ghana, Philippines, and Australia. Legal, institutional and policy reforms will be instrumental in addressing these challenges. These are a combination of: mandated local content requirements; voluntary local content development programmes by the industry to supplement government measures; state participation in local content development, and community development agreements.

The analysis of: the mining local content legal, regulatory and institutional framework in Kenya; the impediments to and opportunities for local content development in Kenya, and the comparative analysis with the selected countries, have provided the study with possible recommendations on: laws, institutions and policies that Kenya should put in place to maximize the benefits of local content in the mining industry in Kenya.

## **5.2 Recommendations.**

Effective local content development in Kenya should entail a combination of: the mandated local content requirements in the Mining Act, 2016 and the mining local content regulations, 2017 ; state participation in local content development; collaborations and partnerships between: the government, mining companies, and the donor community to enhance local content; voluntary local content development programmes by the industry to complement government measures; and community development agreements.

The government of Kenya has a major role to play to ensure that local content development in Kenya becomes a success. The government has a duty to enforce the local content laws to ensure that they are complied with by the mining companies operating in Kenya. This enforcement should entail effective monitoring and enforcement of compliance. The government should also enter into partnerships and collaborations with mining companies to enhance local content. It should complement the existing local content policies to promote: skills and workforce development, local supplier development, and community development agreements.

Under the mining state participation regulations the government should, through the National Mining Corporation, become an active economic player in the industry by increasing the share of public ownership of mine related industries. It should then use its equity in the mining companies to increase local content by requiring the mining industry to: build local workforce capacity, enhance job creation, and enhance local supplier development. The government should also promote business collaborations and partnerships between the local private and public firms by demanding that foreign firms transfer knowledge and technology to the local industry.

The government should also put in place policies that promote linkage formation between extractive FDI and the local industry in Kenya. These include; strategically attracting FDI into the country, adopting specific linkage policies, strengthening the absorptive capacity of the local industry, and establishment of an investment climate that conduces to linkage formation. The government should also ensure that, there is timely co-ordination and complimentary policies on: industry; technology, education; and local content.



The government, in collaboration with the county governments, should facilitate the establishment of cross-sectoral supplier development programmes, targeting: Kenya's small and medium enterprises (SMEs), main contractors, mining firms, and other stakeholders. The programme should be geared towards enhancing the capacity of the local businesses. This would enable local companies to access business opportunities that are made available by the mining sector in Kenya. The supplier development programmes should also facilitate provision of various services, including; business development, information sharing on procurement opportunities, and capacity building. The programme should have wide participation of all stakeholders, including; the national government, the county governments, mining companies, lead contractors, the local private sector (SMEs), industry associations, and development partners.

The government should also facilitate the establishment of an enterprise development centre in Kenya, to co-ordinate: planning, design, and implementation of the supplier development programme. The enterprise development centre should provide a forum for: partnerships, collaborations, and engagement between the stakeholders to enhance local suppliers' access to business opportunities. The enterprise development centre's role should, entail: development and packaging of products, influence partnerships, and collaborations between the stakeholders to facilitate better programme outcomes. The centre should also act as a sieve for supplier development related information and ensure that reports are acted upon. The enterprise development centre should promote: creation of SMEs' packages, pre-assessment of SME capability, training, and mentorship.

The government should also facilitate the establishment of a local content support fund in Kenya. This will enhance building capacity of the local supplier industry in Kenya by providing financial assistance. Capacity building should be effected through: access to investment capital, enhancement of technological capabilities, and creation of incentives to adopt new technology.

The industry skills and workforce development in Kenya should be linked to supplier development programmes. This will enhance local suppliers' access to business opportunities. The strategy will facilitate: local suppliers' staff development, education, and training support. These interventions should target training of skilled and semi-skilled workers in vocational

and technical institutions. This is because skilled workers have greater potential to access the employment opportunities created by the industry. The government should facilitate collaborations and partnerships between training institutions and local suppliers to ensure that skills that are acquired are relevant to market needs.

Community development plans should be developed in close consultation with and participation of the local communities. This should incorporate a process of the identification and prioritization of projects that are most beneficial to the social and economic lives of the communities. The plans should be aligned to the specific county's integrated development plans, and the national development goals under the Kenya Vision 2030.

The enterprise development programme should take measures to mitigate supply chain constraints. It should target to: enhance information dissemination from buyers to suppliers; facilitate suppliers' exposure through workshops and conferences to enhance their technical knowledge and standards, buyers' needs, and competitive pricing. The enterprise development programme should also facilitate buyers' access to information on available goods and services, including where and when to procure them.

The Kenyan suppliers of goods and providers of services should be integrated into the supply chain, with a view to enhancing their access to the procurement processes of mining firms. This would be achieved through such strategies as: a standardized pre-qualification system: a joint qualification system to pre-qualify suppliers to ease selection of suppliers; reduction of contracting cycle time; and enhancing transparency in procurement and contracting procedures.

To meet the industry skills' needs, the government should enhance educational and institutional development, with special emphasis on: technical, tertiary and vocational training of skilled and semi-skilled workers. The trained personnel would serve the industry in the direct and induced employment categories. This can be achieved through collaborations between: training institutions, the local industry, and industry organizations. These collaborations will ensure that: training is relevant to the market, the market is aware of where to get the required skills, and where to access additional training for industry workers.

Finally, the government of Kenya should collaborate with the donor community, including the World Bank and the IMF. The country should incorporate Extractive Industries Transparency Initiative (EITI) principles in her local content strategies. The collaborations should be geared towards: supporting extractive management institutions; preventing fraud; and increasing transparency. The government should also collaborate with the donors in their linkage formation programmes in Kenya, including in: organizing extractive industries training programmes for tertiary and vocational institutions; identifying opportunities for linkage formation; the development of the institutional and physical infrastructure; and promoting specific FDI – local industry linkages.

On their part, the mining companies in Kenya should get actively involved in local content development. This should be through: compliance with the local content requirements under the mining laws and regulations in place in Kenya; undertaking voluntary local content development programmes to supplement government measures; and borrowing local content industry goods practices from their peers in the selected countries and other jurisdictions. Mining companies should ensure that they adhere to their local content plans and comply with reporting requirements. The mining companies in Kenya should, in the procurement of goods and services, embrace value chain disintegration by outsourcing to Kenyan suppliers of goods and providers of services. This can be achieved through: formation of backward linkages and horizontal partnerships between them and local firms.

In pursuit of their corporate social responsibility, foreign mining companies should undertake investments that are socially responsible. Such investments should include local supplier development programmes. The CSR linkage development programmes will enable the mining companies to: obtain a ‘social licence’ to operate; gain legitimacy; and act as a tool for risk management by the investors. Linkage development under CSR should be manifested through: skills and workforce development, education and training on procurement policies, and involvement of Kenyans in building infrastructure among other local content strategies.

The mining firms in Kenya should enter into partnerships and collaborations with NGO’s and donors to enhance local content development in Kenya. Such collaborations should establish and support small business initiatives within the host communities. Such programmes should be designed along the Anglo –Zimele initiative in South Africa. The programmes should be

geared towards enhancing sustainability of small businesses and supporting special interest groups in Kenya, such as: women, the youth, minorities and persons living with disability.

The mining companies in Kenya should enter into business partnerships with local and international financiers, like the International Finance Corporation (IFC), to support local companies to access finance and hence business opportunities in the mining sector. The partnerships can take the form of the partnership between Newmont Business Link/IFC – Ghana. Mining companies in Kenya should also enter into collaborations/partnerships with: the government of Kenya, the host communities, and other stakeholders. These collaborations should be aimed at increasing the visibility of mining companies and to enhance access of local communities to business opportunities. The partnerships should entail; implementation of socio – economic projects within communities; building of local enterprise capacity; promotion of community development projects; and enhancement of growth of the local economies.

The mining companies in Kenya should borrow local content industry good practices from their peers in the selected countries and other mining jurisdictions in the world. These practices should entail: establishment of enduring partnerships and joint ventures with local suppliers for mutual benefit. They should also get actively involved in strategies aimed at promoting local procurement to enhance access of the local industry to business opportunities. These strategies, include; preference of local firms during bidding processes and procedures, exclusively sourcing of goods and services from local firms, unbundling of contracts, and price matching. They should also engage local firms in business, through: partnerships, mentorship, promotion of technical education, promotion of linkages between the local enterprises and foreign firms, technology transfer, and enhancing access to finance.

Finally foreign firms, in collaboration with the government, should also engage in research and development to build local supplier capacity and labour skills to make them internationally competitive.

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