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MASTER OF LAWS (LLM)

A CRITICAL ANALYSIS OF THE LEGAL FRAMEWORK FOR FOREIGN DIRECT INVESTMENT IN MINING IN KENYA

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DECLARATION

I, Salome Karei Mwenda, do hereby declare that this thesis is my original work and has not been presented for a degree at the University of Nairobi or any other university or examination body.

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DEDICATION

I would like to thank my family: Mummy, you have been a strong pillar in my life. Everything I am is because of you, Mother Dear. Your calm spirit, your loving warmth and encouragement - even when the chips were down - have been the wind beneath my wings. Above, all your beautiful smile always assures me that everything will be alright. Daddy, your immense love for reading rubbed off on me and I appreciate your words of advice. Mutuma, I thank you for your unconditional love, encouragement and support including understanding the late nights while good-humouredly listening to me go on and on *ad infinitum* about my research. To my amazing siblings: Kendi, Kinyua, and the twins Justa and Justin I love and treasure you all so much.

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LIST OF LEGAL INSTRUMENTS

Kenya

Constitution of Kenya, 2010

Republic of Kenya, Companies Act, No 17 of 2015

Republic of Kenya, County Governments Act, No. 17 of 2012

Republic of Kenya, Energy Act, No. 12 of 2006 (Repealed)

Republic of Kenya, Energy Act, No. 1 of 2019

Republic of Kenya, Environmental Management and Conservation Act, No. 8 of 1999

Republic of Kenya, Export Processing Zones Act, Cap. 517

Republic of Kenya, Foreign Investments Protection Act, Cap. 518

Republic of Kenya, Foreign Judgments (Reciprocal Enforcements), Cap. 43

Republic of Kenya, Income Tax Act, Cap. 470

Republic of Kenya, Intergovernmental Relations Act, No. 2 of 2012

Republic of Kenya, Investment Disputes Convention Act, Cap. 522

Republic of Kenya, Investment Promotion Act, Cap. 485B

Republic of Kenya, Land Act, No. 6 of 2012

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Republic of Kenya, Mining Act, No. 12 of 2016

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Overseas Private Investment Corporation & 2 others v. Attorney-General [2013] eKLR

Primarosa Flowers Limited v Commissioner of Income Tax [2017] eKLR

Republic v Cabinet Secretary, Ministry of Mining & 2 others Ex Parte Mid Migori Mining Company Limited & another [2017] eKLR

R v Kenya Revenue Authority *ex parte* Jaffer Mujtab Mohamed [2015] eKLR

Tubor Mulnar & Another v. Republic [2007] eKLR.

Twictor Investments Ltd v. The Government of the United States of America [2003] eKLR.

World Duty-Free Co. Ltd v. Republic of Kenya, ICSID Case No. Arb/00/7

ABBREVIATIONS AND ACRONYMS

Art.	Article
BITs	Bilateral Investment Treaties
CMA	Capital Markets Authority
Cap.	Chapter
CG	County Government
CoK	Constitution of Kenya
EIA	Environmental Impact Assessment
EMCA	Environmental Management and Co-ordination Act, 1999
EPC	Export Promotion Council
FDI	Foreign Direct Investment
GoK	Government of the Republic of Kenya
ICJ	International Court of Justice
ICSID	International Centre for Settlement of Investment Disputes
ILO	International Labour Organization
IMF	International Monetary Fund
ITA	Income Tax Act, Chapter 470 of the Laws of Kenya
IPPs	Independent Power Producers
KIA	Kenya Investment Authority
MEIC	Multinational Extractive Industry Companies

MIGA	Multilateral Investment Guarantee Agency
MITs	Multilateral Investment Treaties
MNCs	Multinational Corporations
New York Convention	The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958
OAG	Office of the Attorney General
OECD	Organisation for Economic Co-operation and Development
OPEC	Organisation of Petroleum Exporting Countries
PLUPA	Physical and Land Use Planning Act
Sch.	Schedule
TNCs	Transnational Corporations
UN	United Nations
UNDP	United Nations Development Program
UNCITRAL	United Nations Commission on International Trade Law
USD	Unites States Dollar
Washington Convention	Convention on the Settlement of Investment Disputes between States and Nationals of Other States, 1965
WB	World Bank
World Bank Guidelines	World Bank's Guidelines on the Treatment of Foreign Direct Investment, 1992

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Chapter One

1.1. Background of the Study

Kenya has been blessed with numerous natural resources including crude oil, coal, natural gas, water resources, wildlife, and forests among others. [1] Natural resources refer to materials or substances occurring in nature that may be exploited for economic gain.[2] Notably, the Constitution of Kenya 2010 interprets the term "*natural resources*" to mean the physical non-human factors and components, whether renewable or non-renewable, including—(a)sunlight;(b)surface and groundwater;(c)forests, biodiversity, and genetic resources; and(d)rocks, minerals, fossil fuels and other sources of energy.[3] These resources may be classified under two broad classifications as either: biotic and abiotic; or renewable and non-renewable resources.[4] Biotic resources include living and organic resources and forests. Coal and petroleum fall under this category. Abiotic resources may include air, land, freshwater and heavy mineral metals, among others.[5] Renewable resources are capable of being replenished and may include such resources as sunlight, water, and air; whereas non-renewable resources include fossil fuel and minerals.[6]

Foreign Direct Investment (FDI), on the other hand, has been defined to refer to an entity's goal to secure a lasting interest in an enterprise that is resident in another economy.[7] The Organization

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1 Mining and Minerals Policy 2016- the Popular Version; Republic of Kenya Ministry of Mining.
2 See Concise Oxford Dictionary(Oxford University Press, 2002 10th Edn)950.
3 Article 260, Constitution of Kenya 2010.
4 See Concise Oxford Dictionary(Oxford University Press, 2002 10th Edn)950.
5 'There Are Various Methods of Categorizing Natural Resources - There Are Various Methods of Categorizing Natural Resources These Include Source of Origin | Course Hero' <https://www.coursehero.com/file/8588135/There-are-various-methods-of-categorizing-natural-resources/> accessed 13 November 2020.
6 'Why Must We Conserve Natural Resources?' (*Reference.com*) <https://www.reference.com/science/must-conserve-natural-resources-67c6a7c06ad724d5> accessed 13 November 2020.
7 Maitena Duce, 'Definitions of Foreign Direct Investment (FDI): A methodological note, accessed at www.bis.org/publ/cgfs22bde3.pdf. on 30th September 2018; Wenhua Shan and Sheng Zhang, 'The Treaty of

OECD refers to FDI as: "*...a category of investment that reflects the objective of establishing a lasting interest by a resident enterprise in one economy (direct investor) in an enterprise (direct investment enterprise) that is resident in an economy other than that of the direct investor*".[8] The 'lasting enterprise' is a term that is used to imply the existence of a long-term relationship between the direct investor and the direct investment enterprise, with retention of a significant degree of influence on the management of the latter'.[9]

The term FDI is rather broad and may be used to connote financing arrangements through a government to government on-lending arrangement such as financing for Government of Kenya projects by the China Export-Import Bank (China Exim) owned by the Peoples' Republic of China. It may also refer to funding through multilateral agencies, such as the World Bank-funded programme to GoK commonly known as the Kenya Electricity and Strengthening Infrastructure Project (KESIP). The reference to Foreign Direct Investment in this paper strictly refers TNCs that are currently investing or proposing to invest in resources in the extractive industry in Kenya. Such companies include Base Titanium Limited, Tiomin Resources Inc., Tiomin (Kenya) Limited, Tullow Oil and similar entities.

The extractive industry can thus be defined as including all the activities that lead to the extraction of raw materials from the earth (such as minerals) and the subsequent processing and utilization of these resources by the end-users.[10]

Lisbon: Half Way toward a Common Investment Policy' (2010) 21 European Journal of International Law 1049, 1059.

8 Mishrif, Ashraf, and Yousuf Al Balushi, eds. *Economic Diversification in the Gulf Region, Volume I: The Private Sector as an Engine of Growth*. Springer, 2017, at 118.

9 Ibid; Wenhua Shan and Sheng Zhang, 'The Treaty of Lisbon: Half Way toward a Common Investment Policy' (2010) 21 European Journal of International Law 1049, 1059.

10 Claudine Sigam and Leonardo Garcia, *Extractive Industries: Optimizing Value Retention in Host Countries* (UNCTAD New York and Geneva 2012).

The Constitution grants the State the authority to determine how the extractive industry within its territory is managed. This is articulated under Article 60 of the Constitution of Kenya that states that one of the guiding principles in land management is that land in Kenya should be held, used, and managed in a manner that is equitable, efficient, productive, and sustainable for the benefit of present and future generations. Further, Article 69 also obligates the State to ensure that environment and natural resources are exploited, utilized, managed and conserved sustainably, and ensure equitable sharing of the accruing benefits.

Thus, the State has a responsibility to properly manage minerals and mineral oils. One of the ways the State ought to fulfill this constitutional mandate is by putting in place a comprehensive legal and institutional framework to ensure not only maximum benefit from mineral exploitation but also sustainable development in line with the Sustainable Development Goals.[11]

There has been a general agreement that the extractives sector is very strategic towards Kenya's economic transformation. Mining, an industry with potentially high super-profits, if fully exploited, can transform the economy of Kenya.[12] It may be deduced that it is from this premise, that the Ministry of Planning and Devolution considered oil and other mineral resources as new priority areas under the Vision's economic pillar. This confirms the great potential natural resources exploitation has in its contribution to the economy's growth.[13] The petroleum potential is demonstrated by the existing reserves in four large-sized sedimentary basins in Lamu, Anza,

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[11] Also known as Global Goals, are a collection of 17 interlinked goals designed to be a "blueprint to achieve a better and more sustainable future for all". The SDGs were set in 2015 by the United Nations General Assembly and are intended to be achieved by the year 2030.

[12] Remarks of Dan Kazungu, then Cabinet Secretary for Mining upon the Mining Act, 2016 being enacted into law.

[13] Kamau M, 'State Sees Fortune in Oil, Gas Discoveries to Realise Vision 2030' (*The Standard*) <https://www.standardmedia.co.ke/business/article/2000094849/state-sees-fortune-in-oil-gas-discoveries-to-realise-vision-2030> accessed 30 September 2018 at p. 7.

Mandera, and Tertiary Rift basins.[14] The potential for minerals is evidenced by the deposits of minerals like Gold, Silver, and Copper in Western Kenya as well as gemstones like Ruby, Garnet, Sapphire, Emerald, Aquamarine, Kyanite, Graphite, Kaolin, and Magnesite.[15]

There are in place various laws to oversee the mining sector that not only provide for the regulation of mining operations such as licensing procedures and payment of royalties but also for the establishment of the institutions charged with the mandate to ensure implementation of these regulations. 2016 saw the enactment of the Mining Act that effectively repealed the old colonial Mining Act of 1940 and was welcomed by industry players as an important step towards enhancing investor confidence and placing Kenyan mining firmly on the world map.

However, there still exist some challenges for Kenya in her quest to reap economic benefits through attraction of FDI for the exploitation of her natural resources. Kenya's Vision 2030 ("the Vision") acknowledges natural resources as a crucial factor in reaching economic growth targets.[16] However, the Vision registers concerns that corruption and insecurity are some of the potential impediments to Kenya's macroeconomic growth and further that a huge number of conflicts witnessed in Kenya are natural resource-based.[17] The country's average growth rate of 10 percent per annum anticipated in the Vision is dependent on agriculture, tourism, manufacturing, and the energy sector, all of which in one way or another, depend on the exploitation of natural resources and the environment.[18]

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14 The latter is comprised of the Turkana and Lokichar Basins that have yielded positive amounts of exploitable oil reserves. Similarly a large potential exist with coal and natural gas; 'Opportunities for Oil Exploration – National Oil Corporation of Kenya' <https://nationaloil.co.ke/opportunities-for-oil-exploration/> accessed 13 November 2020.

15 In addition, Kenya is endowed with deposits of limestone, iron ore, base metals (lead, zinc & barite), heavy mineral sands (ilmenite, rutile and zircon), soda ash, gypsum, calcite, diatomite, fluorspar, natural carbon dioxide, geothermal fields and recently a variety of gem quality rubies found within the Rift Valley.

16 Government of Kenya, Kenya Vision 2030: A Competitive and Prosperous Kenya (Government Press, Nairobi 2007) 10.

17 Ibid.

18 Ibid at pg. 124.

There is need to have in place an adequate and harmonized regulatory and institutional framework, to create a good platform for the attraction of FDI and support the country's economic growth.[19] One of the key aims of this study, therefore, is to critically analyze the legal and institutional framework concerning FDI in mining in Kenya in light of relevant laws such as the Foreign Investments Protection Act[20] and other laws.

This study also aims to explore some of the possible challenges facing the sector including corruption and insecurity; revenue collection including taxes and royalties, little or no community participation, and a need for a strong international commercial arbitration framework. A challenge also exists due to the lack of a statute to expressly provide for revenue sharing between national, county governments, and the local communities residing near the exploitation of resources. For example, little or no community participation as well as lack of a revenue sharing structure, may be arguably cited for the dissatisfaction expressed by the communities living around the oil production blocks in Northern Kenya. The people of Turkana County, where the oil fields are located, have in the recent past made demands to Tullow for jobs and supply contracts.[21] This in turn, led to the delay of mining operations that had a spiral effect on production costs.

The issue of royalty rates is a sensitive topic. For example, the 2013 mining regulations on prescription of royalties, provide for 10 per centum royalties for mineral sands[22], which include

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19 Andre Van Heemstra, rightly states that: "Foreign direct investment not only creates jobs directly, it usually supports additional employment up and down the supply chain." "What Foreign Direct Investors Provide and What They Seek," in Financing for Development: Proposals from Business and Civil Society, ed. Barry Herman, Federica Pietracci, and Krishnan Shar (New York: United Nations University Press, 2001), 55–56.

20 Chapter 518 of the Laws of Kenya.

21 'Communities Flag Concerns over Kenya Oil Project' (*Devex*, 12 April 2019) <https://www.devex.com/news/sponsored/communities-flag-concerns-over-kenya-oil-project-94672> accessed 9 November 2019.

22 'Kwale Mineral Sands Project - Mining Technology'<https://www.miningtechnology.com/projects/kwalemineralsandspro/> accessed 20 October 2018.

ilmenite, rutile, and zircon. There have been concerns from some quarters that these rates are much higher than the global average of 3.6 per centum and higher than those charged by Kenya's competitors including Tanzania, Mozambique, and Zambia. The foreseeable effect is that this may portray Kenya as a non-attractive destination for FDI. However, there is another underlying issue. Despite the fact that the law currently provides for these rates, some of the mining agreements were entered into prior to the coming into force of these Regulations. There is therefore need to harmonize the rates provided under the mining agreements with the law.

1.2. Statement of the Problem

As stated above, the law grants ownership over natural resources to the State. When the State is the owner of rights to natural resources, these rights are granted to companies to explore and exploit those resources under licences or leases.[23]

There is a notable number of foreign companies exploiting natural resources in Kenya, such as Base Titanium Limited with mineral sands in Kwale and Tullow with oil in Turkana.[24] The state issues licences to such companies granting them rights to explore and exploit natural resources under various instruments conferring such rights such as Special Mining Leases as well as Investment Agreements. This is done through the Ministry of Mining and Petroleum.

The foregoing are in accordance with Article 69(1) of the Constitution, which makes entrusts the State with the responsibility to ensure sustainable exploitation of the environment and natural resources and the equitable sharing of the accruing benefits. Further, under Article 71 of the

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[23] Makuch K and Pereira R, *Environmental and Energy Law* (John Wiley & Sons 2012).

[24] W Winnie, 'Micro, Small and Medium-Size Enterprises (MSMEs) as Suppliers to the Extractive Industry'.

Constitution Parliament is mandated to enact legislation to govern the exploitation of natural resources.

Pursuant to the above constitutional provisions, Kenya's Parliament enacted the Mining Act 2016[25], the Natural Resources (Classification of Transactions Subject to Ratification) Act, 2016[26], the Petroleum Act, 2019[27] , and the Energy Act, 2019[28]. The Mining Act under Section 12 (3), mandates the Cabinet Secretary to make Regulations to prescribe the procedure for negotiation, grant, revocation, suspension, or renewal of mineral rights. Parliament in its wisdom passed the legislation on ratification to have oversight over the Executive. The process of ratification by the people's representatives should be seen as a great step towards enhancing public and investor confidence that the processes of negotiating, granting, revocation, suspension, or renewal of mineral rights are transparent and accountable as required by the Constitution and other laws.

The Natural Resources (Benefit Sharing) Bill has been pending in Parliament since 2014.[29] This delay in passing the law implies that there is no framework to oversee the sharing of benefits accruing from natural resources in Kenya. This is recognized in the National Energy and Petroleum Policy[30], which notes that there is a lack of a framework for the sharing of petroleum benefits to the local communities; hence, this has the effect of generating disputes between the foreign firms and the locals.[31] Further, the lacuna created by the absence of this law creates an environment that may not be attractive to foreign investors. For example, it may be argued that the recent standoff between Tullow and the local communities in Turkana where there is current oil exploration being undertaken, may have been avoided had there been a proper legal

25 Act No. 12 of 2016.
26 Act No. 41 of 2016.
27 Act No. 2 of 2019.
28 Act No. 1 of 2019.
29 The Natural Resources (Benefit Sharing) Bill (Senate Bills No.31 Of 2018).

framework to regulate the relationship between the investors and the locals, particularly on benefit sharing as well as community participation.[32]

Other factors that may come into play in hurting foreign investor confidence in mining revolve around taxation issues. The Finance Act, 2014 introduced amendments to the Ninth Schedule of the Income Tax Act providing new royalty rates to be paid by investors in the extractives industry, and these rates are way above Kenya's competitors. On top of royalties, the investors are required to pay other taxes such as Pay As You Earn (P.A.Y.E.) for employees, corporation income tax, and other taxes such as excise and import duties as well as value added tax. Some may argue that this may drive foreign investors to other investment destinations leaving Kenya's natural resources underexploited.

It is important to note that, mining is a cyclical industry, and investment in exploration, production, and mine development follows these cycles. The main activities in the mining process can be classified into extractive-related: which involves exploration, development, and mining; and processing-related: which encompasses processing or beneficiation, smelting and refining, other added value activities; and transport and storage.[33] The global market is affected by this cyclicity, and multinationals usually compare numerous development options internationally and screen these options to obtain the best balance between risk and reward.[34] The key factor determining investment decisions in the mining industry is the geological potential of

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[30] 'National Energy Petroleum Policy 2015 – Ministry of Energy' <http://energy.go.ke/?p=407> accessed 11 November 2019, at 118.

[31] Ibid.

[32] 'Tullow Resumes Oil Trucking after Truce with Turkana Locals' (*The Star*) <https://www.the-star.co.ke/news/2018-08-23-tullow-resumes-oil-trucking-after-truce-with-turkana-locals/> accessed 30 September 2018.

[33] United Nations and Department of Economic and Social Affairs, *United Nations Handbook on Selected Issues for Taxation of the Extractive Industries by Developing Countries* (2018).

[34] Mitchell P, 'Taxation and Investment Issues in Mining' [2009] Advancing the EITI in the Mining Sector: A Consultation with Stakeholders, Extractive Industries Transparency Initiative, Oslo 27, pp. 27-31.

a site, strongly hinged on tax rates and the stability of the tax system[35] and to a large extent, the prevailing legal framework, hence the need for Kenya to enact natural resource exploitation laws that not only help her compete favourably on the global market but also ensures sustainable exploitation of natural resources for the benefit of current and future generations.

Additionally, a reliable international commercial arbitration framework is key in affirming foreign investor confidence in a country. Much as Kenya has an independent judiciary, most investors resort to international commercial arbitration as opposed to the local courts in the event of a dispute. There is, therefore, a need to strengthen the legal framework and institutions such as the Nairobi Centre for International Arbitration (NCIA) to compete with other world-renowned institutions such as the London Centre for International Arbitration (LCIA) and the International Chamber of Commerce (ICC).[36]

Laws that manage FDI ensure favourable conditions for investors in a host state. The regulatory regime goes beyond just a country's laws but the administrative regime enforcing that country's laws.[37] This includes the procedure and licensing system upon which the state licenses companies to undertake exploration and exploitation activities.

A clear legal framework gives some security to the investors as well as reducing avenues for corruption and arbitrary administrative action. It is from this premise that the foregoing discussion raises the need for assessment of the adequacy of the policy, legal and institutional framework governing foreign direct investment in natural resource exploitation in Kenya. Despite having numerous laws to support FDI, Kenya nevertheless needs to implement its

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35 Ibid.

36 'The Landscape of International Arbitration in Kenya – The In-House Lawyer' <https://www.inhouselawyer.co.uk/legal-briefing/the-landscape-of-international-arbitration-in-kenya/> accessed 13 November 2020.

37 Shirley Ayangbah and Liu Sun, 'Comparative Study of Foreign Investment Laws: The Case of China and Ghana' (2017) 3 Cogent Social Sciences 1355631.

policies and laws and strengthen its institutions to address the challenges facing the extractives sector, to promote economic growth through foreign direct investment in natural resources.

1.3. Scope of the Study

This study will provide critical analysis of the legal and institutional framework for FDI in mining in Kenya by analyzing certain laws, policies, and institutions impacting FDI. It will proceed to assess challenges faced by foreign investors in natural resource exploitation in light of international best practices in the exploitation of natural resources. The best practices such as the World Bank Guidelines on Treatment of FDI will inform Kenya's direction in enhancing the sustainable exploitation of natural resources.

1.4. Justification of the Study

There are several benefits associated with FDI to the host state. These benefits include but are not limited to: technology transfer and spillovers; human capital formation; international trade integration; and the creation of a more competitive business environment and enterprise development. All of these result in higher economic growth, which is a crucial tool for alleviating poverty in developing countries.[38]

The Vision 2030 notes that 10% of Kenya's economic growth is dependent on agriculture, tourism, manufacturing, and the energy sector, which heavily rely on the exploitation of natural resources and the environment.[39]

Currently, there is a legal framework for the exploitation of natural resources in Kenya with laws ranging from the Mining Act to the Foreign Investments Protection Act. To give these laws full

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[38] http://chss.uonbi.ac.ke/sites/default/files/chss/Kelvin%20Mwangi--impact%20of%20foreign%20direct%20investment%20on%20economic%20growth%20in%20kenya.pdf

[39] Vision 2030 at p. 124.

force and effect, it is important therefore for Kenya to create a conducive legal and institutional environment that supports foreign direct investment in mining to enhance economic growth and realization of the Vision 2030.

There is inadequate literature that specifically addresses the legal, policy, and institutional framework on natural resources, especially mining, in Kenya. There are, however, well documented and increased disputes arising from natural resources exploitation in Kenya, ranging from water disputes between Murang'a County and Nairobi City County to the standoff in Turkana between the British company, Tullow, and the locals in Turkana on oil resource benefit sharing.

This study, therefore, seeks to provide critical analysis of the legal and institutional framework governing foreign direct investments in extractives in Kenya. In so doing, it will provide additional literature in the field of natural resources exploitation in Kenya and make recommendations from international best practices for Kenya's adoption.

1.5. Research Objectives

1.5.1. Primary Objective

The main objective of this study is to assess the legal and institutional framework governing foreign direct investment in natural resources in Kenya.

1.5.2. Specific Objectives

Further, the study has the following specific objectives:

i. To analyze and evaluate the extent to which the legal and institutional framework supports foreign direct investment in mining in Kenya.

ii. To assess the issues and challenges facing investment in mining in Kenya such as profit repatriation, corruption, benefit-sharing, and environmental protection among other challenges witnessed in foreign direct investment in mining in Kenya, providing a comparative analysis where necessary.

iii. Make a case for environmental protection and social equity as important and crucial pillars of natural resource management in Kenya.

iv. Propose measures required to boost the sustainable exploitation of natural resources in Kenya.

1.6. Research Questions

The questions sought to be answered are:

1. What is the legal framework governing foreign direct investment in mining in Kenya?
2. What are the issues and challenges facing investment in the exploitation of mining in Kenya?
3. What is the international best practice for environmental protection and social equity in mining?
4. What are some of the necessary reform measures needed to boost foreign direct investments in natural resources in Kenya?

1.7. Hypothesis

This study will be anchored on the hypothesis that although there is in existence a legal framework for foreign direct investment in mining in Kenya, nevertheless the prevailing environment is not conducive to encourage FDI because of poor implementation of the existing laws by the institutions created under them.

1.8. Theoretical Framework

1.8.1. Introduction

The Constitution of Kenya, 2010 is viewed as a bold attempt to reengineer the state.[40] The terms of the social contract by which the people were governed were radically revised because it had become frayed and fallen into disuse.[41] The state in the realist tradition is regarded as the most significant player in international trade and foreign investments.[42]

FDI acquired an important role in the international economy after the Second World War. Theoretical studies on FDI have led to a better understanding of the economic mechanism and the behaviour of economic agents, both at the micro and macro levels allowing the opening of new areas of study in economic theory. To understand the foreign direct investment, one must first understand the basic motivations that cause a firm to invest abroad rather than export or outsource production to national firms.[43]

Kenya has since independence been a central player in international trade and foreign investments and appreciates the emergence of the forces of globalization which are often seen as the impetus behind the increased interconnectedness of states.[44]

This study relies on these theories namely: Neo-classical theory, Middle Path theory, Dependence theory, Hymer FDI theory, and Eclectic FDI theory. The latter two are considered

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40 Sikuta M, 'A critical analysis of the legal framework governing international trade in Kenya' LLM Thesis (University of Nairobi, 2016); See also Key Note address by the Chief Justice of Kenya at the MCAs Forum in Mombasa, March 21, 2014<www.judiciary.go.ke> accessed 28 November, 2015.

41 Ibid.

42 Matshili VE, 'Sub-National Governments and Foreign Policy : The Case of the Limpopo Province in South Africa' (M.A Thesis, University of South Africa 2013) p. 13. <http://uir.unisa.ac.za/bitstream/handle/10500/14181/dissertation_matshili_ve.pdf?sequence=1>accessed 2 November, 2015.

43 Denisia V, 'Foreign Direct Investment Theories: An Overview of the Main FDI Theories' [2010] European journal of interdisciplinary studies (3).

the most relevant in explaining the regulatory environment for foreign direct investment in natural resources in Kenya. The study analyses the Hymer FDI theory and the Eclectic FDI theory as posited by their key proponents Hymer and John Dunning. Besides, the Neo-Classical and Middle Path theories are also considered.

This section will demonstrate the relevance of the theories by explaining the interplay between government, law, and multinational enterprises concerning the regulatory environment governing FDI inflow in natural resources in Kenya.

1.8.2. Hymer FDI Theory

The Hymer FDI theory explains FDI inflow by comparing the difference between foreign direct investment and portfolio investment.[45] He argues that based on the portfolio investment theory, capital moves from the place where there is low-interest rate to where there is high-interest rate until the interest rate is equal everywhere. He states that the portfolio investment theory assumes there are no barriers to capital movement such as risks and uncertainties. In portfolio investment, investors who invest in foreign countries do not have a right to control enterprises in which they invested their money.

Based on Hymer, there are two reasons why investors seek control i.e. multinational companies control foreign enterprises to make sure their investment is safe and to eliminate competition in foreign countries and other countries. Hymer in his theory stated that multinational companies are motivated to invest in foreign countries due to certain advantages that they get through control of the enterprises. He analyzed the advantage of the foreign firms over host firms. These

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[44] Ibid.

[45] Hymer SH, 'The International Operations of National Firms, a Study of Direct Foreign Investment' (Thesis, Massachusetts Institute of Technology 1960) <https://dspace.mit.edu/handle/1721.1/27375> accessed 2 November 2015.

advantages are getting factors of production at a lower cost, expertise, patents, capita, investment policies, and laws.

The Constitution of Kenya, 2010 under Article 2(5) and (6) provides that treaties ratified by Kenya and general rules of international law form part of the laws of Kenya. Foreign direct investment operates in an environment mostly governed by bilateral and multilateral treaties as well as conventions to which Kenyan policies and laws on foreign investments must be aligned, to promote international commerce.

The Hymer FDI theory is therefore relevant to this study because it demonstrates factors that motivate FDI inflow such as an efficient policy and legal framework, political stability, and effective institutions among others. The theory explains the link between FDI and the legal, policy, and institutional framework that is the crux of this study. The Constitution under Article 65 further makes provision for ownership of land by corporate entities thereby allowing foreign firms to own land and invest thereon. Other Articles of the Constitution that show the relationship between foreign direct investments in natural resources include Articles 62, 66, 68, 69, and 71 of the Constitution.

Parliament, therefore, needs to enact legislation required by the Constitution under the provisions set out above. Such legislation on natural resources should be aligned with other laws regulating foreign direct investment and international commerce as well as the Vision 2030.

Other laws that regulate foreign direct investors, and particularly control and protection of their investments in Kenya, include the Companies Act, 2015 that allows registration and ownership of local companies by foreigners. Also, the Foreign Investment Protection Act safeguards foreign investments from expropriation except per the law.

1.8.3. Eclectic FDI Theory

The key proponent of this theory is John Dunning.[46] He is one of the prominent scholars on the issue of foreign direct investment. He developed a framework called the OLI framework where he described three firms' advantages of foreign direct investment that include Ownership, Locational advantage, and Internalization advantages. Ownership (O) advantages include patents and trademarks that are regulated by law. Dunning argues that this helps firms to compete easily in the host country. Locational (L) advantages include all things that make the firm more profitable to produce and sell in the host country, rather than to produce at home and export to another country. Internalization (I) advantages refer to the advantages of multinational enterprises (MNEs) due to ownership advantage internally inside the host country.

Dunning classified MNEs' activities into four to explain the motives behind FDI: natural resource seekers, market seekers, efficiency seekers, and strategic asset seekers. He argues that natural resource seekers involve enterprises that are looking for natural resources at a lower cost compared to their country.

The main resources that most MNEs are always seeking are minerals, fuels, metals, and agricultural products. Some resources are 'location bound', which can be found only in host countries. MNEs enjoy this locational advantage by investing in host countries that are rich in resources. Government policies and laws regulate all four motives. To promote FDI, the laws should be formulated such that they motivate foreign investment by MNEs.

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46 Dunning, J.H. and Lundan, S.M., 'Multinational Enterprises and the Global Economies' (2008, Cheltenham, Edward Elgar).

Arango supports Dunning's argument by stating that the FDI policy is divided into two: passive and active policies.[47] He avers that passive policies are related to the comparative advantage of the countries on factors such as natural resource availability, low labor costs, and the countries' geographical location. This constitutes the country's comparative advantage to attract FDI. Active policies are related to the policies and laws formulated by the government to attract more FDI. This includes trade liberalization, a conducive regulatory environment, and infrastructure development. These policies should align with the country's development objectives as well as the MNE's strategy for mutual benefit and to enhance FDI benefits to both the host state and the MNEs.

1.8.4. The Neo-classical Theory

Some World Bank-sponsored documents, including in the preamble to the World Bank Guidelines, are based on the neoclassical theory[48]. According to the neo-classical theory, FDI is seen as useful for developing states.[49] This theory views FDI as a pre-condition for sustainable growth and development.[50] This theory argues that the contribution of factors of production by foreign entrepreneurs to a host country encourages dynamic competition and, thus, helps such a host country to emerge from a condition of constant underdevelopment.[51]

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47 Arango, O.E.M, 'Importance of FDI in the development of emerging countries: Application to Colombia and the Philippines' (2008).

48 'World Bank: Report to the Development Committee and Guidelines on the Treatment of Foreign Direct Investment' (1992) International Legal Materials 1363 <https://www.cambridge.org/core/journals/international-legal-materials/article/world-bank-report-to-the-development-committee-and-guidelines-on-the-treatment-of foreign-direct-investment/36FC4252CA3DA5C7205BB254848E9F26#> accessed 22 January 2019.

49 Nolan, "A Comparative Analysis of the Laotian Law," 664.

50 Moran TH, *Foreign Direct Investment and Development: The New Policy Agenda for Developing Countries and Economies in Transition* (Peterson Institute for International Economics 1998) <https://ideas.repec.org/b/iie/ppress/53.html> accessed 22 January 2019, 19.

51 Moran, Foreign Direct Investment and Development, 19.

Some proponents of the neo-classical theory opine that TNCs[52] are important, to the extent of stating that developing countries could not survive or develop economically without FDI. Consequently, supporters of this theory advocate the facilitation of transnational capital flows by removing distorting state interventions and by affording the broadest scope of protection to FDI under international and national laws. Nevertheless, the neoclassical theory fails to explain why there is still state interference in FDI, despite its numerous benefits.

1.8.5. The Middle-path Theory

The middle-path theory—or 'integrative school'—factors in both the beneficial effects and the recognized detrimental effects of FDI on host countries. The recognition of the costs and harmful practices associated with FDI has enabled host countries to implement the requisite regulatory measures designed to alleviate such costs and to counter such practices. At the same time, developing countries are no longer perceived as victims of FDI because of the growing understanding that FDI may be crucial for economic growth. Besides, the theory appeals to TNCs because it urges them to implement internal codes of conduct that require them to avoid specific behaviour patterns that might be detrimental to the economic development of developing countries.

This theory has been gaining influence, particularly as the driving force of key FDI legislation in developing countries.

1.9. Application of the theories to the study

This study leans more towards those theories that acknowledge that FDI is crucial to any host country's development. With the example of Kenya's extractive industry, FDI is generally

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52 United Nations Conference on Trade and Development, *World Investment Report 2011: Non-Equity Modes of International Production and Development* (UN 2011) <https://www.un-ilibrary.org/international-trade-and-

advantageous since the extractives industry is quite nascent in Kenya. Kenya can greatly benefit and is currently doing so, from the technology transfer, job creation, and demand for locally manufactured goods created by foreign investors.

However, there is a need to proceed with caution right from the granting of exploitation permits to the payment of royalties, to not only ensure that the process is transparent but also to ensure that Kenya gains her rightful share in the exploitation of her natural resources.

As articulated by John Dunning[53] in support of the Eclectic FDI Theory, investors usually have motives for investing in host countries that are rich in resources. Hymer[54] on the other hand, states that investors seek certain advantages in host countries. It is imperative that these motives and advantages are not granted arbitrarily and in secrecy, but are regulated by government policies and laws that are favourable to FDI.

In Kenya, we have laws and policies that regulate licensing, property ownership, taxation as well as dispute resolution. This paper will analyze the legal and institutional framework regulating FDI in Kenya and put them to the test as to whether they are favourable to FDI.

1.10. Literature Review

In evaluating the statutory and institutional framework of FDI in Kenya, this study relies on the World Bank's Guidelines on the Treatment of Foreign Direct Investment. These guidelines are not binding but are useful to States in that they lay out a summary of the general principles of entry, incentives, guarantees, and dispute settlement.

Other international instruments and initiatives are also applicable to ensure that mining operations are conducted in a sustainable manner that takes into consideration such key issues as

finance/world-investment-report-2011_6c9c5276-en> accessed 22 January 2019.

[53] Ibid.

environmental biodiversity concerns. These constitute "soft" international law such as the International Council on Mining and Metals Principles which are formulated in line with international standards of Rio Declaration, the Global Reporting Initiative, the Global Compact, OECD Guidelines on Multinational Enterprises, Word Bank Operational Guidelines, OECD Convention on Combating Bribery, ILO Conventions and the Voluntary Principles on Security and Human Rights.

Ayanwale opines that the rationale for increased efforts to attract more FDI stems from the belief that FDI has several positive effects. He argues that these effects include productivity gains, technology transfers, and the introduction of new processes, managerial skills and knowledge in the domestic market, employee training, international production networks, and access to markets.[55]

Mabey and Mcnally aver that the benefits of FDI to a host country can be numerous; it can increase their productive capacity; create spillover effects from the transfer of knowledge, skills, and technology into the domestic market. This discussion is relevant to this study because it portrays the advantages of FDI hence the need for a conducive institutional and legal environment to govern FDI in the extractives sector.

Despite these advantages, developing countries did not always embrace FDI. These countries argued for the need for proper guidelines to deter abuse by TNCs as well as foster development that is attuned with the developmental objectives of the host nations. The OECD guidelines were thus adopted to balance out the interests of the host nations and foreign investors.[56]

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[54] Ibid.

[55] https://aercafrica.org/wp-content/uploads/2018/07/RP_165.pdf

[56] https://www.cambridge.org/core/journals/international-legal-materials/article/world-bank-report-to-the development-committee-and-guidelines-on-the-treatment-of-foreign-direct-investment/36FC4252CA3DA5C7205BB254848E9F26#

Professor Aul in his article *Managing Resource Revenues in Developing Economies*[57] asserts that revenues from the extractive industry are unique because they are finite and exhaustible and secondly 'because commodity prices are highly volatile they are unreliable.[58]' He argues that often after the discovery of such resources, there is a boom in the economy that often leads to the natural resources curse. To counter this, they espouse the creation of a fund by the government. "Government should largely save the boom in foreign financial assets, whether through an explicit fund or simply by the accumulation of reserves. The new information that the boom is over reinforces the wisdom of having saved the boom revenues."

This insight must have informed the creation of the sovereign wealth fund under clause 26 in the Natural Resources Benefit Sharing Bill. This literature was found helpful in conceptualizing from an economic background the necessity of the sovereign wealth fund but unhelpful in advancing the rights of the indigenous local communities that this research, in part, will seek to address.

Manyanza contends that GoK has been making efforts through institutional and legal frameworks, forums, and promotional campaigns to encourage FDI.[59] Many macro-economic reforms and policy incentives have been adopted and implemented to promote foreign investment. Some of the reforms include the shift from import substitution strategy to export-oriented industrialization, liberalization of exchange and interest rates, the introduction of export processing zones, and the elimination of price controls. Despite these efforts on reforms that have been undertaken and the many policy incentives provided to foreign investors, FDI inflows

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57 Collier Aul et al 'Managing Resource Revenues in Developing Economies' Palgrave Macmillan Journals IMF Staff Papers, Vol. 57, No. 1 (2010).

58 Ibid.

59 http://www.ku.ac.ke/schools/economics/images/stories/docs/Journalarticles2017/DeterminantsofForeignDirectInvestmentinKenya.pdf

into Kenya have been erratic.[60] Although Kenya has since made great strides in increasing FDI inflow, Manyanza's argument is relevant to this study concerning issues and challenges facing FDI in the natural resource sectors in Kenya.

Adam Smith in his book *Wealth of Nations* asserts that a good tax system must meet four major criteria. They are proportionate to incomes or abilities to pay; certain rather than arbitrary; payable at times and in ways convenient to the taxpayers and cheap to administer and collect.[61] Kitenga avers that to create a system of taxation, a nation must make choices regarding the distribution of the tax burden – who will pay taxes and how much he will pay- and how the taxes so collected will be spent.[62] He argues that in countries where the public does not have a significant amount of influence over the system of taxation, as is the case with most developing economies, that system reflects the wishes of those in power.

Paul Mitchell[63] argues that when considering whether to invest, companies consider among other things the tax regime of a given country. In a sector like mining that is more complex and highly sensitive for stakeholders, the issue of taxation is one that should be weighed and considered carefully since tax systems play an important role in influencing the relative attractiveness of a country for investors. One way of attracting investors into the country especially in the mining sector is by putting in place tax incentives. Kenya offers various types of tax incentives in the

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60 ibid

61 Smith, A *Wealth of Nations*, edited by C. J. Bullock. Vol. X. The Harvard Classics. New York: P.F. Collier & Son, 1909–14; Bartleby.com, 2001. www.bartleby.com/10/.

62 Kitenga G, *Introduction to Tax Law* (Nairobi, Kenya Law Africa Publishing (K) Ltd 2010), p.2.

63 Mitchell P, 'Taxation and Investment Issues in Mining' [2009] Advancing the EITI in the Mining Sector: A Consultation with Stakeholders, Extractive Industries Transparency Initiative, Oslo 27, pp. 27-31.

Income Tax Act.[64] Tax incentives are mainly offered to encourage some favoured economic activities and to compete favourably with other countries offering the same.[65]

On one hand, the objective of the government for the minerals sector is to obtain an appropriate share of income and to foster development. On the other hand, companies want an adequate return on investment.[66] According to a survey conducted in 2010[67], Africa as a whole does not seem to be making much progress in creating a more attractive mining investment environment. The survey, which is an annual survey of metal mining and exploration companies, assessed how mineral endowments and public policy factors such as taxation and regulation affect exploration investment. Some of the African countries ranking highly in the survey include Botswana, Ghana, and Tanzania in the top ten.

One issue that may be plaguing the sector and in turn affecting FDI is corruption. The World Bank Guidelines recommend that each State should respond appropriately for the prevention and control of corrupt business practices and the promotion of accountability and transparency in its dealings with foreign investors, and cooperate with other States in developing international procedures and mechanisms to ensure the same. Kenya has stepped up its efforts in the war against corruption, notable among them being the strengthening of institutions such as the Ethics and Anti-Corruption Commission, the Directorate of Criminal Investigations, and the Directorate of Public Prosecutions.

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64 ibid 8

65 Alegana H., '*The Effect of Tax Incentives on Economic Growth in Kenya*' (Masters of Science in Finance, University Of Nairobi November, 2014).

66 ibid 11.

67 Claude Harding, 'Annual Rankings: Africa's Best, and Worst, Countries for Mining' (*How We Made It In Africa*, 4 March 2011) <https://www.howwemadeitinafrica.com/annual-rankings-africas-best-countries-for-mining/8263/> accessed 26 July 2017.

1.11. Research Methodology

This study relies solely on secondary data. The researcher also had an opportunity to visit the mining operations of Base Titanium in Msambweni, Kwale.

1.11.1. Data Collection

The study shall use the desk study method to collect the relevant data. The desk study will focus on the following: information on the mining sector as well as the state of the regulatory framework in natural resources. In addition, data collection shall also focus on possible solutions towards an effective and efficient legal and institutional framework for the extractives industry to encourage foreign direct investments.

Desk study will focus on secondary sources: scholarly materials (books and journals), print, audio, and audio–visual reports, working papers, theses, and internet sources on the regulatory framework of FDI in natural resources management in Kenya. Further, various public findings shall be examined. Government generated information on policies, laws, and institutions from the Ministries of Energy, Mining and Petroleum, Foreign Affairs and International Trade will also be useful for analytical purposes; so will information generated by various think tanks and international organizations.

1.11.2. Data Analysis: Reliability and Validity of Data

To ensure the reliability of the data collected, the researcher shall personally gather the data from secondary sources and in doing so constantly remain aware of possible biases. About data validity, the researcher shall crosscheck the data gathered.

This research shall primarily rely on qualitative research methodology. The methodology is appropriate because the variables used are not substantively amenable to quantitative

methodologies. Variables such as institutional quality, legal and policy analysis, opinions, attitudes, abilities, beliefs, and knowledge of different individuals are best captured from the subjective perspective of the population of study in their various dimensions, both verbally and non-verbally.

The qualitatively gathered data will be sorted under different categories that the researcher shall develop after the data collection phase.

1.12. Limitation of the Study

One major limitation is that there is scanty information available on the subject. Another limitation is that there are few or no government records on the extractives sector in Kenya. This will be mitigated by obtaining first-hand information from primary sources where necessary. Lastly, the subject of natural resources is wide and it may not be possible to look into all kinds of natural resources such as rivers and forests. This study will thus focus primarily on the mining sector.

1.13. Chapter Breakdown

This study will comprise four chapters. **Chapter One** will set the agenda of the study. It will introduce the topic of study and set forth the background to the study, statement of the problem, justification of the study, objectives of the study, research questions, research hypothesis, theoretical framework, research methodology, literature review, limitations of the study. It will lay down the road map on how the research study will be conducted.

Chapter Two will provide critical analysis of the legal framework governing foreign direct investment in mining in Kenya. It will set forth and review the statute law as well as case law relevant to the study.

Chapter Three will discuss the institutional framework governing foreign direct investment in mining in Kenya.

Chapter Four will sum up the discussions in the preceding chapters by concluding the research questions and as such provide a comprehensive conclusion of the study, the recommendations and reform measures necessary to establish Kenya as a hub for efficient exploitation of natural resources in Kenya.

Chapter Two

The Legal Framework Regulating Foreign Direct Investments in Natural Resources in Kenya

2.1 Introduction

This chapter reviews the established legal framework on FDI in natural resources in Kenya. The legal framework is contained in several legislations which include the Mining Act, National Land Commission Act, Nairobi Centre for International Arbitration, Foreign Investments Protection Act, Companies Act, Investment Promotion Act, Income Tax Act, Natural Resources (Classes of Transaction Subject to Ratification) Act, Land Act, Land Registration Act, Land Use and Physical Planning Act, Foreign Judgments(Reciprocal Enforcement) Act, Petroleum(Exploration and Production) Act, Public-Private Partnerships Act, Bribery Act, Industrial Property Act, Investment Disputes Convention Act and the Treaty Establishing the East African Community Act, just to mention a few. Whereas all these laws influence FDI in natural resources in Kenya, the study only provides a critical analysis of the key statutes relating to the scope of the study.

This chapter is arranged into four areas of discussion namely: acquisition of mining rights by foreign entities, protection of foreign investments, dispute resolution, and lastly environmental protection and social equity. The four areas of discussion are further sub-divided into several sub-thematic areas.

2.2 Acquisition of Mining Rights by Foreign Investors

2.2.1 Incorporation and Ownership of a Limited Company

The Companies' Act was enacted in 2015 to facilitate commerce, industry, and other socio-economic activities by enabling one or more natural persons to incorporate as entities with perpetual succession, with or without limited liability, and to provide for the regulation of those entities in the public interest, and in particular in the interests of their members and creditors.[68]

The Act simplifies the registration of corporate entities and creates an environment sound for foreign direct investments. Sections 974 and 975 make provision for foreign companies including registration and operation of a business in Kenya. The Act provides several types of companies that can be registered including the conversion of those companies.

Under the old Act[69], a company would be incorporated with a high value of authorized shares; with shares, being issued from time to time out of the company's authorized share capital according to the company's requirements, the authorized share capital was subject to stamp duty.

Part 14 of the new Act abolishes the concept of authorized share capital, meaning that new companies are required to have issued shares that are fully paid up. Shares issued at incorporation are exempt from stamp duty, but future issues are subject to stamp duty. While this amendment is consistent with that in Mauritius and Rwanda and reflects contemporary practice, because the majority of existing companies have authorized shares on which they have already paid stamp duty, they will be in a situation where they are required to issue all the authorized shares under their articles and possibly pay stamp duty twice. There is a need to be a policy 'grandfathering' authorized share capital already in existence exempting companies in such a

[68] Companies Act, 2015, Section 2.
[69] Companies Act, 1948 Chapter 486 of the Laws of Kenya.

situation from stamp duty and allowing them to issue shares up to their authorized limit, after which point they would be required to comply with the new Act's provisions on issued share capital.

Section 324(2) requires Kenyan companies to issue capital in Kenya Shillings only. Under the previous Act, there was no currency restriction, and companies incorporated with dollar-denominated share capital. There have been practical challenges with converting the share capital from USD (or other currency) to Kenya Shillings because, in the event of deflation of the shilling, such a conversion could be construed as a reduction of capital which would increase the relevant company's transaction costs by requiring them to comply with the procedurally detailed and potentially time-consuming steps for reducing its capital. This restriction on issuing share capital other than in Kenya Shillings is not in line with the progressive spirit of the new Act and should be amended.

Section 244 of the new Act proposes that companies with a paid-up share capital of less than in Kenya Shillings 5 million are not required to have a company secretary. This change was made to make it easier to do business in Kenya without incurring administrative costs. Because the Act imposes significant reporting requirements, mandatory time frames, and penalties for non-compliance on all sorts of companies, regardless of paid-up capital thresholds, in practice companies may inevitably require a company secretary's services to manage the financial and legal risks of non-compliance.

Under Section 947, the new Act requires registration of companies 'carrying out business' in Kenya. 'Carrying on business' is a significantly wider scope than 'establishing a place of business' as prescribed under section 366(1) of the old Act, and appears to create a situation where all manner of business activity (exporting goods, marketing, etc.) would impose an

obligation on foreign companies to register a branch in Kenya. This is onerous and references to 'establishing a place of business' as was the case in the old Act, seems practical. Further, the new Act prescribes automatic registration of foreign companies carrying on business in Kenya if the Registrar does not issue a certificate of compliance within a prescribed period. This creates preferential treatment for foreign companies over Kenyan ones (which cannot automatically assume that they have been established unless a certificate of incorporation is issued). Operationally, the Registry can create a fast track procedure permitting registration of foreign branches within a shorter time frame thereby achieving increased ease of doing business.

Amid intense pressure from the investor community, the Finance Act, 2015 repealed section 975 (2) (b)[70] of the Companies' Act that provided that in applying for registration with the Registrar of Companies, foreign companies were required to demonstrate that at least thirty percent of the company's shareholding was held by Kenyan citizens by birth. The effect of this provision was that every foreign company that would have wished to operate in Kenya would have been required to effect a share transfer or share allotment of at least thirty percent (30%) of its shares to a Kenyan individual in its jurisdiction. This would have had the adverse impact of cost implications of having 30% Kenyan shareholders at the parent level when it has many other branches all over the world; the difficulty for Kenyan individuals to purchase or invest at least thirty percent (30%) in a foreign company that may wish to conduct business in Kenya; and the time-consuming and costly process of carrying out due diligence in a company in another jurisdiction to effect the share sale or allotment.

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[70] 'Finance Act - Kareimwenda@gmail.Com - Gmail' <https://mail.google.com/mail/u/0/?tab=wm#search/in%3Asent+finance+/FMfcgxmRSGvMqFzhWDgLGHdzvXqQQnnK?projector=1&messagePartId=0.1> accessed 26 November 2018.

The overall effect of this provision is that it would have significantly reduced capital inflow into the country and hindered Kenya's economic growth as foreign companies and especially existing companies were unwilling to meet these onerous shareholding requirements.

2.2.2 Ratification by Parliament

The agreements relating to natural resources are provided for under Article 71 of the Constitution that provides that a transaction be subject to ratification by Parliament if it involves the grant of a right or concession by or on behalf of any person, including the national government, to another person for the exploitation of any natural resource of Kenya.

Section 120 of the Mining Act sets out the conditions to be fulfilled for the execution of mineral agreements. It provides that the Cabinet Secretary shall have regard to provisions of Article 71 of the Constitution before executing any mineral agreements, or other agreement relating to the exploitation of any natural resources and that any agreement relating to large scale mining operations on terrestrial and marine areas shall be submitted to the National Assembly and the Senate for ratification before execution by the Cabinet Secretary.[71]

2.2.3 Licensing of Mining Operations

The Mining Act, No. 12 of 2016 gives effect to Articles 60, 62 (1)(f), 66 (2), 69 and 71 of the Constitution in so far as they apply to minerals; provide for prospecting, mining, processing, refining, treatment, transport and any dealings in minerals.[72]

The Act provides for licensing, the legal and institutional framework for mineral exploitation in Kenya. The Act provides the procedure for the grant, renewal, transfer, assignment, or surrender

[71] Mining Act, s. 120.
[72] Mining Act, long title.

of a mineral right as well as for an application for the grant or renewal of a mineral dealer's licence or a diamond dealer's licence.

The Act further defines a mineral right to include a prospecting licence; retention licence; mining licence; prospecting permit; mining permit; or an artisanal permit[73]. The same section clarifies that a mining permit authorizes the holder to carry out small scale mining operations whereas a mining licence means a licence relating to large scale operations. Section 10 states that a person shall not search for, prospect, or mine any mineral, mineral deposit, or tailings in Kenya unless that person has been granted a permit or licence.

The Mineral Rights Board established by the Act advises the Cabinet Secretary in charge of mining, on the grant, rejection, retention, renewal, suspension, revocation, variation, assignment, trading, tendering, or transfer of mineral rights agreements. It is noteworthy that several mineral rights agreements were entered into under the previous Mining Act of 1940. To address this, the Mining Act of 2016 in the repeal, savings, and transitional clauses expressly provides that any right contained in a lease, prospecting right, exclusive prospecting licence, special licence, and location granted under the repealed law shall continue in force until expiration by the passage of time.

2.2.4 Protection of Foreign Investments

The Foreign Investments Protection Act gives protection to certain approved foreign investments and deals with other matters related to the approved foreign investments.[74] It provides under

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[73] Section 4, *ibid*.
[74] Foreign Investments Protection Act, long title.

section 3 for the procedure required in an application for grant of certificates by foreign investors of approved foreign investments.[75]

Section 8 of the Act prohibits compulsory acquisition of approved foreign investments and states that: "*No approved enterprise or any property belonging thereto shall be compulsorily taken possession of, and no interest in or right over such enterprise or property shall be compulsorily acquired, except in accordance with the provisions concerning the compulsory taking of possession and acquisition and the payment of full and prompt payment of compensation contained in section 75 of the Constitution and reproduced in the Schedule to this Act.*"

This law was last amended in 2009 before the promulgation of CoK, and it still refers to section 75 of the old Constitution. This minor oversight may not be fatal but it is certainly not good for investor confidence and there is, therefore, a need to harmonize this legislation with the Constitution. Nevertheless, section 75 of the Act which protects approved foreign investments from deprivation unless where conditions set out thereof are fulfilled, is almost word for word as Article 40 (3) of CoK.[76] The latter also guarantees private property rights from state interference unless for a public purpose or interest and subject to prompt and just payment in full. This confirms the government's commitment to the protection and promotion of foreign direct investments in natural resources.

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75 *Ibid* at s. 3.

76 Ibid s. 75. The Act under section 75 provides that: No property of any description shall be compulsorily taken possession of, and no interest in or right over property of any description shall be compulsorily acquired, except where the following conditions are satisfied, that is to say—

(a) the taking of possession or acquisition is necessary in the interests of defence, public safety, public order, public morality, public health, town and country planning or the development or utilization of any property in such manner as to promote the public benefit; and

(b) the necessity therefore is such as to afford reasonable justification for the causing of any hardship that may result to any person having an interest in or right over the property; and

(c) provision is made by a law applicable to that taking of possession or acquisition for the prompt payment of full compensation.

2.3 Benefit Sharing under FDI

The Constitution classifies land as public, community, or private land.[77] It defines public, community, and private land[78] and considers minerals, mineral oils as defined by law as well as exclusive economic zones as public land.[79] It further provides that public land shall vest in and be held by a county government in trust for the people resident in the county, and shall be administered on their behalf by the National Land Commission.

Article 69 provides that: It is the duty of the state to ensure sustainable exploitation, utilization, management and conservation of the environment and natural resources and ensure the equitable sharing of the accruing benefits; protect and enhance the intellectual property in, and indigenous knowledge of biodiversity and genetic resources of the communities; encourage public participation in the management, protection, and conservation of the environment; and establish systems of environmental impact assessment, environmental audit and monitoring of the environment.

The Natural Resources (Benefit Sharing) Bill is yet to be passed into law. The Bill in its long title declares its intention to establish a system of benefit sharing in resource exploitation between resource exploiters, the national government, county governments, and local communities; and for connected purposes. The Bill proposes a revenue sharing ratio where 20% is put into a sovereign wealth fund, with the remaining 80% split between the national and county governments in the ratio of 60% and 40% respectively. Further, at least forty percent of the revenue assigned to county governments is proposed to be utilized to implement local community projects, and 60% utilized for the benefit of the entire county. The Bill also contains

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[77] CoK, Article 61.
[78] Article 62,63 and 64.
[79] Article 62.

a proposal for the establishment of County Benefit Sharing Committees comprising of community members. This legislation ought to be expedited to ensure that host communities benefit from the exploitation of natural resources in their areas.

2.3.1 Local Content

The Constitution of Kenya, 2010 under Article 66(2), states that Parliament shall enact legislation ensuring that property investments benefit local communities and their economies.

The Mining Act under section 47 provides that the holder of a mineral right shall give preference in employment to members of the community and citizens of Kenya. It further provides that in the case of a large scale operation, the holder of a mineral right shall: conduct training programmes for the benefit of employees; undertake capacity building for the employees; only engage non-citizen technical experts following such local standards for registration as may be prescribed in the relevant law; work towards replacing technical non-citizen employees with Kenyans, within such reasonable period as may be prescribed by the Cabinet Secretary responsible for mining; provide a linkage with the universities for purposes of research and environmental management; where applicable and necessary, facilitate and carry out socially responsible investment for the local communities; and implement a community development agreement.[80] Section 50 of the same Act provides that the holder of a mineral right shall, in the conduct of prospecting, mining, processing, refining and treatment operations, transport or any other dealings in minerals give preference to the maximum extent possible: to materials and products made in Kenya; to services offered by members of the community and Kenyan citizens;

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[80] Mining Act, No. 12 of 2016.

and to companies or businesses owned by Kenyan citizens. This is the same spirit embodied in sections 61,68,72,86,103 and 106 of the Mining Act.[81]

Regulation 3 of the Mining (Local Equity Participation) Regulations, 2012[82] prescribe a condition of every mining licence that the mineral right in respect of which the licence is issued shall have a component of local equity participation amounting to at least thirty-five percent (35%) of the mineral right. Section 48 of the Act, on the other hand, requires government participation in mining licences by providing that where a mineral right is for a large scale mining operation, the State shall acquire ten percent free carried interest in the share capital of the right in respect of which financial contribution shall not be paid by the State. This applies to large scale mining operations and mining operations relating to strategic minerals. Despite this requirement in law, there is no record of the State holding any interest in any of the mining or oil companies currently operating in Kenya.

The Local Content Bill 2018, which is still pending before Senate, is intended to address issues to do with local content. The Bill, according to its long title, is intended to provide for a framework to facilitate the local ownership, control, and financing of activities connected with the exploitation of gas, oil, and other petroleum resources; to provide a framework to increase the local value capture along the value chain in the exploration of gas, oil, and other petroleum resources; and for connected purposes. If the Bill is enacted into law it will provide among others that a person shall, before applying for, or bidding for a licence, permit or interest and before

[81] The Act, among other requirements, requires that before granting reconnaissance, prospecting, retention or mining licences, a plan outlining the proposals for procurement of local goods and services by the applicant should be submitted to the Cabinet Secretary.

[82] Legal Notice Number 118 of 2012.

engaging in any extractive activity, prepare and submit a local content plan[83] concerning the extractive activity in the prescribed form. The Bill also proposes various financial incentives for investors such as tax incentives, non-distorting tariff measures, and tax deductions for certain categories of training expenditure, including research and development expenditure, where training is for the benefit of Kenyan nationals. It has been argued[84] that the above Bill will create legal and regulatory duplication and confusion with the Upstream Bill 2018 which is about to be signed into law.

The Ministry of Trade and Industrialization is in the process of coming up with the national local content policy to define the national aspirations and objectives underpinning local content. It should provide broad guidelines to permit uniformity and consistency across all sectors while aligning local content objectives to existing government policies and development plans[85]. To add weight to the above initiatives, President Kenyatta has in the past renewed calls for "*Buy Kenya Build Kenya*".[86]

2.3.2 Public-Private Partnerships

Public-Private Partnerships (PPP) structured projects are important to curbing the financing gap at the root of Africa's infrastructure deficit.[87] The Public-Private Partnership Act, No. 15 of 2013 aims to do just this, by providing for the participation of the private sector in the financing, construction, development, operation, or maintenance of infrastructure or development projects

[83] 'MPUTHIA: What Does Local Content Bill Hold for Mining' (*Business Daily*) <https://www.businessdailyafrica.com/lifestyle/society/What-does-local-content-bill-hold-for-mining-communities-/3405664-4346872-dveb95z/index.html>.

[84] 'WACHIRA: Proposed Local Content Law Will Create Regulatory' (*Business Daily*) <https://www.businessdailyafrica.com/analysis/ideas/local-content-law-will-only-create-regulatory-confusion/4259414-4656344-38pj58z/index.html>.

[85] ibid.

[86] 'President Renews Calls for Buy Kenya, Build Kenya' (*The Star, Kenya*) <https://www.the-star.co.ke/news/2017/12/14/president-renews-calls-for-buy-kenya-build-kenya_c1684444>.

of the Government through concession or other contractual arrangements; the establishment of the institutional framework to regulate, monitor and supervise the implementation of project agreements on infrastructure or development projects.[88]

Section 4 of the Act establishes the Public-Private Partnership Committee whose mandate is to ensure that each project agreement is consistent with the provisions of the Act; formulation of policy guidelines on Public-Private partnerships as well as review the legal, institutional, and regulatory framework of public-private partnerships in Kenya.[89]

2.3.3 Revenue Sharing

The Ninth Schedule of the Income Tax Act[90] provides for taxation of extractive industries. It is a product of the amendment to the Act by the Finance Act, 2014. The amendment introduces new royalty rates and seeks to provide a comprehensive taxation system of the mining and the extractives sector that previously was not well coordinated.[91] There are also in place, various regulations on royalties under the Mining Act. These include specific regulations on royalties on fluorspar, soda ash and diatomite as well as the Mining (Prescription of Royalties on Minerals) Regulations, 2013.[92]

If the extractives sector is to contribute to at least 10% of the country's GDP growth, then there is a need to take the issue of taxation and royalties in the extractives industry more seriously. As noted earlier, many mineral rights agreements were entered into many years before the enactment of the current mining law. Some of these agreements granted royalty rates as low as

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87 Deblina R, 'PPP Capacity-Building Course Launched for Nigerian Government Officials' (African Review) <http://www.africanreview.com/finance/economy/ppp-capacity-building-course-launched-for-nigerian-government-officials>.

88 Public Private Partnership Act, No. 15 of 2013, long title.

89 The functions of the Public Private Partnerships Committee are provided for under section 7 of the Public Private Partnerships Act, No. 15 of 2013.

90 Chapter 470 of the Laws of Kenya.

2.5% which is way lower than the current prescribed royalty rates. This presents an immediate challenge since the Mining Act provides that any agreements entered into before enactment of that law shall subsist until their lapse. This denies Kenya of the much-needed revenue from the exploitation of some of these minerals, which have high value in the international markets.

Furthermore, under the same agreements, these companies also enjoy various tax holidays and incentives: such as waiver on withholding tax, 50% corporation income tax as well as waivers on import and excise duties. This arrangement, which admittedly favours foreign direct investment, is highly skewed in favour of the mining companies but with a corresponding heavy price to pay on the Kenyan Government that could use this foregone revenue for development purposes.

2.4 Dispute Resolution and Enforcement of Judgements and Awards

2.4.1 Dispute Resolution

Article 162 (2) (b) of the Constitution obligates parliament to establish courts with the status of the High Court to hear and determine disputes relating to the environment and use and occupation of title to land. The Environment and Land Court established under the Environment and Land Court Act derives its mandate from this Article.

The Constitution at Article 70 gives Kenyans whose environmental rights are likely to be affected by any investment decision to apply to a court for redress. The applicant does not have to demonstrate that any person has incurred loss or suffered injury.[93] This also applies under Article 40 of CoK, which allows any person who has been deprived of a legitimate interest in land, to seek redress in a court of law.

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91 Income Tax Act, Ninth Schedule. See also the Finance Act 2014. See also chapter one above.
92 Legal Notice No. 187 of 2013.
93 CoK, Article 70 (2)(c).

Further, the Investment Disputes Convention Act is an Act of Parliament that gives legal sanction to the provisions of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention).[94] The Act as such provides a platform for the settlement of investor-state disputes arising out of transactions between parties who are signatories to the convention or nationals whose states are parties to the convention.

The Nairobi Centre for International Arbitration Act, 2013 provides for the establishment of a regional center for international commercial arbitration and the Arbitral Court and provides for mechanisms for alternative dispute resolution.[95] The centre is mandated to promote, facilitate and encourage the conduct of international commercial arbitration; administer domestic and international arbitrations as well as alternative dispute resolution techniques under its auspices; and coordinate and facilitate, in collaboration with other lead agencies and non-State actors, the formulation of national policies, laws, and plans of action on alternative dispute resolution and facilitate their implementation, enforcement, continuous review, monitoring, and evaluation. This is geared towards the strategic positioning of Kenya as a centre of excellence in the resolution of international investment disputes hence attracting foreign investors.[96]

This Act together with the Arbitration Act, 1995 and the Investment Disputes Convention Act provides the basis for the settlement of both domestic and international investment disputes through Arbitration engendering international best practices. These legislations incorporate the provisions of the ICSID Convention and the New York Convention on the enforcement of foreign arbitral awards and the UNCITRAL Model Law On International Trade Law.

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[94] Investment Disputes Convention Act, long title.
[95] Nairobi Centre for International Arbitration Act, long title.
[96] Ibid at s. 5.

Other laws such as the EMCA and the Physical and Land Use Planning Act, establish tribunals to hear on land and environment as provided by the respective statutes. For example, the National Physical and Land Use Planning Liaison Committee established under the Physical and Land Use Planning Act to hear appeals against decisions made by the national planning authority including decisions on the development of major infrastructure facilities; the reserving of public land for public projects; the implementation of national or inter-county physical and land use development plans; or the environmental impacts on ecologically sensitive areas by the implementation of strategic projects.

2.4.2 Enforcement of Foreign Awards

The Act, on recognition and enforcement of Foreign Arbitral Awards, provides under section 4 that an award rendered under the Convention, and not stayed according to the relative provisions of the Convention, shall be binding in Kenya, and the pecuniary obligations imposed by the award may be enforced in Kenya as if it were a final decree of the High Court.[97]

The Foreign Judgments (Reciprocal Enforcement) Act, Cap. 43 makes a new provision in Kenya for the enforcement of judgments given in countries outside Kenya which accord reciprocal treatment to judgments given in Kenya.[98] Section 3 of the Act sets out the judgments to which the Act may apply and this includes: a judgment or order of a designated court in civil proceedings whereby a sum of money is made payable, including an order for the payment of a lump sum as financial provision for, or maintenance of, a spouse or a former or reputed spouse or a child or other person who is or was a dependant of another; a judgment or order of a designated court in civil proceedings under which movable property is ordered to be delivered to any person, including an order for the delivery of movable property as part of a scheme for the provision for,

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[97] Ibid at section 4.

or maintenance of, a spouse or a former or reputed spouse or a child or other person who is or was a dependant of another; judgment or order of a designated court in criminal proceedings for the payment of a sum of money in respect of compensation or damage to an injured person or for the delivery of movable property by way of restitution to an injured person; an award in arbitration proceedings, if the award has, under the laws in force in the country where it was made, become enforceable in the same manner as a judgment given by a designated court in that country.[99]

This Act provides an opportunity to complement international commercial arbitration and makes Kenya a conducive environment for the resolution of international investment disputes.

2.5 Environmental and Social Obligations of Foreign Direct Investors

2.5.1 Environmental Protection

Article 42 provides that every person has the right to a clean and healthy environment, which includes the right to have the environment protected for the benefit of present and future generations through legislative and other measures, particularly those contemplated in Article 69 and to have obligations relating to the environment fulfilled under Article 70.[100]

The principles of land policy which include sustainable and productive management of land resources as well as sound conservation and protection of ecologically sensitive areas are set out in Article 60 (1) (c) and (e).

The National Environment Management Authority (NEMA), is established under the Environmental Management and Co-ordination Act No. 8 of 1999 (EMCA) as the principal

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[98] Foreign Judgments(Reciprocal Enforcements) Act, long title.
[99] Ibid at s. 3.
[100] Constitution of Kenya, 2010, Article 42.

instrument of Government for the implementation of all policies relating to the environment. EMCA 1999 was enacted against a backdrop of 78 sectoral laws dealing with various components of the environment, the deteriorating state of Kenya's environment, as well as increasing social and economic inequalities, the combined effect of which negatively affected the environment. The supreme objective underlying the enactment of EMCA 1999 was to bring harmony in the management of the country's environment.[101]

Section 9 of the Act sets out the mandate of the Authority which include:[102] co-ordination of the various environmental management activities being undertaken by the lead agencies and promote the integration of environmental considerations into development policies, plans, programmes and projects with a view to ensuring the proper management and rational utilization of environmental resources on a sustainable yield basis for the improvement of the quality of human life in Kenya; take stock of the natural resources in Kenya and their utilization and conservation; audit and determine the net worth or value of the natural resources in Kenya and their utilization and conservation; make recommendations to the relevant authorities with respect to land use planning; examine land use patterns to determine their impact on the quality and quantity of natural resources; advise the Government on legislative and other measures for the management of the environment or the implementation of relevant international conventions, treaties and agreements in the field of environment, as the case may be; advise the Government on regional and international environmental conventions, treaties and agreements to which Kenya should be a party and follow up the implementation of such agreements where Kenya is a party; undertake research, investigation and surveys in the field of environment and collect, collate and disseminate information about the findings of such research, investigation or survey;

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[101] https://www.nema.go.ke/index.php?option=com_content&view=article&id=1&Itemid=136
[102] Environmental Management and Coordination Act, 1999, s.9.

mobilize and monitor the use of financial and human resources for environmental management; identify projects and programmes or types of projects and programmes, plans and policies for which environmental audit or environmental monitoring must be conducted under this Act; initiate and evolve procedures and safeguards for the prevention of accidents which may cause environmental degradation and evolve remedial measures where accidents occur; monitor and assess activities, including activities being carried out by relevant lead agencies, in order to ensure that the environment is not degraded by such activities, environmental management objectives are adhered to and adequate early warning on impending environmental emergencies is given; undertake, in co-operation with relevant lead agencies, programmes intended to enhance environmental education, public awareness and public participation; develop, publish and disseminate manuals, codes or guidelines relating to environmental management and prevention or abatement of environmental degradation; render advice and technical support, where possible, to entities engaged in natural resources management and environmental protection; prepare and submit to the Cabinet Secretary every two years, and report on the state of the environment in Kenya and in this regard may direct any lead agency to prepare and submit to it a report on the state of the sector of the environment under the administration of that lead agency; encourage voluntary environmental conservation practices and natural resource conservancies, easements, leases, payments for ecosystem services and other such instruments and in this regard, develop guidelines; work with other lead agencies to issue guidelines and prescribe measures to achieve and maintain a tree cover of at least ten per cent of the land area of Kenya.

2.5.2 Social Equity

Social equity is yet to be achieved because the Benefits Sharing Bill is yet to see the light of day. There have been media reports on how various communities and their respective County Governments have been demanding their share of benefits from natural resources. Examples include Turkana County and Tullow as one example where there the first batch of oil was recently exported for sale. The second example is Kwale County against Base Titanium Limited that is involved in the exploration, production, and sale of mineral sands in Msambweni, Kwale County.

From the foregoing, it is discernible that there are laws in place that provide for environmental protection and social equity such as the EMCA. However, there is a gap in the implementation of the applicable laws, and implementing agencies ought to ensure that the law is enforced and offenders are brought to justice. For example, more ought to be done especially in terms of rehabilitation of land used for the exploitation of mineral resources. International environmental law principles such as Polluter Pays and Precautionary Principles are well anchored in EMCA. These ought to be employed to ensure the protection of biodiversity from degradation caused by mining operations.

2.6 Conclusion

The foregoing discussion demonstrates the fact there is in existence a sufficient legal framework to support foreign direct investment in natural resources in Kenya. The inefficiency in the implementation of the legal and institutional framework is the problem that affects FDI inflow in natural resources. The Constitution of Kenya, 2010, for instance, provides for parliament to enact legislation providing for natural resources benefit-sharing but no legislation has been enacted to provide a formula for benefit-sharing between the locals, the county government, and the

national government.[103] This has caused conflict between the locals and some foreign firms involved in the extractive industry. A case in point is the recent case in Northern Kenya where locals demanded their fair share in the proceeds of oil being produced by Tullow, a British entity. This led to a weeklong standoff that saw the blockage of trucks from transporting oil to the refinery in Mombasa until a cease-fire was called that ended the dispute.[104]

Kenya has one of the most developed power sectors in sub-Saharan Africa, having opened its market to Independent Power Producers (IPPs) in the mid-1990s. Kenya benefits from factors including an active private sector; Kenya Power's long track record as a creditworthy off-taker; and abundant renewable energy resources, especially geothermal, wind, and solar. Limited and aging transmission and distribution infrastructure, financing, opaque procurement processes, right of way disputes, and other challenges affect sector growth.[105]

Some of the biggest issues and bottlenecks affecting FDI in natural resources include land risks, right of way, and community engagement. There is thus a need for the Government of Kenya to facilitate community engagement. This will ensure mining companies work with communities to ensure full support for projects and avoid costly delays in project development while promoting responsible investment. The importance of community engagement is important and cannot be gainsaid. This was evidenced in the Kipeto[106] wind power project case, which stalled due to

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[103] See CoK, Article 66(2) and Chapter one above.

[104] 'Deal Reached on Turkana Oil Trucking' (*Daily Nation*) <https://www.nation.co.ke/counties/turkana/Deal-struck-Turkana-oil-trucking/1183330-4651800-10xnbs7z/index.html>.

[105] 'Power Africa in Kenya | Power Africa | U.S. Agency for International Development' <https://www.usaid.gov/powerafrica/kenya>.

[106] Kipeto Energy Limited Company (KEL) is a special purpose vehicle incorporated in Kenya for the development of the Kipeto Wind Power Project to generate 100MW of clean, renewable electrical energy. The project is set to be the second largest wind power project in Kenya.

disagreements with the community on resettlement of the locals in the Esilanke area, Kiserian Division, Kajiado County, South West of Nairobi.

Chapter Three

The Institutional Framework Governing Foreign Direct Investments in Natural Resources in Kenya

3.1 Introduction

This section reviews the established institutional framework on FDI in natural resources in Kenya. The institutions include the National Environmental Management Authority, National Land Commission, Nairobi Centre for International Arbitration, Registrar of Companies, Kenya Investment Authority, Kenya Revenue Authority, Public-Private Partnerships Committee, Ethics, and Anti-Corruption Commission, Director of Public Prosecution, Director of Criminal Investigations and the National Government through its various arms: the Judiciary, Executive and Legislature as well as through its various ministries such as the Ministry of Mining and Petroleum, Ministry of Energy and Ministry of Lands just to name a few.

3.2 Acquisition of Mining Rights by Foreign Investors

3.2.1 Incorporation and Ownership of a Limited Company

Registrar of Companies[107] is an office established under the Companies Act, 2015, an Act which is alive to the current business practices and realities and whose object is to facilitate commerce, industry, and other socio-economic activities by enabling one or more natural persons to incorporate as entities with perpetual succession, with or without limited liability, and to provide for the regulation of those entities in the public interest, and in particular in the interests of their members and creditors.[108] The Registrar of Companies is therefore responsible for keeping the

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[107] See the Companies Act, 2015 s. 831.
[108] https://www.standardmedia.co.ke/article/2000176942/what-new-companies-act-means-for-entrepreneurs

Register of Companies that comprises the information relating to companies that are contained in documents lodged or filed with, or delivered to, the Registrar under the Act or any other Act; certificates of incorporation issued by the Registrar; and certificates of registration of company security rights.

The Registrar also has to ensure that all records kept by the Registrar are in such form as will enable all the information contained in the records to be readily retrieved for inspection and copied and if the records are kept in electronic form, the Registrar shall ensure that they are capable of being reproduced in hard copy form. This office ensures the efficient registration of companies and thereby fosters an efficient system of formation and operation of companies and businesses in Kenya. Registrar of Companies also facilitates the enforcement and registration of business names and other legal frameworks supporting the establishment and doing of business in Kenya.[109]

3.2.2 Ratification by Parliament

The agreements relating to natural resources are provided for under Article 71 of the Constitution that provides that a transaction is subject to ratification by parliament if it involves the grant of a right or concession by or on behalf of any person, including the national government, to another person for the exploitation of any natural resource of Kenya.

Section 120 of the Mining Act sets out the conditions to be fulfilled for the execution of mineral agreements. It provides that the Cabinet Secretary shall have regard to provisions of Article 71 of the Constitution before executing any mineral agreements, or other agreement relating to the exploitation of any natural resources and that any agreement relating to large scale mining

[109] http://www.statelaw.go.ke/registrar-of-companies/

operations on terrestrial and marine areas shall be submitted to the National Assembly and the Senate for ratification before execution by the Cabinet Secretary.[110]

3.2.3 Licensing of Mining Operations

The Mining Act, No. 12 of 2016 gives effect to Articles 60, 62 (1)(f), 66 (2), 69 and 71 of the Constitution in so far as they apply to minerals; provide for prospecting, mining, processing, refining, treatment, transport and any dealings in minerals.[111]

3.2.3.1 Ministry of Mining and Petroleum

The Ministry of Mining and Petroleum is mandated under the Mining Act, 2016 to: undertake minerals exploration and mining policy and management, inventory and mapping of mineral resources, mining and minerals development, policies on the management of quarrying and mining of rocks and industrial minerals, management of health and safety in mines, policy around the extractive industry, resource surveys and remote sensing, as well as maintenance of geological data (research, collection, collation, analysis).

The Act gives the Cabinet Secretary the power to resolve certain disputes arising from the implementation of the law. It may be argued that this gives the Cabinet Secretary of mining too much leeway. However, in the administration of the Mining Act, the Cabinet Secretary is required to respect and uphold the principles and values enshrined in Article 201(c) and (d); and Article 69 (1) (a) and (h) of the Constitution.

The Cabinet Secretary has additional powers under the Act, such as making Regulations to prescribe the procedure for consideration of the applications made under the Act; and negotiation, grant, revocation, suspension, or renewal of mineral rights. The Cabinet Secretary

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110 Mining Act, s. 120.

also shall upon recommendation of the Mineral Rights Board designate any area of land to be an area small-scale reserved exclusively for small-scale mining operations. The Cabinet Secretary may designate an area to be an area reserved exclusively for small scale and artisanal mining operations if designating the area would not be incompatible with the continued enjoyment of an existing mineral right; or an authority, agency, the Cabinet Secretary, has given written consent or other person required to do so under the Act.

The Cabinet Secretary shall advise and seek the approval of the Cabinet to declare certain minerals or mineral deposits to be strategic minerals or strategic mineral deposits. The Cabinet Secretary may, with the advice of the Mineral Rights Board, prescribe the manner for dealing with the discovery, exploration, mining, processing, and export of strategic minerals and strategic mineral deposits.

3.2.3.2 Mineral Rights Board

The Mining Act provides for the licensing as well as the legal and institutional framework for mineral exploitation in Kenya. One of the bodies established by the Act is the Mineral Rights Board under Section 30.

The functions of the Mineral Rights Board include advising and giving recommendations, in writing, to the Cabinet Secretary on the grant, rejection, retention, renewal, suspension, revocation, variation, assignment, trading, tendering, or transfer of Mineral Rights Agreements; the areas suitable for small scale and artisanal mining; the areas where mining operations may be excluded and restricted; the declaration of certain minerals as strategic minerals; cessation, suspension, or curtailment of production in respect of mining licences; fees, charges and

[111] Mining Act, long title

royalties payable for a mineral right or mineral; and any matters which are required to be referred to the Mineral Rights Board.

3.2.4 Protection of Foreign Investments

3.2.4.1 Investment Promotion and Protection

Kenya Investment Authority[112] (KenInvest) is a statutory body established in 2004 through the Investment Promotion Act of 2004 with the main objective of promoting investments in Kenya. It is responsible for facilitating the implementation of new investment projects, providing aftercare services for existing investments, as well as organizing investment promotion activities both locally and internationally. The core functions of KenInvest are related to investment promotion; investment facilitation and investor tracking and include: issuance of Investment Certificate that facilitates the immediate start of a business, assistance in obtaining any necessary licenses and permits, assisting in obtaining incentives or exemptions under the Income Tax Act, the Customs and Excise Act, the Value Added Tax Act or other legislation, providing information to investors on the business climate, operating rules investment opportunities, sources of capital, liaison with other government agencies for the issuance of additional licenses and approvals not directly handled by the Authority, continuous provision of aftercare services, liaison with other stakeholders who interface with investors in their day-to-day operations with an ultimate aim of improving the investment environment and to make it easier to do business.

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112 The Authority replaced the Investment Promotion Centre then established under the repealed Investment Promotion Centre Act, Cap. 485. This is provided for under section 14 of the Investment Promotion Act, 2004.

3.3 Benefit Sharing under FDI

3.3.1 Local Participation in Shareholding

3.3.1.1 National Mining Corporation

Section 22 of the Mining Act establishes the National Mining Corporation, which shall be the investment arm of the national government in respect of minerals. The functions of the Corporation include: engaging in mineral prospecting and mining; investing on behalf of the national government; acquiring by agreement or hold interests in any undertaking, enterprise or project associated with the exploration, prospecting, and mining; acquiring shares or interest in any firm, company or other body of persons, whether corporate or unincorporated which is engaged in the mining, prospecting, refining, grading, producing, cutting, processing, buying, selling or marketing of minerals; and carry on its business, operations, and activities whether as a principal-agent, contractor or otherwise, and either alone or in conjunction with any other persons, firms or bodies corporate.

The National Mining Corporation is entitled to carry an interest of 10% for large-scale mining projects that exceed USD 500 million in value. However, this key institution is yet to be operationalized. This means that the State does not have an interest in any of the mining companies as required by law.

3.3.2 Local Content

The Ministry of Trade, Industry, and Co-operatives are in the process of coming up with the national local content policy to define the national aspirations and objectives underpinning local content. It should provide broad guidelines to permit uniformity and consistency across all

sectors while aligning local content objectives to existing government policies and development plans.[113]

3.3.3 Public-Private Partnerships Framework

The Public-Private Partnership Unit (PPPU) is established under Section 11 of the Public-Private Partnership (PPP) Act, 2013[114] as a Special Purpose Unit within the National Treasury of the Government of Kenya. The PPP Unit's focus is to serve as the secretariat and technical arm of the PPP Committee, which is mandated with assessing and approving PPP projects in the country. The PPP Unit, as the resource centre for best practice and guardian of the integrity of the PPP process, plays a large role in identifying problems, making recommendations to the PPP Committee regarding potential solutions, and ensuring that projects meet such quality criteria as affordability, value for money, and appropriate transfer of risk.

Section 7 of the PPP Act sets out the functions of the Public-Private Partnerships Committee to include: ensuring that each project agreement is consistent with the provisions of the Act; formulation of policy guidelines on public-private partnerships; ensuring that all projects are consistent with the national priorities specified in the relevant policy on public-private partnerships; formulation or approval of standards, guidelines and procedures for awarding contracts and standardized bid documents; examination and approve the feasibility study conducted by a contracting authority under the Act; and review the legal, institutional and regulatory framework of public-private partnerships; oversee the monitoring and evaluation by contracting authorities, of a public-private partnership from the commencement to the post-completion stage; ensure approval of, and fiscal accountability in the management of, financial

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[113] ibid.

[114] Public Private Partnerships Act, 2013. See sections 7- 16. These sections establishes the legal framework governing PPPs by setting up the PPP Committee, Unit and the Nodes whose roles are as set out above.

and any other form of support granted by the Government in the implementation of projects under this Act; ensure the efficient implementation of any project agreement entered into by contracting authorities.

The Public-Private Partnerships Unit therefore supports the activities of the committee by conducting civic education to promote the awareness and understanding of the public-private partnerships process amongst stakeholders; providing capacity building to, and advising of contracting authorities or other parties involved in the planning, coordinating, undertaking or monitoring of projects under the Act; rate, compile and maintain an inventory of public-private partnership projects that are highly rated and which are likely to attract private sector investment; develop an open, transparent, efficient and equitable process for managing the identification, screening, prioritization, development, procurement, implementation and monitoring of projects, and ensure that the process is applied consistently to all projects; conduct research and gap analysis to ensure continuous performance improvement in the implementation of public-private partnerships; collate, analyze and disseminate information including data on the contingent liabilities of the Government in relation to a project; make recommendations on the approval or rejection of projects prior to submission to the Committee for approval. The Act also establishes the Node, whose role includes the identification, screening and prioritizing projects based on guidelines issued by the Committee and to prepare and appraise each project agreement to ensure its legal, regulatory, social, economic, and commercial viability among others.

3.3.4 Revenue Sharing

As noted in the preceding chapter, the law on revenue sharing is pending in Parliament. However, various institutions are already existing, that will be very instrumental once the law is enacted. These include the National Treasury and Planning as well as the Commission on

Revenue Allocation established under Article 215 of the Constitution. Some of the institutions proposed to be established under the Bill include the County Benefit Sharing Committee and Local Community Benefit Sharing Forum. The Bill also establishes a Natural Resources Royalties Fund to be managed by the Commission on Revenue Allocation.

3.3.5 Taxation

The Kenya Revenue Authority was established by the Kenya Revenue Authority Act, 1995 as the principal government revenue collection agency and accounts for over 95% of Government Ordinary Revenues.[115] The Authority administers the revenue aspects of 18 Acts of Parliament including the Income Tax Act, Valued Added Tax among others as well as collecting agency revenue for several government agencies.

The Authority in the performance of its functions assesses, collects, and accounts for all revenues under the relevant laws and advises the government on all matters relating to the administration of and the collection of revenue under the written laws or the specified provisions of the written laws. The Authority, therefore, provides a clear framework for tax remittance by corporations and individual persons.

The introduction of new tax laws specifically applicable to the mining companies as witnessed in 2014/2015 was meant to boost tax collected from the extractives sector in the country.[116] However, one of the challenges faced by the tax collector relates to transfer pricing. This refers to creative accounting where a firm sells its products to its parent or related company at lower than market prices, to drastically lower profits and consequently, lower the tax payable. In some cases, the transfer pricing may be in the form of a loan made between two related companies.

[115] Section 3 of the Kenya Revenue Authority Act, 1995.

This was the case in *Primarosa Flowers Limited v Commissioner of Income Tax*.[117] In this case, the Appellant, a limited liability company incorporated in Kenya and dealing mainly in floricultural products which it exports to Europe and Asia, was subjected to a tax audit by the Respondent, the Commissioner of Income Tax. The audit was for the period March to May 2011; and according to the Respondent, the Appellant was found liable to pay a sum of Kshs. 127,893,431/= in terms of withholding tax that it had not paid on interest payable to its holding company, Crest Overseas Holdings Limited, from which it had received loans in 2002 and 2010.

Article 210 of CoK forbids imposition, waiver, or variation of any tax or licencing fee except as provided by legislation. Thus, the High Court relying on that constitutional provision held that in the absence of an express provision of law, it was not open for the Respondent to require the payment of withholding tax under Section 35(1) of the Income Tax Act. This finding was based on the principle that the law cannot apply retrospectively, since the amendment was introduced by the Finance Act, 2011, to insert the words "and deemed interest" immediately after the word "interest".

In *R v Kenya Revenue Authority ex parte Jaffer Mujtab Mohamed*[118] the Court held that "...a taxing authority is not entitled to pluck a figure from the air and impose it upon a taxpayer...Such action would be arbitrary, capricious, and in bad faith."

3.3.6 Royalties

The Cabinet Minister in charge of mining is mandated to collect royalties as provided for in the Mining Act and its attendant regulations. The current challenge is that some of the mining

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116 Wanyagathi Maina A, 'The Kenyan Tax Regime for the Oil and Gas Sector: An International Tax Perspective to Policy and Practical Challenges' (Social Science Research Network 2019) SSRN Scholarly Paper ID 3385060 <https://papers.ssrn.com/abstract=3385060> accessed 9 November 2019.

117 [2017] eKLR

118 [2015] eKLR

operations began before the enactment of the Mining Act. The Act was passed in 2016 whereas the regulations introducing the new royalty rates were passed in 2013.

Before the new regime regulating mining, special mining leases were granted to the mining companies and royalty payable was negotiated between the Government of Kenya through the Minister in charge of mining and the mining company. Since the law does not apply retrospectively, there emerges a conflict between the royalty paid by the mining company and the royalty required by law. This is where alternative dispute resolution mechanisms come in handy to ensure that parties negotiate royalty rates upwards in a manner that is mutually beneficial to the people of Kenya and the mining company. For future mining operations, the applicable royalty rate ought to be that which is provided under the law.

3.4 Dispute Resolution and Enforcement of Judgements and Awards

3.4.1 Dispute Resolution

Under the provisions of Article 162 (2) (b) of the Constitution of Kenya, Parliament is required to set up courts that would have the same status with the status of the High Court and with the mandate to hear and determine disputes relating to the environment and use and occupation of title to land, a requirement that has since been met by the establishment of the Environment and Land Court, under the Environment and Land Court Act 2011.

The Constitution at Article 70 gives Kenyans whose environmental rights are likely to be affected by any investment decision to apply to a court for redress. The Constitution does away with any need for the applicant to demonstrate any person loss or injury.[119]

[119] CoK, Article 70 (2)(c); '70. Enforcement of Environmental Rights - Kenya Law Reform Commission (KLRC)' <https://www.klrc.go.ke/index.php/constitution-of-kenya/118-chapter-five-land-and-environment/part-2-environment-and-natural-resources/237-70-enforcement-of-environmental-rights> accessed 13 November 2020.

The Nairobi Centre for International Arbitration(NCIA) was established under the Nairobi Centre for International Arbitration Act[120] as a State Corporation, primarily mandated to promote the practice of international commercial arbitration in Kenya and other forms of alternative dispute resolution in the domestic arena.[121] The Centre offers dispute administration services and facilities for the conduct of arbitration, mediation and other alternative dispute resolution mechanism.[122]

The Centre has commenced the process of coordinating with other lead agencies on the formulation of a national policy on Alternative Dispute Resolution that has now been submitted for public participation.

NCIA is charged with, *inter alia*, promoting, facilitating, and encouraging international commercial arbitration in the country; administering domestic and international arbitrations and other alternative dispute resolution techniques; ensuring that arbitration becomes the choice dispute resolution process in businesses; and developing rules for the conciliation and mediation processes.[123] It should be noted, however, that the Arbitral Court established under the Nairobi Centre for International Arbitration Act has not yet been operationalized to reinforce Kenya's international commercial arbitration framework.

Other institutions include the Chartered Institute of Arbitrators and the court-annexed mediation and arbitration frameworks provided under the Civil Procedure Act and the Arbitration Act, 1995.

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[120] Act No. 26 of 2013, Laws of Kenya.

[121] Nairobi Centre for International Arbitration Act, 2013, s. 4; See also DK Muigua, 'Making East Africa a Hub for International Commercial Arbitration: A Critical Examination of the State of the Legal and Institutional Framework Governing Arbitration in Kenya'.

[122] 'Training & Accreditation' (*Nairobi Centre for International Arbitration*) <https://www.ncia.or.ke/training-accreditation/> accessed 13 November 2020.

[123] Nairobi Centre for International Arbitration Act, 2013, s. 5.

One of the recurring criticisms of the NCIA is that it is untested. This argument is premature since the Centre will remain untested if investors continue to be unwilling to test it. This will place the Centre in a position to compete with other world-renowned institutions such as the London Centre for International Arbitration (LCIA) and the International Chamber of Commerce (ICC).

3.4.2 Enforcement of Foreign Awards

The courts are instrumental institutions in enforcing foreign awards. Kenya is a signatory to the New York Convention on recognition and enforcement of arbitral awards. Besides, the Arbitration Act, 1995 also provides for such recognition and enforcement. This guarantees investors that any award issued in a signatory state will be enforced and recognized by the Kenyan courts.

3.5 Environmental and Social Obligations of Foreign Direct Investors

3.5.1 Environmental Protection

Article 42 provides that every person has the right to a clean and healthy environment, which includes the right to have the environment protected for the benefit of present and future generations through legislative and other measures, particularly those contemplated in Article 69 and to have obligations relating to the environment fulfilled under Article 70.[124]

The principles of land policy which include sustainable and productive management of land resources as well as sound conservation and protection of ecologically sensitive areas are set out in Article 60 (1) (c) and (e).

[124] Constitution of Kenya, 2010, Article 42.

The National Environment Management Authority (NEMA), is established under the Environmental Management and Co-ordination Act No. 8 of 1999 (EMCA) as the principal instrument of Government for the implementation of all policies relating to the environment.

Further, the Mining Act refers to several environmental protection measures such as rehabilitation of mining sites as well as recognizing the need for environmental impact assessments. For example section 72 requires the applicant to furnish the Ministry with copies of an environmental rehabilitation and restoration plan and an environmental impact assessment report before the issuance of a prospecting licence. The procedure of applying for an Environmental Impact Assessment Licence is provided under section 58 of EMCA. In addition, an application for renewal of a prospecting licence ought to be accompanied with proof of submission and approval of environmental audit reports to the National Environmental Management Authority. Similar obligations are required for retention and mining licences.

From these provisions, the Mining Act requires the co-operation between state agencies to ensure the protection of biodiversity. The respective ministries in charge of Environment and Mining ought to work together to ensure environmental obligations are adhered to in accordance with both national laws and international instruments.

3.5.2 Social Equity

The Mining Regulations that insist on the use of local goods and services, as well as employment and training of locals, are very important. Further, section 47 of the Mining Act requires the holder of a mineral right to facilitate and carry out socially responsible investment for the local communities; and implement a community development agreement per the Regulations.

The institution under the law to ensure implementation of these requirements is the Ministry in charge of Mining. The Director of Mines is appointed under section 18 of the Mining Act to

among other things, ensure compliance with the requirements of the Act. This includes the powers of the Director of Mines or a duly authorized officer to issue directions in writing concerning the health and safety of persons employed by a holder of a mineral right and impose restrictions, including temporarily suspending any prospecting or mining operation on the holder or any person so employed.

In conclusion, it is worth noting that aside from economic concerns, there are social, health, and environmental concerns that come into play when dealing with extractives. Institutions should apply relevant laws to ensure all these concerns are balanced to ensure sustainable development.

3.6 Conclusion

From this chapter, we have seen that some key institutions are yet to be operationalized. Besides, there is a clear ineffectiveness in existing institutions to not only support foreign direct investment in mining in Kenya but also uphold environmental protection and social equity. This problem may be further aggravated by a failure by existing institutions to act in concert with other institutions as well as a lack of technical capacity in these institutions.

Concerning co-operation between institutions, the disharmony in the legal framework governing corruption has led to poor coordination among agencies responsible for fighting corruption. The Ethics and Anti-corruption commission lacks prosecutorial powers and therefore carries out investigations and hands over the files to the Director of Public Prosecution. This has led to poor prosecution of cases leading to the release by courts of many corrupt suspects. There is thus a need to harmonize inter-agency coordination to effectively fight corruption, promote FDI and protect and conserve the environment hence attracting the much-needed FDI in natural resources in Kenya.

CHAPTER FOUR

CONCLUSIONS AND RECOMMENDATIONS

4.1 Introduction

This Chapter is inherently linked to the fourth research objective, which was to propose the necessary reform measures required to boost the sustainable exploitation of natural resources in Kenya. The hypothesis that despite the existence of a legal framework for foreign direct investment in mining in Kenya, nevertheless, the prevailing environment is not conducive to encourage FDI because of poor implementation of the existing laws by the institutions created under them, is also revisited to see whether it has been proven true or false.

4.2 Conclusions

Chapter 1 had set out to detail the statement of the problem and justification of research into the legal framework of FDI in mining in Kenya. The chapter also demonstrated that there is a theoretical framework that supports foreign direct investment in natural resources in Kenya.

Chapter 2 had set out to investigate the legal framework governing foreign direct investment in mining in Kenya. As the dissertation above shows, the Constitution in Chapter 5 has guaranteed the protection of natural resources. This has created the necessary environment for the enactment, implementation, and enforcement of various laws that provide for the protection of natural resources including those being exploited by foreign investors.

The regulatory framework to promote FDI in mining exists in Kenya. However, there are some laws whose failure to enact are diminishing the constitutional requirements. These include the Bills on benefits sharing, local content, and sovereign wealth fund as well as on public

participation. Other challenges may hinder FDI such as lack of community involvement which in turn leads to conflict with investors and subsequent delay in mining operations as was the case in Turkana Wind Power and Kipeto Wind Power Projects.

In the Niger Delta, the Ogoni people have long been agitating against the pollution caused by Shell Oil in their oil-rich mangrove ecosystem. This underscores the importance of sustainable development that encompasses economic prosperity and protection of the environment and biodiversity. Kenya has vast deposits of mineral resources, which if well managed will avert the resource curse that has plagued other African countries such as Angola, Equatorial Guinea, Congo-Brazzaville, and the Democratic Republic of Congo.

There is therefore a need for a holistic implementation of the legal regime and institutional framework to ensure that foreign investments enhance social equity and environmental protection in the exploitation of natural resources. As witnessed in countries like Botswana, African governments can collaborate with foreign actors without auctioning their wealth.

4.3 Recommendations

SDG 16 is about peace, justice, and strong institutions. Indeed Article 10 of CoK provides the national values and principles of governance, some of which include sustainable development, good governance, social justice, and transparency. GoK ought to have in place effective state institutions that will act following their respective constitutional and statutory mandates.

Parliament has a critical role to play in passing the requisite laws required to implement the Constitution. This will have the effect of boosting investor confidence and ensuring Kenya's place as the mining destination of choice for foreign investors. The Sovereign Wealth Fund Bill, the Natural Resources (Benefit Sharing) Bill, 2018, the Local Content Bill and the Public Participation Bill are some of the Bills that ought to be fast-tracked by Parliament.

The Constitution[125] encourages alternative dispute resolution mechanisms. To this end, the Judiciary has a role to play in not only issuing judgments that enhance investor confidence and sustainable exploitation of resources but also by promoting Kenya's Nairobi Center for International Arbitration as an arbitration center of choice.

The National Land Commission should ensure speedy and timely compensation of communities affected by the mining and other natural resource exploitation activities. This will ensure that there are no delays to investors in commencing operations while leaving communities reasonably and adequately compensated.

Public Participation is critical for the success of any mining project. The Ministry of Mining, therefore, has a role to play in ensuring communities have free, prior, informed consent before the commencement of mining projects. Even though the Public Participation is yet to become law, the courts have pronounced themselves on the basic principles of public participation. In Constitutional Petition No. 305 of 2012, Mui Coal Basin Local Community & 15 others v Permanent Secretary Ministry of Energy & 17, a three-judge bench of the Kenya Constitutional Court set out the minimum basis for adequate public participation.[126]

Public Participation gives the investor confidence that there is buy-in from the community hence preventing any delays occasioned by the community, as was the case in the Kipeto Wind Power Project in Kajiado. This prompted the investor to invoke the Political Event Force Majeure clause. The matter was referred to arbitration and the arbitral tribunal found that the actions by the community did not constitute a political force majeure event under the Contract between the investor and GoK.

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125 Art. 159 (2) (c)

126 See also the case of : Save Lamu & 5 others v National Environmental Management Authority (NEMA) & another [2019] eKLR

The Government should insist on adequate training, capacity building, technology and skills transfer to resident Kenyans to ensure that the expertise from foreign investors remains long after the winding up of mining operations and exit of the mining company from Kenya. In particular, artisanal miners, who are recognized by the Mining Act, ought to be empowered to be able to effectively compete with international mining companies.

Another salient recommendation is the publication of mining rights instruments for transparency and accountability. Studies have shown that when governments are more transparent, corruption is a lot less likely.[127] Host agreements, product sharing agreements, special mining leases, and similar instruments conferring mining and other mineral exploitation interests to local and international firms should firstly be ratified by Parliament in accordance with Article 69 of the Constitution, and secondly, be availed to the public per Article 35 of the Constitution and the Access to Information Act. The "Publish What You Pay" (PWYP) and the Extractive Industries Transparency Initiative (EITI) campaigns champion disclosure of information on natural resource-related payments.

Also, addressing the rampant corruption in the country remains one of the key steps that will not only boost investors' confidence but will also help in nabbing those who may wish to exploit the vice to facilitate tax evasion hence promoting illicit financial flows out of the country. Sealing such loopholes is important because no matter how efficient the laws are if those who are charged with implementing them are corrupt, the country will continue losing income to illicit financial flows.

About environmental safeguards, these ought to be implemented as provided by law. Foreign investors ought to face the same standards imposed in their home countries. The Mining Act

under section 181 requires investors to provide a bond or some other form of financial security called an environmental protection bond sufficient to cover the costs associated with the implementation of the environmental and rehabilitation obligations. This is in line with the international environmental principle known as the "Polluter Pays".

Last but not least, as part of the above recommendations, GoK may consider re-negotiating the mining agreements entered into under the repealed Mining Act of 1940, to comply with the requirements under the current Act. This includes but is not limited to ensuring that the National Mining Corporation is fully operationalized and acquires the free 10% carried-interest in all mining companies as envisaged by the law.

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