Regulatory framework for mining in Kenya: between government's duty to protect foreign investments and its sovereign right to regulate

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CHAPTER 1

1. INTRODUCTION

1.1. THE ISSUE

Some of the oldest mines are found in Africa, where mineral trade commenced as early as the first and second centuries BC.[1] During the said period, gold coins were minted in Egypt from gold mines in Sudan.[2] Two hundred years later, the British colonisation of the Gold Coast Colony (now the Republic of Ghana) in West Africa drew more Europeans to the area who began to mine and trade in the commodity.[3]In particular, the overthrow of the Ashanti King and the declaration of Ashanti as a British Protectorate in 1896 enabled Ashanti Goldfields Corporation (AGC), whose founders are British, to be granted mining approval to mine the Ashanti region.[4] The company started operations immediately and utilised the most advanced machinery and technical expertise; hence production was significantly high.[5]

In Southern Africa, mineral resource extraction began before colonisation, with the export of gold and high-quality iron from South Africa to Arabia and India reported to have commenced in the mid-12th century /AD.[6]

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[1] Breckenridge Keith, "Special Rights in Property: Why Modern African Economies are Dependent on Mineral Resources," (BWPI Working Paper, no. 62, November 2008), 5, http://dx.doi.org/10.2139/ssrn.1311218 ; Africa Mining Vision:10,http://www.africaminingvision.org/amv_resources/AMV/Africa_Mining_Vision_English.pdf; Cliff D et al., "Geology and nonfuel mineral deposits of Africa and the Middle East," *U.S. Geological Survey* (2009) Open-File Report 2005–1294-E, https://pubs.usgs.gov/of/2005/1294/e/OF05-1294-E.pdf.

[2] Keith, "Special Rights in Property,"5.

[3] Keith, "Special Rights in Property,"5; Ntewusu Samuel Aniegye, "A Social History of Gold Mining in Bole, Northern Ghana: From Pre-Colonial to Recent Times," *Transactions of the Historical Society of Ghana*, no. 17 (2015): 2, www.jstor.org/stable/26512468 .

[4] On September 25 1901, the Kingdom of Ashanti was formerly annexed by Great Britain as part of the British Colony of the Gold Coast. Raymond E. Dumett, "Sources for Mining Company History in Africa: The History and Records of the Ashanti Goldfields Corporation (Ghana) Limited," *The Business History Review* 62, no. 3 (1988): 5, www.jstor.org/stable/3115546.

[5] Raymond."Sources for Mining Company History in Africa," 506.

[6] Duncan Miller, Nirdev Desai, and Julia Lee-Thorp, "Indigenous Gold Mining in Southern Africa: A Review," *Goodwin Series*, no. 8 (Dec.2000): 91, doi:10.2307/3858050.

In the era of colonial rule in Africa, from 1880 to the end of the 1950s, mining became predominant in the African economy as the minerals were exported to Europe as raw materials for their industries.[7] The laws and policies during the colonial period were designed to protect the investments of the colonisers without any regard for the development needs of the colonies.[8]

After the independence of most African states, the nationalisation of large private companies engaging in mining occurred.[9]Africa's leaders were convinced that economic and social development, as a result of mineral resource extraction, could be achieved if the state had significant or full ownership of mining enterprises.[10] On the contrary, the nationalised mining companies experienced problems such as political interference, inadequate technical and managerial expertise, low reinvestment, lack of access to finance, and a decline in global mineral prices. As a result, the mining sector underperformed.[11]

In the 1980s, the debt burden of many African states was very high. The World Bank, in its 1983 annual World Development Report, opined that the development performance of Africa was a result of inappropriate policies and over-extended state structure.[12] Hence, the World Bank and mining companies began encouraging states to adopt reforms to attract Foreign Direct Investment (FDI) to restore the mining sector.[13]Therefore, the states privatised state enterprises and established investor-favourable

[7] Keith, "Special Rights in Property,"6.
[8] For a detailed discussion, see Won Kidane, "Contemporary International Investment Law Trends and Africa's Dilemmas in the Draft Pan-African Code," *George Washington International Law Review, no. 50 (2018*): 535.
[9] Most African states attained independence between the 1960s and 1970s. Example of states where nationalisation occurred. For example, in Ghana, Guinea and Zambia, the state took control of the industry. Ronald T. Libby and Michael E. Woakes, "Nationalization and the Displacement of Development Policy in Zambia," *African Studies Review*, vol. 23, no. 1 (Apr. 1980): 33-50, doi:10.2307/523462; Ralph A.Young, "Privatisation in Africa," *Review of African Political Economy*, no. 51 (1991): 52-53, www.jstor.org/stable/4006050 .
[10]Young, "Privatisation in Africa," 50–62; Libby, "Nationalization and the Displacement of Development Policy in Zambia," 53.
[11]Young, "Privatisation in Africa," 53-54.
[12]Young, "Privatisation in Africa," 55.
[13]Young, "Privatisation in Africa," 55-56.

legal, policy and administrative frameworks.[14] The reforms adopted increased foreign investors' interest in the extractive sector leading to a rise in mineral export earnings.[15]

In the late 1990s and early 21st century, there were concerns that the reforms were more geared toward attracting FDI and promoting exports and less towards promoting local development since living standards, education and health in mining states were still poor.[16] There were further concerns that foreign investors play a significant part in host state corruption, civil unrest, and environmental damage.[17]

Initiatives to promote open and accountable management of mineral resources began, such as the Extractive Industries Transparency Initiative (EITI). Thus, mineral industries started adopting practices geared towards empowering and uplifting local communities. In addition, several states commenced legal reforms aimed at increasing the participation of local communities and introducing revenue sharing between the national government and local government. The Africa Mining Vision has played a significant role in guiding African mineral states in using their mineral resources to catalyse sustainable growth and socio-economic development.[18]

In Kenya, the recent discovery of commercially exploitable oil, coal, iron ore and titanium has attracted multinational corporations interested in investing in the extractive sector.[19] Like many African states, the

[14] Young, "Privatisation in Africa," 55-56.
[15] Punam Chuhan-Pole, Andrew L. Dabalen, and Bryan Christoper Land, "Mining in Africa: Are Local Communities Better of?" *Africa Development Forum series*, Washington DC: World Bank:1, doi:10.1596/978-1-4648-0819-7.
[16] Chuhan-Pole, "Mining in Africa," 3; "Africa Mining Vision,"10.
[17] "Foreign Direct Investment," Peterson Institute for International Economics, accessed July 28, 2020, https://www.piie.com/research/trade-investment/foreign-direct-investment.
[18] African Union, *AMV-Africa Mining Vision*, February 25, 2021, https://au.int/sites/default/files/documents/30995-doc-africa_mining_vision_english_1.pdf.
[19] According to an International Monetary Fund report, oil exploration is undertaken in four sedimentary basins: Lamu, Mandera, Anza and Tertiary Rift. The said basins are further divided into blocks for effective exploration. Tullow Oil, a British firm, has been

government and citizens anticipate that the resources will benefit the country. Therefore, efforts have been put in place by the government to revise and enact relevant legislation and policies in the extractive sector and attract foreign investors through bilateral negotiations.[20]

It is acknowledged that the partnership between host states and foreign investors in the mining sector is vital for economic growth. Thus, a good mining regulatory framework is one that promotes the interests of both the foreign investor and the host state by optimising the chances for the host state to meet its development needs and avoid risks while at the same time protecting the foreign investors' investments. This is an important aspect of mineral resource development.

Hence, this study examines whether the current regulatory framework for Kenya's mining sector adequately balances the interests of Kenya and that of the foreign investors for the mutual benefit of both parties regarding the development and management of the mineral resources in the country.[21]

1.2. RESEARCH QUESTION

As indicated earlier, the experience of other mineral-rich countries in the continent is that foreign investors play a significant part in host state corruption, civil unrest, and environmental damage.[22] This has been possible because of weak mineral regulatory frameworks, strong bargaining positions of foreign investors relative to host states, unequal

exploring oil in Kenya for over a decade. In early May 2012, the company discovered commercially viable oil reserves in Turkana County, situated in the Tertiary Rift basin. Kenya expects to start commercially producing oil in six to seven years. International Monetary Fund, *Fifth Review under the Three-Year Arrangement Under the Extended Credit Facility and Request for a Waiver and Modification of Performance Criteria Kenya Report* (No. 13/107, April 2013), Staff Report, Staff Supplement, and Press Release.

[20] Foreign investors are critical as the State does not have the necessary technology and capital to exploit natural resources sustainably.

[21] In the context of the Public Trust Doctrine discussed in part 1.4.6 of this chapter, natural resources are help by the state for the interest of all the people of Kenya. In this regard, any

[22] Peterson Institute, "Foreign Direct Investment."

expertise between the host government and foreign investors and weak institutions, thus negatively impacting transparency and accountability.[23] As a result, foreign investors, the elite, politicians, or government officials take advantage of the loopholes for their financial benefit.[24] Notably, they collude; for example, foreign investors can obtain mining licences and renewals in an unprocedural manner and undertake illegal mining activities, which negatively impact the environment and local communities. Consequently, only foreign investors and the elite, politicians, or government officials benefit from the mineral resources.

Evidently, in 2011 the Transparency International Bribe Payer's Index rated the extractive industries as one of the sectors where corrupt payments are most likely to occur. One of the reasons given for this trend was the increase in FDI in oil and minerals in developing countries from non-Organisation for Economic Cooperation and Development (OECD) members such as China, Russia, and India.[25]

Hence, a mining regulatory framework must be designed to promote good governance in the sector and achieve a balance between the interest of the host state and that of the foreign investor to ensure that the host state achieves sustainable development while the foreign investor obtains a reasonable return on its investment.

Therefore, properly regulating Kenya's mining resources is important for the country to accrue benefits from the sector for its citizens, hence this study.

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[23] Macartan Humphreys, Jeffrey Sachs and Joseph Stiglitz, "What is the Problem with Natural Resource Wealth?," (Initiative for Policy Dialogue Working Paper Series , September 2006), 4, https://policydialogue.org/files/publications/papers/Ch01Intro.pdf.

[24] Macartan, Jeffrey and Joseph, "What is the Problem with Natural Resource Wealth," 4.

[25] Transparency International, *Bribe Payer's Index 2011* (Germany: Transparency International,2011) 14-19.

Thus, the core research question is: ***does the existing regulatory framework for the mining sector in Kenya adequately balance the interests of Kenya and that of foreign investors?***

Specifically, this thesis answers the following three questions:

I. Does the current regulatory framework for the mining sector protect the interests of Kenya?
II. Does the current regulatory framework for the mining sector protect the interests of foreign investors?
III. What key elements should be present in Kenya's mining regulatory framework to attain an adequate balance between the interests of Kenya and that of foreign investors?

1.3. RESEARCH METHODS

Legal analysis constitutes the core of the study as the core research question identified in 1.2 above can only be effectively answered through this approach. A legal analysis of existing literature on FDI in the mining sector and the mining laws, regulations, policies and literature in Chile, Botswana and Kenya was undertaken. The analysis was predominantly based on library and desktop research. Both primary and secondary sources of data were relied on.

The primary sources of data consulted include official documents of institutions such as the United Nations and other relevant international organisations, jurisprudence of national and regional courts, and statutes. Informal documents such as working papers and information from institutional websites were consulted where formal documents were unavailable.

The main secondary sources relied on were published works of scholarship in the area of this study, such as books, academic journals, articles, newspapers, dissertations, working papers, and relevant internet sources.

Jurisprudential materials and legislative and policy documents from other countries on contemporary legal issues in the mining sector were also examined from a comparative approach. This examination was necessary to compare practices of countries that have been considered successful in striking the right balance between the interests of the host country and the interests of the investor and extract practices that are unique for replication.

A multi-disciplinary approach was also necessary. Thus, materials from political science, economics, environmental studies and engineering were consulted to understand better the mining geology in Kenya and the economic and political issues in the mining sector that may impact the development of mining legislation.

In addition to the above, a field visit was made to the Kenya Chambers of Mines and the State Department of Mining. During the visit to the Kenya Chambers of Mines, the Chief Executive Officer, Mr Moses Njeru, was interviewed to shed more light on the interest of foreign investors in the mining sector in Kenya, the current issues affecting them and proposals on how the problems can be surmounted.

The aim of the State Department of Mining visit was to determine whether the implementation of the Mining Act is being effectively undertaken for the benefit of both the state and foreign investors in the sector. An interview questionnaire was used to guide the discussion.

Ten mining sites were also visited in Taita Taveta and Kwale Counties belonging to local investors, foreign investors and community-based organisations. These mines are Bridges Mines, Daudi Mines, Davids Mines, Kauchimbe Mines, Mama Savannah Mines, Mama Wanjiru's mines, Kamlesh mines, Beth Mugo's mines, Muthama's mines, and Community-Based Organisations (CBOs) mines. The managers of the mines were consulted to understand the gains and challenges faced by

investors in the mining sectors under the mining legal framework. A few "Zurura" miners were also consulted.[26]

1.4. DEFINITION OF TERMS

Sustainable development, international sovereignty over natural resources, foreign direct investment (FDI), the right to regulate, the Constitution of Kenya 2010, the public trust doctrine, and the devolved structure of government in Kenya feature extensively in this study; hence their introduction, at this stage, is essential.

1.4.1. Sustainable Development

Reconstruction of the world economy after the second world war involved considerable growth and development that eroded environmental resources.[27] The United Nations General Assembly (UNGA) became concerned that economic development is not taking into account the interrelationships between people, resources, environment, and development.[28] Hence in 1983, it established the World Commission on Environment and Development, also known as the Brundtland Commission.[29] The Commission was tasked to formulate a global agenda for change.[30] In its 1987 report to UNGA, the Brundtland Commission defined sustainable development as "development that meets the needs of the present without compromising the ability of future generations to meet their own needs."[31]

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[26] Zurura is the local name for members of the respective community who are undertaking small scale mining without a mining licence. They move from land-to-land mining with hand-held tools. The sell the minerals they extract to mineral dealers.

[27] Investments in houses, infrastructure, farms, and Industrial production involves getting raw materials from forests, soils, seas and waterways, as well as creating space for houses and infrastructure by cutting down trees.

[28] United Nations General Assembly, *Report of the World Commission on Environment and Development: Our Common Future* (Oslo: United Nations General Assembly, 1987), 6-7. https://sustainabledevelopment.un.org/content/documents/5987our-common-future.pdf.

[29] The commission's chairperson was called Gro Harlem Brundtland hence the name Brundtland Commission.

[30] United Nations General Assembly, *Report of the World Commission on Environment and Development*, 27.

[31] United Nations General Assembly, *Report of the World Commission on Environment and Development*, 27.

It, therefore, considered sustainable development as "…a process of change in which the exploitation of resources, the direction of investments, the orientation of technological development, and institutional change are made consistent with future as well as present needs."[32]

According to the Commission, the overall goal of sustainable development is achieving a balance between the economy and the environment. The balance can be attained through recognising and integrating economic, environmental and social concerns throughout the decision-making process.

The definition also considers the importance of addressing the needs of future generations, also referred to as intergenerational equity, for development to be sustainable.

This research relied on this broad definition of sustainable development despite numerous other definitions.[33]

1.4.2. International Framework for the Permanent Sovereignty over Natural Resources

The UNGA has, over the years, been pronouncing itself on the issue of natural resources and the rights of sovereign states concerning their natural resources.

In 1960, the General Assembly Resolution 1515(XV) of December 15 1960, recommended that the sovereign right of every state to dispose of its wealth and natural resources should be respected.[34]This recommendation was in recognition of the alienable right of all states to

[32] United Nations General Assembly, *Report of the World Commission on Environment and Development*, 30.
[33]Herman Daly, "Towards Some Operational Principles of Sustainable Development," *Ecological Economics* 2, no.1(1990):1-6 and David Pearce, Anil Makandia and Edward Barbier, *Blue Print for a Green Economy*, (London: Earthscan, 1989),84.
[34] United Nations General Assembly, Resolution 1803(XVII), Permanent Sovereignty Over Natural Resources (December 14, 1962), the preamble.

freely dispose of their natural wealth and resources per their national interests and economic independence, which must be respected.[35]

Consequently, in 1962 the UNGA, in its General Assembly, Resolution 1803(XVII), Permanent Sovereignty Over Natural Resources (December 14, 1962), declared that the right of peoples and nations to permanent sovereignty over their natural wealth and resources must be exercised in the interest of the national development and the well-being of the people of the state concerned. For this reason, the Resolution further declared that host state actions such as nationalisation, expropriation or requisitioning for public interest are recognised as an overriding individual and private interests, both domestic and foreign.

Thus, the Resolution on Permanent Sovereignty Over Natural Resources requires states to engage with mutual respect because of sovereign equality. Hence, international cooperation for developing countries' economic development in capital investments should advance the host state's independent national development.[36]Also, foreign investment agreements freely entered into between host states and foreign investors must be observed in good faith.[37]

Around the same period, the early 1960s, there were increasing concerns about the place of developing countries in international trade.[38] As a result, developing countries called for convening a full-fledged conference devoted explicitly to handling the problem by identifying appropriate international actions. Consequently, the first United Nations Conference on Trade and Development (UNCTAD) was held in 1964 as an intergovernmental forum for North-South dialogue and negotiations on issues of interest to developing countries and analytical research and

[35] United Nations General Assembly Resolution 1803(XVII) of December 14 1962, the Preamble.
[36] United Nations General Assembly Resolution 1803(XVII) of December 14 1962.
[37] United Nations General Assembly Resolution 1803(XVII) of December 14 1962.
[38] "History: Foundation," United Nations Conference on Trade and Development (UNCTAD), accessed April 15, 2022, https://unctad.org/about/history.

policy advice on development issues.[39] It was institutionalised to meet every four years, with intergovernmental bodies meeting between sessions and a permanent secretariat providing the necessary substantive and logistical support.[40]

Simultaneously, seventy-seven developing countries established the Group of 77(G-77) during the first session of UNCTAD held in June 1964 in Geneva to provide developing countries with a means to articulate and promote their collective economic interests, enhance their joint negotiating capacity on all major international economic issues within the United Nations (UN) system, and promote South-South cooperation for development.[41] Currently, the G-77 has 134 member states. The G-77 was established following the 1955 Bandung Conference held in Indonesia.[42] The Bandung conference was the first Afro-Asian conference of newly independent African and Asian States. The Final Communique of 1955 provided the basis for South-South cooperation with a concrete proposal for promoting economic, political, technological, and cultural spheres.[43] It also developed ten principles that should govern friendly cooperation among states in all spheres, focusing on mutual interest, solidarity and respect for national sovereignty.[44]Most importantly, the Bandung Conference gave rise to the establishment of the Non-Aligned Movement (NAM) in 1961, the G-77 in 1964 and the concept of the Third World or the South.[45]

[39] Developed countries are considered as the North and developing countries as the South in International Trade and Investment Law. "History: Foundation," UNCTAD.
[40] "History: Foundation," UNCTAD.
[41] "General Information: About the Group of 77," The Group of 77 at the United Nations, accessed April 15, 2022, http://www.g77.org/doc/.
[42] "Revisiting the 1955 Bandung Asian-African Conference and its Legacy," The South Centre, accessed April 19, 2022, https://www.southcentre.int/question/revisiting-the-1955-bandung-asian-african-conference-and-its-legacy/.
[43] "Revisiting the 1955 Bandung Asian-African Conference and its Legacy," The South Centre.
[44] "Revisiting the 1955 Bandung Asian-African Conference and its Legacy," The South Centre.
[45] "Revisiting the 1955 Bandung Asian-African Conference and its Legacy," The South Centre.

In particular, the G-77 and the NAM enable developing countries to have a voice, hence, articulate their views and concerns on political, economic and cultural issues in international arenas such as the United Nations.[46] Developing countries have continued to seek spaces where they can enhance their voice. One key initiative that enhances developing countries' voices is the Third World Approaches to International Law (TWAIL). TWAIL was established in the 1990s by scholars and practitioners of international law and policy. It focuses on examining the relationship between international law and the third world or the south and the fallacies of international law's neutrality, fairness and justness.[47]The scholars and practitioners have been meeting to discuss their views and concerns with the aim of presenting an alternative normative legal structure for international governance.[48] In effect, they hope to eradicate the conditions of underdevelopment in the third world through scholarship, policy and politics.[49]

One of the debates in UNCTAD was the need for a new international economic order sensitive to an even and balanced development in the international community, hence, eliminating economic colonialism, neo-

[46] "Revisiting the 1955 Bandung Asian-African Conference and its Legacy," The South Centre.
Another key initiative established in the 1990s to enhance the voice of the third world is the Third World Approaches to International Law (TWAIL). TWAIL is an alliance of scholars and practitioners of international law and policy examining the relationship between international law and the third world or the south and the fallacies of international law's neutrality, fairness, and justness. They have been meeting to discuss their views and concerns to present an alternative normative legal structure for international governance and eradicate the conditions of underdevelopment in the third world through scholarship, policy, and politics. The alliance first met at Havard Law School in 1997. Subsequent conferences have been held at Osgoode Hall Law School in 2001, Albany Law School in 2007, and the University of British Columbia in 2008, amongst others. The first TWAIL conference held in the south was the 2015 TWAIL Conference held in Cairo, Egypt, at the American University in Cairo. See "About TWAIL," University of Windsor, accessed April 19, 2022, https://www.uwindsor.ca/twail2015/2/test-page and Makau Mutua, "What is TWAIL?" *American Society of International Law* 94 (April 5-8,2000): 31.
[47] "About TWAIL," University of Windsor and Makau Mutua, "What is TWAIL?".
[48] The alliance first met at Havard Law School in 1997. Subsequent conferences have been held at Osgoode Hall Law School in 2001, Albany Law School in 2007, and the University of British Columbia in 2008, amongst others. The first TWAIL conference held in the south was the 2015 TWAIL Conference held in Cairo, Egypt, at the American University in Cairo. "About TWAIL," University of Windsor and Makau Mutua, "What is TWAIL?".
[49] "About TWAIL," University of Windsor and Makau Mutua, "What is TWAIL?".

colonialism and dependency.[50] Specifically, its resolution 45(III) of May 18 1972, stressed the urgency to establish generally acceptable norms to govern international economic relations systematically.[51] Thus, it was decided that a working group of governmental representatives composed of forty member states be established to develop a draft Charter of Economic Rights and Duties of States.[52]

In 1974, as the development of the draft Charter of Economic Rights and Duties of States was ongoing, UNGA adopted Resolution 3201(S-VI), Declaration on the Establishment of a New International Economic Order (May 1 1974) and its accompanying Program of Action.[53] Thus, once again, UNGA recognised the sovereign equality of states and the need to eliminate the widening gap between developed and developing countries to ensure steady acceleration of economic and social development and peace and justice for present and future generations.[54]It noted that an even and balanced development in the international community under the existing international economic order, which is affected by remnants of colonialism and neo-colonialism, is not achievable hence the need for a New International Economic Order (NIEO). The NIEO appreciates that there exists a close interrelationship between the prosperity of developed countries and the growth and development of developing countries. For this reason, the political, economic and social well-being of present and future generations depends on the cooperation of all members of the international community based on sovereign equality and the removal of disequilibrium between them. Hence, international cooperation for development is a shared goal and common duty of all countries.[55]

[50] "History: Foundation," UNCTAD.
[51] The preamble of the UNGA Resolution 3201(S-VI) of May 1 1974, Declaration on the Establishment of a New International Economic Order.
[52] UNCTAD resolution 45(III) (May 18 1972), and resolution 3037(XXVII) (December 19 1972), that resolved the membership of the Working Group should be forty member states.
[53] The purpose of the Program of Action was to ensure application of the Declaration.
[54] United Nations General Assembly, Resolution 3201(S-VI), Declaration on the Establishment of a New International Order (May 1 1974), the Preamble.
[55] General Assembly Resolution 3201(S-VI).

Further, according to the Resolution, the NIEO is founded on full respect of principles and rights such as (i) sovereign equality of states,(ii) self-determination, (iii) territorial integrity and non-interference in the internal affairs of other states, (iv) the right of every country to adopt the economic and social system that it considers suitable for its development and not to be discriminated for its choice, (v) full permanent sovereignty of every state over its natural resources and all economic activities, and (vi) the regulation and supervision of the activities of transnational corporations by taking measures in the interest of the national economies of the host state.

In the same year, 1974, the draft Charter of Economic Rights and Duties of States was eventually finalised and adopted by the UNGA as Resolution 3281(XXIX), Charter of Economic Rights and Duties (December 12 1974). Despite its adoption by a vote of one hundred and twenty (120) in favour, developed countries were against the Charter.[56] This supposition is corroborated by the fact that six (6) developed countries (Belgium, Denmark, Germany, Luxembourg, United Kingdom and the United States) voted against the Charter while ten (10) countries (Austria, Canada, France, Ireland, Israel, Italy, Japan, Netherlands, Norway and Spain) abstained.[57]

The adoption of the Charter was vital for developing countries as it was considered an effective instrument towards establishing a new system of international economic relations based on equity, sovereign equality and interdependence of the interests of developing and developed countries.[58]

[56] Ricardo Pereira and Orla Gough, "Permanent Sovereignty over Natural Resources in the 21st Century: Natural Resource Governance and the Right to Self-Determination of Indigenous Peoples Under International Law," *Melbourne Journal of International Law* 14, no. 2 (2013):462.
[57] Pereira and Gough, "Permanent Sovereignty over Natural Resources," 462.
[58] The preamble of Resolution 3281(XXIX), The Charter of Economic Rights and Duties.

According to the Preamble and Chapter 1 of the Charter, its fundamental purpose is to promote the establishment of the NIEO through fifteen basic principles that should govern economic, political and other relations among states.[59] They are (i) sovereignty, territorial integrity and political independence of a state, (ii) sovereign equality of all states, (iii) non-aggression, (iv) non-intervention, (v) mutual and equitable benefit, (vi) peaceful coexistence, (vii) equal rights and self-determination of peoples, (viii) peaceful settlement of disputes, (ix) remedying of injuries which have been brought about by force and which deprive a nation of the natural means necessary for its normal development, (x) fulfilment in good faith of international obligations, (xi) respect for human rights and international obligations, (xii) no attempt to seek hegemony and spheres of influence, (xiii) promotion of international social justice, (xiv) international cooperation for development, and (xv) free access to and from the sea by land-locked countries within the framework of the above principles.[60]

Article 1 of the Charter reiterates the sovereign and inalienable right of every state to choose its economic, political, social and cultural systems per the will of its people, without outside interference, coercion or threat in any form whatsoever. It further emphasises, in Article 2, that:

1. Every state has and shall freely exercise full permanent sovereignty, including possession, use and disposal, over all its wealth, natural resources and economic activities.
2. Each state has the right:
   (a) To regulate and exercise authority over foreign investment within its national jurisdiction in accordance with its laws and regulations and in conformity with its national objectives and priorities. No State shall be compelled to grant preferential treatment to foreign investment;
   (b) To regulate and supervise the activities of transnational corporations within its national jurisdiction and take action to ensure that such activities comply with its laws, rules and regulations and conform with its economic and social policies…

[59] Preamble and Chapter 1 of Resolution 3281(XXIX), The Charter of Economic Rights and Duties.
[60] Chapter 1 of Resolution 3281(XXIX), The Charter of Economic Rights and Duties.

(c) To nationalise, expropriate or transfer ownership of foreign property, in which case appropriate compensation should be paid…where the question of compensation gives rise to a controversy, it shall be settled under the domestic law of the nationalising state and by its tribunals, unless it is mutually agreed…that other peaceful means be sought on the basis of the sovereign equality of States and in accordance with the principle of free choice of means.

The Charter reinforced the right to permanent sovereignty as agreed in the December 14, 1962, Resolution on Permanent Sovereignty over Natural Resources, albeit with two significant differences.[61] These differences are (i) Article 2 (2) (c) favours the settlement of foreign investment law disputes through domestic law and courts of the host state and (ii) unlike the Resolution on Permanent Sovereignty over Natural Resources, which includes reference to international law, the Charter has no such reference. Hence, if the investment of a foreign investor is expropriated, the investor cannot rely on international law standards, especially on the issue of compensation.

Thereafter, in 1986, UNGA adopted Resolution 41/128, Declaration on the Right to Development (December 4 1986). It recognised that (i) the right to development is an inalienable human right, (ii) human beings are the main participants and beneficiaries of development, (iii) development is essential in improving the well-being of the entire population, (iv) public participation is significant in development,(v) it is the fundamental responsibility of the state to create favourable conditions to the development of people and individuals, and (vi) the benefits resulting from development should be fairly distributed.[62]

Thus, according to Articles 2(3), 3(1) and 8(1), every state must take all necessary measures for the realisation of the right to development. These measures include formulating appropriate national development policies that aim at constantly improving the well-being of the entire population

[61] Resolution 1803(XVII): Permanent Sovereignty Over Natural Resources
[62] The preamble to the Declaration on the Right to Development: Resolution 41/128 of December 4 1986.

and creating national and international conditions that are favourable to the realisation of the right to development.

In Article 3(3), the Resolution suggests that states can fulfil their said developmental role in such a manner as to promote a NIEO based on sovereign equality, interdependence, mutual interest, and observance of human rights through cooperation with other states.[63] During the cooperation, states should ensure that they respect the principles of international law concerning friendly relations and cooperation among states under the Charter of the United Nations.[64]

There have been debates on the legal status of resolutions of UNGA, in particular declarations, because the sources of international law are treaties, customs and general principles. Scholars have examined whether the legal character of the resolutions permits them to qualify as a traditional source of international law. Hence, they have explored whether the resolutions are customary international law, general principles of international law, declarative statements of law or optional therefore do not create legal obligations upon member states.[65] The dominant school of thought is that UNGA resolutions are not binding.[66] Also, they are not recognised as formal sources of international law under Article 38(1) of

[63] Article 3(3) of the Declaration on the Right to Development, Resolution 41/128 (December 4 1986).
[64] Article 3(2) of the Declaration on the Right to Development, Resolution 41/128 (December 4 1986).
[65] See an analysis of the different schools of thought on the issue in Christopher Joyner, "United Nation General Assembly Resolutions and International Law: Rethinking the Contemporary Dynamics of Norm-Creation,*" California Western International Law Journal* 11, No.3 (1981).
[66] Other scholars posit that some of the operative paragraphs of the 1962 UNGA Resolution on Permanent Sovereignty over Natural Resources already have validity in international law as it formulated a new *opinion juris communis* with respect to the principle. Notably, in *Texaco Overseas Petroleum Company v The Government of the Libyan Arab Republic* (1979) 177 et seq it was held that Resolution 1803 is an expression of customary international law. See the discussion in Yolanda Chekera and Vincent Nmehielle, "The International Law Principle of Permanent Sovereignty over Natural Resources as an Instrument for Development: The Case of Zimbabwean Diamonds," *African Journal of Legal Studies* 6(2013):80-83. See also an analysis of the different schools of thought on the issue in Christopher, "U.N. General Assembly Resolutions and International Law,*"* and Yolanda and Vincent, "The International Law Principle of Permanent Sovereignty over Natural Resources,"80-83.

the Statute of the International Court of Justice. However, they may contribute towards developing both customary international law and general principles of international law.[67] For example, where a resolution is adopted by most states with few objections and abstentions and after that progressively becomes state practice in the majority of the states or is incorporated in their domestic legislations, it could be argued that it demonstrates the existence of *opinion juris.*[68] In effect, it may eventually acquire the status of customary international law.

In answering the research question, this thesis referred to the above international framework for Permanent Sovereignty over Natural Resources.

1.4.3. Foreign Direct Investment

The Resolution on Permanent Sovereignty over Natural Resources and Article 7 of the Charter of Economic Rights and Duties recognise the primary responsibility of every state to choose its means and goals of development. One of the means is through admitting foreign investment-FDI.

FDI is the acquisition of a lasting interest by a resident entity in one economy (direct investor) in an entity resident in an economy other than that of the investor (direct investment enterprise).[69]

For a direct investor to be considered to have acquired a lasting interest in a direct investment enterprise, two things must be satisfied. One, the relationship between the direct investor and the direct investment enterprise must be long-term. Two, the direct investor must have a

[67] Christopher, "U.N. General Assembly Resolutions and International Law," 33.
[68] Pereira and Gough, "Permanent Sovereignty over Natural Resources," 461.
[69] OECD, *OECD Benchmark Definition of Foreign Direct Investment*, 4th ed. (Paris: OECD Publishing, 2008) 48.https://www.oecd-ilibrary.org/docserver/9789264045743-5-en.pdf?expires=1596015380&id=id&accname=guest&checksum=D864FEB7EEDD4FEDE5468C75628B387C.

significant degree of influence on the management of the direct investment enterprise.[70]

There is substantial discourse as to what constitutes a significant degree of influence. The Organisation for Economic Co-operation and Development (OECD) has held that for statistical consistency across countries, the direct or indirect ownership must be ten per cent or more of the voting power of the direct investment enterprise.[71]

FDI is necessary for a host state as it (i) allows for the transfer of technology, (ii) promotes human capital development as the employees are trained in new areas of operating the business, (iii) leads to increased revenues, and (iv) promotes competition in the domestic input market.[72] With an appropriate regulatory framework that considers the interests of the host state, FDI can stimulate economic growth in developing countries and promote global integration. Hence, mobilising FDI to ensure that it contributes to sustainable development and inclusive growth is becoming a priority for all countries.[73]

East Africa is currently the fastest-growing region in the continent with regard to FDI.[74] In 2019, flows to Kenya grew by twenty-seven per cent to one billion six hundred million dollars.[75]The growth was attributed to investment in different sectors, such as oil and gas, manufacturing, hospitality, and chemicals.[76]

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[70] OECD, "OECD Benchmark Definition of Foreign Direct Investment,"48-49.
[71] OECD, "OECD Benchmark Definition of Foreign Direct Investment," 49.
[72] Prakash Loungani and Assaf Razin, "How Beneficial is Foreign Direct Investment for Developing Countries?" *International Monetary Fund Finance and Development Magazine*, June 2001, Volume 38, Number, accessed July 27, 2020, https://www.imf.org/external/pubs/ft/fandd/2001/06/loungani.htm.
[73] United Nations Conference on Trade and Development (UNCTAD), *World Investment Report 2019: Special Economic Zones*, (New York: United Nations Publications, 2019), 92. https://unctad.org/system/files/official-document/wir2019_en.pdf.
[74] UNCTAD, *World Investment Report 2019*, 37.
[75] UNCTAD, *World Investment Report 2019*, 37.
[76] UNCTAD, *World Investment Report 2019*, 37.

The government has been committed to increasing FDI flows in the country through various investment promotion and facilitation measures, such as improving its ease of doing business ranking and promoting Export Processing Zones (EPZs), which have been in Kenya since 1990, and Special Economic Zones (SEZs).[77]

Some SEZ areas are Tatu City in Kiambu County, Konza City in Machakos and Naivasha Special Economic Zone in Nakuru County.

The EPZs and SEZs enjoy numerous tax incentives. Nevertheless, Kenya is yet to realise the anticipated economic benefits from them.

To ensure that the promotion and facilitation of both local and foreign investment are well coordinated, the Kenya Investment Authority[78] was

[77] Ease of Doing Business is a World Bank initiative that ranks 190 countries against each other concerning, *inter alia*, business regulations, protection of property rights, enforcement of contracts and contracting with the government. Kenya has introduced numerous reforms to improve its ranking. In 2017, Kenya ranked position 80, while in 2018 and 2019, it ranked 61 and 56, respectively. See World Bank Doing Business at www.doing business.org.
EPZs were established in 1990 to promote and facilitate export-oriented investments by creating an enabling environment for such investments to thrive. Currently, there are approximately 40 declared zones in several counties in Kenya, such as Kilifi, Nairobi, Bomet, Nakuru, Machakos, Kwale, Narok, Kiambu, and Embu. EPZs are treated as being outside the customs territory with regard to taxes and duties payable under the Customs and Excise Act (CAP. 472 of the laws of Kenya) and the Value Added Tax Act (Act No. 35 of 2013) on all EPZ imports for use in the eligible business activities of an EPZ enterprise. In addition, businesses licensed to operate within the EPZ are exempted from the payment of income tax for the first ten years and stamp duties on the execution of any instruments relating to the business activities of the EPZ enterprise, among other exemptions. See the preamble, section 29 and subsidiary legislation of the Export Processing Act (Cap 517 of the laws of Kenya).
SEZs were introduced in Kenya in 2015 through the enactment of the Special Economic Zones Act (No.16 of 2015) to promote and facilitate both local and international investments through the development of integrated infrastructure facilities; the creation of incentives for economic and business activities; and removal of impediments to economic and business activities. Some of the incentives include the right to fully repatriate all capital and profits without any foreign exchange impediments; the right to determine the prices of any of its goods or services sold inside or outside the SEZ; full protection of its property rights against all risks of expropriation; exemption from stamp duty on legal instruments relating to the business activities; exemption from trade licenses; and entitlement to work permits of up to twenty per cent of their full-time employees. See the preamble, section 34 and section 3 of the Special Economic Zones Act.

[78] Previously referred to as the Investment Promotion Centre under the Investment Promotion Centre Act (Cap. 485), now repealed, and continued under section 14 as a body corporate under the Investment Promotion Act (No. 6 of 2004).

statutorily mandated to promote and facilitate both domestic and international investment in Kenya through, among other things, assisting investors and potential investors in (i) obtaining necessary licences and permits, accessing incentives and exemptions, and (ii) providing information such as investment opportunities and sources of capital.[79]

Within the mining sector, several reforms were recently undertaken by the government to attract FDI. The Mining Act, Act No.12 of 2016 (the Mining Act) was enacted in 2016, replacing the Mining Act 1940 (Chapter 306 of the Laws of Kenya), which has governed the mining sector since 1940.[80] The Act introduced various changes aligned to international sector standards, such as public participation, benefit-sharing, local content, transfer of technology and skills, environmental and social protection, and transparency.

Also, the Act established institutions such as (i) the National Mining Corporation, which is the investment arm of the state to be managed by the National Mining Corporation Board, (ii) the Minerals and Metals Commodity Exchange to facilitate efficiency and security in mineral trade transactions, (iii) the Mineral Rights Board whose primary function is to advise the Cabinet Secretary on different issues in the mining sector such as transfer of mineral rights agreements, the grant and renewal of mineral rights, and fees, charges and royalties payable for a mineral right or mineral, (iv) the Directorate of Geological Survey to undertake geological surveys and use the data to promote FDI in the sector, and (v) the Directorate of Mines.[81] These institutions are expected to improve transparency, public participation and accountability in the sector.

In addition, the Kenya Mining Cadastre Portal was developed to provide an electronic platform where all the stakeholders in the sector can directly

[79] The preamble of the Investment Promotion Act (No. 6 of 2004).
[80] The Mining Act 1940 (Chapter 306 of the Laws of Kenya) was repealed by the Mining Act, Act No.12 of 2016.
[81] Mining Act Part V.

engage with the Ministry of Mining, Blue Economy and Maritime Affairs (the Ministry of Mining) and obtain information and services such as application and renewal of licences and permits.[82]

1.4.4. Right to regulate

Before 1959, FDI used to be regulated by international law, including customary international law, which focuses on the sovereignty of host states concerning foreign capital that it admits in its territory.

However, customary international law and other applicable international law failed to take account of contemporary investment practices, such as the right of foreign investors to make monetary transfers from the host country. Also, the principles of compensation were vague and subject to varying interpretations.[83] Thus, in 1959 states started adopting BITs to provide specific rules to govern the relationship between the host states and foreign investors.

The first BIT was between Pakistan and the Federal Republic of Germany and was signed on November 25, 1959.[84]Currently, there are a total of 2,794 BITs signed, with 2,227 in force.[85] BITs are now one of the key sources of international law in foreign investment, supplementing customary international law and general principles of international law.

The Convention on the Settlement of Investment Disputes between States and Nationals of other States (ICSID Convention) and sectoral and regional treaties such as Chapter 14 (the Investment Chapter) of the

[82] The relevant provisions of the Mining Act will be explored in greater detail in the next chapter.
[83] See also Caroline Wanjiku Kago, "Chinese Investments in Africa: Legal 'Mis-engineering' and Unequal Returns on Investments," (LLM thesis, University of the Western Cape, 2009),15 referring to Jeswald Salacuse and Nicholas Sullivan, "Do BITS Really Work? An Evaluation of Bilateral Investment Treaties and their Grand Bargain," *Harvard International Law Journal* 46, no.1 (Winter 2005):46.
[84] "Investment Policy Hub," Germany-Pakistan BIT (1959), accessed April 19, 2022, https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/1387/download.
[85] "Investment Policy Hub," Germany-Pakistan BIT (1959).

United States-Mexico-Canada Agreement are also key sources of international investment law. In Africa, the upcoming Protocol on Investment to the Agreement Establishing the African Continental Free Trade Area (ACFTA) will be a comprehensive binding instrument on investment. It will establish a clear, transparent, predictable and mutually-advantageous continental framework of principles and rules for investment.

Under international investment law, the right of a host state to regulate is usually discussed in the context of BITs. It entails including clauses in BITs that seek to reserve policy space to enable host states to regulate in the public interest while, at the same time, protecting foreign investors.

Early BITs concluded from 1959 to mid-2000 between developed and developing countries did not expressly provide policy space for host states.[86] This was partly attributed to bargaining power disparity at the time of concluding the BITs.[87] This began to change following multilateral attempts to strengthen states' sovereign powers and the emphasis on investor responsibilities in the UNGA resolutions on Permanent Sovereignty over Natural Resources and the NIEO.[88]

In the mid-2000, states' experiences in investment arbitrations prompted the need to develop a new era of BITs, new model BITs, that would clarify the scope and meaning of investment obligations, including the minimum

[86] See a detailed discussion in chapter 2 of this thesis. See also Kago, "Chinese Investments in Africa,"15 cross-referencing Peter Muchlinski, *Multinational Enterprises and the Law* (Oxford: Oxford University Press, 2007),104-107 and Theodore Moran, *Multinational Corporations and the politics of dependence: Copper in Chile* (Princeton: Princeton University Press, 1974). See also United Nations Conference on Trade and Development (UNCTAD), *World Investment Report 2015: Reforming the International Investment Governance*, UNCTAD, (New York: United Nations Publications, 2019), 121. https://unctad.org/system/files/official-document/wir2015_en.pdf.

[87] See a detailed discussion in chapter 2 of this thesis. See also Kago, "Chinese Investments in Africa," 84 cross-referencing Muchlinski, *Multinational Enterprises and the Law*, 104-107 and Moran, *Multinational Corporations and the politics of dependence*.

[88] UNCTAD, *World Investment Report 2015,* 122.

standard of treatment and indirect expropriation.[89] These new model BITs would further include specific language that makes it clear that investment protection and liberalisation objectives of BITs must not be pursued at the expense of protecting human and animal health, safety, and the environment.[90]

Recently, the number of disputes referred to the International Centre for Settlement of Investment Disputes (ICSID) has grown from 608 in 2015 to 904 in 2022.[91] The increase is raising concerns about the financial implication on host developing states, in addition to their previous concerns on their right to regulate in the interest of the public and sustainable development.[92]

These concerns have prompted developing host states to review their BITs with developed countries or cancel them. For example, in 2012, the South African government began to unilaterally terminate BITs with certain European Union members, such as Switzerland, Netherlands, Spain, Belgium, and Germany.[93] The cancellation was based on a review of existing BITs by the Department of Trade and Industry. The review was concluded in 2010.[94] The review established that the first-generation BITs concluded by the government post-1994 were more favourable to investors, were incompatible with the Constitution and other statutes, especially on policy issues such as Broad-Based Black Economic Empowerment and land distribution, and allowed for legal challenges to regulatory changes.[95] Following the review, the Protection of Investment Act No.22 of 2015 was enacted to govern FDI in South Africa. The South African government now has adequate policy space in the context of FDI.

[89] UNCTAD, *World Investment Report 2015,* 122.
[90] UNCTAD, *World Investment Report 2015,* 122.
[91] "Case Database," International Centre for Settlement of Investment Disputes (ICSID), accessed April 21, 2022, https://icsid.worldbank.org/cases/case-database.
[92] UNCTAD, *World Investment Report 2015,* 122.
[93] Jonathan Lang and Bowman Gilfillan, "Bilateral Investment Treaties – A Shield or a Sword?", accessed April 21, 2022, https://www.bowmanslaw.com/wp-content/uploads/2016/09/PPI-article_mailshot_08112013_1038389_1-1.pdf
[94] Lang and Gilfillan, "Bilateral Investment Treaties".
[95] Lang and Gilfillan, "Bilateral Investment Treaties".

In this thesis, the term 'right to regulate' and 'policy space' have the same meaning and have been used interchangeably.

1.4.5. The Constitution of Kenya 2010

The current Constitution of Kenya was promulgated on August 27 2010, following a national referendum. It replaced the Constitution of Kenya of 1969, which replaced the 1973 independence Constitution.

Kenya was declared a British Protectorate in 1895. At that time, legislation was wholly being done in the United Kingdom and conveyed in the form of Royal Instructions known as Orders-in-Council.[96]

In 1897, the East Africa Order in Council was formulated and established the initial government machinery, including the judicial system.[97] It also recognised that the natives were not British and that their territory was foreign.[98] The order became the first comprehensive constitutional instrument for the protectorate.[99]

In 1905, the responsibility of supervising the protectorate was transferred from the Foreign Office to the Colonial Office. Also, by the Order-in-Council of 1905, the positions of Governor, Executive Council and Legislative Council were created and occupied by the Crown's officials.[100] The Governor was the Chairperson and nominated seven

[96] "Brief History of the Kenyan Parliament: The Senate of the Republic of Kenya," Parliament of Kenya, accessed November 23, 2022, http://www.parliament.go.ke/the-senate/about-more.
[97] Kenya Law Reports, "The Final Report of the Constitution of Kenya Review Commission", February 10, 2005, 18, http://kenyalaw.org/kl/fileadmin/CommissionReports/The-Final-Report-of-the-Constitution-of-Kenya-Review-Commission-2005.pdf.
[98] Kenya Law Reports, "The Final Report of the Constitution of Kenya Review Commission," 18.
[99] Kenya Law Reports, "The Final Report of the Constitution of Kenya Review Commission," 18.
[100] Kenya Law Reports, "The Final Report of the Constitution of Kenya Review Commission," 18.

other members.[101] There was no native representation in the Legislative Council, which served as the legislature for the East Africa Protectorate.[102]

Later, the Legislative Council Ordinance of 1919 permitted European settlers representation in the Legislative Council, while the Royal Instructions of 1919 allowed representation of Indians' and Arabs' interests in the Legislative Council through two nominated Indians and one nominated Arab.[103]

In 1920, Kenya became a British Crown Colony.[104] This meant that the natives became British subjects with no political power except that granted by the Crown, whereas the settlers had all the rights of a British subject.

In 1924, some form of native representation was introduced for only African areas through the Local Native Councils (LNCs), established by the Native Authority (Amendment) Ordinance of 1924.[105] From the late 1920s, the natives began to agitate for native representation in the Legislative Council.

As of 1931, the representation of natives at the Legislative Council had not changed; however, there was progress concerning the LNCs. Notably, the number of LNCs were twenty-two, and they were responsible for

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[101] Parliament of Kenya: The National Assembly, "History of the Parliament of Kenya", August 2022,5, http://www.parliament.go.ke/sites/default/files/2022-08/FS19%20History%20of%20the%20Parliament%20of%20Kenya.pdf.

[102] Parliament of Kenya: The National Assembly, "History of the Parliament of Kenya", 5.

[103] Kenya Law Reports, "The Final Report of the Constitution of Kenya Review Commission," 18.

[104] Colonies are those territories annexed by the Crown through either settlement or conquest.

[105] Okoth Ogendo, "The Politics of Constitutional Change in Kenya Since Independence, 1963-69," *African Affairs* 71, no.282 (January 1972): 9–34. See also Crown Colony of Kenya, *Annual Report on the Social and Economic Progress of the People of the Kenya Colony and Protectorate*, 1931(London: His Majesty's Stationery Office, 1933), 7. https://libsysdigi.library.illinois.edu/ilharvest/Africana/Books2011-05/5530244/5530244_1931/5530244_1931_opt.pdf.

rendering services such as the provision of educational facilities.[106] The funds controlled by the LNCs were derived from the proceeds of local natives rates, which they were empowered to impose on the inhabitants of the areas over which they had control and rents of lands and forest royalties levied within those areas.[107]

The LNCs, the education of natives through the missionary schools and their participation in the First World War, where they fought alongside the British and away from home, played a significant role in the emergence of local leadership in Kenya.[108]

The agitation for native representation in the Legislative Council persisted. Eventually, Eluid Mathu, a native, was nominated in 1944 to the Legislative Council by the Governor to represent the African Community.[109] Thereafter, other natives were nominated: Benaiah Ohanga in 1946, Fanuel Odede in 1947, and Jeremiah Nyaga in 1948.[110]

Nevertheless, the natives were still not content with representation through nominated members and other issues such as low wages, the requirement to carry an identity document referred to as *kipande*, and dispossession of their land; thus, they began to demand independence from the British around 1951.

Additional Royal Instructions were issued in 1951, leading to further legislations being enacted whereby provision was made for the election of fourteen Europeans, six Asians, and one Arab.[111] In addition, six African members and one Arab representative were nominated by the

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[106] Crown Colony of Kenya, *Annual Report on the Social and Economic Progress of the People of the Kenya Colony and Protectorate*, 7.
[107] Crown Colony of Kenya, *Annual Report on the Social and Economic Progress of the People of the Kenya Colony and Protectorate*, 7.
[108] Ogendo, "The Politics of Constitutional Change in Kenya," 11.
[109] Parliament of Kenya, "Brief History of the Kenyan Parliament."
[110] Parliament of Kenya: The National Assembly, "History of the Parliament of Kenya", 7.
[111] Parliament of Kenya: The National Assembly, "History of the Parliament of Kenya", 7.

Governor, making the total number of non-Government members twenty-eight against twenty-six Government members (eight ex officio and eighteen nominated members).[112] The natives were still nominated members.

The colonial office failed to show any commitment to address the grievances of the natives leading to an outbreak of armed conflict referred to as the Mau Mau uprising.[113] Consequently, the Governor[114] declared a state of emergency in the country in October 1952 and arrested and detained several political leaders, including Jomo Kenyatta, who eventually became the first President of the Republic of Kenya. In addition, all African political activities were banned. Still, the Mau Mau movement continued to push the British colonial office to undertake constitutional reforms to address the concerns of the natives.

The 1954 Lyttleton Constitution, named after the then-new colonial secretary Sir Oliver Lyttleton, effected the principle of multi-racialism introduced by the colonial office between 1950 and 1951. Multi-racialism involved a constitutional order that provided for political power sharing among all races; that is, all races should participate in government.[115]Thus, it established a ministerial system by creating the Council of Ministers to replace the Executive Council. The Council of Ministers consisted of six officials (all senior civil servants), two nominated members appointed by the Governor and six unofficial members also appointed by the Governor.[116] They were all collectively responsible to the Governor.[117] The unofficial members consisted of three

[112] Parliament of Kenya: The National Assembly, "History of the Parliament of Kenya", 7.
[113] Crown Colony of Kenya, *Annual Report on the Social and Economic Progress of the People of the Kenya Colony and Protectorate*, 20.
[114] Representative of the British Crown in the Kenya Colony.
[115] Parliament of Kenya: The National Assembly, "History of the Parliament of Kenya", 7.
[116] Parliament of Kenya: The National Assembly, "History of the Parliament of Kenya", 7.
[117] Parliament of Kenya: The National Assembly, "History of the Parliament of Kenya", 7.

Europeans, two Indians, and one African (Benaiah Ohanga); hence, the natives were represented in the executive for the first time.[118]

Concerning the continued agitation by the natives for elective representation in the Legislative Council as opposed to by nomination, the Legislative Council (African Representation) Ordinance was eventually enacted in 1956, which allowed for six elected members and subsequently increased the number to eight.[119] In March 1957, elections were held, and eight natives were elected to the Legislative Council for the first time representing eight electoral areas, namely Central Province, Coast Province, Nairobi, Nyanza Central, Nyanza North, Nyanza South, Rift Valley and Southern (Ukambani).[120]

The natives continued to demand more elected members in the Legislative Council. They rejected the Lyttleton Constitution and demanded fifteen more seats for Africans in the Legislative Council.[121] Further, they refused to take up the position reserved for them in the Council of Ministers, thus affecting the basis upon which the Lyttleton Constitution was founded.[122]

The new Colonial Secretary, Lennox-Boyd, visited Kenya to try and resolve the constitutional deadlock. He was not prepared to grant the Africans their demands concerning the increase of African representatives in the Legislative Council as it would make them the majority race.[123]

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[118] Parliament of Kenya: The National Assembly, "History of the Parliament of Kenya", 8.
[119] Parliament of Kenya: The National Assembly, "History of the Parliament of Kenya", 8.
[120] Crown Colony of Kenya, *Annual Report on the Social and Economic Progress of the People of the Kenya Colony and Protectorate*, 20.
[121] Crown Colony of Kenya, *Annual Report on the Social and Economic Progress of the People of the Kenya Colony and Protectorate*, 20.
[122]Crown Colony of Kenya, *Annual Report on the Social and Economic Progress of the People of the Kenya Colony and Protectorate*, 20.
[123] The Round Table, "A Constitution for Kenya: Mr Lennox-Boyd's Visit," *The Commonwealth Journal of International Affairs* 48, no. 190 (March 1958): 138-143, https://doi.org/10.1080/00358535808452115.

On the Council of Ministers, he asked all the ministers to resign. As a result, the Lyttleton Constitution, which was to last until 1960, was abrogated, and the Lennox-Boyd Constitution was introduced in 1958.[124]

The Lennox-Boyd Constitution increased the total number of Africans in the Legislative Council to fourteen out of thirty-six members.[125] The other members were fourteen Europeans, six Indians and two Arabs.[126] Hence, for the first time, the membership of the natives was equal to that of the Europeans in the Legislative Council.

The African representatives rejected the Lennox-Boyd Constitution and argued for "one man, one vote".[127] They boycotted participating in any proceedings of the Legislative Council, leading to a legislative crisis. A multi-racial delegation of the Legislative Council was sent to London to explain and interpret to the British government their demands and attitude and call for the appointment of a constitutional advisor and a constitutional conference.[128] Consequently, the first Lancaster House Constitutional Conference was convened in 1960.[129]

During the first Lancaster House Constitutional Conference, the British government conceded the principle of independence and discussions on the Constitution of an independent Kenya began.[130]

Nevertheless, the British Government assessed that Kenya was still politically unstable as there were sharp differences among the African

[124] The Round Table, "A Constitution for Kenya," 138-143. See also "The Final Report of the Constitution of Kenya Review Commission," Kenya Law Reports, 20.
[125] Parliament of Kenya: The National Assembly, "History of the Parliament of Kenya", 8.
[126] Parliament of Kenya: The National Assembly, "History of the Parliament of Kenya", 8.
[127] Tom Mboya, "Kenya's Constitutional Crisis," *Africa Today* 5, no. 5, (September – October 1958): 98
[128] Tom Mboya, "Kenya's Constitutional Crisis," 97 and 97.
[129] Parliament of Kenya: The National Assembly, "History of the Parliament of Kenya", 9.
[130] Kenya Law Reports, "The Final Report of the Constitution of Kenya Review Commission," 20.

delegation concerning the form of government.[131] Some delegates advocated for a strong central government, while others advocated for a regional (*majimbo*) government.[132] This necessitated the convening of the second Lancaster Constitutional Conference to address this issue and other issues, including the Bill of Rights.[133]

The independence constitution was published in March 1963.[134]On June 1 1963, Kenya attained internal self-government. The third and last Lancaster Constitutional conference was held in September 1963 to resolve outstanding issues.[135] On December 12 1963, the Kenya Independence Order in Council, containing the Constitution of Kenya of 1963, came into force.

Between 1963 and 1969, the independence Constitution was amended ten times. In 1969, the 1963 Constitution was replaced by the 1969 Constitution of Kenya. The 1969 constitution also underwent several amendments before the 2010 Constitution replaced it.[136]Most of the constitutional amendments after 1969 were made by the political incumbency without consultation to protect the personal and political interests of the then government.

The push for comprehensive constitutional reform began around the 1990s with different institutions such as the Citizens' Coalition for Constitutional Change, the Law Society of Kenya, the International Commission of Jurists (Kenya Chapter), the Kenya Human Rights Commission, the Episcopal Conference of Catholic Bishops, and the

[131] United Kingdom Parliament Hansard 1803-2005, "Kenya Conferences," HL Deb 15 May 1962 vol 240 cc530-618, assessed November 23, 2022, https://api.parliament.uk/historic-hansard/lords/1962/may/15/kenya-conferences.
[132] United Kingdom Parliament Hansard 1803-2005, "Kenya Conferences," 531 and 533.
[133] United Kingdom Parliament Hansard 1803-2005, "Kenya Conferences," 534
[134] Ogendo, "The Politics of Constitutional Change in Kenya," 15.
[135] United Kingdom Parliament Hansard 1803-2005, "Kenya Conferences," HL Deb 15 July 1963 vol 252 cc4-88, assessed November 23, 2022, https://api.parliament.uk/historic-hansard/lords/1963/jul/15/kenya.
[136] Kenya Law Reports, "The Amendments of the Constitution of Kenya from 1963 to 2019," accessed on July 30, 2022, http://kenyalaw.org/kl/index.php?id=9631.

National Council of Churches of Kenya. Different movements were also formed to push for a new Constitution, such as the Inter-Parties Parliamentary Group and the Ufungamano Initiative. In November 2000, the Constitution of Kenya Review Commission was established, and it commenced a participatory process of developing a draft Constitution. It developed a draft Constitution to be debated at a National Constitutional Conference on October 28 2002. The conference delegates were drawn from all sectors: civil society, Parliament members, religious institutions, and community representatives. The conference never took place, and the process collapsed.

After the general elections of December 2002, Parliament took over the process of developing a draft Constitution. It effected changes to the draft generated by the Constitution of Kenya Review Commission. It came up with the "Proposed New Constitution of Kenya (2005), which was taken to a national referendum on November 21, 2005, and rejected by a majority.

Approximately two years later, general elections were held in December 2007. The results of the elections were greatly disputed, leading to post-election violence that saw many Kenyans killed and internally displaced. The violence mutated into a political crisis that paralysed the institutions of the state. The African Union intervened, and a panel of Eminent African Personalities was established to assist Kenyans in finding a peaceful solution to the political crisis.

The result of the mediation process was a negotiation agenda and a timetable.[137] The agenda identified four broad issues whose Resolution was necessary to solve the political crisis. The first issue in Agenda 4 was constitutional, legal and institutional reform. This reform issue led to the enactment of the Constitution of Kenya Review Act (2008). The Act

[137] Agnes Meroka, "Agenda 4: 10th Parliament's Legislative Response," *Plato Institute* (2009).

established the Committee of Experts, whose mandate was to identify the contentious and non-contentious issues in the first two drafts of the Constitution previously developed and come up with a harmonised draft constitution for presentation to the National Assembly. The harmonised draft Constitution was subjected to a national referendum on August 4 2010. It was accepted by a majority of Kenyans and promulgated into law on August 27 2010.

The Constitution of Kenya 2010 is a transformative Constitution that checks state power and introduces fundamental changes in the governance and socio-economic spheres of the state. It moved Kenya from authoritative rule to governance that is keen on public participation, accountability, and transparency.

This Constitution is what is referred to in this thesis as the Constitution of Kenya 2010.

1.4.6. Public Trust Doctrine

The Public Trust Doctrine is applicable in Kenya and is referred to in different sections of this thesis. The doctrine existed as early as the Roman Empire.[138] Roman Law, as recorded by Justinian.[139], held that air, running water, the sea and consequently the shores of the seas are common to mankind and hence cannot be said to belong to anyone as private property.[140] Roman law was later adopted in England with modifications. The English common law recognised the importance of protecting public access to navigable surface waters for a limited set of public purposes such as navigation, commerce and fishing.[141] Hence, the public trust doctrine, as it were, was applied by English courts to bar

[138] The origin of the doctrine as Roman law is, however, disputed by James L Huffman, "Speaking of Inconvenient Truths: A History of the Public Trust Doctrine," *Duke Environmental Law and Policy Forum* 18, no.1 (Fall 2007):1-104.
[139] Justinian was an Emperor of the Roman-Byzantine Empire and ruled from AD 527 to 565. Justinian created a set of laws called the Justinian code.
[140]Huffman, "Speaking of Inconvenient Truths" 1-104.
[141] Richard J. Lazarus, "Changing Conceptions of Property and Sovereignty in Natural Resources Law: Questioning the Public Trust Doctrine," *Iowa Law Review* 71 (1986): 631-716.

public divestment of the shorelines of tidal – and later navigable- waters in a manner inconsistent with the public's right of access for traditional public uses such as navigation, commerce and fishing.

Scholars and judicial decisions later expanded the application of the doctrine to include dry land, that is, mining, wildlife and air pollution. For example, in 1970, Joseph Sax predicted the future development of a broader public trust that would encompass a greater range of natural resource values.[142] Some courts in different countries utilised this broader application of the doctrine. For example, in Uganda, the doctrine was used to prevent the transformation of the Butamira Forest Reserve into a sugar plantation. In Kenya, it provided a remedy for the discharge of raw sewage into the Kiserian River.[143]

Articles 61 and 62 of the Constitution of Kenya introduced the public trust doctrine in Kenya by providing that all minerals and mineral oils belong to the people of Kenya collectively as a nation, as communities and as individuals and are held by the national government for the people of Kenya.

Before the current Constitution, Kenya's natural resources legal framework did not recognise the public trust doctrine.[144] For example, Section 3 of the Petroleum (Exploration and Production) Act[145] provided that all petroleum, existing in its natural condition in strata lying within Kenya and the continental shelf, vests in the government. Nevertheless, the courts used the constitutional Right to Life to apply the doctrine. For

[142] Joseph L. Sax, "The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention," *Michigan Law Review* 68 (1970): 471.
[143] Michael C. Blumm and Rachel D. Guthrie, "Internationalising the Public Trust Doctrine: Natural Law and Constitutional and Statutory Approaches to fulfilling the Saxion Vision," *University of California, Davis* 45 (2012):741-808.
[144] Such legislations include the Energy Act (Chapter 314 of the Laws of Kenya), the Mining Act (Chapter 306 of the Laws of Kenya), the Diamond Industry Protection Act (Chapter 310 of the Laws of Kenya), and the Petroleum (Exploration and Production) Act (Chapter 308 of the Laws of Kenya. All these statutes are available at www.kenyalaw.org.
[145] Petroleum (Exploration and Production) Act (Chapter 308 of the Laws of Kenya. Available at www.kenyalaw.org

example, in *Waweru v. Republic* (2006) 1 K.L.R. 677, 677 (H.C.K.) (Kenya), the court took up the issue of the public trust doctrine on its own motion. It noted that section 71 of the Kenyan Constitution (now repealed) entitles every person to the right to life, and section 3 of the Environmental Management and Coordination Act gives the people the right to a clean and healthy environment. Hence, the state, as trustee, is under a fiduciary duty to deal with trust property, being the common natural resources, in a manner that is in the interest of the general public. The court concluded by declaring that the Kenyan constitutional right to life was the public trust doctrine by implication.

After the promulgation of the current Constitution of Kenya, the public trust doctrine is now embodied in Kenya's laws on natural resources. For example, Section 6 of the Mining Act[146] addresses the issue of ownership of minerals in Kenya. It provides that all minerals in Kenya are the property of the Republic and are vested in the national government in trust for the people of Kenya. Similarly, section 14 of the Petroleum Act[147] vests all petroleum, existing in its natural condition in strata lying within Kenya and its continental shelf, in the national government in trust for the people of Kenya. Further, section 4 (g) of the Wildlife Conservation and Management Act, 2014, states that the general principle should guide the Act's implementation that benefits accruing from wildlife conservation and management shall be enjoyed and equitably shared by the people of Kenya. The public trust doctrine is subsumed in this provision.

The common denominator of these pieces of legislation is that the state has been conferred with the obligation to act as either trustee or custodian of the environment or a specific natural resource, while the environment or that particular natural resource has been bequeathed to the people of Kenya.

[146] Act No. 12 of 2016
[147] Act No.2 of 2019

In this regard, the public trust doctrine serves two purposes: it mandates affirmative state action for the effective management of resources and empowers citizens to question the ineffective management of natural resources.[148] Therefore, the state must ensure that its citizens can access the public trust resources and that it is publicly accountable for any decisions concerning the said resources.[149]

1.4.7. Devolution in Kenya

Kenya adopted a devolved system of government following the promulgation of its current Constitution in the year 2010 hence shifting from a centralised system of government that it operated since its independence in 1963.

Devolution is a type of decentralisation which entails transferring political power and resources from the central government to democratically elected (and largely independent) subnational units.[150] It promotes democratic development and governance through, *among other things,* citizen empowerment and public participation.[151]

Devolution was embraced in Kenya as it: promotes accountability, fosters national unity, gives powers of self-governance to the people, enhances the participation of the people in governance and decision-making, allows the communities to manage their activities and hence further their development, protects the interest and rights of minorities, ensures equitable sharing of national and local resources countrywide, and enhances checks and balances and separation of power.[152]

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[148] Baxipatra Divyashree,"Failure of the States as Public Trustees of Mineral Resources on the Face of Mining Scams," *Kalinga Institute of Industrial Technology Law School*, February 26, 2013, https://dx.doi.org/10.2139/ssrn.2225021.
[149]Baxipatra. "Failure of the States as Public Trustees of Mineral Resources".
[150] Karuti Kanyinga, "Devolution and the New Politics of Development in Kenya," *African Studies Review* 59, no.3 (2016): 156, https://www.jstor.org/stable/26410250.
[151] Kanyinga, "Devolution and the New Politics of Development in Kenya,"156.
[152] Article 174 of the Constitution.

Therefore, there are two levels of government in Kenya: the national and county governments. Article 6(2) of the Constitution affirms that the national and county governments are distinct and interdependent and, therefore, should conduct their mutual relations on the basis of consultation and cooperation.

The Fourth Schedule of the Constitution of Kenya allows for the distribution of functions between the national and county governments. The structure and functions of the county governments are further explicated in the County Governments Act.[153] The county governments undertake their functions with a reasonable degree of autonomy from the national government and are empowered to make county laws and raise revenue to supplement the revenue it receives from the national government.[154]

Regarding the mining sector, the national government is responsible for protecting Kenya's mineral resources with a view to establishing a durable and sustainable system of development.[155] On the other hand, the county government is responsible for implementing specific national government policies on Kenya's mineral resources.[156]

1.5. OUTLINE OF CHAPTERS

The study is divided into six chapters. Chapter one introduces the study by giving a brief background and stating the research question. The terms "sustainable development", "sovereignty over natural resources", "right to regulate", "devolution", "the public trust doctrine", and "foreign direct investment" are defined as they are key terms in this study.

Chapter two analyses the interests of Kenya and foreign investors in the mining sector. The chapter commences with an analysis of Kenya's

[153] County Governments Act No. 17 of 2012 of the Laws of Kenya.
[154] Articles 174 and 175 of the Constitution.
[155] Part 1 of the Fourth Schedule of the Constitution of Kenya.
[156] Part 2 of the Fourth Schedule of the Constitution of Kenya. See also section 5(1) of the County Government Act.

mineral potential, the minerals value chain, and the probable economic impact of the sector on Kenya. It thereafter examines relevant statutes and policy papers, such as the Kenya Vision 2030 and the Africa Mining Vision, to tease out Kenya's interests with regard to the sector.[157] Concerning the interest of foreign investors, the chapter analysis several BITs that Kenya has concluded to tease out the interests of foreign investors in Kenya's mining sector.

Chapter three analyses Kenya's mining sector regulatory framework, including the Constitution, international instruments applicable to Kenya, the Mining Act, and relevant land, environmental and investment legislations. The mining laws are required to function as enabling tools for achieving the objectives of the state identified in chapter two while at the same time attracting foreign investors who are important for the development of the sector. Therefore, this chapter seeks to establish whether this is achieved through legislation.

The mining sector of Chile and Botswana have been recognised by international organisations such as the WTO, UNCTAD and OECD as a critical catalyst of their economic growth.[158] Therefore, chapter four examines the mining regulatory framework of Chile and Botswana with a view of extracting lessons and best practices that are key in ensuring that the mining regulatory framework of Kenya strikes the right balance between the interest of the state and that of the foreign investors in the mining sector.

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[157] Kenya Vision 2030 is the long-term national planning strategy to guide Kenya's development up to the year 2030, aimed at accelerating the country's transformation into a newly industrialised upper-middle-income state.

[158] World Trade Organization (WTO), World *Trade Report 2010: Trade in Natural Resources*,(Switzerland: WTO Publications, 2010), 96. https://www.wto.org/english/res_e/booksp_e/anrep_e/world_trade_report10_e.pdf. See also Jane Korinek, *Mineral Resource Trade in Chile: Contribution to Development and Policy Implications*, (Paris: OECD Publishing OECD, March 2013),9. http://dx.doi.org/10.1787/5k4bw6twpf24-en and United Nations Conference on Trade and Development (UNCTAD), *Best Practices in Investment for Development, How to Attract and Benefit from FDI in Mining: Lessons from Canada and Chile*, (New York, United Nations Publications, 2011).

Chapter five analyses Kenya's regulatory framework for the mining sector using the lessons and best practices identified in chapter four to establish whether the mining regulatory framework strikes the right balance between the interests of Kenya and that of foreign investors.

Chapter six concludes the study by harmonising the findings of the five chapters and presenting the final argument. It then gives the overall conclusion of the study based on the research findings and recommendations.

CHAPTER 2

2. AN ANALYSIS OF THE INTEREST OF HOST STATE AND FOREIGN INVESTORS IN THE MINING SECTOR IN KENYA

2.1. INTRODUCTION

Africa is endowed with minerals such as diamond in South Africa and Botswana; gold in Mozambique and Morocco; copper in Malawi and Mali, silver in Tunisia and Namibia, tanzanite in Tanzania and fluorspar and gemstones in Kenya.[159] Both foreign and local investors exploit these minerals. However, foreign investors are the majority whose operations are large-scale because they have the capital and relevant technology. In contrast, those of local investors are usually small-scale in nature.

For African countries to benefit from their natural resources, FDI should be promoted in the mining sector by the government in ways that strengthen good governance and accelerate economic growth in a sustainable manner.[160] Therefore, the relationship between the state and foreign investors concerning the exploitation of a country's mineral resources should be anchored upon a good legal and policy framework to significantly contribute to ensuring that the interest of both the state and the foreign investors are realised.

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[159] United Nations Economic Commission for Africa, *Minerals and Africa's Development: The International Study Group Report on Africa's Mineral Regimes*, (Addis Ababa: United Nations Economic Commission for Africa, 2011), https://archive.uneca.org/publications/minerals-and-africas-development, 184,185,186.

[160] Deborah Hardoon and Finn Heinrich, *Transparency International Bribe Payers Index 2011*, (Berlin: Transparency International Publication, 2011), 14-19, https://www.transparency.org/en/publications/bribe-payers-index-2011, rated the extractive industries as one of the sectors where corrupt payments are most likely to take place thus only the elite benefit from the resources. One of the reasons for this is the increase in FDI in oil and minerals in developing countries from non-Organisation for Economic Cooperation and Development (OECD) members such as China, Russia, and India. Therefore, the benefit should be to the people of Kenya not just the elite, politicians and government officials. See discussion in chapter 1.3 above.

It is essential to determine the interest of Kenya in the mining sector and that of foreign investors before examining the legal and policy framework for the mining sector in Kenya.

Therefore, this chapter introduces the mining sector in Kenya and, after that, examines the country's policies, strategies and plans in the mining sector to extract Kenya's interest in the sector. Further, it explores why foreign investors invest in host states to establish the interest of foreign investors in the mining sector in Kenya.

2.2. KENYA'S MINERAL POTENTIAL

According to Kenya's geology, there are various mineral deposits in the country spread out in different counties.[161]These mineral deposits are present within Kenya's five significant minerals geological blocks, namely the proterozoic (Mozambique belt and Bukoban) zone in the central Kenya area; the sedimentary Palaeozoic/Mesozoic in the south-eastern region and the coastal belt; the Archean in Nyanza; the Tertiary/Quaternary volcanic in the Rift Valley region; and the Tertiary/Quaternary sediments in Gilgil and Kavirondo Gulf off Lake Victoria.[162]

Kenya's early mineral sector was primarily characterised by titanium and non-metallic substances, including soda ash, gemstones, fluorspar and kaolin. Over the years, the mining sector has grown with a few large-scale mining operations such as soda ash mining by Tata Chemicals in Kajiado County on Lake Magadi; titanium mining by Base Titanium

[161] These minerals are either metals such as gold, copper, iron, steel, zinc, niobium, clinker, manganese, lead and titanium; industrial minerals such as fluorspar, salt, soda ash, barite, diatomite, feldspar, gypsum, lime, silica sand, vermiculite, cement, coral, granite, limestone and marble; or gemstone such as green garnet, ruby, sapphire, turquoise, rhodolite, tsavorite and spinel. See Aaron Waswa and Christopher Nyamai, "The Geology and Mineral Resources Potential of Kenya," (Symposium on Capacity Building in Sustainable Resource Development in Africa, Nairobi, 2016). See also Thomas R. Yager, "The Mineral Industries of Kenya and Uganda," *2012 Minerals Yearbook, U.S. Geological Survey, U.S. Department of the Interior*.

[162] Aaron Waswa and Christopher Nyamai, "The Geology and Mineral Resources Potential of Kenya.

Limited in Kwale County; cement mining by Bamburi Cement, Athi River Mining, Savanna Cement and East African Portland in Machakos County; clinker mining by Simba Cement in Kajiado County; and green garnet mining by Rockland Kenya Limited, Bridges Exploration Limited and Davis Mining in Taita Taveta County.[163]

Nevertheless, artisanal[164] and small-scale mining is still ongoing. For example, in the Western Kenya region, Karembe Mining and Kilimapesa Mining are undertaking small-scale mining of gold. Artisanal and small-scale mining of green garnet, ruby, rhodolite and tourmaline is being undertaken in Taita Taveta County. It is growing fast due to the introduction of the Community-Based Organisations (CBOs) mining model by the Taita Taveta County Government. This mining model encourages the local community to engage in small-scale mining. According to the model, the County Government is responsible for applying for and obtaining a mining licence for a mining area from the relevant ministry. After that, it gives the licence to a registered Community-Based Organisation to subdivide the mining area into small mining portions and thereafter allocate to interested members of the community to mine. After allocation, the CBO facilitates the local small-scale miners with mining resources such as security, storage, site office, and machinery. Upon sale of the minerals, the CBO retains 30% to cater for its operational and associated costs, while the small-scale local miner gets 70% of the sale.

The mining sector contributes less than one per cent of Kenya's GDP, with most minerals being exported with no value addition. In 2019, mining contribution to Kenya's GDP was 0.7 per cent, a decline from

[163] See map in appendix 1: Geology and Minerals Endowment of Kenya Map.
[164] According to section 4 of the Mining Act, artisanal mining means traditional and customary mining operations using traditional or customary ways and means.

0.8 per cent in 2018.[165] With regard to the sources of economic growth, the mining sector contributed only 0.5 per cent.[166]

The quantity of production of most of the minerals declined in 2019. For instance, the amount of titanium ore minerals produced fell from 597.7 thousand tonnes in 2018 to 486.1 thousand tonnes in 2019, while that of gemstones (rough) from 0.5 thousand tonnes in 2018 to 0.4 thousand tonnes in 2019.[167] Others include gold, from 0.47 thousand tonnes in 2018 to 0.39 thousand tonnes in 2019, and soda ash, from 339 thousand tonnes in 2018 to 230.4 thousand tonnes in 2019.[168] However, the quantity of production of gemstones (cut) increased from 14.5 thousand tonnes in 2018 to 19.8 thousand tonnes in 2019.[169] This indicates that Kenya is making substantial strides in value addition to gemstones. Notably, in 2015 the government engaged a contractor to commence the Voi Gemstone Value Addition Center construction at approximately Kenya Shillings (Kshs) 60 million.[170] The construction was completed in 2017 and handed over to the then Ministry of Petroleum and Mining the same year.[171] The ministry procured equipment worth Kshs 12 million and deployed staff to operationalise it.[172] The government intends to establish other value addition centres, namely, Kisii Soapstone Value Addition Center, Vihiga Granite Processing Plan and Kakamega Gold

[165] Kenya National Bureau of Statistics, *Kenya Economic Survey 2020*, (Nairobi: Kenya National Bureau of Statistics,2020), 27. https://www.knbs.or.ke/?wpdmpro=economic-survey-2020.
[166] Kenya National Bureau of Statistics, *Kenya Economic Survey 2020*, 29.
[167] Kenya National Bureau of Statistics, *Kenya Economic Survey 2020*, 146.
[168] Kenya National Bureau of Statistics, *Kenya Economic Survey 2020*, 145 and 146.
[169] Kenya National Bureau of Statistics, *Kenya Economic Survey 2020*, 146.
[170] Solomon Muingi, "Voi Gemstone Center to Begin Works in March," *Star Newspaper*, December 2, 2021.
[171] Following the general elections held on August 9,2022, the new government of President Dr William Ruto restructured the ministries and departments. The mining sector is now under the Ministry of Mining, Blue Economy and Maritime Affairs, hereinafter referred to as the Ministry of Mining.
[172] The National Treasury and Planning, *State Department for Planning Second Annual Progress Report 2019/20 on the Implementation of the Third Medium Term Plan (2018-2022) of the Kenya Vision 2030* (Nairobi: The National Treasury and Planning, March 2021,81. https://monitoring.planning.go.ke/wp-content/uploads/FINAL-APR-II-Rev.01.03.2021.pdf.

Refinery.[173] Consultants have been procured to undertake feasibility studies of these Centers.[174]

Despite the said decline in production, the export price of some of the minerals increased, such as that of titanium ore, which rose from Kshs 27,247 per tonne in 2018 to Kshs 32,556 per tonne in 2019 and soda ash which rose from Kshs 22,642 per tonne in 2018 to Kshs 23,999 per tonne in 2019.[175]

Further, total earnings from mineral production declined by 5.5 per cent from Kshs 30.8 billion in 2018 to Kshs 29.1 billion in 2019.[176] Titanium ore minerals accounted for 67.5 per cent of the total earnings from mineral production.[177] This is despite it experiencing a decline in the total value of its output from Kshs 20.3 billion in 2018 to Kshs 19.6 billion in 2018.[178] Gold and soda ash are other minerals that experienced a decrease in the total value of output. The value of soda ash output decreased from Kshs 6.9 billion in 2018 to Kshs 5.08 billion in 2019, while that of gold from Kshs 2.04 billion in 2018 to 1.4 billion in 2019.[179]

The slow growth in the total value of mining output in 2019 could be partly attributed to the cessation of the mining of fluorspar following the expiration of the Kenya Fluorspar Company mining lease and their unwillingness to renew the lease, which could be attributed to the decline in the international price of minerals.[180] It could also be attributed to the

[173] The National Treasury and Planning, *State Department for Planning Second Annual Progress Report 2019/20 on the Implementation of the Third Medium Term Plan (2018-2022),*81.
[174] The National Treasury and Planning, *State Department for Planning Second Annual Progress Report 2019/20 on the Implementation of the Third Medium Term Plan (2018-2022),*81.
[175] Kenya National Bureau of Statistics, *Kenya Economic Survey 2020*,147.
[176] Kenya National Bureau of Statistics, *Kenya Economic Survey 2020*,145.
[177] Kenya National Bureau of Statistics, *Kenya Economic Survey 2020*,146.
[178] Kenya National Bureau of Statistics, *Kenya Economic Survey 2020*,146.
[179] Kenya National Bureau of Statistics, *Kenya Economic Survey 2020*,146.
[180] The Extractives Hub reported that since 2012 there has been a decline in the prices of minerals, ores and ores hence slowing down international investment in the extractive sector. See Extractive Hub official website, accessed May 25, 2020, https://www.extractiveshub.org/topic/view/id/11/chapterId/365 (site discontinued).

Corona Virus Disease of 2019[181] , which affected the global prices of many commodities, including minerals.[182]

Despite the mineral potential of Kenya, the mining sector's contribution to Kenya's GDP is low because of local and foreign investors' minimal investment in the sector and lack of value addition. Minimal investment has partly been attributed to inadequate geological data; hence, the Ministry of Mining, Blue Economy and Maritime Affairs (Ministry of Mining) has actively been undertaking geological mineral mapping since 2013.[183] It has mapped and documented several mineral occurrences in West Pokot, Bungoma and Kitui counties.[184] Besides, in 2018 it commenced a countrywide airborne geophysical survey aimed at delineating areas in the country with economic mineral potential.[185] Concerning value addition, the government is investing in value-addition centres across the country, as discussed earlier.

Thus, as a result of these two initiatives by the government, it is projected that by 2030, the mining sector's contribution to Kenya's GDP shall increase to 10 per cent.[186]

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[181] COVID-19

[182] World Bank, "A Shock Like No Other: The Impact of COVID-19 on Commodity Markets," accessed February 14, 2022, https://thedocs.worldbank.org/en/doc/558261587395154178-0050022020/original/CMOApril2020SpecialFocus1.pdf.

[183]Ministry of Petroleum and Mining, "About Us: Directorates", assessed November 20,2018, http://www.mining.go.ke/index.php/about-us/our-directorate/directorate-of-geological-surveys. See also the Strategy 3 of the Kenya Mining and Minerals Policy, Sessional Paper No.7 of 2016, which recognizes the benefits of a Geo-Data bank available to different stakeholders depending on needs and user rights arrangements.

[184]Ministry of Petroleum and Mining, "About Us: Directorates", assessed November 20,2018, http://www.mining.go.ke/index.php/about-us/our-directorate/directorate-of-geological-surveys.

185 This is the Kenya Nationwide Airborne Geophysical Survey project under the Ministry of Mining. This project commenced in March 2018 and is projected to be completed in 2021.

[186] MTP II of the Vision 2030. See also United Nations Development Programme, "Ministry of Petroleum and Mining Gap Analysis", assessed November 20,2018, http://www.ke.undp.org/content/dam/kenya/docs/IEG/Ministry%20of%20Mining%20-%20Gap%20Analysis%20Kenya.pdf.

2.3. KENYA'S MINERAL RESOURCES VALUE CHAIN

Kenya's mineral value chain describes the stages followed in exploiting the mineral resources in Kenya to ensure that the minerals ultimately benefit the citizen as envisaged in Articles 61 and 62 of the Constitution. Therefore, it is the steps from exploration to the ultimate use of the revenues by the government for the benefit of the citizens. According to the Mining Act and guided by the World Bank and EITI standards, the value chain consists of seven stages summarised in Figure 1 and Table 1 below.

FIGURE 1: MINERAL VALUE CHAIN IN KENYA

Table 1 below summarises the seven stages above:

TABLE 1: MINERAL VALUE CHAIN IN KENYA

S/NO.	STAGE	DESCRIPTION
1	Access to mineral resources[187]	• Minerals resources are the property of Kenya and are vested in the national government in trust for the people of Kenya.[188] • Mineral resources should be exploited for the benefit of Kenyans. • To search for, prospect or mine any mineral deposit or tailings, one must be granted a permit or licence per the Mining Act.
2	Prospecting and exploration	• Prospecting involves the search for mineral deposits through research to select target areas for exploration. It is non-intrusive and is therefore known as reconnaissance. Methods used include geophysical surveys, geochemical surveys, and photo geological surveys or other remote sensing techniques and surface geology. • Once something of value is discovered, advanced exploration commences, which involves evaluating a geologic discovery through higher impact activities such as further ground geophysics and geological surface mapping and sampling to determine whether it should proceed to development. • For large-scale operations, a reconnaissance and prospecting licence must be obtained at each step. A retention licence must be obtained if the holder of a prospecting licence has identified a mineral deposit that is of potential commercial significance within the prospecting area and the deposit cannot be developed immediately due to factors beyond the reasonable control of the licence holder such as adverse market conditions, economic factors, and technical constraints. • Only a reconnaissance permit and a prospecting permit are required for small-scale operations at this stage.
3	Development and extraction/production	It involves three stages, namely: • Deposit development which involves technical and economic assessments to guide decision-making as to whether to proceed to mine. • Mine development which involves design and planning for extraction and construction of the mine.

[187] Section 10 of the Mining Act.
[188] Section 6(1) of the Mining Act. See also Articles 61 and 62 of the Constitution.

S/NO.	STAGE	DESCRIPTION
		• Production which has two stages: one, extraction (actual mining), also commonly referred to as recovery of the minerals and two, processing of the minerals.[189] For large-scale mining, a mining licence must be obtained, while for small-scale mining, a mining permit must be obtained. Mining transactions where proposed investment exceeds US$ 500 million require ratification by Parliament. After that, the government may enter into a mining agreement with the investor.[190] An export permit must be obtained if the investor wishes to export the minerals.[191]
4	Revenue collection	• It involves (i) collection of taxes, (ii) fees such as application filing fees, report filing fees, fees for access to geological data as well as fees for access to public registers, (iii) charges such as annual charges payable upon a grant of the relevant mineral right or mineral dealer's permit, and (iv) royalties. • The government has a ten per cent free carried interest in the share capital of a large-scale mining right; hence the state is not supposed to make any payment or financial contribution.[192]
6	Revenue management and allocation	• Royalties received are distributed as follows: seventy per cent to the National Government, twenty per cent to the County government, and ten per cent to the community where the mining operations occur.[193] The efficacy of this distribution will be discussed in detail in the following chapters.
7	Social and economic spending	Involves the utilisation of revenue by implementing sustainable development policies and projects.

[189] Mineral processing involves separating the valuable mineral from the waste rock.
[190] See Article 71 of the Constitution and the Natural Resources (Classes of Transactions Subject to Ratification) Act No. 41 of 2016
[191] Section 171 of the Mining Act
[192] Section 48 of the Mining Act
[193] Section 184 of the Mining Act.

2.4. INTEREST OF KENYA IN THE MINING SECTOR

Any government and citizens principally expect economic growth from its mineral resources. In Africa, very few countries with commercially exploitable minerals have utilised the benefits derived from exploiting their natural resources to raise the standard of living of their citizens.[194] The abundance of mineral resources in many African states has resulted in adverse economic and political outcomes, including poor economic performance, civil conflict, weak institutions and authoritarian regimes as opposed to economic prosperity.[195]

Different disciplines have explained the above trend. Economists and political scientists posit that abundant resources engenders a resource curse.[196] Paul Collier argues that oil is core to the economics of civil war. This is because it encourages extortion, looting and resource predation.[197]

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[194] Economists and political scientists call this common problem the resource curse. They have theorised that this common problem is caused by a mineral rich state shifting its production inputs from other export sectors such as agriculture to the mineral sector thus reducing the competitiveness of the other sectors hence leading to their collapse. This accelerates domestic inflation leading to a rise in the real exchange rate. This affects economic growth by reducing a country's economic diversity and increasing its reliance on exports from natural resource sector. In addition, the export boom exerts pressure on governments to share increased revenues with the public, often by investing in unproductive public work projects that are motivated by politics not profits or subsidizing food, fuel, failing industries and government jobs. Corruption becomes rampant especially with persons with close ties to the government. See Erica Weinthal and Pauline Jones Luong, "Combating the Resource Curse: An Alternative Solution to Managing Mineral Wealth," *Perspectives on Politics* 4, no.1, (2006):35-53.

[195] For example, Nigeria is the largest oil exporter in Africa but the largest producing region (Niger Delta) is poor and infrastructurally undeveloped giving rise to violent conflicts and attacks of the oil companies in the region. Similarly, Equatorial Guinea is one of the major oil exporters in Africa but the oil revenues have not benefited the people. Only the President and the elite who are close to the President benefit from the oil wealth. See Yinka Omorogbe,"The Legal Framework for Public Participation in Decision-making on Mining and Energy Development in Nigeria: Giving Voices to the Voiceless," in *Human Rights in Natural Resource Development: Public Participation in the Sustainable Development of Mining and Energy Resources,* eds. Donald M Zillman, Alastair Lucas and George Pring (Oxford: Oxford University Press, May 23,2002); Chilenye Nwapi,"A Legislative Proposal for Public Participation in Oil and Gas Decision-Making in Nigeria," *Journal of African Law* 54, no.2 (2010) : 184-211 ; Emmanuel M. Akpabio and Nseabasi S. Akpan, "Governance and Oil Politics in Nigeria's Niger Delta: The Question of Distributive Equity," *Journal of Human Ecol*ogy 30, no.2 (2010): 111-121; and Leif Wenar,"Property Rights and the Resource Curse," *Philosophy & Public Affairs* 36, no.1(2008).

[196] Weinthal and Luong, "Combating the Resource Curse," 35-53.

[197] Paul Collier, "Economic Causes of Civil Conflict and their Implications for Policy" (Economics of Crime and Violence Paper, World Bank, Washington DC, 2000). See also Paul Collier, "The Political Economy of Natural Resources," *Social Research* 77, no. 4 (2010):1105.

Michael Ross agrees, submitting that oil is a cursed resource due to its rentier effects, such as low taxes and high patronage that dampens pressure for democracy.[198]

Legal scholars have also studied the resource curse phenomenon. Lawan Mamman, for instance, employs a socio-legal argument differing from the resource-curse theses above. He argues that the cause of underdevelopment in oil-producing countries in Africa is a result of corruption that is, in turn, a result of the lack of the rule of law[199].[200] Leif Wenar's perspective is that the resource curse results from the failure of the state to enforce property rights. As a result, dictators and the elite can trade with the resources of their territory without the people's consent and use the proceeds for personal gain, both politically and economically.[201] Wenar's argument is premised on the fact that the citizens of a country own the natural resources of that country and hence have the right to decide what happens to what they own.[202]

Joseph Sax's argument is also from the property law perspective. His view is that most of the threat to public resources comes from poor public decision-making. He thus identified the Public Trust Doctrine[203] as a public property concept that guards against the exploitation of natural

[198]Michael L.Ross, "The Political Economy of the Resource Curse," *World Politics* 51(1999):297-322.
[199] The Rule of law is a principle of governance in which all persons, institutions and entities (both public and private) including the state itself are subject to the laws that are publicly promulgated and consistent with international human rights norms and standards. See "What is the Rule of Law", United Nations and the Rule of Law, accessed July 29, 2020, https://www.un.org/ruleoflaw/what-is-the-rule-of-law/.
[200] Mamman Alhaji Lawan, "The Paradox of Underdevelopment amidst Oil in Nigeria: A Socio-Legal Explanation," (Ph.D. in Law thesis, University of Warwick, 2008).
[201] Leif Wenar, "Property Rights and the Resource Curse" *Philosophy & Public Affairs* 36, no.1 (2008).
[202] As per Article 1 of the International Covenant on Civil and Political Rights; Article 1 of the International Covenant on Economic, Social, and Cultural Rights; Article 21 of the African Charter on Human and Peoples' Rights.
[203] This doctrine provides that natural resources in a state are held by the state in trust for the benefit of all the citizens. The government is therefore a trustee and hence under a fiduciary duty to protect the trust resources for the beneficiaries of the trust who are the citizens.

resources in a manner that does not meet reasonable public expectations.[204]

Kenya's law and policymakers are keen to ensure that Kenya's narrative is different by incorporating relevant mineral resources development and management principles in its legal framework, policy documents and strategies. These documents are discussed hereunder to tease out the interest of Kenya in the mining sector.

2.4.1. The Constitution and the Mining Act[205]

The Constitution of Kenya has several provisions regarding the management of Kenya's natural resources. The critical governing principle in these provisions is the public trust doctrine. Articles 61 and 62 of the Constitution of Kenya[206] introduced the public trust doctrine in Kenya to ensure that the minerals are exploited for the benefit of the citizens.[207] Before the current Constitution, the different legislations on natural resources in Kenya did not recognise the public trust doctrine.[208] For example, Section 3 of the Petroleum (Exploration and Production) Act[209] provided that all petroleum, existing in its natural condition in strata lying within Kenya and the continental shelf, vests in the government.[210]

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[204] Joseph Sax, "Liberating the Public Trust Doctrine from Historical Shackles," *University of California Davis Law Review* 14 (1980):185. See also Michael Blumm and Rachel Guthrie, "Internationalizing the Public Trust Doctrine: Natural Law and Constitutional and Statutory Approaches to fulfilling the Saxion Vision," *University of California Davis Law Review* 45(2012):741-808.

[205] The Mining Act No.12 of 2016.

[206] The current Constitution of Kenya was promulgated on August 27, 2010. It replaced the 1969 Constitution which had replaced the 1963 independence constitution.

[207] Article 61 and 62 of the constitution provide that all minerals and mineral oils belong to the people of Kenya collectively as a nation, as communities and as individuals and are held by the national government for the people of Kenya.

[208] Such legislations include the Energy Act (Chapter 314 of the Laws of Kenya), the Mining Act (Chapter 306 of the Laws of Kenya), the Diamond Industry Protection Act (Chapter 310 of the Laws of Kenya), and the Petroleum (Exploration and Production) Act (Chapter 308 of the Laws of Kenya. All these statutes are available at www.kenyalaw.org.

[209] Petroleum (Exploration and Production) Act (Chapter 308 of the Laws of Kenya.

[210] Nevertheless, the courts used the constitutional Right to Life to apply the doctrine. This was so in the case of *Waweru v. Republic*, (2006) 1 K.L.R. 677, 677 (H.C.K.) where the court took up the issue of the public trust doctrine on its own motion. It noted that Section 71 of the repealed Constitution entitles every person to the right to life and

Following the constitutional provisions, the public trust doctrine is now embodied in Kenya's laws on natural resources. For example, Section 6 of the Mining Act[211] provides that all minerals in Kenya are the property of the Republic and are vested in the national government in trust for the people of Kenya.[212]

Including the public trust doctrine in the Constitution and the Mining Act affirms that the primary interest of Kenya in the sector is to benefit[213]its citizens, both current and future generations.

The Mining Act has provisions to ensure that the citizens enjoy economic, social and environmental benefits from the mining sector as envisaged by the public trust doctrine. For instance, sections 46 (1) and 47 require a mineral right holder to employ and train Kenyan citizens to ensure the transfer of skills. Further, section 50 requires mineral rights holders to give preference, to the maximum extent possible, during procurement of goods and services for its operations to materials and products made in Kenya and services offered by members of the community and Kenyan citizens. Regarding the environment, under section 176 (1), the mineral rights holder must comply with all laws on protecting the environment in Kenya. The following chapter will

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Section 3 of the Environmental Management and Coordination Act gives the people the right to a clean and healthy environment. This therefore implies that the state, as trustee, is under a fiduciary duty to deal with trust property, being the common natural resources, in a manner that is in the interests of the general public. The court concluded by declaring that the Kenyan constitutional right to life was the public trust doctrine by implication.

[211] The Mining Act No.12 of 2016.

[212] This provision is found in other post 2010 laws and bills on natural resources. For example, Section 4 (g) of the Wildlife Conservation and Management Act, 2014 states that the implementation of the Act should be guided by the general principle that benefits accruing from wildlife conservation and management shall be enjoyed and equitably shared by the people of Kenya. The public trust doctrine is subsumed in this provision. Similarly, Section 133 of the Energy Bill vests all Petroleum, existing in its natural condition in strata lying within Kenya and the continental shelf, in the national Government in trust for the people of Kenya. The common denominator of these pieces of proposed legislations is that the State has been conferred with the obligation to act as either trustee or custodian of the environment or a specific natural resource, while the environment or that particular natural resource has been bequeathed to the people of Kenya.

[213] The benefits to the citizens include economic, social as well as environmental gains.

examine the Mining Act and other mining legal instruments in more detail.

2.4.2. Mining and Minerals Policy[214]

It identifies the achievement of sustainable economic development as the interest of Kenya in the mining sector. It posits that this can only be achieved if (i) the proper regulatory and institutional framework is in place, (ii) there exists a transparent licensing system which will enable the efficient management of concessions and allocation of mineral rights, (iii) accurate and timely geological data and information is available, (iv) legislative mechanisms for accessing land for mineral development are developed, (v) a proper balance is achieved between mining and environmental conservation, (vi) the sector operates within national and international standards with regard to safety, health, human rights and environmental protection, (vii) a stable, transparent, predictable and competitive fiscal regime is developed and implemented, (viii) mineral investment in Kenya is actively promoted, (ix) there is equitable sharing of the benefits from the sector amongst the national government, county government and the local community and, (x) there is adequate participation in decision making by the citizens in the sector as well as in mining activities[215] such as large scale, artisanal and/or small scale mining.[216]

2.4.3. Kenya Vision 2030[217]

It is the long-term national planning strategy to guide Kenya's development up to 2030 to accelerate its transformation into a newly industrialising upper-middle-income state.[218] Vision 2030 is anchored on three main pillars, namely the economic, social and political pillars and

[214] The Mining and Minerals Policy, Sessional Paper No.7 of 2016.
[215] Any activity or operations conducted under a licence issue under the Mining Act such a reconnaissance licence, prospecting licence, or a mining licence.
[216] See page 8 to 12 of the Mining and Minerals Policy. These are the policy objectives.
[217] Kenya Vision 2030, Sessional Paper, 2012.
[218] The growth objective underpinning the Vision 2030 require the rate of growth of the economy to rise from 6.1 percent achieved in 2006 to 10 per cent and sustaining that growth thereafter. See Kenya Vision 2030,22.

is implemented through five-year medium-term rolling plans, with the inaugural one being 2008-2012.[219] The Second Medium Term Plan (2013-2017) succeeded the inaugural Medium Term Plan. It introduced oil and other mineral resources as the seventh priority sector under the economic pillar, with a high potential of spurring the country's economic growth and development by harnessing the mineral resources for industrial development. Kenya is currently implementing the Third Medium Term Plan (2018-2022), which succeeded the Second Medium Term Plan.

To achieve Vision 2030 growth objectives, the public and private investment level should rise to 31.3 per cent of GDP by 2012/2013 (that is by ten percentage points) and then remain above 32 per cent for the 2014-2030 period.[220] In particular, private sector investments should rise from 15.5 per cent of GDP in 2006/2007 to 22.9 per cent in 2012/2013 and over 24 per cent of GDP during the period 2020/2021 to 2030.[221] Foreign Direct Investment is expected to comprise a significant share of the increase, and the mining sector is, therefore, one of the contributory sectors.

2.4.4. The Third Medium-Term Plan (2018-2022) for Vision 2030

It succeeds the Second Medium Term Plan 2013-2017, which achieved significant progress, such as (i) the construction of phase one of the Standard Gauge Railway covering four hundred and seventy-two kilometres from the port of Mombasa to Nairobi, (ii) the construction and rehabilitation of three thousand two hundred and fifty kilometres of road, (iii) the connection of approximately six million households to the national electricity grid, (iv) upgrading and expansion of national power transmission network by an additional one thousand four hundred and

[219] There are flagship projects and other priority programmes under each of the three pillars.
[220] Kenya Vision 2030,8.
[221] Kenya Vision 2030,8.

twenty-six kilometres to increase access to electricity, (v) implementation of digital literacy programme thus integrating the use of technology in learning, (vi) the establishment of Huduma Centers[222] in counties to guarantee county access national government services, and (vii) the establishment of E-Citizen government portal to ease access to government services, among others.[223] All these contributed to the ease of doing business in the country, thus encouraging investment by both locals and foreigners.

Despite the achievements realised, significant challenges were experienced during the implementation period. These challenges include (i) high unemployment levels among the youth, (ii) increased prices of food and other essential items resulting in high cost of living, (iii) vulnerability to cyber-crimes, (iv) the negative impact of climate change, (v) low absorption of development partner funds in the development budget hence slowing down project implementation, (vi) slow approval process and uptake of public-private partnership projects, (vii) high energy costs, (viii) weak project selection and prioritisation thus affecting the productivity of investments, and (ix) the COVID-19 pandemic, among others.[224]

The Third Medium Term Plan aims to take advantage of the gains achieved in implementing the Second Medium Term Plan and address the challenges to move the economy to the ten per cent economic growth rate target envisioned in Vision 2030 by the end of the plan period.[225] Therefore, the plan's priority is to invest in appropriate infrastructure to facilitate the development of the country's mineral resources sector. It

[222] This is a physical one-stop shop were all government services can be obtained by the citizens
[223] Third Medium Term Plan 2018-2022, accessed July 29, 2020, https://planning.go.ke/wp-content/uploads/2018/12/THIRD-MEDIUM-TERM-PLAN-2018-2022.pdf, 1 and 2.
[224] Third Medium Term Plan 2018-2022, 2.
[225] Third Medium Term Plan 2018-2022,1 and 2.

also aims to put in place incentives to attract both domestic and foreign investment in the sector.[226]

In line with Vision 2030, under the economic pillar, this medium-term plan recognises the mining sector as one of the eight priority sectors to drive economic growth.[227] Some of the key initiatives planned under the mining sector include (i) carrying out aerial geophysical surveys to establish areas of mineralisation, (ii) the establishment of an internationally accredited mineral certification laboratory, (iii) the establishment of a geological data bank which will host geological data and information for use by investors and other users, (iv) the establishment of a National Mining Institute and, (v) enhancing mining for development through construction, equipping and operationalisation of mineral value addition centres[228] such as the Gemstone Value Addition Centre in Taita Taveta, Granite Processing Plant in Vihiga County, a gold refinery in Kakamega County, and a gypsum product manufacturing plant in Garissa County.[229]

The government further seeks to (i) undertake mineral promotion to market Kenya as a mining and investment destination, (ii) establish a mineral and metal commodity exchange to facilitate mineral trading, (iii) host the African Mineral Development Centre, and (iv) implement the Mining Act by, for example, strengthening the mineral audit unit, establishing the National Mining Corporation, establishing the Mineral Royalty Fund, and upgrading the online transaction mining cadaster portal to increase investment in the sector and promote industrial sector growth.[230]

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[226] Concept Note on Medium Term Plan 2018-2022, 1.
[227] Third Medium Term Plan 2018-2022, xxii.
[228] The aim of this centers is value addition. This means that value is added to the extracted mineral in order to maximise the benefits from the product. For example, the extracted mineral such as gemstone could be washed, sized and polished before it is exported instead of exporting it in its crude form. There is usually more value to a mineral when it is exported having moved up the value chain.
[229] Third Medium Term Plan 2018-2022, xxii and 67.
[230] Third Medium Term Plan 2018-2022, 67.

Therefore, the state's interest is to utilise the mining sector as a catalyst for economic growth and development through domestic and foreign direct investment.

2.4.5. Africa Mining Vision and the Kenya Country Mining Vision

The Africa Mining Vision (AMV) was drafted by the United Nations Economic Commission for Africa in 2008 and adopted by African Heads of State and Government in February 2009. It is a continental framework that advocates for a *"*Transparent, equitable and optimal exploitation of mineral resources to underpin broad-based sustainable growth and socio-economic development*"*.[231] It, therefore, acts as a guide for the mineral resource exploitation plans and strategies of resource-rich African countries to ensure that they maximise the concomitant opportunities offered by mineral resource endowment so that the utilisation of the mineral resources catalyses diversified industrial development [232]

Kenya intends to domesticate the AMV by drafting and adopting the Kenya Country Mining Vision (KCMV). The process commenced in 2017, with the then Ministry of Mining leading the process. A Multi-Sectoral Technical Working Group (MS-TWG) was constituted to coordinate the exercise. [233]

The purpose of the KCMV is to ensure that industrialisation and development, through the utilisation of Kenya's mineral resources,

[231] Africa Mining Vision (2009),v.
[232] Africa Mining Vision (2009), 13.
[233]Kenya County Mining Vision (KCMV), *2017 Report*, June 5-7 2017, 4.

catalyses diversified industrial development[234].[235] This is in line with Kenya Vision 2030.

2.4.6. Sustainable Development Goals (SDGs)

According to Article 10(2)(d), sustainable development is recognised as one of the national values and principles of governance that bind all state organs, state officers, public officers and all persons whenever any of them is interpreting the Constitution, developing legislation, interpreting any law, or makes and implement public policy decisions. The adoption of the SDGs by the government on September 14, 2016, confirmed its commitment to this national value and to implement the SDGs in Kenya.[236]

Since the SDGs came after the adoption of the Kenya Vision 2030, the government mapped each of the seventeen SDG goals with the Vision 2030 Second Medium Term Plan objectives to ensure that the implementation of Vision 2030 is directly linked towards achieving both the Vision 2030 and SDGs.[237]

Under SDG 1, which focuses on eradicating poverty, Target 1.4 of the goal emphasises the need for states to ensure that the poor and the vulnerable in society have equal rights to natural resources. This guarantees that the said category of citizens also benefits from the country's vast mineral resources.

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[234] This means that value addition of crude minerals enables the government to grow other sectors of the economy such as the manufacturing sector. This ensures that the country achieves economic diversification which is considered key for creating jobs and fostering economic development in developing countries. See Clovis Freire, "Economic Diversification: Explaining the Pattern of Diversification in the Global Economy and its Implications for Fostering Diversification in Poorer Countries" (DESA Working Paper No. 150, ST/ESA/2017/DWP/150, United Nations Secretariat, 2017) https://www.un.org/esa/desa/papers/2017/wp150_2017.pdf.

[235] Kenya County Mining Vision (KCMV), *2017 Report*, June 5-7 2017, 4 and 5.

[236] Kenya Voluntary National Review on SDGs, *2017 Report*, https://sustainabledevelopment.un.org/memberstates/kenya.

[237] Implementation of the Agenda 2030 for Sustainable Development in Kenya, June 2017. Ministry of Devolution and Planning.

SDG 8 and 9 address the promotion of inclusive, sustainable economic growth and industrialisation, which have been echoed in most of the country's development plans, such as Vision 2030 and its current Medium-Term Plan. The mining sector has been identified as one of the catalysts for achieving economic growth and industrialisation in the country. Concerning the sustainable production of mineral resources, SDG 12 addresses this by emphasising the need for governments to achieve sustainable management and efficient use of their natural resources by 2030.[238]

Other relevant SDG goals are (i) SDG 13 on climate action and the need to integrate climate change measures in countries' strategies and plans on mining, (ii) SDG 16, which emphasises the need to promote inclusive and accountable institutions that are free from corruption and bribery hence promote local and foreign direct investment in the mining sector, and (iii) SDG 17 which advocates for the importance of global partnership for sustainable development through for example the World Trade Organisation (WTO) and multi-stakeholder partnerships to increase exports in the mining sector.[239]

From this analysis, Kenya's interest in the mining sector can be construed as eradicating poverty and hunger for current and future generations through the utilisation of the sector to achieve economic growth and industrialisation in a sustainable, inclusive, equitable, accountable and environmentally friendly manner.

2.4.7. Government's Economic Transformation Agenda

The current government came into power on September 13, 2022, following the swearing-in of Dr William Ruto as the fifth President of the Republic of Kenya. During the campaign period, Dr William Ruto shared the manifesto of his proposed government known as "the Bottom-

[238] Target 12.2 of the SDGs.
[239] Target 17.10 and 17.15.1

Up Economic Transformation Agenda 2022-2027". The government has confirmed the plan as containing its priorities for the next five years. Thus, all government departments, ministries and agencies must align their respective activities to the plan.

The plan identifies the manufacturing sector as vital for economic growth.[240] Hence, the government has committed to increasing manufacturing by improving the infrastructure, including completing all roads under construction, prioritising upgrading of rural access roads, improving critical national and regional trunk roads that have the highest immediate economic impact, and bringing down the cost of electricity.[241] Specific to the extractives sector, the government has committed to transfer funds owed to the beneficiary counties and communities under the Mining Act within six months of office and work with county governments to increase the capacity of the communities to benefit from extractive resources.[242]

Given the above, the government's interest in the mining sector in the context of the Bottom-Up Economic Transformation Agenda 2022-2027 is to accelerate the social-economic transformation of the country and improve the quality of life for current and future generations through value addition of extracted minerals.

2.5. INTEREST OF KENYA IN THE MINING SECTOR FROM A COUNTY GOVERNMENT PERSPECTIVE

According to Article 174 of the Constitution, the principal objects of devolution include the recognition of the right of communities to manage their affairs, further their development, and ensure equitable sharing of national and local resources throughout Kenya.[243]

[240] United Democratic Alliance, *The Kenya Kwanza Plan: The Bottom-Up Economic Transformation Agenda 2022-2027*: 33, https://uda.ke/downloads/manifesto.
[241] *Kenya Kwanza Plan*: 33,34,29.
[242] *Kenya Kwanza Plan*: 60.
[243] Article 174 (d) and (g) of the Constitution.

This is in line with World Bank's emphasis that:

> If the project involves the commercial development of natural resources (such as minerals, hydrocarbon resources, forests, water or hunting/fishing grounds) on lands or territories that Indigenous Peoples traditionally owned, or customarily used or occupied, the borrower … [must include] arrangements … to enable the Indigenous Peoples to share equitably in the benefits to be derived from such commercial development; at a minimum, the … arrangements must ensure that the Indigenous Peoples receive, in a culturally appropriate manner, benefits, compensation and rights to due process at least equivalent to that to which any landowner with full legal title to the land would be entitled in the case of commercial development on their land."[244]

To achieve this, the Constitution grants the County Assembly and the Senate[245] different roles concerning the management of mineral resources.

The County Assembly implements national government policies on natural resources and environmental conservation.[246]It may, therefore, receive and approve plans and policies for managing and exploiting the county's resources to ensure that the interests of the county government and local communities are considered.[247] According to Article 69(1) of the Constitution, some of the community's interests that must be considered include benefit sharing, local content and local equity participation.

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[244] Pritchard Robert, "Participation of Indigenous Peoples in Natural Resource Development in Australia" (Energy White Paper, Australian Government, June 28, 2013), http://www.resourceslaw.net/documents/RIIndigenousParticipationMay09.pdf.The author referred to the World Bank Operational Manual (OP4.10 July 2005), paragraph 18.

[245] The Parliament of Kenya is established under Article 93(1) of the Constitution and consists of the National Assembly and the Senate. The role of Senate is provided for in Article 96 of the Constitution.

[246] Part 2, Fourth Schedule of the Constitution

[247] Article 185 (4a) and Article 196 (1b) of the Constitution

The County Assembly must undertake its said implementation role in a participatory manner; hence, the community must be involved when making policy decisions and approving plans. Notably, Article 10(2)(a) of the Constitution recognises the participation of the people as one of the national values and principles of governance that bind all state organs, state officers, public officers and all persons whenever any of them is interpreting the Constitution, developing legislation, interpreting any law, or making and implementing public policy decisions. Specifically, the participation of the people in the management, protection and conservation of the environment is mandated in Article 69(1) of the Constitution.

On the other hand, the Senate is responsible for representing the interests of the counties and their governments at Parliament and considering, debating and approving Bills concerning counties.[248] Therefore, the role of the Senate concerning the management of mineral resources is a legislative function. For example, the Senate originated the Natural Resources (Benefit Sharing) Bill, Senate Bill No.25 of 2020. The Bill was passed by Senate, with amendments, and referred to the National Assembly for consideration.[249] It also originated the Local Content Bill, Senate Bill No.10 of 2018, which was also passed by the Senate with amendments and referred to the National Assembly for consideration.[250]

[248] Article 96(1) of the Constitution. According to Article 110 of the Constitution, a Bill concerning county government means a Bill containing provisions affecting the functions and powers of the county government set out in the fourth Schedule of the Constitution; a Bill relating to the election of members of a county assembly or a county executive; and a Bill referred to in Chapter 12 (Public Finance) affecting the finances of county governments.

[249] The Bill was received by the National Assembly from Senate on November 11,2019. Technical review of the Bill was concluded by the National Assembly on February 18, 2020 and forwarded to the Budget and Appropriations Committee for further consideration. The committee declared the Bill to be a money bill in terms of Articles 109(5) and 114 of the Constitution on August 12,2020. A money bill can only be introduced in the National Assembly (Article 109(5) of the Constitution) and therefore the bill could not proceed after the declaration. See "Bills Tracker", The Senate of the Republic of Kenya, accessed May 24, 2022, http://www.parliament.go.ke/the-senate/house-business/bills-tracker. See also See also "Bill Tracker", the National Assembly of the Republic of Kenya, http://www.parliament.go.ke/the-national-assembly/house-business/bill-tracker.

[250] The Bill was received by the National Assembly from Senate on September 12,2019. Technical review of the Bill was concluded by the National Assembly on September

Unfortunately, the two Bills were considered money bills[251] by the National Assembly, and therefore the National Assembly did not consider them. Nonetheless, this does not negate the legislative role of the Senate. The Senate needs to ensure that Bills originating from them deal with matters within their mandate as provided for in Articles 110,111, and 112 of the Constitution.

Therefore, the interest of the county governments in the mining sector is focused on benefit-sharing, local content and local equity participation.[252] This means that its emphasis is ensuring that the benefits accruing from the exploitation of minerals are shared equitably among the county government, national government and local communities; the local community where the mining activities are being undertaken participate in the mining activities; and artisanal and small-scale mining is developed.

2.6. INTEREST OF FOREIGN INVESTORS IN KENYA'S MINING SECTOR

2.6.1. A General Examination of the Interest of Foreign Investors

The interest of foreign investors in any sector is profit maximisation, that is, the ability to make a commercial return on its investments.[253] Investors

24, 2019 and forwarded to the Budget and Appropriations Committee for further consideration. The committee declared the Bill to be a money bill in terms of Articles 109(5) and 114 of the Constitution on August 12,2020. A money bill can only be introduced in the National Assembly (Article 109(5) of the Constitution) and therefore the bill could not proceed after the declaration. See "Bills Tracker", The Senate of the Republic of Kenya, http://www.parliament.go.ke/the-senate/house-business/bills-tracker. See also "Bill Tracker", the National Assembly of the Republic of Kenya, http://www.parliament.go.ke/the-national-assembly/house-business/bill-tracker.

[251] According to Article 114(3) of the Constitution, a money bill contains provisions on taxes; imposition of charges on a public fund or the variation or repeal of any of those charges; the appropriation, receipt, custody, investment or issue of public money; the raising or guaranteeing of any loan or its repayment; or matters incidental to these matters. Senate cannot originate money bills. It is the sole mandate of the National Assembly.

[252] Kenya Mining and Minerals Policy, 2016.

[253] Agarwal Jamuna, "Determinants of Foreign Direct Investment: A Survey," *Weltwirtschaftliches Archiv* 116, no. 4 (1980): 739-73, www.jstor.org/stable/40438670.

will therefore evaluate a proposed project based on the return it will provide against the risk.

Mineral exploration and extraction are capital-intensive stages of mineral development as they rely heavily on technical expertise and expensive mining equipment such as excavators and compressors. Therefore when a foreign investor decides to invest in any country, it means that (i) the country has more substantial geological potential for mineral exploration and production and (ii) a high return on investment can be achieved by cost-cutting and lowering risks through market diversification and benefits such as low labour costs, preferential tariffs, tax incentives, cost of capital and subsidies. Also, investment is high in countries *inter alia* with favourable interest rates, cheap supply of labour, ability to repatriate profits, political and economic stability, favourable government policies, legal certainty and predictability because of the presence of a good legal system and mining legal framework, and access to regional markets.[254]

According to Mr Moses Njeru of the Kenya Chambers of Mines, the interest of foreign investors in the mining sector is to trade in the minerals produced and hence make a profit.[255] Thus, foreign investors usually examine a host state's legal and regulatory framework for assurance that upon investing in mineral exploration and finding commercially exploitable minerals, the government shall allow them to mine and trade in the minerals. Also, foreign investors want the assurance that their investment in the sector is secured from expropriation and that they shall be granted fair and equitable treatment in the host state. For these reasons, foreign investors have been securing their interests through Bilateral

[254] Lokesha B.K., and D.S. Leelavathy, "Determinants of Foreign Direct Investment: A Macro Perspective," *Indian Journal of Industrial Relations* 47, no. 3 (2012): 459-69, June 25, 2020, www.jstor.org/stable/23267337 .

[255] Moses Njeru (Chief Executive Officer, Kenya Chambers of Mines), in a virtual discussion with the author, Thursday June 25, 2020. The Kenya Chambers of Mines is a not-for-profit organisation established in 2001. Its objective is to bring together players engaged in mineral development in Kenya to give them a voice.

Investment Treaties.[256] An examination of the provisions of BITS can bring out the interests of the foreign investors in the host state.

2.6.2. The interest of Foreign Investors under BITs

BITs entered into by Kenya form part of the laws of Kenya. This is by virtue of Article 2(5) and (6) of the Constitution, which states that the general rules of international law and treaties and conventions ratified by Kenya form part of the laws of Kenya.[257] International investment law is governed by customary international law and BITs.

Every host state is sovereign and thus has the discretion as to whether or not to accept foreign investments in its territory and the conditions under which the investments will be made. To attract FDI, host states limit this right by committing, through BITs, to granting foreign investors certain standards of treatment that would stimulate investments in their countries.

These standards of treatment for foreign investors include fair and equitable treatment of investors, Most Favoured Nation Treatment (MFN), National Treatment (NT), and expropriation.[258] They contribute to certainty, transparency and legitimate expectation on the part of the foreign investor concerning its investment in the host state. In particular, the MFN and NT prohibit the host state from discriminating the investment of one foreign investor against another foreign investor or the investment of a local investor against a foreign investor.[259] On the other hand, expropriation proscribes host states from taking away an investor's property for reasons other than for a public purpose where full, prompt

[256] BITs.
[257] International investment law is governed by customary international law and BITs. Host states are sovereign and thus have the discretion as to whether or not to accept foreign investments in its country and the conditions under which the investments will be made. In order to attract FDI, host states limit this right by committing, through BITs, to granting the foreign investors certain standards of treatment that would stimulate investments in their countries.
[258] "Principles of the Trading System," World Trade Organisation (WTO), accessed December 8, 2022, https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact2_e.htm.
[259] "Principles of the Trading System," World Trade Organisation (WTO).

and adequate compensation must be given.[260] Expropriation may be direct or indirect expropriation.[261] Direct expropriation involves the transfer of property rights or title to the state, while indirect expropriation involves imposing measures that are equivalent or tantamount to direct expropriation. [262]

In the case of indirect expropriation, the main factors considered are the effect of the regulation, that is, whether the investor has been substantially deprived of its investment, and police powers, that is, the purpose of the regulation.[263] As part of customary international law, every state has the sovereign right to regulate for a public purpose. Thus, a good faith, non-discriminatory regulation or measure for the protection of public welfare that is enacted following due process and affects a foreign investor or investment is not deemed expropriation. Hence, the expropriation clause under a BIT would not be applicable, and the investor would not need compensation.[264]

Countries began to conclude BITs with foreign investors about 1959. This was around the period when most African states attained independence from their colonisers and gained the power to control access to their resources.[265] However, this power was surpassed by the superior advantage of foreign investors, such as the ability to offer

[260] Sornarajah M, *The International Law on Foreign Investment* (Cambridge: Cambridge University Press, 1994), 253-313.
[261] Sornarajah M, *The International Law on Foreign Investment*), 253-313.
[262] Sornarajah M, *The International Law on Foreign Investment*), 253-313.
[263] Sornarajah M, *The International Law on Foreign Investment*), 253-313.
[264] See *Methanex Corporation vs United States of America*, NAFTA/UNICITRAL, August 3,2005.
[265] During the period of colonial rule laws and policies were designed to protect the investment of colonial masters. Upon attainment of independence, colonial control was replaced by voluntary trade. See General Resolution 3201(S-VI) of May 1, 1974, Declaration on the Establishment of a New International Order, which declared that independence from colonial and alien domination made the people and nations members of the community of free peoples. However, it recognised that there still remains vestiges of colonial domination and neo-colonialism which affect the progress of developing countries. See also Won Kidane, "Contemporary International Investment Law Trends and Africa's Dilemmas in the Draft Pan-African Code", *George Washington International Law Review* 50 (2018):526.

foreign capital, technological know-how and market access.[266]Thus, the BITs entered into by African states with foreign investors were legally mis-engineered[267] to protect the interests of foreign investors at the expense of African countries because of Africa's weak bargaining position.[268]

The UNGA Resolutions on permanent sovereignty over natural resources and the sovereign right of every state to dispose of its natural resources, as well as the declaration on the establishment of the new economic order, emphasised the need to recognise the sovereign equality of states and full permanent sovereignty of every state over its natural resources and all economic activities, including the regulation and supervision of the activities of transnational corporations by taking measures in the interest of the national economies of the host state.[269] This conversation continued under UNCTAD, G-77 and NAM between the 1950s and late 1980s.[270] In the 1990s, the TWAIL was established. Since its establishment, TWAIL has been examining the relationship between international law and the third world or the south and the fallacies of the neutrality, fairness and justness of international law.[271]

In the area of international investment law, international arbitral tribunals began to assert the importance of according to developing countries policy space in BITs from mid-2000. For example, the Tribunal in *Parkerings-Compagniet AS vs Lithuania,* ARB/05/08, ICSID, August

[266] Caroline Wanjiku Kago, "Chinese Investments in Africa: Legal 'Mis-engineering' and Unequal Returns on Investments" (Master of Laws (LLM) thesis, University of the Western Cape, 2009), 84.
[267] Drafted without giving due regard to the development goals of African states and their policy space. See a detailed discussion in Kago, "Chinese Investments in Africa,*"* 2.
[268] The economies and industries of most African states were not mature hence relied on foreign capital and new technologies from foreign investors to boost their economic growth. See Kago, "Chinese Investments in Africa,*"* 84. See also Peter Muchlinski, *Multinational Enterprises and the Law* (Oxford: Oxford university Press, 2007), 104-107 cross referencing Theodore Moran, *Multinational Corporations and the politics of dependence: Copper in Chile* (Princeton: Princeton University Press, 1974).
[269] Kago, "Chinese Investments in Africa,*"* Chapter 1 Clause 1.4.2.
[270] Kago, "Chinese Investments in Africa,*"* Chapter 1 Clause 1.4.2.
[271] Kago, "Chinese Investments in Africa,*"* Chapter 1 Clause 1.4.2.

2007, while addressing the issue of investors' right to fair and equitable treatment, made it clear that investors' legitimate expectations must be interpreted in light of host states' right to legislate and that investors cannot expect the legal environment to remain unchanged.[272] Further, it established that Tribunals are entitled to take account of public policy considerations when determining whether a host state has discriminated between the investor and other similar operations.[273] Concerning expropriation, the awards in *Methanex Corporation vs United States*[274] and *Saluka investments BV vs Czech Republic*[275]declared that a non-discriminatory regulation for a public purpose, which is enacted in accordance with due process, is not deemed expropriation unless the host state has given specific commitments to the investor that it would refrain from such regulation.[276]

All the above activities contributed to a mind shift in Africa towards the "Africanisation" of international investment law.[277] This is corroborated by the development and subsequent adoption of international investment codes and rules such as (i) the Pan-African Investment Code (PAIC), which was adopted as a non-binding model investment treaty by African Union (AU) member states in 2016, (ii) the Economic Community of West African States (ECOWAS) Common Investment Code of 2018, and (iii) the Southern African Development Community (SADC) Protocol on Finance and Investment Annex 1 of 2006, as amended in 2016, all aimed

[272] Award of August 14, 2007 (award on jurisdiction and merits).
[273] Kago, "Chinese Investments in Africa,*"*8.
[274] Final award on jurisdiction and merits, 3 August 2005.
[275] Methanex Corporation –vs- United States[275] and Saluka investments BV –vs- Czech Republic, Partial award, PCA – UNICITRAL Arbitration rules, 17 March 2006.
[276] Kago, "Chinese Investments in Africa,*"*8.
[277] "Africanisation" defined by Tomasz as the recalibrating of international investment law created with symbolic African participation, full of rules detrimental to Africa and enrooted in colonialism to address the problem of content, the problem of interpretation and the problem of agency. See Tomasz Milej, "Reclaiming African Agency: The Right to Regulate, the Investor-State Dispute Settlement and the 'Africanisation' of International Investment Law," in *Investment Protection, Human Rights, and International Arbitration in Extraordinary Times*, ed. Rainer Hofmann, Julian Scheu, Stephan Schill, and Christian Tams (eds) (forthcoming): 27-28, https://ssrn.com/abstract=3839434.

at guiding member states when concluding investment treaties to ensure that they retain their right to regulate.[278]

2.6.3. An Examination of BITs Concluded by Kenya

Kenya has entered into various Bilateral Investment Treaties (BITs), some of which are in force and others signed but not yet in force. Those in force include the BIT with Japan, the United Arab Emirates, the Republic of Korea, Kuwait, Germany, the Netherlands, Switzerland, Burundi, Finland, France and the United Kingdom. Those signed but yet to enter into force are the BIT with Singapore, Qatar, Turkey, China, Mauritius, Slovakia, the Islamic Republic of Iran, and Libya.[279]

The BIT between Kenya and Germany was signed on May 3 1996 and entered into force on December 7 2000. It contains the three significant standards of treatment for foreign investors: MFN, NT and expropriation. An examination of the MFN and NT clauses reveals that it is designed to protect the returns on investment of the investor without regard to the development needs of Kenya. In particular, there are no express exceptions to the MFN and NT, which would allow Kenya to regulate to protect or enhance legitimate public welfare objectives such as public health, safety, the environment, or national interest. Also, the BIT does not provide for general exceptions, similar to the one contained in the General Agreement on Tariffs and Trade (GATT) Article XX and XXI, that would allow Kenya to adopt or enforce measures relating to the protection of human, animal and plant life or health, or the protection of its national security interests without discrimination.

Further, no express exceptions to the MFN and NT, which would allow Kenya to regulate to protect or enhance legitimate public welfare objectives such as public health, safety, the environment, or national

[278] See detailed discussion in Milej, "Reclaiming African Agency".
[279] United Nations Conference on Trade and Development (UNCTAD), "International Investment Agreements," accessed April 6,2020, https://investmentpolicy.unctad.org/international-investment-agreements/countries/108/kenya.

interest. Also, the BIT does not provide for general exceptions, similar to the one contained in the General Agreement on Tariffs and Trade (GATT) Article XX and XXI, that would allow Kenya to adopt or enforce measures relating to the protection of human, animal and plant life or health, or the protection of its national security interests without discrimination.

In addition, there are no provisions providing for investor obligations to, for example, the protection of the environment, human resources development, transfer of technology, corporate social responsibility, labour issues, and prohibiting investors from engaging in corrupt practices such as bribery.

From the analysis of the BIT between Kenya and German, it is clear that the interest of Germany is to ensure that its citizens investing in Kenya maximise profit at the expense of the development needs of Kenya because the BIT does not accord Kenya policy space. It exclusively follows the investor protection paradigm.

2.7. CONCLUSION

According to the various national policies and legal documents examined, it is evident that the national government is keen to utilise the mining sector to accelerate the socio-economic growth of the country in a sustainable, inclusive, equitable, accountable, and environmentally friendly manner hence improve the quality of life of its citizens, both the current and future generations.

On the other hand, the county governments see an opportunity for the counties where the mining activities are being undertaken to get an equitable share of the benefits from the sector. This will enable the counties to use their share of benefits from the mineral resources to develop the local communities and thereby improve the life of the residents. The local communities also anticipate that they shall be involved in the mining activities by supplying local materials and

employment. In addition, they are confident that the transfer of skills will be critical in developing artisanal and small-scale mining.

Therefore, the government needs foreign investors' participation for two reasons. The first is that it lacks the risk capital, which is generally expensive, to exploit the mineral resources. The second is that it lacks the technical expertise to exploit the resource. Attracting FDI is, therefore, key for the government to gain a "no-risk" production revenue.[280]

The only reason that foreign investors would be keen to invest heavily in the sector is that they have undertaken their due diligence and established that Kenya has a strong geological potential for mineral exploration and production and has a favourable social, political and regulatory environment to achieve a high return on their investment.

In summary, the interest of the foreign investors in the sector is to obtain an adequate return on capital for taking exploration and development risks, and that of the government is to maximise its no-risk production revenue.

A good intergovernmental relationship between the national and county governments where the mineral resources are located, on the one hand, and the investors, on the other hand, is therefore essential in ensuring that both the county and national government, as well as the foreign investors, benefit from the mineral resources. A disagreement between the two levels of government, for example, about benefit sharing, will affect the mining activities through, for instance, interference by the local communities. A benefit-sharing system in the mineral resources where the foreign investors, national government, county government and local communities all benefit is therefore important.

[280] Tina Hunter and John Chandler, *Petroleum Law in Australia* (Australia: LexisNexis Butterworths, 2013), 14.

The UN General Assembly emphasised this in its Resolution 1803 (XVII) of 1962, which declared, among other things, that:

> The right of peoples and nations to permanent sovereignty over their natural wealth and resources must be exercised in the interest of their national development and of the well-being of the people of the state concerned. The exploration, development and disposition of such resources, as well as the import of the foreign capital required for these purposes, should be in conformity with the rules and conditions which they freely consider to be necessary or desirable with regard to the authorisation, restriction or prohibition of such activities.

Mineral exploration and production are, therefore, is the result of a complex interplay of law and policy between the government that owns the resources and the local and foreign investors who mine the mineral resources.

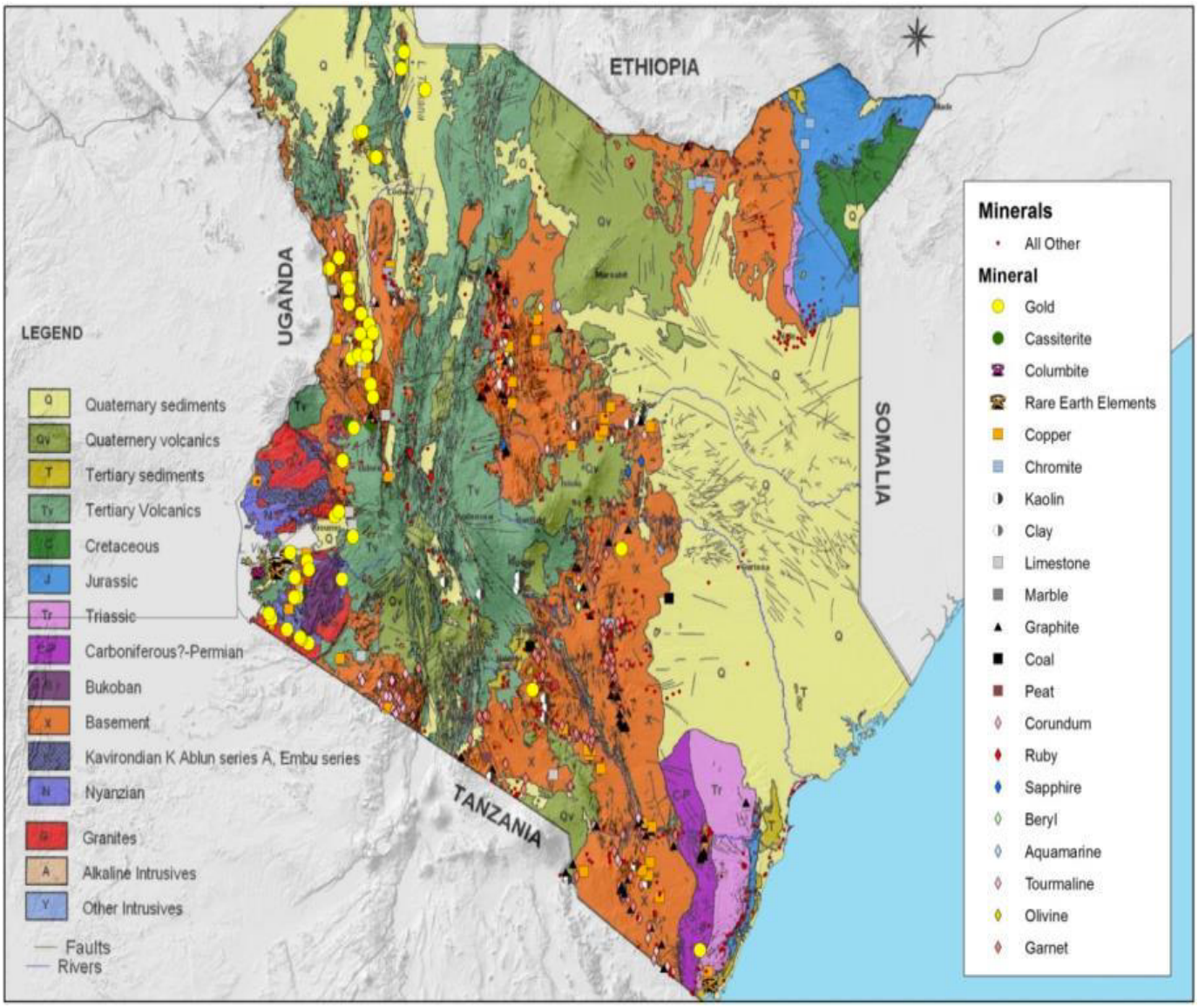
Even though Kenya is eager to attract FDI in the mining sector, it must be keen to have and maintain a robust regulatory framework that maximises positive and minimises adverse effects.[281] It needs to place sustainable development and inclusive growth at the core of its efforts to attract and benefit from FDI in the mining sector without protectionism. Such a regulatory framework balances access to the mineral resources and the consequences of its development with attracting investors who have the technical and financial capacity to develop the mineral resources. This will encourage investors to explore and produce the minerals as the allocation of risk and reward between the government, the investors and other stakeholders, such as the local communities, is balanced.

The next chapter commences this discussion by examining the laws governing the mining sector in Kenya, including applicable FDI laws, to

[281] UNCTAD, *World Investment Report 2019*, 92.

determine whether the regulatory framework balances the risks and rewards of the stakeholders.

APPENDIX 1: GEOLOGY AND MINERALS ENDOWMENT OF KENYA[282]



[282] The map was derived from the output of the East Africa Research Fund research project (Economic Contributions of Artisanal and Small-Scale Mining in Kenya: Gold and Gemstones, January 2018) funded by the UK Department for International Development (DFID) through the Research for Evidence Division (RED) for the benefit of developing countries.

CHAPTER 3

3. AN ANALYSIS OF THE LEGAL FRAMEWORK FOR THE MINING SECTOR IN KENYA

3.1. INTRODUCTION

Between 1940 and 2016, all mining activities in Kenya were regulated by the colonial Mining Act of 1940 (Chapter 306 of the Laws of Kenya).[283] After the enactment of the Constitution of Kenya 2010 and the launch of both the Kenya Vision 2030 and the Africa Mining Vision, the said law was considered an impediment to the growth of the mining sector in Kenya.[284] As a result, efforts towards legislative reform of the sector commenced with the development of the Mining and Mineral Policy of 2016, which provided a firm foundation and basis for establishing a comprehensive legal framework for the mining sector. Eventually, the Mining Act No. 12 was enacted in 2016, repealing the 1940 legislation.

This Chapter analyses the legal framework for the mining sector in Kenya, which includes the Constitution, international instruments applicable to Kenya, the Mining Act, and relevant land, environmental and investment legislations.

The mining laws should function as an enabling tool for achieving the objectives of the state identified in the previous chapter while at the same time attracting foreign investors who are essential for the development of the sector. In this regard, this exposition is key as it first identifies the various laws relating to mining in Kenya and thereafter examines the protection accorded to the state, on the one hand, and foreign investors, on the other hand.

[283] Discussed in detail later in this chapter.
[284] Discussed in detail later in this chapter.

In view of the mineral value chain discussed in the previous chapter, when a foreign investor decides to invest in Kenya's mining sector, it must take various actions to be fully operational. These actions include establishing an appropriate investment vehicle, acquiring the land upon which it intends to undertake the exploration or mining activities, and procuring appropriate licence(s). After that, the investor should undertake a legal audit of its operations to ensure that it complies with all other laws of the country affecting mining investments, such as environmental laws, investment laws, employment laws and fiscal requirements.

Thus, this chapter commences by first examining the Constitution of Kenya, which is the supreme law of the land; hence all laws and policies must be aligned with it. It thereafter examines the Mining Act and other laws relevant to the mining sector, such as land, environment and investment laws.

3.2. THE CONSTITUTION OF KENYA

The Constitution is the country's supreme law, and every legislation must reflect its principles; otherwise, it is considered null and void. Because of the supremacy of the Constitution, it applies to all sectors of the economy, including the Mining Sector. This section shall focus on the most relevant provisions as guided by the scope of this thesis.

3.2.1. National Values and Principles of Governance

The national values and principles of governance provided for in Article 10 of the Constitution are essential in mining governance as they guide the different stakeholders, such as State organs and officers, public officers and all persons when executing their respective mandates within the mining sector. They include public participation, equity, inclusiveness, equality, good governance, transparency, integrity, accountability, social justice and sustainable development.

All the values and principles of governance enumerated in Article 10 of the Constitution are essential for the mining sector. In the *Mui Coal Basin Local Community & 15 others v Permanent Secretary Ministry of Energy & 17 others,*[285] the Court noted that these values and principles of governance are now established rights and justiciable in Kenya.[286]

Public participation is one of the key national values and principles applicable to mining governance. It is achieved in the sector by making the community where any mining project is to be undertaken aware of all proposed mining activities and involving them in the decision-making process. In *Kenya Small Scale Farmers Forum and six others v Republic of Kenya and two others*[287] , the Court noted, "One of the golden threads running through the current constitutional regime is public participation in governance and the conduct of public affairs."

Similarly, in *Nairobi Metropolitan PSV SACCOS Union Limited and 25 others v County of Nairobi Government and three others,*[288] the Court noted, "It is thus clear to me that the constitution contemplates a participatory democracy that is accountable and transparent and makes provision for public involvement."

Concerning the extractive sector, the Court in *Mui Coal Basin Local Community & 15 others v Permanent Secretary Ministry of Energy & 17 others*[289] stated that it would not hesitate to strike down any laws or public acts or projects that do not meet the public participation threshold

A majority of the cases that have been determined in Court on public participation have been on the issue of the threshold of public participation. The Constitution is silent on what amounts to public

[285] *Mui Coal Basin Local Community & 15 others v Permanent Secretary Ministry of Energy & 17 others*, (2015) eKLR.
[286] Paragraph 87 of *Mui Coal Basin Local Community & 15 others v Permanent Secretary Ministry of Energy & 17 others*.
[287] [2013] eKLR.
[288] [2013] eKLR.
[289] [2015] eKLR.

participation. Therefore, the question of the threshold of public participation has been addressed by the Courts in several cases. The Courts have consistently cited, with approval, the South African cases of *Minister of Health and Another vs New Clicks South Africa (Pty) Limited and others*[290] and *Merafong Demarcation Forum and others v The Republic of South Africa and others*[291].

In the New Clicks case, Justice Sachs stated that members of the public and all interested parties must be offered a reasonable opportunity, which depends on the circumstances of each case, to know about the issue and have an adequate say for public participation to be considered adequate. According to the Merofong case, this obligation to the members of the public may be fulfilled in different ways; thus, stakeholders have the leeway to be innovative.

Justice Emukule in *John Muraya Mwangi & 495 others & six others v Minister for State for Provisional Administration & Internal Security & four others*[292], cited the Merofong case and noted that "There is no specific manner in which public participation is to be conducted because the constitution is silent on this. All that is required is to establish that reasonable steps were taken to afford the public a chance to participate…."

In the *Mui Coal Basin Local Community & 15 others v Permanent Secretary Ministry of Energy & 17 others,*[293] the Court examined the threshold of public participation from an environmental governance perspective and stated that:

> In other words, no single regime or programme of public participation can be prescribed and the Courts will not use any litmus test to determine if public participation has been achieved or not. The only test the Courts use is one of effectiveness. A

[290] 2006(2) SA 311 (CC). Some of the cases include *Were Samwel & 14 others v Attorney General & 2 others* [2017] eKLR.
[291] CCT 41/07 [2008] ZACC 10.
[292] [2014] eKLR.
[293] [2015] eKLR.

> variety of mechanisms may be used to achieve public participation… whatever programme of public participation is fashioned, it must include access to and dissemination of relevant information.

Although this part has focused on public participation, it is essential to note that some of the other values and principles of governance have been incorporated in the various statutes relevant to the mining sector and shall, therefore, be considered when discussing those statutes.

3.2.2. Constitutional Provisions on Land and Natural Resources

The Constitution has various land and natural resources provisions, which set the foundation for key statutes on mineral resources.[294]

3.2.2.1. Definition of Land and Natural Resources

The Constitution provides that all land in Kenya belongs to the people of Kenya collectively as a nation, as communities and as individuals.[295] Land is defined in Article 260 to include the surface of the earth and the subsurface rock; any body of water on or under the surface; marine waters in the territorial sea and exclusive economic zone; natural resources completely contained on or under the surface; and the air space above the surface. Thereafter, it is classified as either public land, private land or community land.[296]

Minerals are considered to be public land. Public land can either be held by the national government or county government in trust for the people of Kenya.[297] Minerals fall in the category of public land entrusted to the

[294] See Article 66,68, and 72 which empowers the state to regulate land use, investments in property and the environment for the benefit of the people of Kenya.
[295] Article 61(1) of the constitution.
[296] Article 61(2) of the constitution.
[297] Article 62(2) and (3) of the constitution. To ensure that public land is properly managed for the benefit of the people of Kenya, the National Land Commission (NLC) was established under Article 67(1) of the constitution. According to Article 67(2) (a) of the constitution the NLC is mandated to manage public land on behalf of the national and county governments.

national government.[298] The national government is mandated to protect mineral resources by ensuring that it is exploited sustainably.[299]

Even though minerals are public land entrusted solely to the national government, the Court in *Mui Coal Basin Local Community & 15 others v Permanent Secretary Ministry of Energy & 17 others*[300] noted that the two-tier governance system imposed by our Constitution requires the national and county government to cooperate and collaborate. Hence, the national and county governments have different mineral governance responsibilities. In particular, it is the responsibility of the national government to consult the county government where the proposed mining activities are to be undertaken when making decisions concerning any mining activities that could potentially affect the county's residents. On the other hand, the county government should support the national government by implementing specific national government policies on mineral resources and environmental conservation.[301] Thereafter, any benefits from utilising the mineral resources must be shared equitably between the national government, the county government and the community where the minerals are being exploited.[302] In effect, this ensures that the communities that are affected by the mining activities, through the loss of a non-renewable resource and negative environmental effects of mineral exploitation, are adequately compensated for the loss and also benefit through improved infrastructure, transfer of skills and technology, and job and business opportunities.[303]

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[298] Article 62 (1) (f) and (3) of the constitution.
[299] Fourth Schedule of the constitution – Distribution of Functions Between the National Government and the County Governments – Part 1: National Government. See also Article 66(2) of the Constitution which empowers Parliament to enact legislation to ensure that investments in property benefit local communities and their economies.
[300] [2015] eKLR.
[301] Fourth Schedule of the constitution – Distribution of Functions Between the National Government and the County Governments – Part 2: County Governments.
[302] Article 69 (1) (a) of the constitution.
[303] International Finance Corporation, "The Art and Science of Benefit Sharing in the Natural Resource Sector," (World Bank Group Discussion Paper), 37, http://commdev.org/pdf/publications/IFC-Art-and-Science-of-Benefits-Sharing-Final.pdf. See also Patrik Söderholm and Nanna Svahn, *Mining, Regional Development and Benefit-Sharing* (Lulea University of Technology Report),15, http://ltu.diva-portal.org/smash/get/diva2:996874/FULLTEXT01.pdf.

In addition to the definition of land discussed above, natural resources are further defined in Article 260 of the Constitution as the physical non-human factors and components, whether renewable or non-renewable, including sunlight; surface and groundwater; forests, biodiversity and genetic resources; and rocks, minerals, fossil fuels and other sources of energy. Therefore, minerals are also considered natural resources and the state is mandated to ensure their sustainable exploitation[304], utilisation, management and conservation for the benefit of the people of Kenya.[305] Hence, the Constitution expressly recognizes the importance of the sustainable development of mineral resources. It appreciates that sustainable exploitation of mineral resources guarantees that the present and future needs of the community and the state, namely economic, social and environmental, are considered.[306]

3.2.2.2. Rights of Land Owners vis-à-vis Rights of the State

Since mineral exploitation is undertaken on land that is either owned by the state, county government, the community or private persons, the foreign investor must be in possession of the land to be able to exploit the minerals therein.

The Constitution clearly states that landowners should not be arbitrarily deprived of their land or any interest in or right over their land.[307] This, therefore, means that foreign investors should legally obtain possession of the land from the land owner to gain access to the mineral resources. Possession can be obtained through either a consent to mine from the land owner or acquisition of the land in accordance with the relevant land laws, which are discussed later in this chapter.[308]

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[304] Mineral exploration and production is together known as mineral exploitation.
[305] Article 260 and Article 69(1)(a) and (h) of the constitution.
[306] See Article 66(2) of the constitution.
[307] Article 40(2) (a) of the constitution.
[308] The land owner includes a private individual in the case of private land, the community in the case of community land, and the county government in the case of public land under the control of the county government. The land laws include the Land Act No.6 of 2012 which provides for the sustainable administration and management of public, private and community land and land based resources, the Land Registration

Whichever land acquisition method is adopted by the foreign investor, the land owner must prove legal ownership of the land and be compensated if he or she is the legitimate land owner. Notably, in *Peter Nzeki and 14 others v Base Titanium Limited and four others,*[309]the court affirmed that a mining investor could only compensate a person with land rights on the area they allege they occupy and not trespassers. This decision is important because it affirms foreign investors' protection from compensation demands by persons who do not have proof of ownership of land that they have earmarked for acquisition.

In some instances, landowners may be reluctant to grant possession of land that contains mineral resources. In such cases, the state is empowered to compulsorily acquire any land or an interest in any land for a public purpose or in the public interest, provided that it makes full, just and prompt compensation to the land owner.[310]

In this regard, whenever the national government is satisfied that it is necessary to acquire land compulsorily, it must submit a request for acquisition of the land to the National Land Commission[311] (NLC) to acquire the land on its behalf [312]. Once the private or community land has been acquired compulsorily, it becomes public land vested in the national government and managed, on its behalf, by the NLC. The national government can thereafter avail the land to foreign investors for mineral exploitation.

Act No.3 of 2012 which provides for the process of registration of titles to land, the Community Land Act No. 27 of 2016 which deals with community land including unregistered community land, and the Land Control Act Chapter 302 of the Laws of Kenya which provides for transactions relating to agricultural land. The different ways of obtaining possession of land shall be discussed in detail in the following section.

[309] [2021] eKLR.

[310] Article 40(2) (a) and Article) 40 (3) (b) (i) of the constitution. See also Part VIII of the Land Act which provides for the process of compulsory acquisition of land by either the national government of the county government.

[311] It is established under Section 67 of the constitution to manage public land on behalf of the national and county government.

[312] The NLC may reject the request if it establishes that the request does not meet the requirements under Article 40(3) of the Constitution, that is, the acquisition is not for a public purpose or in the public interest. See Section 107 (3) of the Land Act.

The main contention concerning the compulsory acquisition of land is on compensation. Some landowners are usually dissatisfied with the compensation issued on the basis that it is not just compensation. The question of what amounts to just compensation was settled in *Patrick Musimba v National Land Commission and four others,*[313] where the Court held that "…compensation is the essence of compulsory acquisition… prompt full and just compensation does not mean any speculative value of the land but an equivalent value which could be the contract value or market value."

Similarly, in *Katra Jama Issa v Attorney General and three others,*[314] the Court, in determining the question of just compensation, quoted the following from the *Patrick Musimba v National Land Commission and four others'*[315] decision:

> …Compensation of compulsorily acquired property be quantified in accordance with the principle of equivalence. A person is entitled to compensation for losses fairly attributed to the taking of his land but not to any greater amount as "fair compensation requires that he should be paid for the value of the land to him, not its value generally or its value to the acquiring authority…In our view, the only equitable compensation for compulsory acquisition of land should be one which equates restitution. Once the property is acquired and there is direct loss by reason of the acquisition the owner is entitled to be paid the equivalent. One must receive the price equivalent to his pecuniary detriment; he is not to receive less or more. This can be achieved to the satisfaction of the land owner of land by Appeal to the market value of the land.

3.2.2.3. Ownership of Land by Non-citizens

When a foreign investor decides to acquire land for mining purposes, the investor must be cognizant that non-citizens can hold land only under a leasehold tenure of not more than ninety-nine years.[316] This is regardless of whether the foreign investor has an agreement, deed, conveyance or

[313] [2016]eKLR.
[314] [2018] eKLR.
[315] [2016] eKLR.
[316] Article 65(1) of the constitution.

any other document conferring an interest in land greater than a ninety-nine-year lease.[317] For corporate foreign investors, the body corporate is considered a citizen only if one or more citizens wholly own it.[318]

3.2.2.4. Ratification of Mineral Transactions

As a check and balance of the powers of the executive with regard to the management of mineral resources, Article 71 of the Constitution requires the ratification by both the national assembly and senate of any agreement relating to the grant of a right or concession by any person, including the national government, county government, state organs and all county government entities, to another person to exploit natural resources in Kenya.

The class of transactions designated as subject to ratification are provided for in the Natural Resources (Classes of Transactions Subject to Ratification) Act.[319]The Natural Resources (Classes of Transaction Subject to Ratification by Parliament) Act 2016[320] was enacted to give effect to this Article.

Regarding mineral resources, the transactions subject to ratification are mineral agreements with a threshold of US $ 500 million and any transaction involving the extraction of minerals within a wildlife conservation area or other wildlife-protected areas.[321] There are, however, three exceptions: one, if a right or concession to exploit mineral resources is granted through a permit or licence per the Mining Act or any other legislation in Kenya; two, where a private person enters into a

[317] Article 65(2) of the constitution.
[318] Article 65(3) (a) of the constitution.
[319] Section 3(2) of the Natural Resources (Classes of Transactions Subject to Ratification) Act.
[320] Natural Resources (Classes of Transactions Subject to Ratification) Act No. 41 of 2016.
[321] Section 4 and the Schedule of the Natural Resources (Classes of Transactions Subject to Ratification) Act.

contract or agreement with an investor to exploit mineral resources; and three, where the threshold of US $ 500 million has not been met.[322]

It is the investor's responsibility to submit the agreement or other instrument evidencing the transaction and a memorandum giving more details about the transaction to the cabinet secretary responsible for mineral resources.[323]The cabinet secretary then submits the agreement and memorandum to parliament within seven days of receiving them for ratification. [324]Parliament must consider and give its decision within sixty days of receiving the agreement and memorandum.[325]

When considering the application, parliament is required to consider (i) applicable government policies, (ii) recommendations of the ministry of mining and other relevant agencies, (iii) comments by the county government where the mining activity will be undertaken, (iv) adequacy of stakeholder consultation undertaken, (v) the extent to which the agreement has struck a fair balance between the interests of the investor and the benefits to the country arising from the agreement, (vi) the benefits the local community is likely to enjoy from the transaction, and (vii) the extent of compliance with necessary laws.[326]

Any transaction that is subject to ratification becomes effective only upon its ratification. If parliament refuses to ratify a transaction, the transaction is considered to be null and void.[327]

Transactions subject to ratification but were entered into on or before the current constitution's effective date are deemed valid and lawful,

[322] Section 4 (2) of the Natural Resources (Classes of Transactions Subject to Ratification) Act.
[323] Section 5(1) Natural Resources (Classes of Transactions Subject to Ratification) Act.
[324] Section 6 Natural Resources (Classes of Transactions Subject to Ratification) Act.
[325] Section 8 and 10 Natural Resources (Classes of Transactions Subject to Ratification) Act.
[326] Section 9(1) Natural Resources (Classes of Transactions Subject to Ratification) Act.
[327] Section 7 of the Natural Resources (Classes of Transactions Subject to Ratification) Act.

notwithstanding the absence of ratification by Parliament.[328] In *Haji Ibrahim Ali Hussein & 21 others v Cabinet Secretary Ministry of Energy and Petroleum & 6 others; County Government of Wajir (Interested Party)*[329] , Justice Obaga stated:

> The production sharing agreement between Taipan and the government was signed on 17th September 2008. The Natural Resources (Classes of Transactions Subject to Ratification) Act No 41 of 2016 was assented to on 13th September 2016 and commenced on 4th October 2016. Under this Act, transactions which are subjected to ratification by Parliament include any contract authorizing extraction of crude oil or natural gas. Section 16 of the aforesaid Act provides as follows: -
>
> > **"A transaction that is subject to ratification by parliament, which was lawfully entered into on or after the effective date, shall continue in effect and be deemed valid and lawful notwithstanding the absence of ratification by Parliament".**
>
> The effective date is the date when the Constitution 2010 came into effect that is 28th August 2010. The agreement between Taipan and the Government having been signed before the effective date, there was therefore no wrong committed by Taipan as there was no requirement for ratification then and in any case any contract lawfully entered into before 4th October 2016, the date the aforesaid Act commenced is deemed to have been lawfully done".

Unlike in the Haji case above where the agreement between Taipan and the government was signed before the promulgation of the 2010 constitution, in the *Mui Coal Basin Local Community & 15 others v Permanent Secretary Ministry of Energy & 17 others*,[330] the concessioning of the Mui Coal Mining Project to Fenxi took place after the promulgation of the 2010 constitution but before the enactment of the Natural Resources (Classes of Transactions Subject to Ratification) Act. Thus, the court held that the transaction was a transaction subject to ratification. However, since the law required to give effect to Article 71 of the constitution was yet to be enacted, Article 71 was not considered

[328] Section 16 of the Natural Resources (Classes of Transactions Subject to Ratification) Act.
[329] [2020] eKLR.
[330] [2015] eKLR.

to be a bar to the operationalization of the concessioning agreement. The court based its decision on Section 8(3) of the Sixth Schedule of the constitution, which provides, "The provisions of Article 71 shall not take effect until the legislation contemplated under that Article is enacted."

3.2.3. International Law

3.2.3.1. Article 2 of the Constitution

Article 2(5) and (6) of the Constitution provides that the general rules of international law, as well as treaties and conventions ratified by Kenya, form part of the law of Kenya. Kenya is a signatory to numerous international human rights and humanitarian laws as well as environmental conventions and treaties that are relevant to the mining sector, such as the General Agreement on Tariffs and Trade, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, and the United Nations Framework Convention on Climate Change. These instruments provide for minimum standards of engagement between States to ensure equality of States.

The Court has considered the place of international law in the hierarchy of laws in Kenya. In *Karen Njeri Kandie v Alassane Ba and another*[331] , the court clarified that by virtue of Article 2 of the Constitution, international treaties and conventions are part of the laws of Kenya and are at least at par with other laws enacted by Parliament. Also, in *Beatrice Wanjiku and another v the Attorney General and others*[332], Justice Majanja stated:

> I take the position that the use of the phrase 'under this Constitution' as used in Article 2 (6) of the Constitution means that the international conventions and treaties are 'subordinate' to and ought to be in compliance with the Constitution. Although it is generally expected that the government through its executive ratifies international instruments in good faith on the behalf of and in the best interests of the citizens, I do not think the framers of the Constitution would have intended that international

[331] Court of Appeal 20 of 2013 [2015]eKLR.
[332] High Court Petition No.190 of 2011 [2012] eKLR.

> conventions and treaties should be superior to local legislation and take precedence over laws enacted by their chosen representatives under the provisions of Article 94…..
>
> Article 2 (5) and (6) regulates the relationship between international law and national law in two ways. First, by placing the issue of international law within the supremacy clause, the supremacy of the Constitution is emphasized in relation to international law.

The Court in *Kiriro Wa Ngugi and 19 others v Attorney General and two others*[333]concurred with Justice Majanja. It stated that "…Articles 2 (5) and 2 (6) of the **Constitution** clearly demarcates the place of international law in the hierarchy of Kenyan law. The latter, just like ordinary statutes are subordinate to the **Constitution**."

3.2.3.2. International Investment Law

International investment law also falls under the ambit of international law under Article 2 of the Constitution.

As indicated in the previous chapter, Kenya has entered into several BITs. The examination of the BIT between Kenya and Germany in the previous chapter revealed that it does not accord Kenya the right to regulate in the public interest.

Just like the Kenya-Germany BIT, the BIT between Kenya and the United Kingdom, which entered into force on September 13, 1999, does not have exceptions to the MFN and NT, as well as general exceptions in line with Article XX and XXI of GATT. This means that the right of Kenya to regulate in the interest of public health and public policy, including sustainable development objectives, is curtailed. This has two effects: one, the state is limited from exercising its mandate of ensuring, for example, that its citizens enjoy the rights and fundamental freedoms enshrined in chapter four of the constitution, such as the right to a clean

[333] [2020] eKLR.

and healthy environment and economic and social rights.[334]Two, the BITs elevate themselves above the constitution in contravention of Article 2 of the constitution. As discussed earlier in this chapter, the effect of Article 2 of the constitution was clarified by the courts in *Karen Njeri Kandie v Alassane Ba and another*[335] and *Beatrice Wanjiku and another v the Attorney General and others*[336] that international treaties and conventions are, at least, at par with other laws enacted by Parliament not above the constitution. Undoubtedly, Kenya needs to withdraw from the BITs as they are unconstitutional.

Further, Article 2 of this BIT requires each Contracting State to observe all investment obligations entered into with investors from the other Contracting State. This is referred to as an Umbrella Clause and means that a mining investor from the United Kingdom may seek redress for a breach of any investment contract between it and Kenya through international arbitration under the BIT. The effect of this is that domestic commercial disputes are elevated to the status of international investment disputes. This was the case in *SGS v. Philippines,* where the tribunal decided that a BIT tribunal had jurisdiction over contractual claims.[337]
Interestingly, the most recent international investment dispute in the mining sector relied on the Kenya-United Kingdom BIT. This was possible because of the Umbrella Clause within the BIT. Cortec Mining Kenya Limited[338], Cortec (Pty) Limited and Stirling Capital Limited (claimants) submitted a dispute to the International Centre for the Settlement of Investment Dispute (ICSID) on June 18, 2018, claiming that the Republic of Kenya revocation of its Special Mining Licence[339]

[334] Provided for in Articles 42 and 43 of the constitution respectively.
[335] Court of Appeal 20 of 2013 [2015]eKLR.
[336] High Court Petition No.190 of 2011 [2012] eKLR.
[337] *Société Général de Surveillance S. A. v. Philippines*, Decision of the Tribunal on Objections to Jurisdiction, ICSID (W. Bank) Case No. ARB/02/6 (2004).
[338] A company incorporated in Kenya whose majority shareholder (70% shareholding) is Cortec (Pty) Limited (Cortec UK), a company incorporated in England and Wales. Cortec UK and Stirling Capital Limited (Stirling), a company also wholly incorporated in England and Wales, were eventually wholly owned by Pacific Wildcat (PAW), a Canadian company listed on the Venture Exchange Market of the Toronto Stock Exchange.
[339] The licence was gazetted on March 22, 2013.

amounted to direct expropriation in violation of the provisions of the Kenya-United Kingdom BIT. Even though the tribunal decided in favour of the government of Kenya because the claimants did not adhere to the statutory requirements for the issuance of a Special Mining Licence, the case offers great lessons for the government and the region.[340] In particular, it bolstered the importance of a suitable mining regulatory framework that promotes sustainable development and accords host states policy space.

With regard to BITs, the Pan-African Investment Code (PAIC) is an essential guide for African Union Member States when negotiating BITs with developed states. It provides for exceptions to the MFN and NT and general exceptions. Further, it provides for performance requirements and investor obligations such as corporate social responsibility, technology transfer and non-involvement in bribery.

3.3. THE MINING ACT[341]

Following the foundation for the mining sector laid down by the Constitution discussed above, the Mining Act gives further provisions for developing and managing mineral resources in Kenya. It is the primary legislation governing the mining sector in Kenya. The Mining and Minerals Policy[342]was vital in developing the Act as it guides sustainable mineral resources development in Kenya by setting out the necessary frameworks, principles and strategies.[343]

Prior to the Act, the mining sector was regulated by the colonial Mining Act (Chapter 306 of the Laws of Kenya), the Trading in Unwrought Precious Metals Act (Chapter 209 of the Laws of Kenya) and the Diamond Industry Protection Act (Chapter 310 of the Laws of Kenya), now repealed.[344]

[340] That was gazetted on March 22, 2013.
[341] Act No.12 of 2016.
[342] Sessional Paper No.7 of 2016.
[343] Mining and Minerals Policy Sessional Paper No.7 of 2016, 7.
[344] Section 225 of the Mining Act.

The Act seeks to address the shortcomings of the 1940 Act as well as the challenges of using an old law that is not reflective of current trends and emerging issues in the sector, such as mineral value addition, environmental protection, local participation, mineral governance, promotion of artisanal and small-scale mining, post-mine closure activities, and use of appropriate technology such as geo-spatial technology and airborne geophysical surveying. Some of the shortcomings of the 1940 legislation include, *inter alia*, not being aligned with the constitution as it did not provide for consultation with stakeholders in mineral development. Also, it excluded several minerals mined commercially and lacked proper guidelines on the licensing process leading to uncertainty.[345]

Upon its enactment in May 2016, it became the primary legislation governing the mining sector in Kenya. It guides the national government in exercising its control over the minerals in the country. There are several regulations under the Act which guide the implementation of the Act

The Act reiterates Article 61(1) of the Constitution by vesting all minerals in the national government to hold in trust for the people of Kenya.[346] This is applicable even if an investor owns or has leased the land in, on or under which minerals have been found.[347]

3.3.1. Institutional Framework for Mining

The Act provides the institutional framework for the sector. The main institution is the Ministry of Mining, Blue Economy and Maritime Affairs (Ministry of Mining), headed by a cabinet secretary responsible for the Mining Act's general administration.[348] The mining sector falls

[345] Mining and Minerals Policy Sessional Paper No.7 of 2016, 8 and 9.
[346] Section 6(1) of the Mining Act.
[347] Section 6(2) of the Mining Act.
[348] Executive Order No. 1 of 2022, Organization of the Government of the Republic of Kenya, October 2022.

under the State Department of Mining under the said Ministry and is headed by a Permanent Secretary.

For better administration of the sector, the Act establishes the Directorate of Mines and the Directorate of Geological Survey, each headed by a director.[349]

The Director of Mines is responsible for, among other things, (i) promoting sustainable development of the mineral resources in the country, (ii) supervising all mining activities, (iii) monitoring compliance with the Mining Act and conditions relating to mineral rights, (iv) ensuring members of the public access the necessary information held by the directorate, (v) providing advice during negotiation of mineral agreements, (vi) facilitating multisector collaboration, and (vii) advising on development of policies.[350]

The Director of Geology, on the other hand, is responsible for (i) advising the government on all matters related to geology and the development of minerals, (ii) undertaking the necessary surveys such as geological, geophysical, geochemical, seismological and hydro-geological surveys and investigations that help in determining the mineral potential of the country, (iii) developing a national repository of geo-science, and (iv) promoting private sector investment in the mining sector by availing geological information and services.[351]

To ensure accountability and transparency in the sector, the Act establishes the Mineral Rights Board under Section 30 of the Act to advise the cabinet secretary and give written recommendations on matters such as (i) the grant, rejection, retention, renewal, suspension, revocation, variation, assignment, trading, tendering, or transfer of

[349] Section 17 (1) (a) and (b) and (2) of the Mining Act.
[350] Section 20(1) of the Mining Act.
[351] Section 21(1) of the Mining Act.

mineral rights[352], (ii) fees or charges payable for a mineral right, (iii) cessation, suspension or curtailment of production in respect of a mining licence, and (iv) areas where mining operations may be excluded and restricted.[353]Its membership includes representatives from the ministry responsible for mining, the national treasury, counties, the National Land Commission, and members of the public with experience in the mining sector.

The investment arm of the national government for purposes of the mining sector is the National Mining Corporation (NMC) which is established under Section 22 of the Act. It is mandated to engage in mineral prospecting and mining, invest on behalf of the National Government, and acquire interests in any company operating in the mining sector.[354] The day-to-day administration and management of the NMC are undertaken by a chief executive officer who is supported by members of staff recruited by the NMC.[355]

The NMC is managed by a board consisting of representatives of the ministry responsible for mining, the ministry responsible for trade, the National Treasury and members of the public. The chief executive officer of the NMC is the secretary of the board.[356]

The Act also establishes the Minerals and Metal Commodity Exchange, whose mandate is to facilitate minerals trade transactions.[357]

[352] It is property rights to exploit a specified area for minerals. In Kenya, a mineral right is evidenced by either a licence or a permit. See section 35(1) of the Mining Act. A foreign investor may apply for four types of licences: a reconnaissance licence, a prospecting licence, a retention licence and a mining licence. See Section 32(2) (a) of the Mining Act.
[353] Section 31(1) of the Mining Act.
[354] Section 24 of the Mining Act.
[355] Section 26(2) of the Mining Act.
[356] Section 25 of the Mining Act. The Mining(National Mining Corporation) Regulations, 2017 gives further provisions on the composition and management of the NMC.
[357] Section 28(1) and (2) of the Mining Act.

3.3.2. Classification of minerals

Under the First Schedule of the Mining Act, there are seven classes of minerals in Kenya: construction and industrial minerals, precious stones, precious metals, semi-precious stones, base and rare metals, fuel minerals, and gaseous minerals.

3.3.3. Categories of mining investors

Mining investors are categorized under the Act as large-scale, small-scale, or artisanal miners. Foreign investors fall in the category of large-scale investors, hence the focus of this section.

Foreign investors may apply for and subsequently be issued four types of mineral rights: a reconnaissance licence, a prospecting licence, a retention licence or a mining licence.[358] No mining activities should be undertaken by any person without the requisite mining right. In *Tom Mboya Odege v Cabinet Secretary, Ministry of Petroleum and Mining and three others*[359] , the petitioner alleged that foreigners are undertaking illegal gold and copper mining activities in the Macalder Area of Nyatike Constituency. In particular, he claimed that the third respondent, Lijin Mining Company Limited, does not hold any mining rights in respect of the area it is undertaking mining activities. The court established from the evidence submitted that Lijin Mining Company Limited does not hold

[358] A reconnaissance licence allows the foreign investor to undertake geological, geochemical, geophysical or airborne surveys. The holder of this kind of licence is not permitted to undertake any form of drilling, excavation or other subsurface exploration techniques. See Section 67(d) of the Mining Act.
A prospecting licence allows the licence holder to explore for mineral resources for purposes of identifying mineral deposit that is of potential commercial significance within the prospecting area.
Once the foreign investor identifies mineral deposits that is commercially viable, it may apply for either a retention licence or a mining licence. A retention licence is useful where the foreign investor is not able to develop the mineral deposit immediately due to economic, technical and market factors. The retention licence enables the licence holder to preserve the mineral deposits until the circumstances change when it can apply for a mining licence for the area. The term of a retention licence is two years. The licence holder can only renew the licence for a further period not exceeding two years. See Section 85 and 87 of the Mining Act.
A mining licence allows the right holder to extract minerals from the area under licence.
[359] [2019] eKLR.

a valid mining licence, and the company is to stop undertaking any mining activities in the area.

A foreign investor must meet two key requirements to undertake any mining activity in Kenya under any of the licences. First, it must be a company that is duly established[360]in Kenya and whose directors have the required technical capacity, expertise, experience and financial ability. Second, it must apply and be issued with the requisite mineral right, which is dependent on the mining activity it intends to undertake.[361]

3.3.4. Grant of mineral rights

The ministry responsible for mining established an online mining cadastre to regulate the issuance of licences and permits for mineral rights.[362] Thus, all applications for mineral rights must be made online through the online mining cadastre. This enhances transparency and accountability.

Before the establishment of the online mining cadastre, there were numerous conflicts caused by the double allocation of mineral rights in respect of a mining area and border conflicts. For example, the border conflict between Campell Rodney Bridges and Mwatate[363] local

[360]For a company to be granted a mineral right, it must be incorporated in Kenya under the Companies Act No.17 of 2015. See Section 11(2) of the Mining Act. Further, the Mining Act provides additional requirements in Section 11(5) that the company must also be operating in its registered office and in operation within Kenya.

[361] A mineral right is obtained by making an application to the cabinet secretary responsible for mineral resources. The Directorate of Mining under the Ministry administers and supervises mining activities in the country to ensure that such activities are being undertaken in accordance with the Act. It is headed by a Director. See Section 17 1(a) and 2, and Section 20 of the Mining Act. The Mineral Rights Board established under Section 30(1) of the Mining Act advises the Cabinet Secretary responsible for mining on the grant, rejection, retention, renewal, suspension, revocation, variation, assignment or transfer of mineral rights agreements. The Board considers the applications for a mineral right and prepares a report which it submits to the cabinet secretary. See Section 52 of the Mining Act. The applications are considered, processed and determined on a first-come first-served basis. See Section 56 of the Mining Act. The board also advices the Cabinet Secretary on cessation, suspension, or curtailment of production in respect of mining licenses. See Section 11(3), 31 and 33(1) and (2) of the Mining Act.

[362] The online mining cadastre was established under Regulation 4(1) of the Mining (License and Permit) Regulations 2017.

[363] In Taita Taveta county.

independent miners was established to have led to the murder of Campell Rodney Bridges in *Republic v Mohamed Dadi Kokane and six others*[364].

In *Luka Kitumbi & 8 others v Commissioner of Mines and Geology and another*[365], the border conflict concerned the overlapping of prospecting rights, which the plaintiff claimed resulted in the death of his daughter and his wife sustaining grievous physical harm. When the plaintiff applied for prospecting rights over his parcel of land, he was informed by the Commissioner of Mines and Geology that the area he had applied for overlapped with the area of an earlier mining licence issued. Being the owner of the parcel of land, he was not aware of any mining rights issued concerning the minerals present in his property hence the legal battle between him, the Commissioner of Mines and Geology, and the mineral rights holders. Other similar disputes include *Lilian Mercy Mutua t/a Lilian M Gems v Elizabeth Wangechi Olonginda & 3 others*[366] and *Kasigau Ranching Limited v John Gitonga Kihara & 4 others*[367], where the land owners contested the mining activities over their parcel of land on the basis of the validity of the mining licence issued by the Commissioner of Mines and Geology. All these disputes were under the repealed Mining Act.

With the online mining cadastre, the possibility of such conflicts is limited because of the requirement to submit all applications for a mineral right through the cadastre.[368] Also, all information submitted to or sent from the cadastre is held in a cadastre register, including the digital copy of the mineral right, the description of the mineral right area, the cadastral coordinates defining the mineral right area and the mineral or minerals for which the mineral right was issued and is easily verifiable.[369] Hence, it is easy to determine whether an investor has

[364] Criminal Case (Murder) No.21 of 2010 at Mombasa High Court – [2014] eKLR.
[365] [2010] eKLR.
[366] [2013] eKLR.
[367] [1998] eKLR.
[368] Regulation 10(1) of the Mining (License and Permit) Regulations 2017.
[369] Regulation 6 and 7(3) (d), (e) and (f) of the Mining (License and Permit) Regulations 2017.

applied for a mining right or holds any mining right in any given area. In *Mohamed Hussein Haji v Abdinoor Ahmed and five others,*[370] the Ministry of Mining relied on regulation 4 of the Mining (Licence and Permit) Regulation and presented to the court the online mining cadastre register to prove that the first two respondents, Abdinoor Ahmed and Midrock Company Limited, do not appear in the register of companies and entities who have applied for and received any licence under the Mining Act within Garissa and Tana River Counties hence not authorised to undertake and mining activities in Jibril area.

The process of grant of a mineral right is predictable as there are clear timelines within which the cabinet secretary responsible for mining must communicate its decision to the applicant. For a reconnaissance licence, a prospecting licence and a retention licence, the cabinet secretary must communicate its decision in writing to the applicant within ninety days of receiving the application, while for a mining licence, within one hundred and twenty days.[371] During this time, the cabinet secretary informs the land owner or lawful occupier of land, the community and the county government where the mineral is located of the pending application, the proposed boundaries of the land in relation to the application, and after that, invites any objections to the grant of the mineral right applied for.[372] Any objection must be made within twenty-one days for an application for a prospecting licence and forty days for an application for a mining licence.[373]

Before the Mineral Rights Board recommends to the cabinet secretary the grant of a mineral right to a foreign investor applicant, it must satisfy itself that the applicant has the necessary approvals, discussed in the following sections, such as approval from the National Land Commission and other relevant departments, state agencies, and ministries in the case

[370] [2018] eKLR.
[371] Section 33(2(a) and (b)) of the Mining Act and Regulation 44 of the Mining (License and Permit) Regulations 2017.
[372] Section 34(1) and (3) of the Mining Act.
[373] Section 34(4) of the Mining Act.

of public land.[374] With regard to private land, the applicant must have the express consent of the registered land owner where the foreign investor applicant is not the registered owner of the land.[375] If the land owner unreasonably withholds consent, the land may be compulsorily acquired.[376] The registered owner of the land does not lose the right to graze livestock and cultivate the land provided that doing so does not interfere with the mining activities or does not pose a danger or hazard to the livestock or crops.[377]

In certain circumstances, foreign investors enter into legally binding agreements with registered landowners of private land. These binding agreements usually take two forms: to undertake prospecting and mining jointly or the payment of adequate compensation.[378]In such cases, consent is deemed to have been given.

Though the Mineral Rights Board has been processing licence applications, no new licence has been issued since November 2019, when the Ministry of Mining issued a moratorium against granting mineral rights.[379] The moratorium was issued to allow the ministry to undertake an aerial geophysical survey to map Kenya's mineral deposits.

In addition to the above approvals and consent, the foreign investor applicant is required to submit to the cabinet secretary for approval a work programme that describes the activities that it proposes to carry out

[374] Section 36 of the Mining Act. See also Regulation 13 of the Mining (License and Permit) Regulations 2017. See also Section 176 of the Mining Act which provides that the applicant must obtain an environmental impact assessment licence and approved social heritage assessment and environmental management plan.
[375] Section 37)1) of the Mining Act. Where consent is granted, any change of ownership thereafter does not affect the validity of the consent for as long as the prospecting and mining rights subsists. See Section 37(3) of the Mining Act. See also Regulation 23 of the Mining (License and Permit) Regulations 2017.
[376] Section 40(1) of the Mining Act
[377] Section 152 of the Mining Act
[378] Section 37(2) of the Mining Act
[379] Macharia Kamau, "Suspended Miners to get back Licences," *The Standard Newspaper*, June 29,2021, https://www.standardmedia.co.ke/business/news/article/2001416947/suspended-miners-to-get-back-licences

under the licence, a detailed programme for the recruitment and training of Kenyan citizens and a local product plan that details how it intends to procure locally available goods.[380] The foreign investor applicant must also submit an environmental rehabilitation and restoration plan for a prospecting licence. [381]The cabinet secretary must approve the programme and plans before a mineral right is granted.[382]

Upon receipt of the decision approving the grant of the mineral right applied for, the foreign investor applicant is required to accept or reject the offer within twenty-one days from the date of receipt of the notification of the approval failure to which the approval lapses.[383] The foreign investor has a right to appeal the decision of the cabinet secretary to the High Court within thirty days.[384]

The Act limits the number of a particular mineral right that a foreign investor can hold. For a reconnaissance licence, a foreign investor cannot hold more than two licences concurrently, while a prospecting licence, it is limited to ten licences.[385]

All information in respect of any application for a mineral right is captured in the cadastre register, such as (i) the full details of the applicant, (ii) the date and time the application registration receipt was issued, (iii) the date on which the Mineral Rights Board received the report of the application from the director of mines, (iv) the date on which the cabinet secretary received the recommendation of the Mineral Rights Board, (v) the date on which the cabinet secretary granted or denied the mineral right, (vi) the date on which the registrar notified the applicant

[380] For work programmes, see Regulation 4(1) of the Mining (Work Programmes and Exploration Reports) Guidelines, 2017. The work programme is required to accompany a new application for a reconnaissance licence, prospecting licence and rention licence as well as when sorting their renewal. Section 46 (1), Section 61 (3) (c) and (d), Section 72(2) (e) and (f) of the Mining Act
[381] Section 72(3) (c) of the Mining Act.
[382] Section 46 (2) of the Mining Act.
[383] Section 33(5) and (6) of the Mining Act.
[384] Section 33(7) of the Mining Act.
[385] Regulation 31 and 37(1) of the Mining (License and Permit) Regulations 2017.

that the application was granted or denied, and (vii) the date on which the applicant accepted the offer for grant of a mineral right.[386] This creates transparency in the application process.

3.3.5. State participation in prospecting or mining operations

With regard to mining licences for large-scale mining operations, the state automatically acquires a ten per cent interest in the share capital of the locally incorporated company of the right holder once it is granted. The interest is free as the state is not required to make any financial contribution for the shares.[387] The NMC holds the state's interest.[388] The NMC shall therefore be issued with a share certificate and have the right to vote, receive notice of any general meeting of the members of the holder of the mining licence, and attend and speak at the meeting.[389] The NMC is also entitled to receive dividends declared by the holder of a mining licence. Any dividend received will be proportionate to its shareholding. It is also entitled to appoint a director or the number of directors proportionate to its shareholding to the board of the locally incorporated company of the mining licence holder. [390] The interest held does not entitle NMC to manage or participate in the day-to-day management of the company's operations.[391]

If the state wishes to acquire additional shares, it must negotiate a mineral agreement with the mineral rights holder and pay the agreed contribution per the agreement.[392]

[386]Regulation 7(2) of the Mining (License and Permit) Regulations 2017.
[387]Section 48 of the Mining Act. See also Regulation 6 of the Mining (State Participation) Regulations, 2017.
[388] Regulation 5(2) (a) of the Mining (State Participation) Regulations, 2017.
[389] Regulation 6(8) of the Mining (State Participation) Regulations, 2017.
[390] Regulation 6(13) of the Mining (State Participation) Regulations, 2017.
[391] Regulation 6(14) of the Mining (State Participation) Regulations, 2017.
[392] Section 48(3) of the Mining Act and Regulation 7(1) of the Mining (State Participation) Regulations, 2017.

3.3.6. Mineral Right Agreement

This agreement is usually concluded for investments that may exceed five hundred million United States dollars and must be submitted to the National Assembly and Senate for ratification.[393]

All mineral agreements must conform to the standard format provided under the Mining Act to ensure the standardisation of mineral agreements.[394] Standardization is further guaranteed by the fact that any term or condition in a mineral agreement inconsistent with the Mining Act or the Constitution is, to the extent of the inconsistency, considered void and of no legal consequences.[395]Also, a mineral agreement cannot be relied on to absolve any party to the agreement from complying with the provisions of the Mining Act or any other statute.[396]

Section 117(2) of the Act provides for terms and conditions that must be included in the agreement. One of the notable requirements is the mineral value addition requirement which provides that the whole or part of the minerals produced must be processed in Kenya.

The cabinet secretary responsible for mining is permitted to negotiate mineral agreements on behalf of the state and on the advice of the Mineral Rights Board.[397] Upon conclusion of negotiations of the agreement, the agreement must be submitted to the National Assembly and the Senate for ratification before the cabinet secretary executes it.[398]

To promote transparency in the mining sector in Kenya, it is a legal requirement that all mineral rights agreements be published and made accessible to the public.[399]In particular, the cabinet secretary responsible

[393] Section 117(1) and (5) of the Mining Act.
[394] Section 117(4) of the Mining Act.
[395] Section 121(1) of the Mining Act.
[396] Section 121(2) of the Mining Act.
[397] Section 118 of the Mining Act.
[398] Section 120(2) of the Mining Act.
[399] Section 119(1) of the Mining Act and Regulation 7 of the Mining(Reporting of Mining and Mineral Related Activities) Regulations, 2017.

for mining must ensure that all mineral agreements and their status are available on the official website of the ministry responsible for mining.[400]

3.3.7. Mining rights dealings

The foreign investor mineral right holder is permitted to assign, transfer, mortgage or trade with the mineral right provided that the consent of the cabinet secretary, on the recommendation of the mineral right board, is obtained.[401] One of the preconditions for consent in the case of a transfer of an interest in the mining right is the notification of the Kenya Revenue Authority (KRA) of the intended transfer and compliance with relevant tax provisions.[402]

Transfer of a mineral right is differentiated from a change in control or ownership of the mining company that has been issued with the mineral right. A foreign investment company is permitted to change ownership and control in accordance with the Companies Act[403]provided that where the proposed change will result in a single interest in the mineral right exceeding twenty-five per cent, the cabinet secretary must be notified of the proposed change and his approval obtained for the proposed change to take effect.[404]

In the case of trading, the mineral right holder must obtain a mineral dealer's licence.[405]

3.3.8. Disposal of mineral resources

There are restrictions on the disposal of minerals under different mineral rights. For example, any minerals the foreign investor acquires under a reconnaissance licence or a prospecting licence are considered the

[400] Section 119(2) of the Mining Act.
[401] A reconniassance licence is not transferable. See Section 67(4) of the Mining Act.
[402] Section 51(1), (2), (4) and (5) of the Mining Act.
[403] Companies Act No.17 of 2015. This law governs the different types of companies in Kenya. It provides for their incorporation, management and winding up.
[404] Section 51(6) and (7) of the Mining Act.
[405] Regulation 9(1) of the Mining (Dealings in Minerals) Regulations, 2017.

property of the national government.[406] Therefore, the foreign investor is not permitted to dispose of or remove the minerals from the country without the written consent of the cabinet secretary.[407]

In the case of a prospecting licence, the cabinet secretary usually prescribes the quantity of minerals allowed to leave the country for sampling, assaying, analysis or other similar examination under the licence.[408] The position is different for a mining licence as the foreign investor is permitted to dispose of the minerals mined subject to the payment of royalties, taxes and applicable charges.[409] However, the foreign investor must obtain a dealers licence before trading with the minerals. An export permit must also be obtained if the investor intends to ship the minerals.[410]

3.3.9. Renewal of mining rights

The Act also gives timelines for the renewal of the licences, which is important for predictability and certainty. A prospecting licence is usually for a maximum period of three years and may be renewed on application to the cabinet secretary.[411] The cabinet secretary must respond within sixty days of receipt of the application.[412] Within this period, the Mineral Rights Board must consider the application and send its recommendations to the cabinet secretary. If the cabinet secretary does not respond within this period and the licence expires, the foreign

[406] Section 66 and Section 76(1) (a) of the Mining Act.
[407] Section 66 and Section 76(1) (b) of the Mining Act.
[408] Section 76(2) of the Mining Act.
[409] Section 108 2(c) of the Mining Act.
[410] Section 171(1) of the Mining Act and Regulation 18 and 20(2) of the Mining (Dealings in Minerals) Regulations, 2017.
[411] Section 81(1) of the Mining Act. The application must be made at least three months before the expiry of the term indicated in the current prospecting licence. See Section 81(2) of the Mining Act. The renewal term should not exceed three years. The holder of a prospecting licence can further renew the licence on expiry of the renewal term for a further final term not exceeding three years. Thus, a prospecting licence holder can only renewal the licence twice after the initial grant of licence. See Section 83 of the Mining Act.
A reconnaissance licence is for a maximum term of two years and is not renewable therefore the issue of timeline does not apply in this case. See Section 63 of the Mining Act.
[412] Section 81(4 of the Mining Act.

investor mineral right holder may continue the prospecting operations until its application is determined.[413]

For a mining licence, the renewal timelines are not indicated, which creates uncertainty on the part of the foreign investor. In particular, the Act stipulates that a mining licence is for a period of twenty-five years or the forecast life of the mine, whichever is shorter. It may be renewed on application to the cabinet secretary, one year before the licence expires, for a further period of fifteen years or the remaining life of the mine, whichever is shorter.[414] It, however, fails to provide the duration within which the cabinet secretary must respond to the application and what happens if the cabinet secretary does not respond by the time the current licence expires.

3.3.10. Community protection and development

For the conservation of mineral resources, protection of the environment, the safety of mining operations labourers, and community development, a mining right may be granted subject to specified conditions to which the mineral rights holder must adhere.[415] In addition to these conditions, the Act has explicit provisions on the employment of Kenyan citizens, training for skills transfer, sustainable exploitation of the minerals to guard against wasteful mining, community investment, and procurement of local goods and services, which the mineral right holder must observe. All these provisions aim to safeguard the community from the adverse effects of mining activities, such as environmental and health hazards and ensure that it benefits from the mining sector through skills transfer, employment, and business activities.

[413] Section 81(5) of the Mining Act.
[414] Section 107 , 114 (1) and 116 of the Mining Act.
[415] Section 42 of the Mining Act. The cabinet secretary responsible for mineral resources is responsible for enforcing the conditions as contract between the cabinet secretary and the holder of the mineral right. See Section 42(3).

3.3.10.1. Environment

Under environment, a mining licence will not be issued by the cabinet secretary to an applicant unless an Environmental Impact Assessment[416] licence and an approved social heritage assessment and environmental management plan are submitted.[417] In addition, the applicant must submit a mine closure plan[418]for an application for a prospecting, retention, or mining licence.[419]

Once mining activities commence, the licence holder must ensure that it avoids seepage of toxic wastes into streams, rivers and lakes and that toxic waste is disposed of only in approved areas.[420]It must also ensure that any blasting and works that cause massive vibrations are done per the Environmental Management and Coordination Act.[421]

Upon completion of prospecting or mining, the licence holder must restore the land where the mining activities were being undertaken to its original status or to an acceptable and reasonable condition, which should be as close as possible to its original state.[422] To ensure compliance with this provision, an applicant for a prospecting, retention, or mining licence must provide an environmental protection bond sufficient to cover the costs associated with implementing the environmental and rehabilitation obligations contained in the licence.[423] The bond is released to the investor once it completes the required rehabilitation measures under the mining right.[424]

A majority of the concerns by communities about mining activities have been on the issue of the environment. For example, in *Haji Ibrahim Ali Hussein & 21 others v Cabinet Secretary Ministry of Energy and*

[416] EIA.
[417] Section 176(2) of the Mining Act.
[418] Also known as a site mitigation and rehabilitation plan.
[419] Section 180(1) of the Mining Act.
[420] Section 179(b) of the Mining Act.
[421] Section 179 (c) of the Mining Act.
[422] Section 179(d) of the Mining Act.
[423] Section 181 of the Mining Act.
[424] Section 181(4) of the Mining Act.

Petroleum & 6 others and the County Government of Wajir (Interested Party)[425] , the Ajuran community of Wajir County, represented by the petitioners in this case, alleged that their right to a clean and healthy environment, as guaranteed in Article 42(a) of the constitution, will be infringed by the oil exploration activities of Taipan Resource Corporation, Lion Petroleum Corporation and Premier Oil PLC. The community foresaw that before the exploration activities commenced, the oil companies would clear forests and vegetation. The court held that the companies conducted both an environmental impact assessment study and an environmental audit. The two exercises concluded that the impact of the exploration activities on the environment would be minimum, and the oil companies have taken adequate measures to mitigate the effects of environmental damages.

Similarly, in *Mui Coal Basin Local Community & 15 others v Permanent Secretary Ministry of Energy & 17 others*[426] , the Mui coal basin local community alleged that the proposed coal mining activities are likely to infringe on the community's right to a clean and healthy environment, as guaranteed in Article 42(a) of the constitution. The three-judge bench found the community's claim premature since the EIA had not been concluded. Nevertheless, it recognized that coal mining is an environmentally damaging activity but noted as follows:

> … However, the fact that Coal mining causes environmentally adverse effects is not a self-defining reason not to concession coal mining. This is because there is a need to balance, on the one hand, the need to utilize natural resources sustainably so that they spur economic development since, after all, environmental resources are the capital base of the economy. On the other hand, there is the need to control and manage the use of the environmental resources so that they do not generate unsustainable levels of pollution or waste or unjustified adverse effects on the health of humans.

The two cases are important as they demonstrate that the court is not quick to issue injunctions to stop mining activities because of their

[425] [2020] eKLR.
[426] [2015] eKLR.

perceived or proven negative environmental impact. All the court is concerned with is that a balance has been struck between the sustainable exploitation of environmental resources and the protection of the environment through proper control and management of those environmental resources.

The requirement of an Environmental Impact Assessment and the process of obtaining an EIA licence will be discussed later in this chapter when examining the Environmental Management and Coordination Act.[427]

3.3.10.2. Community Development Agreement

A foreign investor licence holder must spend at least one per cent of the gross revenue from the sale of minerals every calendar year to finance community projects.[428] Thus, upon being issued with a mining licence, the licence holder must identify a community or communities with which it proposes to enter into a community development agreement and conclude a community development agreement. The community projects to be supported must be those in the community development agreement between the licence holder and the community.[429]

The agreement should address issues such as the role of the County Government, employment of community members, scholarships, training, and internship opportunities, support for infrastructural development such as schools, hospitals, roads, water and power, protection of the environment and natural resources, and special programmes for youth, women and persons with disabilities.[430] The agreement should not impose any additional rent, fee, tax or benefit that

[427] Act No.8 of 1999.
[428] Regulation 12(1) of the Mining (Community Development Agreement) Regulations, 2017.
[429] This must be done within 30 days of issuance of a mining licence. See Regulation 5(1) and (2) of the Mining (Community Development Agreement) Regulations, 2017.
[430] Regulation 3 of the Mining (Community Development Agreement) Regulations, 2017.

is not specified in any statute or have provisions that benefit a specific clan, family or group in the community.[431]

The duration of the agreement is for the productive life of the mine but can be modified or amended by the parties from time to time and reviewed at least every five years from the date of signing.[432]

The Community Development Agreement Committee[433]is the link between the community and the licence holder. It also monitors and evaluates compliance with the terms of the agreement and settles disputes and grievances between the licence holder and the community.[434]

At the end of every year, the licence holder must submit an annual report to the cabinet secretary and County Government indicating, among others, the expenditure of all projects carried out under the agreement.[435]

On May 24, 2021, Base Titanium Limited operating in Kwale County, signed Community Development Agreements with three Community Development Agreement Committees from Msambweni, Lunga Lunga and Likoni in Kwale County.

3.3.10.3. Compensation

In certain circumstances, mining activities may affect the land owner where mining activities are being undertaken by causing loss or damage to immovable property such as buildings, damaging the water table, thus

[431] Regulation 9 (a) and (c) of the Mining (Community Development Agreement) Regulations, 2017.
[432] Regulation 14 and 15 of the Mining (Community Development Agreement) Regulations, 2017.
[433] Established under Regulation 7(1) of the Mining (Community Development Agreement) Regulations, 2017. Its membership is wide as it includes the Governor, National Government representatives, a representative of women, a village elder, two representatives of the youth, civil society representative, a representative of the marginalized groups, a representative of Persons with Disabilities and the Member of Parliament of the area.
[434] Regulation 4 of the Mining (Community Development Agreement) Regulations, 2017.
[435] Regulation 16 of the Mining (Community Development Agreement) Regulations, 2017.

affecting the water supply, and harming crops and livestock. In such cases, the land owner is entitled to compensation by the mineral right holder, who is required to pay prompt, adequate and fair compensation.[436] Upon a claim for compensation being raised, the mineral right holder is required to deliver a bond as a guarantee against the claim for compensation to be held by the ministry responsible for mining in a non-interest-bearing escrow account.[437]

A land owner can, however, not deny the mineral right holder the enjoyment of the rights under a mineral right by, for example, demanding compensation based on the value of the minerals under the land or in consideration for permitting entry to the land that is subject to a mineral right.[438]

One of the cases where the community claimed compensation from investors was the *Haji Ibrahim Ali Hussein & 21 others v Cabinet Secretary Ministry of Energy and Petroleum & 6 others; County Government of Wajir (Interested Party)*[439] . In this case, the Ajuran community of Wajir County, represented by the petitioners, claimed that they are pastoralists; hence, the activities of the oil companies significantly interfered with their way of life and movement. They further claimed that the oil companies dug small holes during the seismic survey, which they left uncovered. As a result, their animals were injured and died. The court held that the oil companies had not curtailed the community's freedom of movement because they were utilizing a small area of land measuring thirty-six hectares. On the issue of the dead animals, the court established, through evidence, that the holes dug during the seismic survey were filled up by the oil companies and that the animals, in fact, died due to drought. The compensation claim did not succeed.

[436] Section 153(1) of the Mining Act.
[437] Regulation 26(1) of the Mining (License and Permit) Regulations 2017.
[438] Section 153(4) of the Mining Act.
[439] [2020] eKLR.

From the above case, it is clear that the court requires the community or landowner to prove causation for a claim for compensation to succeed. The requirement is good for investors as they are guaranteed that frivolous and vexatious compensation claims they have refused to pay will not succeed in court.

3.3.10.4. Local Content

At each stage of the mineral value chain, the foreign investor must utilize locally supplied goods and services and employ Kenya nationals. This is important as it increases national participation in the mining sector through job creation due to direct employment by foreign investor companies or through the use of local goods and services, businesses and financing. This has the effect of contributing to economic development and increasing the capability and international competitiveness of domestic businesses.[440]

The proposed local content law, the Local Content Bill 2018[441], provides a framework to facilitate the local ownership, control and financing of activities connected with the exploitation of oil, gas and other petroleum resources only. Mining resources are not included in the draft law. Nonetheless, the Mining Act and its regulations have clear provisions addressing employment and use of local products by foreign investors, as discussed below.

3.3.10.4.1. Employment and trainings

The employment and training requirements are important as they ensure that local expertise is utilized in the entire mining value chain leading to job creation, development of local capacity, and skills and technology transfer and retainment.

[440] Regulation 3 of the Mining (Use of Local Goods and Services) Regulations, 2017.
[441] Which underwent the first reading in the Senate on May 10,2018. It is awaiting the second reading. See "Senate Bills 2018", Kenya Law, accessed March 19, 2022, http://kenyalaw.org/kl/index.php?id=7937.

When applying for a reconnaissance, prospecting or mining licence, the foreign investor must submit a plan for the employment and training of Kenyans.[442] The plan must include the specification of the skills needed, the number of Kenyans the foreign investor plans to employ, the number of expatriates required, a plan for the employment of women and persons with disabilities, and an estimate of the expenditure that will be incurred under the plan.[443]

Foreign investors are usually keen to bring in expatriates experienced in a specialized area. The law permits the investor to recruit expatriates provided that the expatriates are not being recruited for middle and junior-level positions, which involve unskilled or clerical work, as these are reserved for Kenyan citizens only.[444] In certain circumstances where the foreign investor can demonstrate that there is no qualified Kenyan to occupy a particular junior or middle-level position, the Director of Mines may approve the recruitment.[445] In such a case, the foreign investor must submit a plan, together with its application for a mineral right, for the progressive replacement of the expatriate with a Kenyan.[446] For senior-level positions, the cabinet secretary will not approve an application to recruit an expatriate if he or she is satisfied that a Kenyan possesses the required qualifications, skills, and experience.[447]As a result, an expatriate cannot apply to the Department of Immigration Services for a work permit.[448]

Once the licence is issued, the approved plan forms part of the conditions or obligations of the licence issued.[449] One year after issuance of the

[442]Regulation 5(1) of the Mining (Employment and Training) Regulations, 2017.
[443] Regulation 5(3) of the Mining (Employment and Training) Regulations, 2017.
[444] Regulation 7(1) and (2) of the Mining (Employment and Training) Regulations, 2017.
[445] Regulation 7(3) of the Mining (Employment and Training) Regulations, 2017.
[446] Regulation 5(2) and (11) of the Mining (Employment and Training) Regulations, 2017.
[447] Regulation 5(7) of the Mining (Employment and Training) Regulations, 2017. The recommendation of the Director of Mines is required for an expatriate in the mining sector to obtain a work permit from the Department of Immigration Services.
[448] Section 5(8) and (9) of the Mining (Employment and Training) Regulations, 2017.
[449] Regulation 5(6) of the Mining (Employment and Training) Regulations, 2017.

licence, the investor must submit to the director of mines a programme for the promotion of education, research and development.[450] Also, the investor must report to the Director of Mines yearly on its performance on employment, training, research and development and half yearly on the employment and training activities.[451]

According to the Department of Mining under the Ministry of Mining, Blue Economy and maritime Affairs, foreign investors have not been submitting the yearly and half-yearly reports to the Director of Mines.[452]

3.3.10.4.2. Use of local goods and services

When a licence holder, its contractors or sub-contractors are purchasing goods or procuring services for its mining operations, they are required to give priority to materials and goods made in Kenya and services provided by citizens of Kenya or entities incorporated and operating in Kenya or owned and controlled by Kenyans. The goods and services must be equal in quality, quantity and price to, or better than, goods and services that are obtainable outside the country.[453]To this end, a procurement plan must be submitted by an investor with the application for a mining right.[454]

The licence holder must submit to the Director of Mines on a half-year basis a list of all contracts and purchase orders exceeding Kenya Shillings 100,000,000 awarded in the previous half-year. The list should indicate, among other things, the items and services, the value of the contract or purchase order, the name of the successful contractor or vendor, and the estimate of Kenyan content. Unfortunately, licence holders have not been submitting the list, and no action has been taken to date for non-compliance. Consequently, the Department of Mining cannot track

[450] Regulation 9(2) of the Mining (Employment and Training) Regulations, 2017.
[451] Regulation 5(6), (7) and 10(1) of the Mining (Employment and Training) Regulations, 2017.
[452] See attached interview checklist and responses with regard to the interview carried out with the now Ministry of Mining, Blue Economy and Maritime Affairs.
[453] Regulation 5 of the Mining (Use of Local Goods and Services) Regulations, 2017.
[454] Regulation 6(1) of the Mining (Use of Local Goods and Services) Regulations, 2017.

compliance with the Mining Act, mainly whether the use of local goods and services by licence holders is being promoted in the mining sector.[455] With regard to professional services such as engineering, accounting and legal, there are specific requirements under the mining regulations. Engineering services must be rendered by Kenyan engineering consultants and firms.[456] However, foreign engineering consultants and firms may collaborate with local engineering firms to render engineering services.[457] If a foreign investor licence holder can demonstrate that there is no Kenyan company with the capability to offer the engineering services it seeks, the cabinet secretary may permit the licence holder to engage an expatriate or foreign company.[458]

According to the Department of Mining, it is unknown whether the cabinet secretary has permitted any foreign investor to engage a foreign engineering firm under the above circumstances.[459]

Similarly, a licence holder is required to engage the services of lawyers and certified accountants licenced to practice in Kenya only.[460] However, foreign consultants and firms in the legal and accounting discipline may collaborate with local firms to render accounting and legal services.[461]

The Director of Mines monitors Kenyan local content through the annual reports on Kenyan content that must be submitted annually by the foreign investor licence holder.[462] According to the Department of Mines, licence

[455]See attached interview checklist and responses with regard to the interview carried out with the now Ministry of Mining, Blue Economy and Maritime Affairs.
[456] Regulation 13(1) of the Mining (Use of Local Goods and Services) Regulations, 2017.
[457] Regulation 13(2) of the Mining (Use of Local Goods and Services) Regulations, 2017.
[458] Regulation 13(3) of the Mining (Use of Local Goods and Services) Regulations, 2017.
[459] See attached interview checklist and responses with regard to the interview carried out with the now Ministry of Mining, Blue Economy and Maritime Affairs.
[460] Regulation 15(1) of the Mining (Use of Local Goods and Services) Regulations, 2017.
[461] Regulation 15(2) of the Mining (Use of Local Goods and Services) Regulations, 2017.
[462] Regulation 16(1) of the Mining (Use of Local Goods and Services) Regulations, 2017.

holders have not been submitting these reports; thus, monitoring of Kenyan local content under the mining sector is not being undertaken.[463]

3.3.10.4.3. Insurance and re-insurance

Foreign investor licence holders must insure all insurable risks related to their mining business with insurance companies licenced by the Insurance Regulatory Authority (IRA) of Kenya.[464]Where a foreign investor wishes to engage the services of an offshore insurance or re-insurance company, it must first obtain consent from the IRA. Consent is usually issued upon satisfaction that there is no local capacity.[465] Currently, there is local capacity to offer insurance services to foreign investors engaged in mining activities.[466]

After the end of every licence year, the foreign investor must submit a report to the Director of Mines on all the companies it engaged for insurance services, the classes of cover obtained and the premium paid for each cover.[467]

3.3.11. Dispute Resolution

The Act has a clear dispute resolution process.[468] Any dispute arising from a mining right issued under the Mining Act may be determined by the cabinet secretary, a mediation or arbitration process agreed upon by the parties or through a court of competent jurisdiction.[469]

The cabinet secretary responsible for mining may inquire and determine boundary disputes concerning a prospecting or mining right, a wrongful

[463] See attached interview checklist and responses with regard to the interview carried out with the now Ministry of Mining, Blue Economy and Maritime Affairs.
[464] Regulation 14(1) of the Mining (Use of Local Goods and Services) Regulations, 2017.
[465] Regulation 14(2) of the Mining (Use of Local Goods and Services) Regulations, 2017.
[466] See attached interview checklist and responses with regard to the interview carried out with the now Ministry of Mining, Blue Economy and Maritime Affairs.
[467] Regulation 14(3) of the Mining (Use of Local Goods and Services) Regulations, 2017.
[468] Section 154 to Section 157 of the Mining Act.
[469] Section 154 of the Mining Act.

act committed or omitted during prospecting or mining operations, rights under a prospecting or mining licence, and assessment and payment of compensation.[470]

Any order made by the cabinet secretary to resolve any dispute brought before him or her is enforceable by a Court in the same manner as an order of that Court.[471] An aggrieved party may appeal the decision of the cabinet secretary to the High Court within thirty days.[472]

Any aggrieved party is required to adhere to this dispute resolution procedure. Courts will not entertain litigants who approach the court without exhausting the dispute resolution procedure. This position was emphasized in the case of *Peter Nzeki and 14 others v Base Titanium Limited and four others*[473] where the court cited *Mutanga Tea & Coffee Company Ltd v Shikara Limited & another*[474] and *Geoffrey Muthinja & Another –v- Samuel Muguna Henry & 1756 others*[475] and noted that where a dispute resolution mechanism outside court is provided for, the same must be exhausted before the jurisdiction of the court is invoked. Thus, Justice Yano concluded that the petitioners failed to apply or follow the procedure provided for under the Mining Act, hence, went to court prematurely.

3.3.12. Fiscal regime [476]

A good fiscal system balances the returns investors need to justify their investments and the rights of a state and its citizens to benefit from the

[470] Section 155 of the Mining Act.
[471] Section 156(5) of the Mining Act.
[472] Section 157 of the Mining Act.
[473] [2021] eKLR.
[474] [2015] eKLR.
[475] [2015] eKLR.
[476] Set of instruments or tools such as taxes, royalties and dividends that determine how the revenues from mining projects are shared between the state and foreign investment mining companies. Natural Resource Governance Institute, "Fiscal Regime Design: What Revenues the Government Will be Entitled to Collect," March 2015, accessed February 10, 2021, https://resourcegovernance.org/sites/default/files/documents/nrgi_primer_fiscal-regime-design.pdf.

resources.[477] It should also accord the host state policy space. Before a foreign investor invests in the mining sector, it usually examines the fiscal regime to determine its return after taxes and the fees and charges payable as part of its risk assessment.

The fiscal regime for the mining sector is contained in the Mining Act and the Tax Act. According to these legislations, the government uses four fiscal tools to capture economic rents for the country. These are royalties, taxes, dividends for the state's equity participation, and fees and charges.

A mineral rights holder is expected to pay several fees or charges prescribed by law. Such fees may include application fees, approval fees, report filing fees, fees for access to geological data held by the ministry responsible for mining, annual charges payable upon grant of a mining right, and fees to access public registers.[478] Any outstanding fees or charges payable by a mineral rights holder are treated as a civil debt.[479]

Like any business venture in Kenya, the foreign investor company must also pay corporation taxes, value-added tax, withholding tax, excise duty, export duty, and stamp duty.

Further, a mineral right holder must pay royalty for the minerals produced under a mineral right. Royalty is considered monetary compensation to the citizens for losing their renewable resources. The National Government, County Government and the community where the mining is being undertaken receive royalty payment on behalf of the citizens. In particular, seventy per cent of the royalty goes to the National Government while the County Government and the community receive twenty per cent and ten per cent, respectively.[480]

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[477] Lisa Sachs, "On Solid Ground: Toward Effective Resource-Based Development," *World Politics Review,* (August 6, 2013):5.
[478] Section 182(2) of the Mining Act.
[479] Section 182(5) of the Mining Act.
[480] Section 183(5) of the Mining Act.

Regulations on royalties to prescribe the royalty base[481] and the rate is yet to be enacted. Nonetheless, royalty is being collected by the ministry on negotiated rates and is based on the export sales value. The current royalty rates are as follows:

TABLE 2: MINERALS ROYALTY RATE

MINERAL	**CURRENT RATE L.N No 187,220.221.222 of 2013 (*percentage of the free-on-board price[482] or the export sales value*)**
Precious metals such as gold	5
Gemstones	5
Diamonds	12
Technology minerals – tantalite, columbite, tin, tungsten, lithium, cobalt, niobium	10
Rare earth elements	10
Radioactive elements	10
Metallic ores – copper, zinc, lead, aluminium, vanadium	8
Other non-precious metallic ores	8
Titanium mineral sands	10
Titanium ore	10
Zircon sands	10
Coal	8
Limestone, gypsum, dolomite, silica sand, talc	1

[481] It is the value to which the royalty rate is applied.
[482] Market value of the minerals at the point of uniform valuation, that is, the customs frontier of the economy from which the minerals are exported. Definition by OECD. See stats.oecd.org.

MINERAL	CURRENT RATE L.N No 187,220.221.222 of 2013 (*percentage of the free-on-board price*[482] *or the export sales value*)
Diatomite	5
Carbon dioxide	5
Construction minerals	2
Fluorspar	5
Cement manufacturing minerals	Kshs 140 per tonne of cement
All other minerals	5

The ministry remits the royalty collected to the consolidated fund for distribution to the National Government, County Government and the identified community. To date, the royalties due to the different County Governments and communities are yet to be distributed by the treasury since there is no regulation under the Public Finance and Management Act[483]to guide the distribution of the funds.

Also, the state being a shareholder or holder of a free-carried interest in the foreign investor mining company and a holder of any other additional shares in the company thereafter obtained at a consideration is entitled to dividends.

To track the exploration expenses of the foreign investor to avoid loss of revenue by the state, the state has prescribed allowable exploration expenses in the Seventh Schedule of the Mining (Work Programmes and Exploration Reports) Guidelines. Allowable exploration expenses are divided into nine categories, namely field and laboratory exploration activities, drilling, excavation and pre-production costs, environmental

[483] Act No.18 of 2012.

activities, logistics, depreciation of owned equipment used in the exploration, administration costs, compensation to land owners and community, training costs for Kenyan citizen and miscellaneous costs unavoidably incurred in the course of the work programme. Overseas headquarter costs, overseas staff-related costs, financing costs, and non-project-related travel are not considered exploration expenses.

To further track the depreciation of owned equipment used in mining activities, the Mining (Use of Assets) Regulations, 2017 requires a licence holder to maintain a complete, up-to-date and accurate register of all its immovable and movable assets. [484] The holder must update the register continuously and maintain a separate list of disposed of assets.[485] It is unknown how the Ministry is tracking compliance with this provision.[486]

3.3.13. Reporting, monitoring, compliance and enforcement

The licence holder has numerous reporting obligations under the Act, as discussed in the different sections of this chapter.

The Mining (Reporting of Mining and Mineral Related Activities) Regulations,2017 expounds on the reporting obligations, especially on the timelines, the different types of reports required and the content of the reports.

On the other hand, the Mining (Work Programmes and Exploration Reports) Guidelines provide a checklist for the information that must be provided in annual reports, exploration reports, retention reports, surrender reports, airborne surveys progress and final reports and feasibility study reports.

[484] Regulation 4 of the Mining (Use of Assets) Regulations, 2017.
[485] Regulation 4(3)(a)(b) of the Mining (Use of Assets) Regulations, 2017.
[486] See attached interview checklist and responses with regard to the interview carried out with the now Ministry of Mining, Blue Economy and Maritime Affairs.

The Act criminalizes the making of misleading statements in any application, report, notice, records or other documents an investor presents to mining institutions to deter rogue practices. Other criminal acts include failure to adhere to the conditions of a mineral right, salting[487], and unlawful disposal of minerals.[488]

For the cabinet secretary to effectively monitor compliance and take enforcement action where necessary, he is mandated to gazette mine inspectors to undertake monitoring, compliance and enforcement on his behalf.[489] The mine inspectors have the authority to enter and inspect land or premises which is subject to a mineral right, as well as inspect books and documents on the condition that they properly identify themselves.[490]It is a criminal offence to obstruct or hinder them from performing their task.[491]

According to the ministry, mining inspectors have been gazetted and have been undertaking inspections in accordance with the Act. However, limited funds have been a significant hindrance to their performance. Hence, adequate budgetary allocation, procurement of vehicles for field inspections and empowerment of the inspectors would significantly improve mine inspections.[492]

According to the case of *Megalith Mining Company Limited v Cabinet Secretary Ministry of Mining*[493] , the Department of Mining has been following up with investors on the various reporting obligations provided for under mining licences. In this case, the cabinet secretary revoked the

[487] Placing or depositing material in a place with the intention of misleading people as to the mineral endowment or potential of the place or manipulating a mineral sample to enhance its value with the intent of deceiving or defrauding people. See Section 208 of the Mining Act.
[488] See Section 208, 209, 210, 211 and 212.
[489] Section 196 of the Mining Act.
[490] Section 197 of the Mining Act.
[491] Section 205 of the Mining Act.
[492] See attached interview checklist and responses with regard to the interview carried out with the now Ministry of Mining, Blue Economy and Maritime Affairs.
[493] [2019] eKLR.

appellant's special licence No. 246 of 2007 through a Gazette Notice dated March 24, 2015, which was published in the Kenya Gazette on May 8, 2015, for breaching reporting obligations under the special conditions of the licence by its failure to submit quarterly reports to the Commissioner. Megalith Mining denied the allegation and presented various quarterly reports submitted to the Commissioner in 2014 and 2015. Justice Okong'o found that Megalith complied with its reporting obligations, set aside the revocation and reinstated Megalith's licence to run in full term unless otherwise lawfully terminated.

According to case law and the Department of Mining, the reporting that is currently ongoing is that which is a special condition of the licence. There are various other reporting obligations under the Act but not expressly provided for as a special condition under the licence. Licence holders have not been submitting these reports, and the Ministry has not been monitoring compliance and enforcement.

3.4. RELEVANT LAND AND ENVIRONMENTAL LEGISLATIONS

Minerals and land are inseparable. As indicated in the previous sections, investors must be in possession of the land where the minerals are located to be able to undertake any mining activities. It is, therefore, essential to examine the laws relating to land to understand how an investor can obtain possession of land to undertake mining exploration and production and how to deal with land.

Before undertaking this examination, it is imperative to note that land was the basis upon which our forefathers fought for the country's independence from colonial rule and therefore retains a focal point in Kenya's history.[494] It is still an essential aspect of the country's social,

[494] Report of the Commission of Inquiry into the Illegal/Irregular Allocation of Public Land in Kenya commonly referred to as the "Ndungu Report", xvii, http://kenyalaw.org/kl/fileadmin/CommissionReports/A_Report_of_the_Land_Commission_of_Inquiry_into_the_Illegal_or_Irregular_Allocation_of_Land_2004.pdf.

economic, political and legal relations.[495] In particular, land is used as a: source of income through undertaking agricultural activities such as farming and livestock rearing; burial site since a majority of Kenyans prefer to bury their family members on private land as opposed to public or private cemeteries; source of medicinal plants; site for undertaking community and cultural rituals; sentimental ancestral ground, grazing field; and watering points, among other activities.

Over the years following Kenya's independence[496], land meant for public purposes was allocated to private individuals and corporations, disregarding public interest and legal provisions. There was fear that Kenya would soon be devoid of a public land tenure system leading to a development crisis since the balance between private and public land rights is a critical physical development planning principle.[497] The country had only two options for restoring its public land tenure system: compulsory acquisition of private lands by the government, which would be a very costly exercise or tracing illegally allocated public parcels of land and reclaiming them.[498]

The government pursued the latter option. The Commission of Inquiry into the Illegal/Irregular Allocation of Public Land in Kenya (commonly known as the Ndung'u Commission after the Chairperson of the Commission, Paul Ndiritu Ndungu) was established by the former President of Kenya, President Mwai Kibaki, through Gazette Notice Number 4559 dated 30th June 2003 and published on 4th July 2003. Its mandate was to inquire into the illegal allocation of public land and recommend how to deal with the said public land tenure system crisis.

The Ndung'u Commission, in its report, noted that legal and political factors contributed to the illegal and irregular allocation of public land.

[495] See The Ndungu Report, xvii
[496] Kenya attained independence on 12th December 1963.
[497] The Ndung'u Report,1.
[498] The Ndung'u Report,1.

These include the system of allocation of commercial plots in townships and urban centres and of residential plots in municipalities during the colonial period.[499] Before 1951, the said commercial and residential plots were allocated by public auction. This system changed to the direct grant land allocation system in 1951 via a circular by the then Governor. It was adopted after independence via the repealed Government Land Act[500] . It is considered to have significantly contributed to the illegal and irregular allocation of public land in Kenya as the Commissioner of Lands abused it. The Commissioner of Lands made grants or dispositions of unalienated public land, which power squarely rested upon the President as provided for in sections 3 and 7 of the repealed Government Lands Act.

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[499] See The Ndung'u Report,1-7. Allocation of land prior to independence was only for settlers as the Crown Land Ordinance of 1915 declared Africans/natives as tenants at the will of the Crown. Prior to 1951, Section 15 of the Crown Land Ordinance of 1915 empowered the Commissioner of Lands to subdivide any township plot not required for a public purpose for purposes of erection of buildings for business or residential purposes. The plots would then be disposed of through public auction unless the Governor directed otherwise (this same provision was repeated in section 9 and 12 of the Government Lands Act, Chapter 280 of the Laws of Kenya, which succeeded the Crown Land Ordinance after independence. The Government Land Act substituted the word "Governor" with "President"). In particular, commercial plots were allocated through a system of public auction while residential plots were allocated through a system of public tender system. The public auction system for commercial plots was abandoned in the late 1940s and the direct grant system of land allocation with the assistance of a land committee adopted. This system gave development conditions to the purchaser. It entailed advertisement of available public land not required for public purposes for allocation, application by interested persons, and selection of allottees by the selection board established by the provincial administration based on laid down guidelines such as ability to pay, ability to carry out intended. The system change was important because the 1939 Mortimer Commission established to make recommendations on land tenure policy noted that the auction system favored the wealthy since they always outbid the not so wealth for prime plots creating a land speculation cartel. This created serious grievances within the settler community. In addition, the speculative activities were inconsistent with the agricultural development agenda of the colonial government, which was one of the key factors for colonization. This system was formalized in 1951 via a circular by the Governor. This direct grant system was also adopted for residential plots. With regard to agricultural land, Section 25 of the Crown Land Ordinance empowered the Commissioner to subdivide agricultural land into farms not exceeding 5000 acres, unless the Governor approved the leasing of farms exceeding 5000 acres but up to 7500 acres. The farms would then be disposed of through public auction. These provisions were inherited after independence via the Government Land Act section 19 to 26. The only difference was that there was no limitation on the acreage to be leased by the Commissioner. Following independence in 1963, the tender system that changed from the auction system in 1951 facilitated the illegal allocation of land by the President, Commissioner of Lands and District and Provincial Plot Allocation Committees. See The Ndung'u Report,1-7.
Kenya attained its independence on 12 December 1963.

[500] Chapter 280 of the Laws of Kenya which is now repealed.

According to sections 3 and 7 of the repealed Government Lands Act, the Commissioner of Lands could only make such grants or dispositions upon receiving written directions from the President. This was an important check and balance to ensure that unalienated public land was granted or disposed of for public interest purposes only. On the other hand, the President was considered to be holding unalienated public land in trust for the people of Kenya and therefore was expected to exercise his discretion for the benefit of the public. However, in breach of this public trust, the former President of Kenya, the late President Daniel Moi, allocated public land to individuals and corporations to reward political loyalty.

These abuses of power and illegalities by the Commissioner of Lands and the executive unfairly enriched a small percentage of Kenyans. It also led to land speculation and cartels and the allocation of public land meant for public use, such as playgrounds, recreational areas, schools, hospitals and other social amenities. This significantly affected the public land tenure system.[501] There was public outcry through demonstrations and litigation by the civil society and the public; thus, land reform became a critical political tool to gain support from the public.

After the defeat of former President Daniel Moi in the December 2002 General Elections, the new government under former President Mwai Kibaki commenced the reform of the public land tenure system by establishing the Ndung'u Commission in June 2003, approximately six months after taking over power.

The Ndung'u Commission recommended, among other recommendations, that (i) all allocations of public land, including public utility land, wetlands, forest reserves and riparian and protected areas, should be repossessed and restored to the purpose for which they had been reserved, (ii) public officials and persons who are found to have

[501] The Ndung'u Report, 17.

facilitated or participated in the illegal allocation of public land be investigated and prosecuted, (iii) all monies and other proceeds unjustly acquired as a result of the illegal allocation and sale of public land be recovered by the government in accordance with the law, (iv) land titles tribunal be established to deal with the proposed revocation and rectification of land titles in Kenya, (v) land records in the country be computerized, (vi) land titles be capable of being insured, (vii) a national land commission be established to deal with all land matters in the country, (viii) land legislation be harmonized and, (ix) a land division of the High Court be established.

The various government efforts to deal with land injustices in the country, such as the Ndung'u Commission and the Constitution of Kenya Review Commission,[502] culminated in the development of the National Land Policy by the Ministry of Lands through a consultative process.[503] The aim of the policy was to guide the country "*towards efficient, sustainable and equitable use of land for prosperity and posterity"*.[504]

The National Land Policy informed the enactment of new laws to deal with land in Kenya and the repeal of old laws, most of which inherited colonial land practices.[505] The new laws are discussed below.

[502] Established by the Constitution of Kenya Review Act (Chapter 3A of the Laws of Kenya). The members of the commission were appointed and gazetted on 10th November 2000. Professor Yash P. Ghai was the chairperson of the commission. The main mandate of the commission was to ensure a comprehensive review of the independence constitution through a people driven process.
[503] Sessional Paper No.3 of 2009 on National Land Policy, August 2009.
[504] See the vision of the policy in the National Land Policy, 1.
[505] The Land Act No.6 of 2012 repealed the Land Acquisition Act (Chapter 292 of the laws of Kenya) and the Land Acquisition Act (Chapter 295 of the Laws of Kenya). The Land Registration Act No.3 of 2012 repealed the Indian Transfer of Property Act, 1882, the Government Lands Act (Chapter 280 of the Laws of Kenya), the Registration of Titles Act (Chapter 281of the Laws of Kenya), the Land Titles Act (Chapter 282 of the Laws of Kenya), and the Registered Land Act (Chapter 300 of the Laws of Kenya).

3.4.1. The National Land Commission Act[506]

The NLC was established in 2010 by Article 67(1) of the constitution. Thereafter, the NLC Act was enacted in May 2012 to make further provisions regarding the functions and powers of the NLC.

The functions of the NLC include, among other things, (i) alienating public land on behalf of and with the consent of the national and county governments, (ii) monitoring the registration of all rights and interests in land, (iii) ensuring that public land under the management of any designated state agency is sustainably managed for the intended purposes, and (iv) receiving and investigating all historical land injustice complaints and recommending appropriate redress.[507] This is in line with Article 60(1) of the Constitution.

This, therefore, means that the NLC must be involved in all transactions relating to public land, including the compulsory acquisition of land by national or county governments and the grant of a mineral right discussed in the previous sections of this Chapter.

3.4.2. The Land Act[508]

This statute repealed the Wayleaves Act (Chapter 292 of the laws of Kenya) and the Land Acquisition Act (Chapter 295 of the Laws of Kenya), which dealt with compulsory acquisition. Notably, in *Virendra Ramji Gudka & 3 Others –v- Attorney General,*[509] the court stated, *"*Rights of compulsory acquisition are conferred by specific provisions of the law being Article 40 of the Constitution and Sections 107 to 133 of the Land Act, No. 6 of 2012 which replaced the provisions previously contained in the Land Acquisition Act".

[506] The National Land Commission Act No. 5 of 2012.
[507] Section 5(2) and Section 15(1) of the National Land Commission Act.
[508] Land Act No.6 of 2012.
[509] [2014] eKLR.

The Land Act provides for the sustainable administration and management of public, private and community land and land-based resources.

It recognizes four forms of land tenure, freehold, leasehold, partial interests, and customary land rights, consistent with the constitution.[510] Interest in land under these forms of land tenure may be acquired through allocation, land adjudication process, compulsory acquisition, prescription, settlement programs, transmissions, transfers, and long-term leases exceeding twenty-one years created out of private land.[511]

For foreign investors, interest in land may be acquired through long-term leases. The foreign investor should ensure that any contract concerning land that it concludes is in writing and further that the signatures of the parties are attested to for the contract to be admissible in a court of law.[512]

In addition, the National Land Commission may grant a foreign investor a license to use unalienated public land for a period not exceeding five years, subject to prescribed planning principles and the payment of agreed fees.[513] Regulation 9 of the Land Regulations,2017 provides for the procedure for the application and issuance of the license.

To meet its development and public interest needs, such as the exploitation of natural resources, the government may convert public land to private land.[514] Thus, public land may be converted to private land and allocated to a foreign investor for mining purposes.[515] However, the

[510]Section 5(1) of the Land Act.
[511] Section 7 of the Land Act.
[512] Section 38(1) of the Land Act provides for the conditions to be met in a contract concerning land in Kenya, that is, the contract or agreement should be in writing, signed by all parties thereto and the signature of each party signing attested to by a witness who was present and saw the party signing. If these conditions are not met, the foreign investor will not be able to rely on the contract in a court of law.
[513] Section 20(1) and (3) of the Land Act
[514] Section 9 of the Land Act and Regulation 4 of the Land (Conversion of Land) Rules, 2017.
[515] Allocation is done in accordance with the Land(Allocation of Public Land) Regulations, 2017 which provides, in Regulation 3, six methods of allocation of public

National Land Commission must ensure that public consultation is undertaken and approval of the national assembly or the county obtained for substantial transactions before such conversion is undertaken.

The government may also convert private land to public land through compulsory acquisition, reversion of leasehold interest to the government after the expiry of a lease, transfer or surrender.[516] The national or county government seeking to acquire any privately owned land compulsorily must adhere to the provisions of section 107 of the Act. It must first submit a request in writing to the National Land Commission to acquire the land on its behalf. The commission may accept or reject the request. If the request is accepted, the commission must publish the approval, which must also include at least a thirty days notice of intention to acquire the land. The approval should also indicate the purpose for which the land is to be compulsorily acquired and the location, general description and approximate area of the land. The publication should be done in the Kenya Gazette, the county Gazette, at least two daily newspapers with national-wide circulation and one local newspaper. Upon publication, the commission should serve the notice to compulsory acquire the land to the land registrar and affected persons, such as the land owners.[517] It must also affix the notice in the County, Sub County and ward offices.

Upon receiving the notice, the land registrar is required to make an entry in the register of the intended acquisition. After that, all dealings with the parcel of land become prohibited or restricted until it is vested in the acquiring authority. Just compensation must be paid promptly in full to all persons whose interests in the land have been determined.[518]

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land namely (1) public auction; (2) application confined to a targeted group of persons or groups; (3) public notice of tenders; (4) public drawing of lots; (5) public request for proposals; and (5) public land exchange of equal value. The National Lands Commission considers the purpose of the allocation and any other key circumstances when determining the method to adopt.

[516] Section 8(2) (c) of the Land Act.

[517] See Regulation 22,23 and 24 of the Land Regulations.

[518] Section 111(1) of the Land Act. See also Regulation 29 of the Land Regulations and the Land (Assessment of Just Compensation) Rules, 2017 which outlines in Regulation 3 the factors to be considered in the assessment of compensation.

Regarding any compulsory acquisition dispute, the court is keen to ensure that the above process in the Land Act is strictly adhered to. In *Patrick Musimba v National Land Commission and four others,*[519] the petitioners claimed that the compulsory land acquisition for the Standard Gauge Railway project in their constituency was not done in accordance with the constitution and the law. In particular, they claimed that no gazette notices of the acquisition and award or offer were served as required by law. They also claimed that no public participation was undertaken. The court noted that taking a person's property against his will is a serious invasion of his proprietary right; hence, the constitution and any other law providing for the deprivation of those rights must be carefully scrutinized. Thus, the court described the process of compulsory acquisition provided in sections 107, 110, 111 and 112 of the Land Act and concluded that the acquisition was undoubtedly for a public purpose and was undertaken in conformity with the constitution and the law.

As indicated when introducing this Act, this statute also provides for the proper management of land-based natural resources and the sustainable administration and management of public, private and community land. For example, the National Land Commission is required to take an inventory of all land-based natural resources in the country.[520] In addition, it is mandated to make rules and regulations for the sustainable conservation of land-based natural resources, such as procedures for the registration of natural resources, procedures for the involvement of stakeholders in the management and utilization of land-based natural resources, and measures to ensure benefit sharing in the affected communities.[521]

Further, upon the request of either the national or the county government, the National Land Commission may reserve public land with natural

[519] [2016] eKLR
[520] Section 15(3) of the Land Act.
[521] Section 19 of the Land Act.

resources on or under the surface.[522] The care, control and management of the reserved public land may be vested with a statutory body, public corporation or public agency to deal with the land in a manner consistent with the reservation order or any laws or regulations governing the management body or the specific land that has been placed in reserve.[523] The management body may, on its own motion or at the request of the National Land Commission, submit to the commission for approval a plan for the development, management and use of the reserved public land.[524]If the plan is approved, the management body must use the reserved land following the approved plan.[525]

In case of a land dispute, section 150 of the Act grants the Environment and Land Court and subordinate courts empowered by statute the jurisdiction to hear and determine disputes, actions and proceedings concerning land.

Several regulations have been made under the Act, such as the Land Regulations,2017, the Land (Extension and Renewal of Leases) Rules, 2017, the Land (Conversion of Land) Rules, 2017, the Land (Assessment of Just Compensation) Rules, 2017, and the Land (Allocation of Public Land) Regulations, 2017.[526] These Regulations guide the implementation of the specific provisions of the Act for which they were made.

3.4.3. The Land Registration Act[527]

This legislation repealed five land legislations that were enacted after independence, namely the Indian Transfer of Property Act, 1882, the Government Lands Act (Chapter 280 of the Laws of Kenya), the Registration of Titles Act (Chapter 281of the Laws of Kenya), the Land

[522] Section 15(1) (d) of the Land Act.
[523] Section 16(1) (a) and (6) of the Land Act.
[524] Section 17(1) of the Land Act.
[525] Section 17(3) of the Land Act.
[526] Section 160 of the Land Act grants the Cabinet Secretary for Lands powers to make regulations to better effect the provisions of the Act.
[527] Land registration Act No.3 of 2012.

Titles Act (Chapter 282 of the Laws of Kenya), and the Registered Land Act (Chapter 300 of the Laws of Kenya).

It deals with the registration of public, private, and community land interests, such as leases, charges, transfers, and transmissions. The Act, however, does not apply to the registration of mineral rights over land as this is provided for under the Mining Act.[528]

Any land acquired by a foreign investor must be registered under the Act. Section 107(3) reiterates the provisions of Article 65(1) of the constitution that non-citizens can only hold land under leasehold tenure not exceeding ninety-nine years.

Several regulations have been enacted under the Act, such as (i) the Land Registration (Registration Units) Orders, 2017, which establishes land registration units and registries in the country to ease the land registration process, and (ii) the Land Registration (General) Regulations, 2017, which guides on the organization and administration of the registries in the country, lost documents, electronic land transactions, and registration of cautions and inhibitions pursuant to a court order.[529]

3.4.4. Community Land Act[530]

Community land is land vested in and held by a community on the basis of ethnicity, culture or other similar community interests.[531] It, therefore, includes (i) land lawfully registered in the name of group representatives, (ii) land transferred to a specific community by any process of law, (iii) land that is declared by statute to be community land, and (iv) land lawfully held, managed or used by a particular community as a community forest, grazing areas, or shrines. Ancestral lands, lands traditionally occupied by hunter-gatherer communities or land lawfully

[528] Section 4 of the Land Registration Act.
[529] Section 110 of the Land Registration Act grants the Cabinet Secretary for Lands powers to make regulations to better effect the provisions of the Act.
[530] Community Land Act No. 27 of 2016.
[531] Article 63(/1) of the Constitution.

held as trust land by the county government of the area the land is located, are also considered community land.[532]

Community land may therefore be held as communal land, family or clan land, reserve land, and any other category recognized in law.[533]

This Act was enacted to give effect to Article 63 of the Constitution. It provides for the recognition, protection and registration of community rights and the management and administration of community land.[534]It repeals the Land (Group Representatives) Act (Chapter 287 of the Laws of Kenya) and the Trust Land Act (Chapter 288 of the Laws of Kenya).

Regarding land-based natural resources, the communities are required to establish procedures for registering the natural resources in an appropriate register and the involvement of communities and other stakeholders in the management and utilization of the resources.[535] They must also put in place necessary measures for conserving the resources in the community land.[536]

Community land may be converted to public land through compulsory acquisition, transfer or surrender.[537] It may also be converted to private land through transfer or allocation by the registered community subject to ratification by two-thirds of the community assembly, which consists of all adult members of the community, in a special meeting convened for that purpose.[538]

Natural resources on community land must be used and managed sustainably and productively for the benefit of the whole community, both current and future generations, with transparency and

[532] Article 63(2) of the Constitution.
[533] Section 12 of the community Land Act.
[534] Preamble of the Community land Act.
[535] Section 20(2) (d) and (e) of the Community Land Act.
[536] Section 20(3) of the Community Land Act.
[537] Section 22(1) of the Community Land Act.
[538] Section 23 and 21(2) of the Community Land Act.

accountability, and on the basis of equitable sharing of accruing benefits.[539]

A foreign investor may acquire an interest in community land for mining purposes through transfer, allocation or a lease over the community land.[540] It may also enter into an investment agreement with the community to undertake mining activities on community land.[541] Such an agreement must be concluded following a participatory and consultative process and approved by two-thirds of the community assembly.[542]

The investment agreement must contain provisions relating to (i) environmental, social, cultural and economic impact assessment, (ii) stakeholder consultations and involvement of the community, (iii) continuous monitoring and evaluation of the impact of the investment on the community, (iv) payment of compensation and royalties, (v) land rehabilitation upon completion or abandonment of the projects, (vi) mitigating measures of any adverse effects of the investment, (vii) capacity building of the community, (viii) transfer of technology to the community, and (ix) any other matters indicating how the community will benefit from the investment.[543]

In *Mohamed Hussein Haji v Abdinoor Ahmed and five others,*[544] the petitioners claimed that Midrock Company Limited commenced mining activities in the Ali Jibril area within the Wabari ward in Garissa County without undertaking public participation or obtaining the consent of the community. The court noted that the land in question is an unregistered community land held in trust by the County Government of Garissa. Hence, there being no evidence presented in court that the national

[539] Section 35 of the Community land Act.
[540] See section 32(1) of the Community Land Act on leases over community land.
[541] Regulation 22(1) of the Community Land Regulation, 2017.
[542] Section 36(1) of the Community Land Act. See also Regulation 21 of the Community Land Regulation 2017.
[543] Section 36(1) of the Community Land Act.
[544] [2018] eKLR.

government compulsorily acquired the land, the commissioner of mines and geology ought to consult the county government and the inhabitants of the area, by way of public participation, before issuing any licence to undertake mining activities. The Ministry of Petroleum and mining defended itself by claiming that regulation 4 of the Mining (Licence and Permit) Regulation requires all applications for a mineral right to be done online through the online mining cadastre. It presented the online mining cadastre register, which revealed that the first two respondents, Abdinoor Ahmed and Midrock Company Limited, do not appear in the register of companies and entities in Garissa and Tana River Counties who have applied for and received any licence under the Mining Act. For these reasons, the court stopped the respondents from undertaking mining activities within the Jibril area through a conservatory order.

3.4.5. The Environmental Management and Co-ordination Act[545]

The Mining Act requires an investor to obtain an EIA[546] licence as a precondition for the issuance of any authority to undertake mining activities because mining has been identified as a high-risk project under the second schedule of the Act.[547] The court affirmed this in *Cortec Mining Kenya Limited v Cabinet Secretary Ministry of Mining and nine others,*[548] where the court disagreed with the argument of Cortec Mining Kenya Limited that obtaining an EIA licence is not a condition precedent before it could be issued with a mining licence. The Court held that:

> The Environmental (Impact Assessment and Audit) Regulations 2003 are explicit in regard to the obtaining of NEMA licenses for projects that are likely to have any Environmental Impact.

[545] Act No.8 of 1999.
[546] It is defined in Section 2 of the Environmental Management and Co-ordination Act as "systematic examination conducted to determine whether or not a programme, activity or project will have any adverse impacts on the environment".
[547]The Ministry of Mining, Blue Economy and Maritime Affair cannot issue an investor with any mining licence until the investor obtains an EIA licence. See Regulation 4(2) of the Environmental (Impact Assessment and Audit) Regulations, 2003 and Section 58(1) of the Environmental Management and Co-ordination Act. An investor will be held criminally liable if it fails to prepare and EIA report or fraudulently makes false statements in the EIA report. See Section 138 of the Environmental Management and Co-ordination Act.
[548] [2017] eKLR.

> Furthermore under EMCA 'Mining' is one of those projects that require to undergo an EIA before implementation and by its own admission Cortec did not submit a NEMA license to the Commissioner before being issued with the Special Mining License. To the extent that the Commissioner was not furnished with a NEMA license as required under the EMCA and the Regulations made thereunder, he could not issue a valid mining license and the one he issued to Cortec on 7th March, 2013 was null and void and of no legal effect.

The EIA licence is issued under the Environmental Management and Coordination Act[549], which is the primary legislation governing the management of the environment.[550] This Act recognizes the constitutional right to a clean and healthy environment, including the right to have the environment protected for the benefit of present and future generations through legislative and other measures.[551]

The Act requires an EIA study to be undertaken when an investor decides to undertake mining activities on any land. Upon undertaking an EIA study[552], the investor presents the report to the National Environment Management Authority (NEMA)[553] for issuance of an EIA licence if it qualifies.[554]

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[549] EMCA.

[550] Section 2 of the Environmental Management and Co-ordination Act defines environment as "the physical factors of the surroundings of human beings including land, water, atmosphere, climate, sound, odour, taste, the biological factors of animals and plants and the social factor of aesthetics and includes both the natural and the built environment."

[551] See Section 3(1) of the Environmental Management and Co-ordination Act and Article 42 of the Constitution.

[552] This study should only be undertaken individual experts or firm of experts authorized by NEMA to undertake such studies otherwise the report will not be accepted. See Section 58(5) of the Environmental Management and Co-ordination Act. The register of experts is available at NEMA offices or in their website www.nema.go.ke.

[553] Established under Section 7 of the Environmental Management and Co-ordination Act. It is responsible for general supervision and co-ordination of all matter pertaining to the environment and the implementation of government policies regarding the environment (Section 9(1)).

[554] The EIA report must be in the format prescribed in the Environmental (Impact Assessment and Audit) Regulations, 2003. The application by the investor must be accompanied with the fees payable. The licence is usually issued within three months of the investor complying with all the requirements for issuance of an EIA licence. If an investor does not get a response of its application within the stipulated period, it can commence its mining activity. See Section 58(8) and (9) of the Environmental Management and Co-ordination Act and Regulation 23(1) of the Environmental (Impact Assessment and Audit) Regulations, 2003.

Before issuance of an EIA licence, NEMA must publish a summary of the report on its website, the Kenya Gazette and two newspapers of wide circulation in the area of the proposed mining activity and announce it on the radio within fourteen days of the EIA report.[555] In the publication and announcement, NEMA must invite comments from the public. The comments should be sent within sixty days of the publication and radio announcement.[556] Upon receipt of oral or written comments from the public, NEMA may hold public hearings in a venue convenient and accessible to people who are likely to be affected by the mining project.[557]

Within fourteen days of receipt of the EIA report, NEMA must submit a copy of the report to the ministry responsible for mining, being the lead agency in mining, for written comments.[558] The ministry should send its comments within thirty days of the written request.[559]

NEMA, after that, reviews the EIA report and considers the comments by members of the public and the ministry responsible for mining. During its review process, it may find that an EIA study is not accurate or exhaustive and thus instruct an investor to either undertake a further EIA study or submit additional information. Upon completion of the evaluation and review process, it prepares an evaluation and review report and thereafter issues an EIA licence.[560]

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[555] The expense for the notices is met by the investor. The newspaper advertisements should be done once a week for two consecutive weeks. The radio announcement is done once a week for two consecutive weeks. The comments by the public may be oral or written. Regulation 21(1) of the Environmental (Impact Assessment and Audit) Regulations, 2003.

[556] Section 59 of the Environmental Management and Co-ordination Act.

[557] Regulation 22 of the Environmental (Impact Assessment and Audit) Regulations, 2003.

[558] Regulation 20(1) of the Environmental (Impact Assessment and Audit) Regulations, 2003.

[559] Section 60 of the Environmental Management and Co-ordination Act. See also Regulation 20(2) of the Environmental (Impact Assessment and Audit) Regulations, 2003.

[560] Section 63 of the Environmental Management and Co-ordination Act. NEMA may refuse to grant a licence.

The EIA licence may contain appropriate terms and conditions that NEMA considers necessary to ensure sustainable development and sound environmental management.[561]In addition, it may contain an environmental restoration order that requires the investor to restore the environment after completion of the mining project as near as possible to the state in which it was before the mining project commenced.[562] For example, the investor may be required to replace the soil, replant trees and cover any excavated areas or pits in the land.

This elaborate procedure for issuance of an EIA licence has been relied on by the courts in determining matters of infringement of Article 42 of the constitution, which provides for the right to a clean and healthy environment, including the right to have the environment protected for the benefit of present and future generations through legislative and other measures.

In *Patrick Musimba v National Land Commission and four others,*[563] the learned judges noted that EMCA has laid down certain statutory safeguards that must be observed when an investor or the state initiates any physical development. At the core is the EIA and study, undertaken under section 58 of the EMCA.

The court in *Haji Ibrahim Ali Hussein & 21 others v Cabinet Secretary Ministry of Energy and Petroleum & 6 others; County Government of Wajir (Interested Party)*[564] examined the process for issuance of an EIA licence provided for in EMCA and concluded that the oil and gas exploring companies followed the laid down procedure. In particular, the court stated that the companies involved NEMA in all the stages of their activities, and NEMA provided all the required licences.

[561] Section 63 of the Environmental Management and Co-ordination Act.
[562] Section 108(2) (a) and (3) of the Environmental Management and Co-ordination Act. Failure to comply with a restoration order is a criminal offence. See Section 143(1) (a) of the Environmental Management and Co-ordination Act.
[563] [2016] eKLR.
[564] [2020] eKLR.

In *Okiya Omtata Okoiti and two others v Attorney General and three others*[565] , the court, while considering the question of whether the Standard Gauge Railways project was approved without a valid EIA report, established that the government conducted an EIA on the project and the procedure laid down in EMCA was followed before NEMA issued the EIA licence. Justice Lenaola quoted Justice Angote in *Kwanza Estates Ltd v Kenya Wildlife Services*[566] on the issue of sustainable development. In this case, Justice Angote emphasized the importance of adhering to the process of issuance of an EIA licence because it ensures public participation in environmental matters and guides the application of the precautionary principle of sustainable development. In particular, the judge stated as follows:

> The other principle of sustainable development that must guide this court in the exercise of its jurisdiction is the pre-cautionary principle. This principle states that if an action or policy has a suspected risk of causing harm to the environment, in the absence of scientific consensus that the action is harmful, the burden of proof that it is not harmful falls on those undertaking the act. This principle is a statutory requirement under EMCA and the Environment and Land Court Act.

Similarly, in *Rodgers Muema Nzioka and two others v Tiomin Kenya Limited*[567] , Justice Hayanga noted that the EIA is a structured process for gathering information about the potential impact of a project on the environment. The information gathered forms part of the data that is used to determine whether a project should proceed, not proceed, or proceed with proposed modifications. Hence, decisions are made on "*known facts regarding environmental consequences*".

NEMA may revoke, suspend or cancel the licence if the investor contravenes any terms or conditions of the licence.[568] In such a case, the

[565] [2014] eKLR.
[566] [2013] eKLR.
[567] [2001] eKLR.
[568] NEMA must give the licence holder written reasons for the cancelation, revocation or suspension. Any suspension of licence should not exceed twenty-four months. See

investor must stop the mining activity until the issuance of a new licence.[569]

NEMA monitors compliance with the terms and conditions of the licence by examining the records and annual reports submitted by the licence holder. It is the responsibility of the licence holder to keep accurate records and make annual reports to NEMA describing how far the mining project conforms in operation with the statements made in the EIA report submitted during the licensing process.[570]Also, if the investor finds that the mining project has undesirable effects on the environment that it did not anticipate, it must ensure that it takes all reasonable measures to mitigate the undesirable effects.[571]It should also prepare and submit an environmental audit report on the measures taken to NEMA annually or as required by NEMA in writing.[572]

There are cases where NEMA has suspended or cancelled licences. For example, in *KM and nine others v Attorney General and seven others,*[573] the residents of the Mikindani area of Mombasa County claimed that Penguin Paper and Book Company leased its neighbouring property to Metal Refinery (EPZ) Limited to undertake lead acid recycling. NEMA presented evidence that the metal refinery company submitted an EIA project report on 13th March 2007. NEMA undertook a site visit and established that the company was smelting scrap lead batteries without

Section 67(1) and (1A) of the Environmental Management and Co-ordination Act. See also Regulation 28 of the Environmental (Impact Assessment and Audit) Regulations, 2003.

[569] Section 67(2) of the Environmental Management and Co-ordination Act.

[570] Section 68(3) of the Environmental Management and Co-ordination Act. It is a criminal offence to keep false records. See Section 139 of the Environmental Management and Co-ordination Act.

[571] Section 68(4) of the Environmental Management and Co-ordination Act.

[572] It is prepared after undertaking an environmental audit of the project that must be undertaken within twelve months of commencement of the mining project and thereafter, annually. Section 68(4) of the Environmental Management and Co-ordination Act. See also See also Regulation 31 of the Environmental (Impact Assessment and Audit) Regulations, 2003. A member of the public may, after showing reasonable cause in writing, petition NEMA to direct an investor to undertake an audit of its mining project. See Regulation 39 of the Environmental (Impact Assessment and Audit) Regulations, 2003.

[573] [2020] eKLR.

an EIA license. Thus, it gave the company a cessation and restoration order and advised it on conditions for approval. On February 5, 2008, the company was issued an EIA licence upon meeting the conditions for approval. Nonetheless, the company failed to comply with the conditions for operation issued by NEMA, as disclosed by the annual audit reports, and thus NEMA closed down the factory on November 29, 2013.

Notwithstanding the issuance of a licence, the investor may be required by NEMA to submit a fresh EIA report in certain circumstances. For example, where (1) there is a substantial change or modification in the mining project or the manner in which the project is being operated, (2) the mining activity poses an environmental threat which could not be reasonably foreseen at the time the investor was undertaking the EIA study, (3) or where NEMA establishes that the information or data that the investor submitted in support of its application for an EIA licence was false, inaccurate or intended to mislead.[574]

The *Moffat Kamau and nine others v Aelous Kenya Limited and nine others*[575] considered the requirement of a fresh EIA report where there is substantial change or modification of a project. The petitioners averred that they are land owners within Kinangop Wind Farm situated in Kinangop Plateau on the border of Nakuru and Nyandarua counties, where Aeolus Kenya Limited, the first respondent, and Kinangop Wing Park Limited, the second respondent, have been licenced to develop a sixty-megawatt Kinangop Wind Park Project. They claim that NEMA approved the upscale of the project from fifty megawatts to sixty megawatts without following procedure. The court established from the evidence that the applications seeking to vary the licence only mentioned the upscale of the project by megawatts and additional turbines. However, it failed to mention that the project will, moving forward, be situated on a different site than that of the original licence. Thus, NEMA

[574] Section 64(1) of the Environmental Management and Co-ordination Act.
[575] [2016] eKLR.

never formally sanctioned the new site of the project. For this reason, the court found that there was impropriety in the manner in which the EIA licences were varied; hence, the new sites of the project were being developed contrary to the law. Nevertheless, the court guided the investors as follows:

> I feel that I also need to emphasize and clarify, that this judgment does not mean that the Kinangop Wind Project cannot be actualized or operated. It can. But it can only proceed if proper procedures are followed and a green light properly given in accordance with the law. It behoves upon the proponents of the project to get their act together, follow the law and see whether their project will be given the go ahead. This judgment should not therefore be interpreted as a victory for those who are against the project over those who are for the project. It is a judgment that merely insists that proper EIA procedures need to be followed. (emphasis)

An investor may wish to transfer its EIA licence to another investor. The transfer is permitted under Section 65(1 and 2) of EMCA, provided that both the transferor and transferee jointly notify the Director General of NEMA in writing. NEMA considers the transfer to take effect when the Director General of NEMA is notified.[576]If the notification is not done, the original holder of the licence is still considered as the licence holder for purposes of adherence to the terms and conditions of the licence and any other provisions of the Act.[577]In addition, the transferor and transferee investors may be criminally liable for transferring the EIA licence without notifying the Director General of NEMA.[578]

Investors need to note that the issuance of an EIA licence by NEMA for a mining activity does not protect the investor from legal action, both civil and criminal, that may be brought against it in respect of the manner in which the mining activity is being executed, managed or

[576] Section 65(4) of the Environmental Management and Co-ordination Act. The investor will be issued with a certificate of transfer of an EIA licence. See Regulation 26(4) of the Environmental (Impact Assessment and Audit) Regulations, 2003.
[577] Section 65(3) of the Environmental Management and Co-ordination Act.
[578] Section 65(5) of the Environmental Management and Co-ordination Act.

operated.[579]For this reason, investors must ensure that they are at all times complying with all the terms and conditions of the country's licence and environmental laws, including international treaties and conventions ratified by Kenya.

In addition to the EIA licence, NEMA may impose requirements on how the mining activity should be carried out, such as machinery to be used and permitted noise levels.[580] Also, the investor may be required to obtain other licences or permits under the Act depending on the nature of the mining activity. For example, mining companies occasionally use explosives and vibrating mining equipment, which cause noise pollution beyond the acceptable standard.[581] In such a case, the investor must obtain a permit to undertake explosive works or a licence to emit noise or vibrations above permissible levels from NEMA.[582] The Explosives Act[583]is also relevant as it provides a list of authorized explosives in Kenya and the movement, storage and use of explosives. A licence is required under the Explosives Act to undertake any explosive activities.[584]

[579] Section 66(2) of the Environmental Management and Co-ordination Act.
[580] Regulation 14(1) of the Environmental Management and Co-ordination (Noise and Excessive Vibration Pollution) (Control) Regulations, 2009. See also the First Schedule of the Regulation that indicates the maximum permissible noise levels for commercial activities as 60 sound level limit dB(A) during the day 35 sound level limit dB(A) during the night. For Noise Rating Level, the maximum is 55 NR during the day and 25 during the night.
[581] Any mining company likely to use explosives or cause vibrations should be located not less than two kilometers away from human settlement. It is the responsibility of the Ministry of Mining, Blue Economy and Maritime Affairs to ensure that this requirement is adhered to. See Regulation 14(2) of the Environmental Management and Co-ordination (Noise and Excessive Vibration Pollution) (Control) Regulations, 2009.
Any vibration should not exceed zero point five (0.5) centimeters per second beyond any source boundary. See Regulation 2, 4(1) (b) and 14(3) of the Environmental Management and Co-ordination (Noise and Excessive Vibration Pollution) (Control) Regulations, 2009.
[582] The permit for undertaking explosive works. The permit is only valid for three months and is different from a licence. Section 103 of the Environmental Management and Co-ordination Act. See also the Regulation 19 of the Environmental Management and Co-ordination (Noise and Excessive Vibration Pollution) (Control) Regulations, 2009. The application for a licence should be in accordance with the form provided for in the Fourth Schedule of the Regulation.
[583] Chapter 115 of the Laws of Kenya.
[584] See Section 11 of the Explosives Act.

NEMA is also responsible for identifying projects and activities that require environmental audit and monitoring and monitoring such projects and activities to ensure that the environment is not being degraded.[585] In doing this, it is necessary to liaise with relevant ministries such as the Ministry of Mining, Blue Economy and Maritime Affairs, which is in charge of managing and coordinating mining activities in Kenya. Monitoring usually entails an environmental inspector visiting the mining project to inspect the project and reports to determine the extent to which the mining activities conform with the statements made in the EIA report.[586]

Any citizen may make a complaint against an investor concerning the degradation of the environment. Such complaints should be made to the National Environmental Complaints Committee[587]. Upon receipt of a complaint from the public, the committee investigates the complaint and reports its findings to the Cabinet Secretary responsible for environmental matters.[588]The committee may also investigate an environmental degradation matter on its own motion.[589]Further, the committee is mandated to undertake public interest litigation on behalf of the citizens on environmental issues.[590]

Concerning the decisions made by NEMA, such as the grant or refusal to grant a licence, imposition of conditions on a licence, the revocation, suspension or variation of a licence, fees payable under the Act, or restoration orders, the investor has a right of appeal to the National Environmental Tribunal.[591]An investor aggrieved by an order or decision

[585] Section 9(2) (j) and (l) and 68(1) of the Environmental Management and Co-ordination Act.
[586] Section 68(2) of the Environmental Management and Co-ordination Act.
[587] Established under Section 31 of the Environmental Management and Co-ordination Act. See also the Environmental Management and Co-ordination (Public Complaints Committee) Regulations, 2012.
[588] Section 32(a) (i) of the Environmental Management and Co-ordination Act.
[589] Section 32(a) (ii) of the Environmental Management and Co-ordination Act.
[590] Section 32(bb) of the Environmental Management and Co-ordination Act.
[591] Established under Section 125 of the Environmental Management and Co-ordination Act. See also Section 129(1) and Regulation 46 of the Environmental (Impact Assessment and Audit) Regulations, 2003.

of the tribunal may appeal to the Environment and Land Court, whose decision shall be final.[592]

In *Okiya Omtata Okoiti and two others v Attorney General and three others*[593] , Justice Lenaola, while recognizing the jurisdiction of the National Environmental Tribunal, emphasized that the tribunal established under EMCA is "the specialized body that is acquainted with environmental issues" and his court lacks "the expertise and the resources to determine whether the Standard Gauge Railway project is detrimental to the environment or not".

In *Moffat Kamau and nine others v Aelous Kenya Limited and nine others,*[594] the court examined the character of the suit in determining whether the dispute falls under the jurisdiction of the National Environmental Tribunal or its court. It held:

> The case before this court is a constitutional petition alleging violations of various rights enshrined in the Constitution, including a violation of the right to a clean and healthy environment provided for in Article 42 of the Constitution, and the right to property provided for in Article 40 of the Constitution. Of course, part of the argument that the right to a clean and healthy environment has been violated is anchored on the EIA licences issued. But that does not change the character of the suit, which is a Constitutional petition and the NET does not hear Constitutional petitions. Its mandate is only to hear appeals on NEMA decisions.

Similarly, in *Benson Ambuti Adega and two others v Kibos Sugar and Allied Industries and four others, and Kenya Union of Sugar Plantation and Allied Workers (Interested Party)*[595], the court held that its jurisdiction in respect of disputes regarding EIA licence could only be on appeal on the decision of the National Environmental Tribunal.

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[592] Section 130(1) and (5) of the Environmental Management and Co-ordination Act.
[593] [2014] eKLR.
[594] [2016] eKLR.
[595] [2019] eKLR.

3.4.6. Environment and Land Court Act[596]

Disputes concerning land and the environment are inevitable in the mining sectors. The Environment and Land Court, established under section 14(1) of the Environment and Land Court Act, is a superior court with original and appellate jurisdiction[597] mandated to hear and determine environmental and land matters.[598] Thus, the court has the power to hear and resolve disputes relating to mining, minerals, compulsory acquisition of land, environmental protection, title, tenure, boundaries, rates, rents, land transactions, the constitutional right to a clean and healthy environment and matters regarding sustainable exploitation of natural resources, public participation and benefit sharing.[599]

Where the parties to a dispute before the court agree or request the court, or on its own motion, the court may adopt and implement alternative dispute resolution mechanisms such as conciliation, mediation and traditional dispute resolution to resolve the dispute.[600]

3.4.7. Climate Change Act[601]

Another environmental legislation relevant to the mining sector is the Climate Change Act. The mining sector is considered one of the major emitters of greenhouse gases worldwide. For this reason, the Climate Change Act requires both public and private entities in the mining sector to integrate climate change actions into their decision making and implementation of functions. The National Climate Change Council[602] may, in consultation with the Ministry of Mining, Blue Economy and

[596] Act No.19 of 2011.
[597] See Section 13(4) of the of the Environment and Land Court Act.
[598] See Section 13(1) of the Environment and Land Court Act. The Act was enacted to give effect to Article 162 (2)(b) of the constitution which required parliament to establish a court with the status of a high court to hear and determine disputes relating to environment and the use and occupation of, and title, to land.
[599] Section 13(2) and (3) of the Environment and Land Court Act.
[600] Section 20(1) of the Environment and Land Court Act.
[601] Climate Change Act No. 11 of 2016.
[602] Established by section 5(1) of the Climate Change Act and is responsible for coordinating climate change action by both the government and the private sector.

Maritime Affairs and other state departments and agencies, impose climate change obligations on foreign investors in the mining sector.[603] Subsequently, the foreign investor may be sued for damages for breaching any of the obligations.

3.5. OTHER LEGISLATIONS RELEVANT TO THE MINING SECTOR

3.5.1. Forest Conservation and Management Act[604]

This legislation is relevant when an investor intends to conduct mining activities on land declared or registered as a forest or with woody vegetation growing nearby in an area of over 0.5 hectares.[605]

In the case of public forests, the investor must apply to the Kenya Forest Service for a concession agreement to utilize a public forest or portion thereof.[606] The application must include an independent environmental impact assessment, evidence that public consultation was undertaken and completed per the second schedule of the Act, and a forest management plan that includes reforestation or replanting programmes, annual operation plans, and community user rights and benefits.[607]

If the concession agreement is approved, it must indicate the nature of the concession, such as the physical location and boundaries and the purpose for which it is granted.[608] It may also prescribe conditions that the investor must observe during the concession period, the breach of which entitles the service to withdraw the concession agreement by notice in the Kenya gazette.

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[603] Section 16 of the Climate Change Act.
[604] Forest Conservation and Management Act No. 34 of 2016. It repealed the Forests Act,2005 (Chapter 385 of the Laws of Kenya) and the Timber Act,1971 (Chapter 386 of the Laws of Kenya).
[605] Section 2 of the Forest Conservation and Management Act. Section 30 classifies forests as eith public, private or community forests.
[606] Section 2 of the Forest Conservation and Management Act defines a forest concession as "the right of use granted to an individual or organization in respect to a specific area in a national or county forest by means of a long-term contract for the purpose of commercial forest management and utilization".
[607] Section 44(3) (c) of the Forest Conservation and Management Act.
[608] Section 44(4) of the Forest Conservation and Management Act.

A grantee of a concession is personally liable for any loss or damage, including the negligence of its employees, arising from the grantee's operations on the land on which the concession has been obtained.[609] In addition, the grantee must place an environmental protection bond determined by the type and characteristics of the concession granted.[610]The bond acts as financial security for the environmental obligations of the grantee under the concession.

A concession agreement is not required for mining activities in a community or private forest; however, the consent of the Kenya Forest Service may be required. This is implied under section 46 of the Act, which requires an investor to obtain consent to undertake quarry activities in a forest area. The Kenya Forest Service will deny the consent if the forest area where the investor intends to undertake mining activities contains (1) rare, threatened, or endangered species, (2) has cultural importance or contains sacred trees or groves, or (3) is a critical catchment area or source of springs.[611] The foreign investor may also be required to take up a license to undertake mining activities in the identified forest area.[612] The license may contain the condition to undertake compulsory restoration and re-vegetation immediately upon completion of the mining activity.

The requirement of obtaining the approval of the Kenya Forest Service to undertake mining activities in public forests was affirmed in *Cortec Mining Kenya Limited v Cabinet Secretary Ministry of Mining and nine others*[613] . In this case, the appellant (Cortec Mining Kenya Limited), a Canadian-based company, was granted a special mining licence on March 7, 2013, to explore, develop and mine niobium and rare earth elements on an area of 142.149 hectares in Mrima Hills Forest Reserve for 21 years. The mining licence was granted under the repealed Mining

[609] Section 44(5) of the Forest Conservation and Management Act.
[610] Section 44 (7), (8) and (9) of the Forest Conservation and Management Act.
[611] Section 46 (1) of the Forest Conservation and Management Act.
[612] Section 46 (2) of the Forest Conservation and Management Act.
[613] [2017] eKLR.

Act. Under the repealed Act, Mrima Hill was excluded by section 7 from prospecting and mining activities. Thus, the consent of the Kenya Forest Service was necessary, as provided for in section 42 of the repealed Forest Act. The court held that the appellant did not demonstrate that it obtained any consent from the Kenya Forest Service. Consequently, the mining licence was declared invalid. The court emphasized that "The Commissioner could not properly issue a valid mining license which would entail carrying out mining activities in areas which were otherwise protected by reason of being Gazetted Forest and/or falling under the jurisdiction of the National Museums of Kenya."

3.5.2. Wildlife Conservation and Management Act[614]

Some Mining companies undertake mining activities in national parks[615] in Kenya, especially Tsavo East and West National Parks in Taita Taveta County.[616] Therefore, this Act is relevant as it provides for the sustainable management and use of wildlife resources whose provisions should guide investors licensed to mine in national parks. Section 6(1) of the Act establishes the Kenya Wildlife Service (KWS), whose mandate is to, among other responsibilities, conserve and manage national parks, wildlife conservation areas and sanctuaries and issue consents and licences.[617]

Section 45(1) of the Act explicitly prohibits mining in a national park without the approval or consent of the KWS. Approval or consent will usually be given provided the area the investor wishes to mine does not contain endangered or threatened species, is not a critical habitat and

[614] Act No. 47 of 2013.
[615] Section 2 of the Wildlife Conservation and Management Act defines a national park as an area of land or sea dedicated to the protection and maintenance of biological diversity and of natural and associated cultural resources, and managed through legal or other effective means.
[616] For example Rockland Kenya Limited and Tsavolite Mining Company.
The Eleventh Schedule of the Wildlife Conservation and Management Act lists the national parks, marine protected areas and sanctuaries gazetted as such. See Section 31 of the Act.
[617] Section 7(a) of the Wildlife Conservation and Management Act.

ecosystem for wildlife, and is not a vital catchment area or source of springs.[618]

Before the approval or consent is granted, the investor must show that it has carried out an environmental impact assessment per the provisions of the Environmental Management and Coordination Act and further that it has obtained approval under the Mining Act.[619]

Suppose the KWS decides to grant the approval or consent. In that case, the investor will be required to issue an undertaking in the form of a bond[620]to rehabilitate the mining site upon completion of the mining activity before approval or consent is granted.[621]

The investor must apply to KWS for a licence or permit upon obtaining approval or consent. This is not explicitly provided for in the Act but implied in Section 102(1)(g), which provides that any person who undertakes extractive activities in a protected area[622] without a licence or permit from the KWS commits an offence and is liable, upon conviction, to a fine of not less than two hundred thousand Kenya Shillings[623] or imprisonment of not less than two years or both such fine and imprisonment.[624]

An investor licensed or permitted to undertake mining activities in a national park or any other wildlife-protected area must ensure that its activities do not pollute the environment through the emission of hazardous substances or waste. Pollution is considered a criminal offence, and an investor convicted by a court of law shall be liable to the

[618] Section 2 of the Wildlife Conservation and Management Act.
[619] Section 45(2) (d) and (e) of the Wildlife Conservation and Management Act.
[620] The value of the bond is determined by KWS.
[621] Section 45(2) (f) of the Wildlife Conservation and Management Act. The KWS prescribes to the investor the level of rehabilitation required as guided by the Mining Act.
[622] For example, a national park, national reserve, wildlife sanctuary or marine reserve.
[623] Approximately One Thousand Five Hundred and Thirty-Eight Euros. One Euro is currently equivalent to One Hundred and Thirty Kenya Shillings.
[624] Section 102(1)(h).

payment of a fine of not less than two million Kenya Shillings or imprisonment of not less than five years or both such fine and imprisonment.[625] In addition, the investor shall be required to pay the total cost of cleaning up the polluted environment and removing the effects of pollution to the satisfaction of the KWS.[626] The court has the discretion to order further the polluter investor to contribute to a wildlife conservation activity as compensation, restoration and restitution.[627]

3.5.3. Investment Promotion Act[628]

This Act is essential for investors in the mining sector because it defines a foreign investor in Kenya and creates two institutions that are key in supporting foreign investors in Kenya.

Section 2 defines a foreign investor as:

> (a) a natural person who is not a citizen of Kenya;
> (b) a partnership in which the controlling interest is owned by a person or persons who are not citizens of Kenya; or
> (c) a company or other body corporate incorporated under the laws of a country other than Kenya.

The Kenya Investment Authority[629] is one of the two institutions created by the Act and is responsible for promoting and facilitating foreign and local investment in Kenya. To this end, it assists foreign investors in obtaining necessary licences, permits, incentives, and exemptions, including tax exemptions.[630]

The Authority is managed by a board established under Section 16(1) of the Act, whose members include relevant ministries, the Export Processing Zones Authority, the Export Promotion Council, and six members of the public.[631]

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[625] Section 89(1) of the Wildlife Conservation and Management.
[626] Section 89(2) of the Wildlife Conservation and Management.
[627] Section 89(3) of the Wildlife Conservation and Management.
[628] Act No.6 of 2004.
[629] Established under Section 14 of the Investment Promotion Act No.6 of 2004.
[630] Section 15 of the Investment Promotion Act No.6 of 2004.
[631] Section 16 of the Investment Promotion Act No.6 of 2004.

The Act also establishes the National Investment Council, whose functions include advising the Government on ways to increase investment and economic growth in Kenya and promoting cooperation between the public and private sectors in formulating and implementing economic and investment policies.[632]

The National Investment Council is mandated to consult with the private sector to obtain views and suggestions for promoting investment and economic development hence a key institution in supporting the mining sector.[633]

A foreign investor who intends to invest in the country may apply to the authority for an investment certificate. The certificate is useful for obtaining entry permits under the Kenya Citizenship and Immigration Act, No. 12 of 2011, for management or technical staff of foreign investors, owners, shareholders, and partners.[634]

3.5.4. Foreign Investments Protection Act[635]

This Act protects foreign investments approved under the Act. It commences by defining two important terms, foreign assets and foreign national, in Section 2(1).

A foreign asset is defined to include the following:

> Foreign currency, credits, rights, benefits or property, any currency, credits, rights, benefits or property obtained by the expenditure of foreign currency, the provision of foreign credit, or the use or exploitation of foreign rights, benefits or property, and any profits from an investment in an approved enterprise by the holder of a certificate issued under section 3 in relation to that enterprise.[636]

[632] Section 27(1) of the Investment Promotion Act No.6 of 2004.
[633] Section 27(2) (c) of the Investment Promotion Act No.6 of 2004.
[634] Section 13(1) of the Investment Promotion Act No.6 of 2004.
[635] Chapter 518 of the Laws of Kenya.
[636] Section 2(1) of the Foreign Investments Protection Act Chapter 518 of the Laws of Kenya.

On the other hand, a foreign national is defined as a person who is not a citizen of Kenya and includes a body corporate not incorporated in Kenya.[637]

A foreign national who intends to invest foreign assets in Kenya may apply to the Minister[638] responsible for finance for a certificate indicating that the enterprise it intends to invest foreign assets is an approved enterprise.[639] The Minister considers the application, and a certificate is issued if he or she is satisfied that the enterprise would benefit Kenya, for example, by furthering its economic development.[640]

The certificate indicates the applicant's name, the name and description of the enterprise, the amount of foreign assets invested or to be invested by the foreign investor divided into capital and loan, the foreign currency invested or to be invested, and any other relevant information.[641]

A conditional certificate is issued if the foreign national has yet to invest the foreign assets. This conditional certificate indicates the period in which the foreign national intends to invest the foreign assets[642] If the foreign national does not invest the foreign assets within the period indicated in the conditional certificate and has not applied for and been granted an extension by the Minister, the certificate is deemed revoked.[643]

Both the certificate and conditional certificate may be amended to replace the certificate holder with another person in the event of a transfer of interest to another person or the death of the certificate holder, where the

[637] Section 2(1) of Foreign Investments Protection Act Chapter 518 of the Laws of Kenya.
[638] Now referred to as Cabinet Secretary in the current constitutional dispensation. The Act is yet to be aligned to the Constitution of Kenya,2010.
[639] Section 3(1) of Foreign Investments Protection Act.
[640] Section 3(2) of Foreign Investments Protection Act.
[641] Section 3(4) of Foreign Investments Protection Act.
[642] Section 3(5) of Foreign Investments Protection Act.
[643] Section 4(g) and 5 of Foreign Investments Protection Act.

enterprise changes its name, and where additional foreign assets are invested.[644]

The protection of foreign investments provided in the Act includes the right of a certificate holder to transfer profits and the principal and interest of any loan specified in the certificate out of Kenya at the prevailing rate of exchange.[645] Also, the Act prohibits the compulsory acquisition of any approved enterprise, any property belonging thereto, or any interest to or right over the enterprise or property except in accordance with the Constitution[646] and on payment of full and prompt compensation as guided by the Constitution.[647]

To promote foreign investments, the Minister may enter into a special arrangement for investment promotion and protection with the government of any country. Any special arrangement concluded must be gazetted by the Minister.[648] In 2007 and 2008, special arrangements were entered with the government of the French Republic and the government of the Republic of Finland, respectively. Both special arrangements were gazetted in 2009. Under the current constitutional dispensation, special arrangements have been entered with the Republic of Mauritius in 2012, the Republic of Kuwait in 2013 and the Republic of Korea and the State of Qatar in 2014. The latest special arrangement is with the government of Japan, concluded in August 2016 and gazetted in 2017.

The special arrangements are a replica of the BITs concluded by Kenya with the same governments. Hence, they have provisions such as the definition of investments and investor; MFN, NT and Fair and Equitable Treatment provisions; investor-state dispute settlement; expropriation; and transfer payments. An analysis of the special arrangements

[644] Section 4 of Foreign Investments Protection Act.
[645] Section 7 of Foreign Investments Protection Act.
[646] The Act has not been aligned with the current Constitution hence the Constitution referred to in the Act is the independent Constitution of Kenya.
[647] Section 8 of Foreign Investments Protection Act.
[648] Section 8(B) of Foreign Investments Protection Act.

establishes that they are investor focused. For example, the special arrangement between Kenya and the government of the French Republic does not provide for general exceptions or exceptions to the MFN provision. However, there is an exception under NT where measures by the Kenya government to promote small and medium-sized enterprises and infant industries are permitted, provided that the measures do not significantly affect the investments and activities of the French investors in Kenya.[649]

With regard to expropriation, there is a mention of indirect expropriation without a definition of the same. Nevertheless, expropriation by the government may be undertaken for a public or national interest provided it is not discriminatory and prompt and full compensation is paid.[650]

In the event of a dispute, the special arrangement allows a French investor a choice between the domestic court and either the International Centre for Settlement of Investment Disputes (ICSID), an ad hoc arbitration tribunal to be established under the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL), or any other previously accepted ad hoc arbitration tribunal. This means that the investor does not have to first seek redress from the domestic court before proceeding to an international tribunal.

One would expect that with the availability of the PAIC as a guide to concluding agreements with home states of foreign investors, Kenya will negotiate special arrangements that balance its duty to protect foreign investments and its sovereign right to regulate in the public interest. An examination of special arrangements negotiated after 2016 reveals that this is not the case. For example, the special arrangement between the government of Kenya and that of Japan gazetted in 2017 does not have

[649] See Article 4(5) of the Special Arrangement between Kenya and the Government of the Republic of French, Legal Notice (L.N.) 138/2009.
[650] Article 6(2) of Special Arrangement between Kenya and the Government of the Republic of French, Legal Notice (L.N.) 138/2009.

general exceptions and exceptions to the MFN. With regard to NT, the exception is only for measures by the Kenya government to promote small and medium-sized enterprises and infant industries, provided that the measures do not significantly affect the investments and activities of the Japanese investors in Kenya. On expropriation, non-discriminatory measures designed and applied to protect or enhance legitimate public welfare objectives such as public health, safety and the environment may constitute indirect expropriation. Further, performance requirements are prohibited in Article 7, and the exceptions to the transfer of funds in Article 13 are inadequate because the government of Kenya cannot adopt or maintain measures in the event of serious balance of payments and external financial difficulties or threats. Akin to the special arrangement with the government of the French Republic, a Japanese investor has a choice between resolving disputes in domestic courts or international tribunals without a requirement first to exhaust domestic remedies.

3.6. CONCLUSION

Foreign Direct Investment in the mining sector can benefit both the foreign investor and the host state if the regulatory and institutional framework over which investment in the mining sector takes place protects the interest of both parties.

The above analysis demonstrates that sustainable development and inclusive growth have been prioritised without protectionism by addressing key issues that have been affecting the mining sector in Africa, such as land rights, environmental impact mitigation, rehabilitation of mining sites, resettlement of communities, local content, access to information, community development, value addition and benefit-sharing. All these issues are beneficial for enhancing the state's economic growth when included in the legislation as they link the mining sector with the rest of the economy.

In particular, the current regulatory framework has restrictions on the employment of foreigners and skills transfer, as well as local content

requirements. These are all important in increasing job opportunities for the citizens, developing local participation of domestic industries in the mining supply chain and promoting the local acquisition of the necessary skills and experience hence guaranteeing the sustainability of the mining sector. Despite this advantage for Kenya, it cannot be ignored that a foreign investor may view that the requirement restricts its efficiency and productivity as it cannot utilise its experienced foreign technical workforce. Nevertheless, the law does not entirely forbid a foreign investor from recruiting expatriates. If it can demonstrate that the skills are not available in Kenya, it can be permitted to recruit expatriates to fill the skills gap.

Notwithstanding the elaborate provisions on local content under the Act, the objective of the provisions is not being fully realised by the government because it fails to monitor compliance and enforcement effectively. The Mining Act has provided various reporting obligations for licence holders on local content. Licence holders are not submitting the required reports, and the Ministry is not monitoring compliance; thus, the government cannot determine the effect of the provisions on enhancing the sustainability of the mining sector.

In addition to the restrictions on the employment of foreigners and skills transfer requirements, it is further evident from an analysis of the mining regulatory framework and case law that a balance has been achieved between the need for sustainable utilisation of natural resources for economic growth, on the one hand, and conservation of the environment, on the other hand. Hence, mining activities by foreign investors are encouraged provided that they do not infringe on the rights of the citizens to a clean and healthy environment as provided for in Article 42 of the constitution.

For foreign investors, transparency of the fiscal regime is a key advantage as it enables an investor to determine its return on investment, which is a significant investment decision. For Kenya, the enhanced transparency

and accountability for the mining sector revenue flow contribute to increased financial gains from the sector, which the government can utilise for social programs and development. This is because the requirement to publish data on mining revenues and payments to the government makes it possible for the government, citizens, and civil society to track the income from the sector. Also, the requirement for value addition for investments that may exceed five hundred million United States dollars will move the economy up the value chain, thus increasing the state's resource rent. Value addition is, however, not adequately addressed in the legislations, thus leading to increased exports of the minerals in their raw form.

Concerning the protection of foreign investments, the special arrangement for investment promotion and protection, which are a replica of the BITs, are investor favourable at the expense of the host state's policy space. This is an advantage for foreign investors but not favourable for Kenya as it impedes its right to regulate in the public interest. Kenya needs to examine all its BITs and either terminate them or renegotiate them to ensure they accord Kenya policy space.

For the communities where mining activities are being undertaken, revenue sharing ensures that they are not neglected or short-changed in the distribution of revenue accruing from the mining sector. However, it is unfortunate that the royalties so far collected and due to the different county governments are yet to be distributed by the treasury for the benefit of the communities because there is no regulation under the Public Finance and Management Act to guide the distribution of the funds. This may spur conflict between the communities and foreign investors as the communities may view the mining activities as not benefitting them. In the meantime, the Community Development Agreements, such as those concluded by Base Titanium Limited and communities from Kwale County in 2021, offer a structured way for foreign investors to develop the communities where mining activities are being undertaken as they can undertake development projects that meet

the community's needs. Indeed, the revenue sharing provisions and the Community Development Agreements will ultimately benefit the investor and the state because there will be minimal disruption in production by the communities that usually arise when the communities feel excluded from mining activities and benefits accruing therefrom.

Protecting the environment and social-cultural rights is also essential for the community as it ensures that foreign investors are not undertaking mining activities at the expense of the environment and the community's health and safety.

On its face, the government seems to have achieved a balance through legislation. This could, however, be an inaccurate conclusion. This regulatory analysis must be juxtaposed with identified parameters considered at a global level to promote a balance between the state's interest and that of the foreign investor in the mining sector.

In this regard, the next chapter seeks to establish these factors by analysing the main features of the regulatory and institutional frameworks of countries that have been considered successful in achieving the balance.

CHAPTER 4

4. BALANCING STATE'S INTEREST AND THAT OF THE FOREIGN INVESTOR: AN ANALYSIS OF BEST PRACTICES

4.1.INTRODUCTION

Many developed and developing resource-rich countries strive to increase the development impact of their resource wealth. Finding a way of increasing the value obtained from extractives while at the same time giving investors a fair return is, therefore, a key concern of these countries. This can be achieved by balancing the mining sector requirements for foreign investors in both the regulatory and institutional framework governing extractives. This means that the two frameworks should be able to effectively balance the mining sector requirements, such as fiscal contributions as well as regulations on economic, environmental and social impact to ensure that they are not set too high as they will affect the profits of foreign investors or too low that the host state is unable to benefit.[651]

Thus, a host state can benefit from natural resources wealth if the tax revenue from the mining industry contributes substantially to the country's budget, the government appropriately manages the tax revenue, and there are policies in place to facilitate positive linkages and spillovers into other sectors of the economy.[652] This is dependent on a sound and functioning regulatory and institutional framework governing the mining sector, which encourages FDI while at the same time protecting and adequately managing the wealth from mining for the benefit of both the current and future generations of the host state.[653] This means that property rights are defined, the legal system is functioning well, thus

[651] UNCTAD, *Best Practices in Investment for Development*, 8.
[652] Jane Korinek, "Mineral Resource Trade in Chile," 5.
[653] World Trade Organization (WTO) 2010, *World Trade Report 2010: Trade in Natural Resources*, 93.

guaranteeing juridical security, the rule of law is upheld, and democracy is exercised.[654]

In the previous chapter, an analysis of the regulatory and institutional framework of Kenya's mining industry was undertaken. To determine whether there is a good balance of the mining sector requirements in the two frameworks to facilitate the collection of tax revenue, proper management of the revenue by the government, good linkages between the mining sector and other sectors in the country, and profitability of foreign investors' companies, a study of best practices by other countries that have been successful in utilising the mining industry to achieve economic growth is essential.

The mining sector of Chile and Botswana have been recognised by international organisations such as the WTO, UNCTAD and OECD as a critical catalyst of their economic growth.[655] Therefore, this chapter examines these two countries' regulatory and institutional frameworks to extract lessons for Kenya's mining industry.

4.2.CHILE

Chile is a developing country[656]in South America with a total land area of approximately 743,532 square kilometres.[657] Its total population is about nineteen million one hundred, with a Gross Domestic Product[658](GDP) of 282 billion United States (US) dollars (out of which 11.5% was from mineral rents) and a GDP per capita of 14,896.5 US dollars as of 2019.[659]

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[654] World Trade Organization (WTO) 2010, *World Trade Report 2010: Trade in Natural Resources*,93. See also UNCTAD, *World Investment Report 2007: Transnational Corporations, Extractive Industries and Development*, 126.http://www.unctad.org/ en/docs//wir2007_en.pdf.

[655] World Trade Report 2010: Trade in Natural Resources, p.96. See also Jane Korinek, "Mineral Resource Trade in Chile,"9 and UNCTAD, *Best Practices in Investment for Development*.

[656] According to United Nations (UN) Country Classifications in the World Economic Situation and Prospects 2020.

[657] "World Bank Open Data," The World Bank, accessed March 5, 2021, https://data.worldbank.org.Note that Kenya is 580,367 square kilometres with a population of approximately fifty-four million.

[658] Total value of all goods and services produced in a country in a year.

[659] "The World Bank Open Data."

It is divided into fifteen regions, each headed by a regional attendant.[660] These regions are further divided into provinces, each headed by a governor, and the provinces are divided into communes.[661]

Chile is rich in natural resources, with twenty-two per cent of the world's copper reserves, eleven per cent of the molybdenum reserves, five per cent of the silver reserves, seven per cent of the gold reserves and forty-eight per cent of the lithium reserves.[662]

It was ranked fifty-nine out of one hundred and ninety in the World Bank's Doing Business 2020 report, position twenty-five out of one hundred and eighty in the Transparency International Corruption Perception Index 2020 and position fourteen out of one hundred and sixty-two jurisdictions ranked in the Economic Freedom of the World rating of 2020.[663] According to these ratings, Chile is an attractive destination for foreign investment.

To boost the economic growth of Chile, the Chilean Government concluded several bilateral and multilateral trade agreements, such as the free trade agreement with Canada in 1996, the European Union in 2002, the United States in 2003 and China in 2006, which contributed to the

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[660] "The Regions of Chile," WorldAtlas, accessed April 16, 2021, https://www.worldatlas.com/articles/regions-of-chile.html.

[661] "The Regions of Chile."

[662] According to InvestChile, Chile's government agency responsible for promoting Chile in the global market as a FDI destination and supporting foreign investors in Chile. See "About Us," InvestChile, accessed March 5,2021, https://investchile.gob.cl/aboutus/ and "Key Industries: Mining," InvestChile, accessed March 5,2021, https://investchile.gob.cl/key-industries/mining/.

[663] "Transparency International Corruption Perceptions Index 2020," Transparency International, accessed October 14, 2021, https://www.transparency.org/en/cpi/2020/index/nzl. The World Bank Group, *Doing Business 2020: Comparing Business Regulation in 190 Economies*, https://documents1.worldbank.org/curated/en/688761571934946384/pdf/Doing-Business-2020-Comparing-Business-Regulation-in-190-Economies.pdf. The Fraser Institute, *Economic Freedom of the World 2020 Annual Report*, https://www.fraserinstitute.org/sites/default/files/economic-freedom-of-the-world-2020.pdf.

The World Bank Ease of Doing Business ranking ranks one hundred and ninety economies based on their business environment including business regulation.

The Economic Freedom of the World rating measures the degree to which the policies and institutions of countries are supportive of economic freedom based on five parameters, namely, the size of government, protection of persons and their property rights, sound money, freedom to trade internationally, and regulation.

country's export growth.[664] These were typical second-generation investment treaties. However, Chile has since renegotiated some of the agreements. For example, the Canada-Chile Free Trade Agreement Chapter G on Investment was amended in 2019 to reaffirm Chile's right to regulate in the public interest and to add provisions that encourage alternatives to arbitration, such as mediation and consultation.

After that, it commenced targeted reforms to increase innovation. The three key reforms were (1) the introduction of royalty on mining to facilitate the financing of innovation in the country, (2) the setting up of the Fund for Innovation and Competitiveness (FIC), (3) and the creation of the National Council for Innovation and Competitiveness (CNIC) (renamed National Council for Innovation and Development, CNID, in 2016) as an advisory body and in charge of identifying strategic priorities for innovation and competitiveness.[665]

The CNIC developed the National Innovation Strategy and Competitiveness in 2007-08, which identified strategic options to diversify the economy of Chile. The strategy prioritised thirteen areas of strategic importance, one of which is mining.[666] The government focused on promoting research and development through tax incentives. It also promoted investments in technical skills development, innovation in firms and infrastructure development necessary to support innovation.[667]

In 2014, the government developed and started implementing the Productivity, Innovation and Growth Agenda to build on its past experiences. It involved educational reforms, environmental

[664] OECD and United Nations, *Production Transformation Policy Review of Chile: Reaping the Benefits of New Frontier*, (Paris: OECD Publishing, OECD Development Pathways, 2018), 69, https://doi.org/10.1787/9789264288379-en.
[665] OECD, *Production Transformation Policy Review of Chile: Reaping the Benefits of New Frontier*, 70.
[666] OECD, *Production Transformation Policy Review of Chile: Reaping the Benefits of New Frontier*, 70.
[667] OECD, *Production Transformation Policy Review of Chile: Reaping the Benefits of New Frontier*, 70.

sustainability, decentralisation and autonomy in the regions, and reforms for enhancing productivity, innovation and growth.[668]

Promoting FDI has been one of the key Chilean government's national development strategies for economic reform. The government has succeeded in attracting FDI by (1) implementing policies and laws that promote capital transparency and non-discrimination against foreign investors, such as the reduction of restrictions on entry, establishment and operations of foreign investors, (2) having no restrictions on the purchase of real estate by foreign investors except in State-owned land in border areas, (3) according National Treatment to enterprises from OECD countries, and (4) avoiding exceptions to National Treatment.[669]

As of 2019, its FDI inflow was 11.4 billion US dollars, approximately 30 per cent of which was attributed to the mining sector.[670]Greenfield investments[671]accounted for 8.7 billion US dollars.[672]

4.2.1. Chile's Mining Sector

Mining is a key sector of Chile's economy. The sector's contribution to the country's Gross Domestic Product was approximately 11.5 per cent in 2019.[673] Chile is the number one producer of copper and the number two producer of lithium globally. It is also the world's leading producer of iodine and rhenium. It accounts for 63.2 per cent of the world's copper production, 50 per cent of the world's rhenium production and 39 per cent of the world's lithium production.[674]It holds the world's largest copper reserves of approximately 200 million metric tons, accounting for 28 per cent of world reserves, and the world's largest known lithium reserve of

[668] OECD, *Production Transformation Policy Review of Chile: Reaping the Benefits of New Frontier*, 70.
[669] OECD, *OECD Reviews of Foreign Direct Investment: Chile* (Paris: OECD Publishing,1997),8, https://www.oecd.org/chile/34384328.pdf,
[670] UNCTAD, *The World Investment Report 2020*, 49 and 52.
[671] A form of FDI where a parent company establishes a subsidiary in a foreign country and constructs new facilities such as a production facility, staff accommodation and distribution centers as opposed to leasing them.
[672] UNCTAD, *The World Investment Report 2020*, 49 and 52.
[673] "The World Bank Open Data."
[674] OECD, *Production Transformation Policy Review of Chile: Reaping the Benefits of New Frontier*, 24.

roughly 9.2 million metric tons, accounting for 52 per cent of world reserves.[675] Chile exports most of the minerals that it produces. In 2019, it exported 18 billion US dollars worth of copper.[676]

The Fraser Institute Annual Survey of Mining Companies 2020, which assesses how mineral endowments and public policy factors such as taxation and regulatory uncertainty affect exploration investment, ranked Chile position thirty out of seventy-seven jurisdictions surveyed and position two in Latin America and the Caribbean Basin.[677]

Mining occurs mainly in the northern and central parts of Chile.[678]Mining in Chile's Atacama Desert began around 1860 with the mining of sodium nitrate, which was used to manufacture fertilizers and explosives.[679] The discovery of synthetic nitrogen by Germany led to the collapse of the nitrate market after World War 1.[680] This affected the economy of Chile, leading to economic stagnation for over a decade.[681] Mining of nitrates continues in Chile, but mining of copper and lithium is currently dominant.

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[675] United States Geological Survey, *Mineral Commodity Summaries* (U.S. Geological Survey, January 2021) ,2, https://pubs.usgs.gov/periodicals/mcs2021/mcs2021-lithium.pdf and United States Geological Survey, *Mineral Commodity Summaries* (U.S. Geological Survey, January 2020),2, https://pubs.usgs.gov/periodicals/mcs2020/mcs2020-copper.pdf.

[676]"World Top Export: Ore Copper (2018)," World's Top Exports, accessed March 5,2021, http://www.worldstopexports.com/copper-oreexports-by-country/.

[677] "Fraser Institute Annual Survey of Mining Companies 2020," Fraser Institute, accessed April 15, 2021, https://www.fraserinstitute.org/sites/default/files/annual-survey-of-mining-companies-2020.pdf.

[678] UNEP, *Environmental Impacts of Trade Liberalization and Policies for the Sustainable Management of Natural Resources: A Case Study of Chile's Mining Sector*, (New York and Geneva: UNEP Publications, 1999), 15, https://wedocs.unep.org/20.500.11822/8470.

[679] UNCTAD, World Bank and International Council on Mining and Metals (ICMM), *The Challenge of Mineral Wealth: Using Resource Endowments to Foster Sustainable Development- A Case Study of Chile* (London and Geneva: 2007),18, https://digitallibrary.un.org/record/620844?ln=en. See also George Ericksen, "Geology and Origin of the Chilean Nitrate Deposits" (Geological Survey Professional Paper 1188, 1981),1.

[680] UNCTAD, *The Challenge of Mineral Wealth,* 18.

[681] Markos Mamalakis, "The American Copper Companies and the Chilean Government, 1920-1967" (Economic Growth Center, Yale University, September 1967), 2.

Copper mining began in Chile around 1810, when it produced approximately nineteen thousand tonnes. Between 1820 and 1900, Chile produced two million tonnes of copper, becoming the world's first producer and exporter of the mineral. The high-grade copper deposits began to deplete around 1897. High-grade copper ores were eventually exhausted, and only low-grade copper deposits of under four per cent copper remained.[682]

The increase in global demand for copper in the twentieth century due to the rise of the electrical industry and technological innovation led to Chile's renewed interest in copper mining. Copper mining was predominantly undertaken by North American firms in the early twentieth century using technological advancements, such as mechanised equipment, large electric power plants and electrolysis.[683] The only benefit the government derived from the copper resources was taxes levied on these foreign firms.[684] There was minimal regulation between 1925 and 1932 hence free trade, convertibility of currency, similar tax regimes for both national and foreign producers and non-interference in the buying and selling of mining products.[685]

To have control of the mining industry, the government commenced mild interventions in the 1950s by signing the Washington Convention in 1951, giving it control over twenty per cent of Chile's copper production.[686] After that, in 1952, The Copper Law, Law 10.255, was enacted. The law allowed Chile to terminate the Washington Convention

[682] Kristin Ranestad, "The Mining Sectors in Chile and Norway,ca. 1870-1940: The Development of a Knowledge Gap" (EHES working papers in Economic History, European Historical Economics Society (EHES), No. 105, November 2016), 4, http://hdl.handle.net/10419/247036.
[683] Kristin Ranestad, "The Mining Sectors in Chile and Norway," 4. See also John Fleming, "The Nationalization of Chile's Large Copper Companies in Contemporary Interstate Relations," *Villanova Law Review* 11, no. 4 (1973):595.
[684] John Fleming, "The Nationalization of Chile's Large Copper Companies," 595.
[685] UNEP, *Environmental Impacts of Trade Liberalization and Policies,* 20.
[686] UNEP, *Environmental Impacts of Trade Liberalization and Policies,* 20. See also CODELCO, *Annual Report 2015 Index*, 29.

unilaterally and to put the Central Bank of Chile in charge of marketing all of Chile's copper.[687] This expanded Chile's copper market to Europe.

In 1955, the Copper Department was established to oversee copper production and participate in international copper markets.[688] In the same year, the National Foundry Company, ENAF (Empresa Nacional de Fundiciones), was also established to promote the direct smelting of minerals, concentrates and precipitates, thus reducing exports without value addition.[689]Subsequently, in 1960, the National Mining Company, ENAMI (Empresa Nacional de Mineria) was established by merging the Fund for the Promotion and Funding of Mining (Caja de Credito y Fomento Minero)[690] and the National Smelting Company (Empressa Nacional de Fundiciones).[691] The role of ENAMI was to promote the development of small and medium-scale mining by offering processing and marketing services to small and medium-scale miners.

In the 1960s, most of the Chilean public viewed its underdevelopment, despite being rich in natural resources, as being occasioned by foreign exploitation of its mineral resource.[692] There were also concerns that the country's negative experience with the mining of sodium nitrate would be replicated in the copper mining industry. The public, therefore, started advocating for the nationalization of large foreign-owned copper firms.[693]This was picked up by the two leading candidates in the 1964

[687] CODELCO, *Annual Report 2015 Index*, 29.
[688] CODELCO, *Annual Report 2015 Index*, 30.
[689] See "About Us: History," ENAMI (Empresa Nacional de Mineria), accessed April 2,2021, https://www.enami.cl/Historia.
[690] Established in 1927 at the request of the National Mining Society (SONAMI), a union federation that brings together small, medium and large-scale mining companies in Chile created in September 1883 by a supreme decree by the then President Domingo Santa Maria. Its purpose is to support small scale miners by, for example, creation of low-grade mineral treatment plans and buying and selling minerals so that the miners are not harmed by intermediaries. See "About Us: History," ENAMI (Empresa Nacional de Mineria), accessed April 2,2021, https://www.enami.cl/Historia. See also "Origin of the Great Copper Mining (1904-1930): National Mining Society FG," Memoriachilena, accessed April 2, 2021, http://www.memoriachilena.gob.cl/602/w3-article-542814.html.
[691] Japan International Cooperation Agency and ENAMI, *Environmentally-Friendly Operation of Mineral Processing Plant Using Biotechnology in the Republic of Chile (*1999), 24, https://openjicareport.jica.go.jp/pdf/11705431_02.PDF.
[692] John Fleming, "The Nationalization of Chile's Large Copper Companies," 595.
[693] John Fleming, "The Nationalization of Chile's Large Copper Companies," 595.

presidential elections, Eduardo Frei and Salvador Allende, in their campaign manifestos. They both pledged to nationalise Chile's major foreign-owned copper industries.[694]

Eduardo Frei won the elections, and his new government commenced significant reforms, including mining sector reform. Legislation was passed to permit the Chilean State to purchase a fifty-one per cent equity interest in copper mining companies producing over seventy-five thousand metric tons of copper per annum.[695] This legislation affected three United States based firms, the Kennecott Copper Corporation, Cerro Corporation and the Anaconda Copper Company, whose combined copper production amounted to eighty per cent of Chile's total copper production. [696]

The Copper Department was converted to the Copper Corporation, Corporacion del Cobre (CODELCO), as an autonomous agency with supervisory and regulatory powers over the copper industry and the power to establish mixed mining companies in which it would own at least twenty five per cent of the capital.[697]Chile's fifty-one per cent equity interest in foreign-owned copper companies was purchased and held by CODELCO. The idea was to pursue nationalization gradually as opposed to immediate nationalization.

When Salvador Allende took office in 1970, he pushed for the nationalization of copper companies through an amendment to the Chilean constitution. The Chilean Congress unanimously passed the nationalization bill on July 11, 1971.[698] The constitutional amendment placed all of Chile's primary resources and resource industries on the

[694] John Fleming, "The Nationalization of Chile's Large Copper Companies," 595.
[695] John Fleming, "The Nationalization of Chile's Large Copper Companies," 596.
[696] C.J Tesar and Sheila Tesar, "Recent Chilean Copper Policy," *Geography* 58, no. 1 (1973):9. http://www.jstor.org/stable/40567857.
[697] John Fleming, "The Nationalization of Chile's Large Copper Companies," 597.
[698] UNEP, *Environmental Impacts of Trade Liberalization and Policies,* 20. See also John Fleming, "The Nationalization of Chile's Large Copper Companies," 600.

government of Chile for national interest purposes leading to the nationalisation of foreign-owned copper companies.[699]

The United States based firms asserted that they were not duly compensated per customary and generally accepted minimum international standards that require that any alien whose property is taken by a host state for a public purpose must be justly compensated for their losses.[700] That is, the compensation must be prompt, adequate and effective and reflect the going concern value of the assets taken. On the other hand, the Chilean government was adamant that its nationalisation program adhered to international and national laws; hence, any punitive measures exercised against it violated its national sovereignty.[701]This difference in opinion led to a strained relationship between the government of Salvador Allende and the American government, resulting in interruptions of grants and credits to Chile.

On September 11, 1973, Salvador Allende was overthrown following a military coup led by General Augusto Pinochet. Pinochet's regime commenced neoliberal transformation in Chile.[702] It entered into compensation negotiations with the American companies that were nationalised to mend Chile's relationship with the American government and reopen the flow of foreign direct investment in the country, as well as increase exports. As a result, United States bilateral aid increased sixfold in 1974 and tripled again in 1975.[703]The World Bank, which had withdrawn its relationship with the Allende government, extended new loans in 1974 and 1975.[704]United States commercial banks also opened

[699] UNEP, *Environmental Impacts of Trade Liberalization and Policies,* 20.
[700] John Fleming, "The Nationalization of Chile's Large Copper Companies," 593.
[701] John Fleming, "The Nationalization of Chile's Large Copper Companies," 594.
[702] Neoliberalism is a political-economic philosophy that advocates for free trade and market expansion approach to development by reducing state intervention through elimination of price controls, liberalization of import trade, deregulation of financial markets and capital flows, cuts in social program funding and privatization of public enterprises. See Ashley Davis-Hamel, "Successful Neoliberalism?: State Policy, Poverty, and Income Inequality in Chile," *International Social Science Review* 87, no.3/4 (2012): 80.
[703] Peter Bell, "Democracy and Double Standards: The View from Chile," *World Policy Journal* 2, no.4 (Fall,1985):715.
[704] Peter Bell, "Democracy and Double Standards," 715.

commercial relationships with Chile.[705] In 1974, the military government passed a decree, DL-600, on foreign investment, which helped increase the flow of foreign investment by safeguarding investments through a contract between the investor and the state and fiscal benefits.[706]Between 1976 to 1979, the liberalisation process resulted in an annual growth rate of exports of 17.5 per cent and increased foreign investment.[707] Mining accounted for over two-thirds of the total exports during this period.[708]

To develop local mining capacity and stabilise the Chilean economy, Pinochet's regime passed Decree Laws 1349 and 1350 on April 1, 1976, which divided the Copper Corporation, CODELCO, into two independent organisations: the Chilean Copper Commission - *Comision Chilena del Cobre* (COCHILCO) – a technical and advisory service agency, and *Corporacion Nacional del Cobre de Chile* (CODELCO) – the state-owned copper producer that consolidated the copper mines under one mining, industrial and trading company, acquiring full legal status and capacity.[709]

Pinochet's regime consequently proposed changes to the constitution and mining legislation to effect its liberalisation plans for the sector. Chile's new constitution was approved in a national referendum held in 1980. Subsequently, the Constitutional Organic Law of Mining Concessions (LOCCM) was passed in 1982 and the Mining Code in 1983. The result was extreme liberalisation of the mining sector through limiting state intervention and protecting the rights of foreign investors. [710]Foreign investors were, therefore, able to acquire private control of mineral deposits for an indefinite period through the payment of an annual licence and a guarantee for full indemnification in the event of expropriation.[711] 472 out of 507 state-owned enterprises were sold off by the

[705] Peter Bell, "Democracy and Double Standards," 715.
[706] UNEP, *Environmental Impacts of Trade Liberalization and Policies,* 20.
[707] UNEP, *Environmental Impacts of Trade Liberalization and Policies,* 25.
[708] UNEP, *Environmental Impacts of Trade Liberalization and Policies,* 27.
[709] CODELCO, *Annual Report 2015 Index*, 30
[710] UNEP, *Environmental Impacts of Trade Liberalization and Policies,* 27.
[710] CODELCO, *Annual Report 2015 Index*, 20.
[711] UNEP, *Environmental Impacts of Trade Liberalization and Policies,* 27.
[711] CODELCO, *Annual Report 2015 Index*, 20.

government.[712]The public budget was reduced from twenty per cent of GDP as at 1972 to twelve per cent of GDP as at 1981.[713]In 1985, the Copper Stabilization Fund was introduced by the government to minimise the impact of world fluctuations in the prices of copper on Chile's economy.[714]Thus, when copper prices increase, the government would set aside a proportion of revenue from CODELCO, which would be drawn upon when the prices fall.[715]

In December 1989, presidential elections were held following a 1988 constitutional referendum loss by Pinochet's government to extend military rule. Patricio Aylwin was elected the President of Chile, thus ending sixteen years of military rule. The democratically elected governments that took over in 1990 maintained the liberalised economic order introduced during military rule.[716]

Mining is mainly linked to extraction and export; thus, minimal value addition is done. Also, the mining companies have moved towards automated mining mainly because of the deterioration in copper ore grades that has demanded a shift to underground mining.[717] The change to automated mining has made the mining sector energy intensive.[718]In 2015, mining accounted for 20 per cent of total domestic energy consumption, 7 per cent higher than in 2000.[719]

Most of the FDI continues to be in the mining industry; thus, mining continues to be a key driver of growth. With the exception of CODELCO's mines, which produce approximately 29 per cent of all national copper production and 8 per cent of the world's mined copper

[712] UNCTAD, *The Challenge of Mineral Wealth* 19.
[713] UNCTAD, *The Challenge of Mineral Wealth,* 19.
[714] UNCTAD, *The Challenge of Mineral Wealth,* 21.
[715] UNCTAD, *The Challenge of Mineral Wealth,* 21.
[716] UNCTAD, *The Challenge of Mineral Wealth,* 12.
[717] OECD, *Production Transformation Policy Review of Chile: Reaping the Benefits of New Frontier*, 22.
[718] OECD, *Production Transformation Policy Review of Chile: Reaping the Benefits of New Frontier*, 22.
[719] OECD, *Production Transformation Policy Review of Chile: Reaping the Benefits of New Frontier*, 25.

output,[720] all large copper mines in Chile are currently owned by foreign investors.

Since 2000, the Chilean economy has been growing at an average of 4 per cent annually compared to other Latin American countries, whose GDP growth in the same period has been 2.8 per cent.[721]The citizens have been benefiting from this growth as the government has been utilising tax revenue from mining to invest in social development. Hence the number of people living in poverty has decreased by approximately 50 per cent since 1990.[722]

Even though Chiles's pre-1990 neoliberal economic policies under a dictatorship enhanced the private sector's power, the 1980 Constitution limited citizens' participation and access to social and economic rights, leading to social inequities.[723] Thus, despite an average annual economic growth of 3.5 per cent between 1973-1989, 45.1 per cent of the population still lived in poverty.[724]

Both President Patricio Aylwin's administration (1990-1994) and President Eduardo Frei Ruiz Tagle's administration (1994-2000) maintained the existing economic model but addressed the social inequities. For example, they expanded the export-oriented approach inherited by entering into new trade partnerships with countries in Asia and Latin America and implemented tax reforms that increased the tax burden for investors.[725] A high economic growth rate was experienced, which enabled them to increase social spending and reduce poverty from 45 per cent to 23 per cent.[726]

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[720] CODELCO, *Annual Report*, 2019, https://minedocs.com/20/Codelco-Corp-AR-2019.pdf, 16.
[721] OECD, *Production Transformation Policy Review of Chile: Reaping the Benefits of New Frontier*, 24.
[722] UNCTAD, *The Challenge of Mineral Wealth,* 5.
[723] Silvia Borzutzky and Sarah Perry, "It is not about the 30 Pesos, it is about the 30 years: Chiles's Elitist Democracy, Social Movements and the October 18 Protests," *The Latin Americanist* 66, no.22 (June 2021): 212.
[724] Silvia Borzutzky and Sarah Perry, "It is not about the 30 Pesos," 212.
[725] Silvia Borzutzky and Sarah Perry, "It is not about the 30 Pesos," 213.
[726] Silvia Borzutzky and Sarah Perry, "It is not about the 30 Pesos," 213.

Economic growth and poverty reduction continued to be experienced in the subsequent administration of President Ricardo Lagos' (2000 to 2006) as he entered into Free Trade Agreements and reduced tariffs, thus opening up Chile's market.[727] Also, Constitutional reforms were undertaken in 2005 that tried to advance democracy.[728]

Despite economic growth and poverty reduction, there was a significant economic disparity in the society. That is, the gap between the rich and the poor was considerable. Social inequity was attributed to the limitation of civic participation by the 1980 Constitution.[729] Participation was undertaken by the political elite through political consensus.[730] The pension system was privatised, and the development of a private sector in the health and education fields was encouraged.[731]

Social protests demanding changes in inequality, education, environmental protection, indigenous rights, pension reforms, and decentralisation began in the 1990s.[732] An explosion of the protests occurred in October 2019, leading to a declaration of a state of emergency by President Sebastian Pinera in several cities as there was widespread damage to public and private property, including infrastructure.[733] This unrest forced a referendum on 25 October 2020 to vote in favour or against a new Constitution. Over 78 per cent voted in favour of a new

[727] Silvia Borzutzky and Sarah Perry, "It is not about the 30 Pesos," 213.
[728] Silvia Borzutzky and Sarah Perry, "It is not about the 30 Pesos," 211-212.
[729] Silvia Borzutzky and Sarah Perry, "It is not about the 30 Pesos," 210.
[730] Silvia Borzutzky and Sarah Perry, "It is not about the 30 Pesos," 215.
[731] Aislinn Laing, Dave Sherwood, and Fabian Cambero, "Explainer: Chile's inequity challenge: What went wrong and can it be fixed?" *Reuters*, October 24,2019. See also Charis McGowan, "Chile protests: What prompted the unrest?", *Aljazeera*, October 30,2019 and J. Patrice McSherry, "Chile's Struggle to Democratize the State," *Nacla*, February 24,2020.
[732] Silvia Borzutzky and Sarah Perry, "It is not about the 30 Pesos," 210. See also J. Patrice McSherry, "Chile's Struggle to Democratize the State", *Nacla*, February 24,2020.
[733] Aislinn Laing, Dave Sherwood, Fabian Cambero, "Explainer: Chile's inequity challenge,".See also Charis McGowan, "Chile protests," and J. Patrice McSherry, "Chile's Struggle to Democratize the State,".

Constitution.[734] A referendum to approve a new Constitution was held on 4 September 2022 under the presidency of President Gabriel Boric.[735]

From the experience of Chile, it is evident that social inclusion and social equity are integral components of the sustainable development of the mining sector.

4.2.2. Chilean Mining Legal Framework

The Political Constitution of the Republic of Chile of 1980 is the legal basis for mining legislation. According to Article 19(24), the State has absolute, exclusive, inalienable and imprescriptible domain over all mines, notwithstanding the ownership of natural or juridical persons over the lands where the mines are situated.

Concessions may, however, be awarded in respect of the minerals to confer the rights and impose obligations specified in the law concerning the exploration or exploitation of the minerals. Following this provision of the Constitution, the Organic Constitutional Law on Mining Concessions was enacted in 1982 to describe the general terms of mining concessions, such as duration and the rights and obligations of the concession holder.

The ordinary courts of justice are responsible for granting mining concessions following a non-contentious proceeding.[736] The first person to file a petition or a claim (in the case of a concession to explore) for establishing a mining concession in respect of a territorial extension not already protected by a mining concession is deemed the discoverer. This person shall have a preference to constitute it unless it is proven that force or fraud was utilised to delay the person who actually discovered it

[734] Aislinn Laing, Dave Sherwood, Fabian Cambero, "Explainer: Chile's inequity challenge,".See also Charis McGowan, "Chile protests," and J. Patrice McSherry, "Chile's Struggle to Democratize the State,".
[735] Aislinn Laing, Dave Sherwood, Fabian Cambero, "Explainer: Chile's inequity challenge,".See also Charis McGowan, "Chile protests," and J. Patrice McSherry, "Chile's Struggle to Democratize the State,".
[736] Article 5 of the Organic Constitutional Law on Mining Concessions of Chile. See also Article 34 of the Chilean Mining Code.

first.[737] Once the mining concession is constituted, the judge orders its registration under the Mining Code.[738] The detailed procedure for granting exploration and exploitation concessions is contained in Title V of the Chilean Mining Code. The Mining Code Regulations complement the rules in the Mining Code.

The State may also file a request for an exploration or exploitation concession, but it must do so through a company owned by it or one where it holds an interest.[739]

The holder of a mining concession has a right to property thereon and is thus protected against expropriation except for public benefit or national interest reasons authorised by a general or special law.[740]For authorised expropriation, the property owner must be promptly and adequately indemnified.[741]

The exploration concession is for an initial term of two years from the date of the judgement declaring the establishment.[742] An extension for a further two years may be granted upon request by the concession holder, provided the request for an extension waives the rights over at least half of the land covered by the concession.[743]During the term of the concession to explore, only the concession holder can file a claim for a concession to exploit.[744]

Another mining legislation is the Mining Safety Regulation which provides for health and safety requirements related to mining activities,

[737] Article 5 of the Organic Constitutional Law on Mining Concessions of Chile. See also Article 35 and 41 of the Chilean Mining Code.
[738] Article 5 of the Organic Constitutional Law on Mining Concessions of Chile.
[739] Article 5 of the Organic Constitutional Law on Mining Concessions of Chile and Article 4 of the Chilean Mining Code.
[740] Article 19(24) of the Political Constitution of the Republic of Chile. See also Article 91 and 92 of the Chilean Mining Code.
[741] Article 19(24) of the Political Constitution of the Republic of Chile.
[742] Article 112 of the Chilean Mining Code.
[743] Article 112 of the Chilean Mining Code.
[744] Article 114 of the Chilean Mining Code.

such as (1) the requirement of signage at the work sites, (2) waste disposal requirements, and (3) the obligation to train workers to operate heavy machinery and work in high altitude conditions.

There are no restrictions concerning investment and ownership of mining concessions by foreigners. However, the Foreign Investment Statute (Decree Law No 600) requires a foreign investor to sign a foreign investment contract with the Chilean State.[745] The contract also sets out the rights and obligations of the parties, such as the right of a foreign investor to transfer their capital and net profits to other countries; and the right not to be directly or indirectly discriminated against by the State.[746]

In 2011, Chile enacted Law 20,551 of 2011, as amended by Law 20819, to regulate the closure of mining works and facilities. The Law requires all mining companies to have a mine closure plan to guide them on the progressive closure of mines, thus ensuring the physical and chemical stability of the mining site upon its closure.[747] The closure plan is, therefore, implemented progressively by the mining company during the various stages of operation of the mining site. It, among other issues, specifies the set of technical measures and activities the mining company must carry out from the beginning of the mining operation and the detailed program according to which they must be implemented.[748] The proposed measures and activities must be capable of preventing, minimising or controlling the risks and adverse effects that may be generated to the environment and the health and safety of the people.[749]

The Law also establishes a fund whose purpose is to manage closed Mining Works to ensure their physical and chemical stability over time.[750] The fund comprises contributions from mining companies who

[745] Article 3 of the Foreign Investment Statute of Chile.
[746] Article 4 and 9 of the Foreign Investment Statute of Chile.
[747] Article 2 of Law No. 20,551 on Closure of Mining Works and Facilities.
[748] Article 3(n) of Law No. 20,551 on Closure of Mining Works and Facilities.
[749] Article 3(n) of Law No. 20,551 on Closure of Mining Works and Facilities.
[750] Article 55 of Law No. 20,551 on Closure of Mining Works and Facilities.

must make a non-reimbursable computed contribution to the fund before they are issued with a Closure Certificate, fines paid as a result of the breach of Law 20,551, and donations.[751] It is administered by an independent professional institution experienced in the administration of financial assets and accredited by the Superintendency of Securities and Insurance. The independent professional institution is appointed through a competitive tender process.

The Law further provides for the offences that constitute a breach of the Law, the sanctions, the penalty process and the applicable financial penalties.[752] The Law is supported by the Tailing Deposits Regulation, Supreme Decree 248, which guides on dealing with tailing deposits during the operation and closure of mining sites.[753]

4.2.3. Chilean Mining Institutional Framework

The primary mining institution is the Ministry of Mines, created on March 21, 1953, by Decree with Force of Law (DFL) No.16 and later renamed Ministry of Mining by DFL No. 231 on July 23, 1953. It is responsible for developing mining policies and promoting and implementing initiatives for the mining sector.[754]

The National Geology and Mining Service is also a key mining institution whose mandate is to generate, maintain and disseminate information on Chile's geology and geological resources and regulate and oversee compliance with mining regulations regarding safety, property

[751] Article 55 and 56 of Law No. 20,551 on Closure of Mining Works and Facilities.
[752] Article 40, 41, 42 and 43 of Law No. 20,551 on Closure of Mining Works and Facilities.
[753] Tailings are waste such as ground rock and process effluents generated in a mine processing plant when extracting the desired product from the ore (rock from which the valuable mineral is extracted from). The waste include the unrecoverable and uneconomic metals and minerals from the mine ore and the chemicals and process water used in the extraction process.
[754] "Institutional Mission," Ministry of Mining, accessed May 27, 2021, https://www.minmineria.cl/mision-institucional/.

and closure plans by mining companies.[755] It also advises the Ministry of Mining on mining and geological matters.

The Ministry of Mining and the National Geology and Mining Service are supported by other institutions relevant to the mining sector, such as the Ministry of the Environment, the Environmental Evaluation Service and the Environmental Superintendence, which are discussed later in this chapter.

4.2.4. Lessons from Chile

The mining sector of Chile has faced numerous struggles in an effort to develop the sector to drive economic growth. Although Chile is a major global producer of copper, the mining sector is yet to contribute substantially to Chile's economic growth. However, Chile has made significant progress due to the Chilean government's commitment to sustainably develop the sector through substantial policy reforms. Hence, Chile's mining sector history, reforms, and challenges and achievements in implementing the reforms provide essential lessons for Kenya, which has recently undertaken significant reforms in the sector. The main lessons are discussed below.

4.2.4.1. Trade liberalisation

The free market policies by the military government and the democratic governments that governed after 1990, discussed in the previous two sections, contributed to Chile's success in the mining sector. From 1974, the degree of openness of the Chilean economy increased significantly. Trade liberalisation aimed to stimulate change in the domestic industry to focus on exportable goods and import substitutes that Chile has a comparative advantage. Consequently, a high level of protection is not

[755] "We Are," National Service of Geology and Mining, accessed May 27, 2021, https://www.sernageomin.cl/mision-y-vision-institucional/.

required leading to profitability as opposed to competing with imports.[756]

Between 1940 and 1973, the foreign trade regime was restrictive with non-tariff barriers such as quotas, licences, extensive price controls, forbidden import lists and high nominal tariff rates of up to one hundred and five per cent.[757] This restrictiveness led to increased economic growth during the military regime. However, the development was not sustainable because there was no consideration for environmental conservation, social inclusiveness and labour rights.

Following the return of democratic governance in 1990, trade liberalisation efforts commenced by the military regime were taken over by the new government, albeit with necessary adjustments. By 1991, import tariffs were reduced to a uniform eleven per cent.[758] Thereafter between 1998 and 2002, they were further reduced to six per cent and then to two per cent by 2007.[759] Chile also concluded several multilateral and bilateral free trade agreements, thus increasing the share of trade covered by trade agreements from twenty-five per cent at the end of 2002 to eighty-three per cent by the end of 2007.[760]

To support the trade liberalisation efforts, Chile made other policy reforms. For example, Chile's FDI policy was revised to stimulate both mining and non-mining exports since favourable FDI policies are known to attract transnational corporations with desirable technological or management assets and access to markets for manufacturers.[761]Also, privatisation, domestic financial market liberalization to support

[756] Manuel Agosin,"Trade and Growth in Chile," *CEPAL Review*, no. 68 (1999): 86.
[757] Patricio Meller, "Review of the Chilean Liberalisation and Export Expansion Process (1974-90)," *The Bangladesh Development Studies* 20, no.2/3 (June-September 1992): 155,157.
[758] Brieuc Monfort, "Chile:Trade Performance, Trade Liberalisation and Competitiveness," (IMF Working Paper , Western Hemisphere Department, WP/08/128, 2008), 3.
[759] Brieuc Monfort, "Chile:Trade Performance, Trade Liberalisation and Competitiveness,", 3.
[760] Brieuc Monfort, "Chile:Trade Performance, Trade Liberalisation and Competitiveness,", 3.
[761] Manuel Agosin, "Trade and Growth in Chile," 97.

emerging businesses, price liberalisation and fiscal reforms were undertaken.[762]

All these efforts contributed to increased foreign investment; thus, between 2003 and 2006, mining and quarrying absorbed 77 per cent of FDI capital and export expansion. In 2016, InvestChile was established to further attract strategic FDI in critical sectors such as mining by promoting Chile in the global market as a FDI destination. It also acts as a bridge between the interests of overseas investors and the country's business opportunities.[763]

4.2.4.2. Diversification of exports

Expanding exports provides the basis for general and sustainable economic development and avoids over-dependence on mineral wealth. Chile's trade liberalisation policies contributed to export diversification. Between 1971 to 1973, copper presented almost eighty per cent of total exports, with ten per cent and five per cent representing other minerals and goods such as agricultural products, fishmeal and fishery products, wood and wood products, and paper and pulp, respectively. [764]After that, between 1974 and 1979, tariffs were reduced from nearly one hundred per cent to ten per cent. As a result, the export of other goods grew by twenty-five per cent per year.[765]

From 1990, the share of copper went down to forty per cent; other minerals remained at ten per cent while the export of other goods increased to forty per cent.[766] Currently, Chile is taking advantage of its success in technology mining services obtained through the government's efforts to grow the sector by promoting technology and research and development in the country.[767] It exports technology mining

[762] Patricio Meller, "Review of the Chilean Liberalisation and Export Expansion Process (1974-90)," 155.
[763] "About Us," InvestChile, accessed March 5,2021, https://investchile.gob.cl/aboutus/.
[764] Manuel Agosin, "Trade and Growth in Chile," 83.
[765] Manuel Agosin, "Trade and Growth in Chile," 92.
[766] Manuel Agosin, "Trade and Growth in Chile," 83.
[767] See a detailed discussion in 4.2.2.3 below.

services to thirty-nine markets, including Peru, the United States of America (USA) and Mexico.[768]

Even though Chile has made efforts to diversify its exports, its exports are still majorly concentrated in natural resource-based and primary products whose sophistication level is low and linkages with the rest of the economy not adequate.[769]Nevertheless, the mining sector has played an important role in facilitating and stimulating other economic activities leading to additional employment opportunities.[770]

4.2.4.3. Technology and Research and Development

The use of mining technology in Chile is vital because of the deterioration in copper ore grades that has demanded a shift to underground mining.[771] Underground mining exposes workers to toxic air, extreme temperatures, cave-ins and explosions, thus raising safety concerns and reducing productivity. Hence, Technology and Research and Development (R&D) are significant for three reasons: one, it enables local producers to produce goods efficiently, thus increasing their capacity to compete in both the domestic and external markets; two, it allows the collection of information on technologies, external markets and foreign tastes; and three, it provides suitable solutions for the environment, work safety and social concerns connected to mining activities.[772]

Currently, advanced technology realised through automation, artificial intelligence, digitization and electrification are productivity growth drivers in the mining sector.[773]Innovation and new technologies have an

[768] "Mining," InvestChile, accessed March 5,2021, https://investchile.gob.cl/key-industries/mining/.
[769] OECD, *Production Transformation Policy Review of Chile: Reaping the Benefits of New Frontier*, 23-24.
[770] UNCTAD, *The Challenge of Mineral Wealth,* 4.
[771] OECD, *Production Transformation Policy Review of Chile: Reaping the Benefits of New Frontier*, 22.
[772] Manuel Agosin, "Trade and Growth in Chile," 87.
[773] OECD, *Production Transformation Policy Review of Chile: Reaping the Benefits of New Frontier*, 31.

impact on output as the production rate is increased.[774]European countries such as Germany, Sweden and Italy are investing in R&D in the mining sector as they are aware of the potentially disruptive impacts of ongoing technological changes to the sector.[775] For example, Sweden invested half a billion USD in 2014 to establish the world's most automated mine, which led to an increase of nearly 50 per cent in the extracted output and energy savings of 25 per cent.[776]

Building R&D capabilities in a rapidly changing technological environment takes time and thus requires commitment and consistency. Earnest investment in R&D by the Chilean government began with the establishment of Chile's National Commission for Scientific and Technological Research (CONICYT) in 1967 as an advisory body to the President on scientific development matters.[777] In 1968, CONICYT acquired legal personality, and its mandate expanded to advising the President on planning, promotion and development of science and technology in Chile.[778] After that, in 1982, the National Fund for Scientific and Technological Development (FONDECYT) was established through Decree No.33.[779] This became the leading public fund for supporting research in basic science and technological development.

For research to be successful, the human capacity to undertake research is necessary. The need to increase human capacity in research was, therefore, identified as a priority by the Chilean government, leading to

[774] Felipe Sanchez and Philipp Hartlieb, "Innovation in the Mining Industry: Technological Trends and a Case Study of the Challenges or Disruptive Innovation," *Mining, Metallurgy and Exploration* 37, (October 2020): 1386, https://doi.org/10.1007/s42461-020-00262-1.
[775] OECD, *Production Transformation Policy Review of Chile: Reaping the Benefits of New Frontier*, 31.
[776] OECD, *Production Transformation Policy Review of Chile: Reaping the Benefits of New Frontier*, 31.
[777] "About CONICYT: History," National Commission for Scientific and Technological Research, accessed March 5,2021, https://www.conicyt.cl/sobre-conicyt/historia/.
[778] "About CONICYT: History,". The initial statute of CONICYT was established in Decree 491 of 1971.
[779] "About CONICYT: History,".

the development of the National Plan for Scientific and Technological Development (PLANDECYT), whose implementation began in 1988. PLANDECYT commenced by providing scholarships for national doctorate and masters programs. In 1989, funding was extended to postgraduate programs abroad, thus creating the Program for Postgraduate Studies in Chile and Abroad (Becas Chile de CONICYT).

Another government priority was the creation of links and associations between research institutions and companies to develop applied research projects, public interest and technology transfer. As a result, the Fund for the Promotion of Scientific and Technological Development (FONDEF) was established in 1992.[780]

For all these efforts to start benefiting Chile, the government realised that public interest and a mind shift of the population towards science and technology are essential. To this end, in 1995, the Explora Program was created to undertake scientific dissemination in Chile to develop a scientific and technological culture in the population and foster critical and reflective reasoning among the citizens.[781]In 1997, the Advanced Research Fund in Priority Areas (FONDAP) was established to create and maintain centres of scientific research and excellence in Chile.[782]The fund contributed to the growth of research centres and groups.

To promote a coordinated approach to science and development in line with the development policies of the state and a focus on local issues by the different research centres, groups and universities in the different territories, the Regional Program for Scientific and Technological Research was created in the year 2000.[783] Thereafter, the consolidation of the different research groups and centres all over the country became necessary to strengthen ties between scientific and technological research

[780] "About CONICYT: History,".
[781] "About CONICYT: History,".
[782] "About CONICYT: History,".
[783] "About CONICYT: History,".

and the economic development of Chile. Hence, the Basal Financing Program was created to finance the consolidation and thus have Scientific and Technological Centres of Excellence known as Basal Centres.[784]

The establishment of Corporación de Fomento de la Producción or Corporation for the Promotion of Production (COFCO) in 1939 also promoted innovation and Chile's economic growth.[785] Its mandate is the promotion of national productive activities, including the advancement of research and technological development with an economic impact and broad repercussions in the different productive sectors.[786] In the 1960s, it promoted the creation of training institutions and research organisations such as the Institute of Natural Resources(IREN). InnovaChile promotes the actions developed by COFCO on innovation and technology transfer.[787]COFCO manages multiple financing lines to support R&D in firms, including small and medium-sized enterprises.[788]

Despite these efforts, Chile spends 0.5 per cent of its GDP on R&D compared to the world average of 1.3 per cent. This low expenditure in R&D is attributed to the fact that Chile has allocated more resources to basic science, which does not produce much results.[789]R&D is said to facilitate the adoption of new technology and the production of better goods and services.[790]

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[784] "About CONICYT: History,".
[785] See COFCO website - http://www.corfo.cl/acerca_de_corfo/que_es_corfo/historia
[786] See COFCO website - http://www.corfo.cl/acerca_de_corfo/que_es_corfo/historia
[787] See http://www.corfo.cl/acerca_de_corfo/emprendimiento_e_innovacion/que_es_innovachile
[788] OECD, *Production Transformation Policy Review of Chile: Reaping the Benefits of New Frontier*, 33.
[789] Rodrigo Vergara, "Productivity Performance in Developing Countries: Country Case Studies-Chile," (UNIDO Publication 2005), viii, https://www.unido.org/sites/default/files/2009-04/Productivity_performance_in_DCs_Chile_0.pdf.
[790] Rodrigo Vergara, "Productivity Performance in Developing Countries," 15.

CODELCO, the government-owned mining company, has embraced new and emerging mining technology in its operations in line with the government's vision of taking advantage of technology.

It recently developed a digital transformation plan, which involves the creation of networked and automated mining operations to improve its processes and thus increase its productivity and operational safety. The implementation of the plan commenced in 2019.[791]It has also automated most of its production operations, including underground mining tasks, supply chain, and management and reporting functions.[792] For example, in 2004, it installed the first AutoMine loading system at its El Teniente copper mine.[793] It also implemented the Sandvik Suites AutoMine and OptiMine at its El Teniente and Chuquicamata operations in 2019.[794] AutoMine enables automation of operations hence moving from remote and autonomous operation of single equipment to multi-machine control through automatic mission and traffic control capabilities.[795] OptiMine, on the other hand, is a digital tool that analyses and optimises mining production and processes. It compiles relevant data into one source, therefore, availing real-time and predictive information that is vital for improving operations.[796]

Further, between 2018 and 2019, it deployed electric pickup trucks to its mining sites and tested electric buses at its Chuquicamata and El Teniente divisions.[797] Also, it began the mechanisation of tasks, for example, by

[791] CODELCO, *Annual Report*, 2019, 45.
[792] CODELCO, *Annual Report*, 2019, 45 and 47.
[793] Federal Institute for Geosciences and Natural Resources (BGR), *Assessment of the Effects of Global Digitization Trends on Sustainability in Mining: Digitization Processes in the Mining Industry in the Context of Sustainability*, (Hannover: September 2020), 35.
[794] Federal Institute for Geosciences and Natural Resources(BGR), *Assessment of the Effects of Global Digitization Trends,* 35.
[795] Federal Institute for Geosciences and Natural Resources(BGR), *Assessment of the Effects of Global Digitization Trends,* 35.
[796] Federal Institute for Geosciences and Natural Resources(BGR), *Assessment of the Effects of Global Digitization Trends,* 35.
[797] CODELCO, *Annual Report*, 2019, 47.

using the "block caver" equipment, which uses a telescopic arm to handle and place explosives.[798]

With regard to innovation, CODELCO is innovating and conducting extensive testing of its innovations. For example, in 2019, it started testing its invention, the "uncrushable detector", which detects and extracts elements that may affect the operations of a crushing unit.[799]Despite the efforts by CODELCO, the National Productivity Commission of Chile is of the view that Chile has not yet taken full advantage of technology in its mining industry despite its availability but is making good progress.[800]

Most of the mining technology being utilised in the world still needs further R&D and testing under actual mining conditions to determine their full capabilities.[801]Nevertheless, Chile has embraced new technology in its mining sector, which has contributed to a significant reduction in the cost of production, leading to increased competitiveness of Chile's minerals in the world market. Also, technology has helped Chile reduce the negative environmental impacts of traditional mining techniques, enhance the population's skills in mining technology, and improve mining safety.

4.2.4.4. Mining Education

Investment in the education sector to incorporate mining programs and courses at the university and college levels began as early as 1853.[802] Mining schools were established in the key mining regions of Chile. For example, the Mining School of Copiapó was founded in 1857, while that of La Serena was founded in 1887.[803] The Industrial School of Saltpetre and Mining in Antofagasta was founded in 1918. [804]

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[798] CODELCO, *Annual Report*, 2019, 47.
[799] CODELCO, *Annual Report*, 2019, 47-48.
[800] National Productivity Commission (Chile), *Report on Productivity in the Chilean Copper Mining Industry,* 9, https://www.comisiondeproductividad.cl/wp-content/uploads/2018/06/Resumen-Ejecutivo-Idioma-ingl%C3%A9s.pdf.
[801] Federal Institute for Geosciences and Natural Resources(BGR), *Assessment of the Effects of Global Digitization Trends,* 38.
[802] Kristin Ranestad, "The Mining Sectors in Chile and Norway," 5.
[803] Kristin Ranestad, "The Mining Sectors in Chile and Norway," 5.
[804] Kristin Ranestad, "The Mining Sectors in Chile and Norway," 5.

The mining engineering program at the university level was four to six years of study and was scientifically and theoretically oriented. In contrast, mining technician programs were shorter and more focused on practical exercises.[805] These programs adapted to technological changes in the mining industry.[806]However, there was a challenge in recruiting students to the programs because a large number of the population in Chile did not undertake primary education, and many who went through primary education did not proceed to high school. Hence, as of 1950, 19.8 per cent of the Chilean population was illiterate.[807] The military government did not pay attention to education and made drastic cuts in education expenditure.[808]

The trade reforms in Chile adopted to attract foreign investment in the mining sector allowed foreign mining companies to employ foreign engineers and mining technicians at the managerial level.[809]These foreign workers did not interact with the domestic professionals, thus affecting knowledge transfer within the mining sector.[810] As a result, skilled domestic labour in the mining sector continues to be a challenge in Chile. There is a shortage of local project control managers, project directors, plant managers and mining engineers.[811] According to CODELCO, very few students in Chile choose a career in mining because of the distance to the job sites, difficulties in working in the mines, poor image of the sector, and limited financial support to the students.[812]

[805] Kristin Ranestad, "The Mining Sectors in Chile and Norway," 5.
[806] Kristin Ranestad, "The Mining Sectors in Chile and Norway," 5.
[807] Kristin Ranestad, "The Mining Sectors in Chile and Norway," 10.
[808] UNCTAD, *The Challenge of Mineral Wealth*, 21.
[809] Kristin Ranestad, "The Mining Sectors in Chile and Norway," 5.
[810] Kristin Ranestad, "The Mining Sectors in Chile and Norway," 5.
[811] Matilde Mereghetti, Sidonie Pichard, and Yana Stankova, "Chile: Investing to Maintain Leadership," *Global Business Reports,* March 2012, 66. See also OECD, *OECD Economic Surveys: Chile 2018* (Paris, OECD Publishing, February 2018), https://doi.org/10.1787/eco_surveys-chl-2018-en.
[812] Matilde Mereghetti, Sidonie Pichard, and Yana Stankova, "Chile: Investing to Maintain Leadership," 66. See also OECD, *OECD Economic Surveys: Chile 2018.*

In 2012, Chile's Mining Skills Council was established to connect Chile's mining industry with the education sector to streamline national efforts to match labour force supply with demand.[813]

4.2.4.5. Greening mining

Greening mining is a global business priority due to the high and growing energy costs and negative environmental impacts of using fossil fuels.[814]Chile's Atacama Desert has the highest solar incidence in the world, which Chile has taken advantage of, making it the biggest solar energy producer in Latin America.[815]

In 2016, fossil fuel imports represented 70 per cent of the country's total primary energy supply, with petroleum products dominating at 41 per cent, followed by coal at 19 per cent and natural gas at 10 per cent.[816] The mining sector consumed approximately 20 per cent of this energy because of automated mining.[817]

A Concentrated Solar Power (CSP), capable of storing energy, is currently being constructed in the Atacama Desert.[818] There are plans to build such other plants by foreign companies. Also, CORFO set up a strategic power programme to take advantage of solar energy through, for example, undertaking infrastructure development which will include improving the power grid to increase transmission capacity, encouraging

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[813] Intergovernmental Forum on Mining, Minerals, Metals and Sustainable Development (IGF), *Case Study- Chile: Direct Employment- The Mining Skills Council and Centralised Data Collection* (Ottawa: IGFMining, 2018), *https://www.iisd.org/sites/default/files/publications/case-study-chile-direct-employment.pdf.*

[814] OECD, *Production Transformation Policy Review of Chile: Reaping the Benefits of New Frontier*, 32.

[815] OECD, *Production Transformation Policy Review of Chile: Reaping the Benefits of New Frontier*, 32.

[816] OECD, *Production Transformation Policy Review of Chile: Reaping the Benefits of New Frontier*, 109.

[817] The mining sector is currently energy intensity due to deteriorating copper ore grades leading to a shift to underground mining which requires automated mining. See OECD, *Production Transformation Policy Review of Chile: Reaping the Benefits of New Frontier*, 22.

[818] OECD, *Production Transformation Policy Review of Chile: Reaping the Benefits of New Frontier*, 109.

private sector participation, and technology and skills development. The effect of this is that Chile will have a cheap, permanent, reliable and sustainable source of electricity which will positively impact the economy, including the mining sector, as it will reduce the cost of production and operations.

4.2.4.6. Environmental Conservation

Copper mining may cause adverse environmental consequences, including air pollution by sulphur compounds, overuse of water resources and pollution, soil contamination, and abandoned mines. It is, therefore, crucial for host governments to take necessary measures to protect the environment in accordance with their national law and international standards.

An increase in foreign investors in Chile due to trade liberalisation contributed to the need for the Chilean government to develop environmental legislation that conforms to international standards and consolidates the various ministerial pronouncements on environmental issues. This is because the investors were mainly multinationals who were already adhering to international environmental standards in their operations in other countries and thus demanded a more comprehensive and predictable legal framework as opposed to the piecemeal environmental interventions by the different ministries in the form of Executive Decrees.[819]

Chile's Basic Law on Environment, Law 19.300, was enacted in 1994 and established two institutional structures to ensure effective coordination of environmental decision-making at the national and regional levels. The National Commission on the Environment, CONAMA, mandate was to promote cooperation among all government bodies dealing with environmental issues. The Regional Environmental

[819] According to UNEP, Chile had over two thousand laws and regulations on environmental issues. See UNEP, *Environmental Impacts of Trade Liberalization,* 31.

Commissions, COREMAs, acted as the operational authority for the environment at the regional level. Therefore, they dealt with the administration of the System of Environmental Impact Assessment (SEIA). They also reviewed and approved environmental impact assessments and studies for projects such as mining projects which must undertake environmental impact assessments.

The law also provided for public participation in environmental decision-making, mitigation, correction and compensation of environmental damage, environmental liability, and monitoring of environmental variables based on national and international standards.

Law 19.300 was amended in January 2010 by Law 20.417. The new law changed the institutional structure by abolishing CONAMA and replacing it with the Ministry of the Environment, the Environmental Evaluation Service and the Environmental Superintendence. The Environmental Evaluation Service is currently responsible for administering the SEIA. Other changes introduced by the new law include the increase of penalties for non-compliance to encourage compliance, enhancement of the role of the local community in environmental decision-making, and creation of an integrated system of conservation and protected areas. Later, in 2012, Environmental Courts were established by Law 20.600.

These legislative reforms in environmental matters complemented the positive impact on the environment of using advanced mining technology in the mining sector.[820]

[820] As discussed earlier, the use of advanced mining technology and management practices by mining companies substantially reduces the negative environmental impacts of mining. UNEP, *Environmental Impacts of Trade Liberalization,* 37.

4.2.4.7. Strengthening Public-Private Partnerships

Public-Private consultation in the mining sector is vital as it facilitates the development of policies that benefit the government and investors. Chile has strengthened the public-private dialogue with lead mining firms, and thus it has been able to identify gaps in the mining sector and the actions that will address them.[821] This collaboration between public institutions and the private sector has significantly contributed to the country's economic success.[822]

Alta Ley is a key public-private partnership coordinated by CORFO in collaboration with the Ministry of Mining to improve the mining sector.[823] It identified long-term priorities that can transform Chile's mining sector and developed a shared vision and road map for 2035.[824] Some of the targets in the vision include increasing the production of copper from 5.5 metric tons of copper as of 2015 to 7.5 metric tons by 2035.[825]

The collaboration has also enabled the government to obtain funds from the private sector to support strategic government projects to improve the mining sector. This has contributed to coordinating the government and private sector interventions, thus avoiding duplicate interventions. [826]

As discussed in earlier sections, the collaboration between government and learning institutions for innovation and technological development is also important. The government is currently working on strengthening

[821] OECD, *Production Transformation Policy Review of Chile: Reaping the Benefits of New Frontier*, 33.
[822] UNCTAD, *The Challenge of Mineral Wealth*, 4.
[823] OECD, *Production Transformation Policy Review of Chile: Reaping the Benefits of New Frontier*, 131.
[824] OECD, *Production Transformation Policy Review of Chile: Reaping the Benefits of New Frontier*, 131.
[825] OECD, *Production Transformation Policy Review of Chile: Reaping the Benefits of New Frontier*, 131.
[826] UNCTAD, *The Challenge of Mineral Wealth*, 4.

the participation of other stakeholders in the value chain, such as civil society, entrepreneurs, local government and communities.

4.2.4.8. Supporting State-Owned Mining Companies

As discussed earlier, CODELCO is a state-owned mining company whose mandate is to undertake mining, commercial and industrial activities. It is among the world's largest copper producers. It operates seven mine sites in Chile in Chuquicamata, Ministro Hales, Radomiro Tomic, Gabriela Mistral, Salvador, Andina, and El Teniente.[827]

In 2019, it produced approximately 1,706,000 metric tons of fine copper, equivalent to 8 per cent of the world's mined copper output and 29 per cent of Chile's copper production for the year.[828]Its total sale for 2019 was 12,525,000 US dollars.[829]

CODELCO contributes significantly to Chile's socioeconomic development by transferring surplus revenue to the treasury and paying taxes. Its contribution since 1990 was equivalent to 13 per cent of total tax revenues, and in some years, it exceeded 30 per cent.[830]

The coexistence of public and private mining in Chile has enabled the development of vast mineral resources, which would not have been possible for CODELCO to exploit on its own, as well as increased fiscal revenues.[831]

ENAMI, on the other hand, has also been key in promoting the development of small and medium-scale mining. It does not operate

[827] CODELCO, *Annual Report*, 2019, 15.
[828] CODELCO, *Annual Report*, 2019,16.
[829] CODELCO, *Annual Report*, 2019,16
[830] African Development Bank, *Chile's Fiscal Policy and Mining Revenue: A Case Study*, (Abidjan: African Natural Resource Center, 2016), 8, https://www.afdb.org/fileadmin/uploads/afdb/Documents/Publications/anrc/CHILE_CASESTUDY_ENG__HR_PAGES.pdf.
[831] African Development Bank, *Chile's Fiscal Policy and Mining Revenue*, 9.

mines like CODELCO but offers financial support in the form of short and long-term loans, ore processing services, smelting and refining services, and marketing services to small and medium-scale miners.[832] This has enabled small and medium-scale miners to compete technically and commercially with large-scale miners.

4.2.4.9. Development of local industries

Trade liberalisation is expected to contribute to the decentralisation of investments leading to closer linkages between the mining sector and other sectors of the economy. In particular, reducing tariffs should lead to increased goods imported by the productive sectors and greater access to foreign technology, thus developing the local industries connected to the mining sector.[833] Unfortunately, trade liberalisation in Chile did not benefit local industries as anticipated. Conversely, foreign mining companies benefitted more from reduced tariffs by increasing their exports and importation of goods for their operations, thus affecting the growth and development of the local industries.[834]

4.2.4.10. Fiscal regime[835]

Copper mining in Chile is both a source of foreign exchange from exports and a source of revenue for the government.[836]Since Chile's mining resources are exploited through a mixed model where the private and public mining sectors co-exist, the fiscal regime will be examined from this perspective.

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[832] Japan International Cooperation Agency (JICA) and Empresa Nacional de Mineria (ENAMI), *Environmentally-Friendly Operation of Mineral Processing Plant Using Biotechnology in the Republic of Chile Report*, 2002 report, 2-5, https://openjicareport.jica.go.jp/pdf/11705431_02.PDF.
[833] UNEP, *Environmental Impacts of Trade Liberalization and Policies,* 19.
[834] UNEP, *Environmental Impacts of Trade Liberalization and Policies,* 19.
[835] Set of tools or mechanisms that determine how the revenues from oil and mining projects are shared between the government and companies such as royalties, taxes, concessions, production-sharing contracts. See Natural Resource Governance Institute, *Fiscal Regime Design*: *What Revenues the Government will be Entitled to Collect* (New York, NRGI Reader, March 2015).
[836] African Development Bank, *Chile's Fiscal Policy and Mining Revenue,* 8.

CODELCO and ENAMI are the main public mining entities. The government benefits through the two entities' sale of copper and other minerals and the taxes they pay. All mining companies, including the two public entities, pay (1) standard corporate income tax of 27 per cent[837], (2) withholding tax on dividends at the rate of 35 per cent (less corporate income tax credit), (3) an annual licence fee for the maintenance of a mining concession, and (4) are permitted to carry forward losses indefinitely.[838]

Also, according to Law No.21,210, published in February 2020, investments in fixed assets between June 1, 2019, and December 31, 2021, enjoy a 50 per cent depreciation.[839] The depreciation method applicable is straight-line over the useful life of the asset, which is determined by the Chilean Tax Authorities on each kind of asset through an Exempt Resolution No.43/2002.[840]

A special tax on mining activities was introduced in 2005 for mining companies. The tax is based on annual sales of minerals which varies depending on sales volumes. For example, annual sales of fine copper exceeding 50,000 tonnes pay a progressive rate of between 5 per cent and 14 per cent; annual sales of fine copper between 12,000-50,000 pay a progressive rate of 0.5 per cent and 1.93 per cent; and companies whose annual sales of fine copper are equal or less than 12,000 tonnes are exempt from the tax.[841] The value is based on the value of grade A copper

[837] According to the July 31, 2021 tax summary by PriceWaterhouseCoopers(PWC) Chile's corporate income tax is 27 per cent. See "Worldwide Tax Summaries: Chile, PriceWaterhouseCoopers(PWC), accessed August 5, 2021, https://taxsummaries.pwc.com/chile/corporate/taxes-on-corporate-income.
[838] PriceWaterhouseCoopers, *Corporate income Taxes, Mining Royalties and other Mining Taxes: A Summary of Rates and Rules in Selected Countries* (London, Global Mining Industry Update, June 2012), 21, https://www.pwc.com/gx/en/energy-utilities-mining/publications/pdf/pwc-gx-miining-taxes-and-royalties.pdf. See also "Worldwide Tax Summaries: Chile, PriceWaterhouseCoopers (PWC).
[839] "Worldwide Tax Summaries: Chile, PriceWaterhouseCoopers (PWC),
[840] Straight line depreciation means that the asset's cost is depreciated at the same rate for each accounting period until it reaches the salvage value, or the end of the asset's useful life. This method of depreciating an asset is easy and predictable.
[841] Michael Cullen and Bertrand Toiano, "Mining Royalties, Elections and the Constitution in Chile," *jdsupra.com*, 3, accessed August 25, 2021, https://www.jdsupra.com/legalnews/mining-royalties-elections-and-the-6830747/.

registered at the London Metal Exchange.[842] Most of the foreign mining companies entered into fiscal stability agreements, and thus they pay an invariable rate regardless of the price of the fine copper.[843] Most of these agreements will expire in 2023, after which the special tax will be applicable.[844]

The duties and fees applicable to any business also apply to mining activities. These include municipal duty, stamp duty and Value Added Tax.

The uniformity in taxation of all companies in Chile eliminates the necessity for lobbying by mining companies for special taxes, reduces the complexity of the tax codes as all companies are subjected to the same tax code, and thus makes it easier for the government to administer taxes, and avoids discrimination of industries in the event of tax increases.[845]

Following past experiences concerning the unpredictability of the international price of copper, the military government established the Copper Stabilisation Fund in 1985 to cushion Chile's economy from the impact of any copper price fluctuation in the international market. Thus, when the price of copper increases, the extra gains are saved, and these additional resources are spent in times of low prices.[846]

To further cushion the government from economic shocks when economic growth is below average and pay public debts, the surplus

[842] Michael Cullen and Bertrand Toiano, "Mining Royalties, Elections and the Constitution in Chile," 3.
[843] Where a foreign company opted to enter into a fiscal stabilization agreement, it pays an extra 2 per cent over the income tax rate. See Laguna Y. Rudy, Orozco A. Alvaro and Bejarano P. Madeherik, "Mining Investment and a Fiscal Regime that Promotes the Investment: An Inter-Temporal Model," *Journal of Economic and Financial Analysis* 1, (2018): 27-32.
[844] Michael Cullen and Bertrand Toiano, "Mining Royalties, Elections and the Constitution in Chile," 4.
[845] World Bank, *Mining Royalties: A Global Study of Their Impact on Investors, Government and Civil Society* (Washington DC: World Bank Publishing, 2006), 12, https://documents1.worldbank.org/curated/ar/103171468161636902/pdf/372580Mining0r101OFFICIAL0USE0ONLY1.pdf.
[846] UNCTAD, *The Challenge of Mineral Wealth*, 21.

structural rule was introduced in 2000.[847] Any revenue from CODELCO received by the government above the long-term reference price for copper is saved. Thus when the price of copper is more than the reference price, the extra gains are saved and used to cushion the government from economic shocks when economic growth is below average and pay public debts.[848]

Chile has no royalty on mineral production; however, a new proposed law, the Mining Royalties Law, is being discussed by parliament, which proposes introducing mining royalties on copper and lithium sales. The bill proposes a royalty rate of 3 per cent on the gross copper sales exceeding 12,000 metric tonnes per year.[849] However, additional rates apply where copper prices in the London Metal Exchange exceed determined amounts. This means that as the copper prices increase, an additional royalty rate is payable on additional profits generated by the market price. For example, where copper prices are below 2 pounds, the royalty payable is 3 per cent of revenue. However, when copper prices are at 2 pounds and 2.5 pounds, a 15 per cent and 35 per cent royalty is payable, respectively, on additional profits generated.[850] When copper prices are at 3.3 and 4 pounds, the rate will be 60 per cent and 75 per cent, respectively, on additional profits.[851]

The Chilean government projects that the tax burden of large mining companies will increase from 14 per cent to more than 80 per cent if the bill is passed into law, thus affecting the profitability of the companies.[852]

[847] UNCTAD, *The Challenge of Mineral Wealth*, 5
[848] UNCTAD, *The Challenge of Mineral Wealth*, 5
[849] Michael Cullen and Bertrand Toiano, "Mining Royalties, Elections and the Constitution in Chile, 4.
[850] Michael Cullen and Bertrand Toiano, "Mining Royalties, Elections and the Constitution in Chile, 4.
[851] Michael Cullen and Bertrand Toiano, "Mining Royalties, Elections and the Constitution in Chile, 4.
[852] Michael Cullen and Bertrand Toiano, "Mining Royalties, Elections and the Constitution in Chile, 4.

4.2.5. Key lessons from Chile

The Chilean experience has many key lessons for Kenya. Chile's mining sector reform involved continuous improvement of the regulatory and institutional framework of the sector over several years. The institutional framework has supported the legal framework by providing good regulatory oversight. As a result, the legal framework has positively impacted the mining sector.

Chile began its reform agenda by liberalising trade to attract foreign investors in the mining sector and promote export diversification. The liberalisation was achieved through reducing tariffs, eliminating non-tariff barriers to trade, introducing favourable FDI policy, and concluding bilateral and multilateral trade agreements. As a result, there was increased economic growth.

Despite these neoliberal economic policies that spurred economic growth, the participation of the people was limited by the 1980 Constitution. This led to social exclusion, inadequate environmental policies, and social inequality. All these had a negative impact on the sustainable development of Chile as the economic growth was not supported by a major component of sustainable development, namely social inclusion.

Also, local industries in Chile did not develop because the trade liberalisation policies enabled the foreign mining companies to increase exports of raw materials and importation of goods for their operations without value addition and local content requirements.

In addition to liberalising trade, the Chilean Government recognised the trio role of technology and research and development in the mining sector as copper ore grades deteriorated over time hence the need to shift to underground mining. Indeed, technology and research and development play a significant role in (1) increasing the productivity of mines due to the significant reduction in the cost of production, (2) increasing the

competitiveness of minerals in the world market, thus enhancing market access, and (3) enhancing mine safety. Thus, the government promoted technology and research and development by increasing human capacity and funding in research and development.

To further reduce the cost of production, Chile embraced greening mining to lower energy costs and guarantee a permanent, reliable and sustainable source of electricity for the mining sector. Greening mining also contributed to the various environmental conservation efforts, such as the requirement of environmental impact assessments, public participation in environmental decision-making, compensation, and monitoring of compliance with environmental laws and regulations.

On revenue, Chile utilized different strategies to increase the economic benefits of the sector to the country. For example, the existence of Chile's state-owned mining company, CODELCO, has been beneficial to the country. CODELCO is a significant revenue contributor in the mining sector. Thus, the country benefits directly from the mining sector without the need to over-tax foreign investment companies to raise revenue. Further, the company, a key investor in the mining sector, prompted the government to prioritise the mining sector. Hence, the government invested in domestic innovation, mining education, research and development, and enacted favourable policies to reduce costs and increase CODELCO's productivity.

Also, Chile's fiscal regime is transparent, predictable and balanced hence a pivotal contributor to the success of Chile's mining sector. In particular, uniformity of taxation avoids lobbying for special taxes and eases tax administration. Additionally, the stabilization fund and surplus structural rule are also important fiscal policies as they encourage the government to monitor its spending and save and cushion itself from economic shocks when the prices of minerals decline in the world market or when economic growth is below average.

Concerning the protection of the environment following the closure of mines, Chile introduced a Mining Fund to manage closed mines and ensure their physical and chemical stability over time.

The importance of multisectoral collaboration within government is also an important lesson as it ensures coordinated management of the mining sector, as different government agencies have different mandates within the mining sector.

Finally, Chile recognizes that public-private partnership plays a critical role in the success of the mining sector as it facilitates the development of policies and laws that benefit both the government and foreign investors. In particular, the shared vision and roadmap for the mining sector jointly created by the government and private sector have been vital in promoting good coordination of the mining sector interventions by the government and foreign investors, thereby avoiding duplication of interventions. It has also ensured that the private sector supports strategic government projects to improve the mining sector.

From the experience of Chile, continuous review of the mining sector's legal and institutional framework is essential to achieve sustainable development. In addition, social inclusion is an important aspect of the sector's sustainable development.

Although the current mining legislation of Kenya is only seven years old, further reform of the regulatory and institutional framework of the sector is inevitable to improve the sector. Further, legal and institutional reforms take time to yield benefits and thus require the commitment of current and successive governments through the allocation of adequate resources for implementation.

4.3.BOTSWANA

Botswana is a landlocked country of approximately 581,730 square kilometres[853], about the same size as Kenya.[854] It is located in the Southern part of Africa and shares borders with Namibia, South Africa, Zambia and Zimbabwe. Approximately 5 per cent of its land area is arable, as much of the country is covered by the Kalahari Desert.[855] This explains its small population of roughly two million four hundred thousand.[856]

Botswana is rich in mineral resources. It is one of the largest producers of diamonds in the world.[857] The other minerals it mines are nickel-copper, coal, soda ash, gold, silver, semi-precious stones and granite.[858] Thus, the mining sector is Botswana's most significant contributor to the country's economy and accounts for a quarter of its GDP.[859]

Botswana attained self-government in 1965, after eighty years of British rule, and became the independent Republic of Botswana on September 30, 1966. Sir Seretse Khama was elected as the first president under the Botswana Democratic Party (BDP) and served until his death in 1980.[860] He was succeeded by Ketumile Masire, who voluntarily retired from office in 1998. [861]Festus Mogae succeeded President Ketumile Masire and served two terms of five years each.[862] In 2008, he handed over power to Ian Khama, who also served for two terms.[863] President Ian

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[853] "About Our Country," Government of Botswana, accessed October 14, 2021, https://www.gov.bw/about-our-country.
[854] Kenya is approximately 569,140 square kilometers, according to the "World Bank Data," World Bank, accessed September 13, 2021, https://data.worldbank.org/indicator/AG.LND.TOTL.K2?locations=KE. .
[855] United Nations Development Programme, *Assessment of Development Results: Botswana* (New York: UNDP Publication, May 2009), 5, https://www.oecd.org/countries/botswana/46818033.pdf.
[856] According to latest data of the United Nations Population Fund. https://www.unfpa.org/data/world-population/BW, accessed September 13, 2021.
[857]"About Our Country," Government of Botswana.
[858] "About Our Country," Government of Botswana.
[859] "About Our Country," Government of Botswana.
[860] "History of Botswana," Embassy of the Republic of Botswana Washington DC, accessed October 14,2021, http://www.botswanaembassy.org/page/history-of-botswana.
[861]"History of Botswana," Embassy of the Republic of Botswana Washington DC.
[862] "History of Botswana," Embassy of the Republic of Botswana Washington DC.
[863] "History of Botswana," Embassy of the Republic of Botswana Washington DC.

Khama was succeeded in 2019 by the current president, President Dr Mokgweetsi Eric Masisi.

Botswana is a multi-party democracy with general elections held every five years. The BDP has, however, been the ruling party since independence.[864] The country has enjoyed political stability and legitimacy since independence, contributing significantly to its economic growth.[865]

At independence, Botswana was classified as one of the poorest countries in the world.[866] However, it experienced rapid economic growth after discovering large mineral deposits in the early 1970s and became the world's fastest-growing economy between 1966 and 1989.[867] By 1992, the country was ranked as a lower-middle income economy and grew to upper-middle income by 1998. [868] It is still under the upper-middle income economy category but projects, in its transformational agenda – Botswana Vision 2036, to become a high-income country by 2036.[869]

In 2018, Botswana ranked forty-three out of one hundred and sixty-two jurisdictions in the Economic Freedom of the World rating of 2020, while Kenya ranked eighty-six.[870] In the World Bank Ease of Doing Business 2020, it was position eighty-seven out of one hundred and ninety economies ranked, while Kenya was position fifty-six.[871]

According to the Transparency International Corruption Perceptions Index 2020, Botswana was position thirty-five out of one hundred and

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[864] Hillbom Ellen, "Diamonds or Development? A Structural Assessment of Botswana's Forty Years of Success," *The Journal of Modern African Studies* 46, no. 2 (2008): 192.
[865] Hillbom, Ellen. "Diamonds or Development?" 191-193
[866] Tsie Balefi, "The Political Context of Botswana's Development Performance," *Journal of Southern African Studies* 22, no. 4 (1996): 599.
[867] Tsie, Balefi, "The Political Context of Botswana's Development Performance," 599.
[868] Tsie, Balefi, "The Political Context of Botswana's Development Performance," 599.
[869] "Vision 2036," Botswana Vision 2036, accessed October 13, 2021, https://vision2036.org.bw/.
[870] Fraser Institute, *Economic Freedom of the World 2020 Annual Report*, https://www.fraserinstitute.org/sites/default/files/economic-freedom-of-the-world-2020.pdf. The Economic Freedom of the World rating measures the degree to which the policies and institutions of countries are supportive of economic freedom based on five parameters, namely, the size of government, protection of persons and their property rights, sound money, freedom to trade internationally, and regulation.
[871] The World Bank Group, *Doing Business 2020*.

eighty countries ranked, while Kenya was position one hundred and twenty-four.[872]

Political stability, democratic governance, adherence to the rule of law, strong government institutions, and good laws and policies have played a significant role in the success of the mineral sector in Botswana. According to the Democracy Index 2021, Freedom House, by Economist Intelligence, which provides a snapshot of the state of democracy worldwide in one hundred and sixty-five independent states and two territories, Botswana ranked position two in Sub-Saharan Africa and position thirty globally while Kenya ranked position fourteen in the region and ninety-four globally.[873]

4.3.1. Botswana's Mining Sector

After independence, the economy of Botswana radically improved when diamonds were discovered in Orapa, Jwaneng and Letlhakane.[874]

The search for diamonds in Botswana began in 1955.[875] Three small alluvial diamonds were discovered along the Motloutse river.[876] In 1967, between the village of Letlhakane and Mopipi Pan in the South Central District of Botswana, a team of De Beers[877] geologists found abundant quantities of ilmenite and garnet, the two chief indicators of diamondiferous kimberlite.[878] It was named the Orapa mine and became fully operational in July 1971.[879] The Letlhakane Mine, situated fifty kilometres from the Orapa Mine, began production in 1975[880]

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[872] Transparency International Corruption Perceptions Index 2020.
[873] "Democracy Index 2021", Economist Intelligence, accessed October 19, 2022, https://www.eiu.com/n/campaigns/democracy-index-2021-download-success/.
[874] "Home," Debswana Diamond Company, accessed October 19, 2021, http://www.debswana.com/Pages/default.aspx.
[875] "About Us: Our History," Debswana Diamond Company, accessed October 19, 2021, http://www.debswana.com/About-Us/Pages/Our-History.aspx.
[876] "About Us: Our History," Debswana Diamond Company.
[877] De Beers Group is an international corporation that specializes in diamond exploration, mining, retail, trade and value addition. It was established in 1888 by Cecil Rhodes and its headquarters are in London, United Kingdom.
[878] "About Us: Our History," Debswana Diamond Company.
[879] "Operations: Orapa Mine," Debswana Diamond Company, accessed October 19, 2021, http://www.debswana.com/Operations/Pages/Orapa-Mine.aspx.
[880] "Operations: Orapa Mine," Debswana Diamond Company.

Prospecting by De Beers geologists continued, and the efforts led to the discovery of Jwaneng Mine in 1972 in the Naledi River Valley, also known as the Valley of Stars.[881] It became fully operational in August 1982.[882]

In 1969, the Government of Botswana entered into an agreement with De Beers Group of Companies, a foreign investor, to establish Debswana Diamond Company, to be owned in equal shares. [883]Currently, the company is the world's leading diamond producer by value and volume and the largest contributor to Botswana's National Treasury[884]

In 2020, the Orapa mine produced approximately 8.28 million carats of diamonds, while the Jwaneng mine produced about 7.2 million carats of diamonds, compared to 12.7 million carats in 2019.[885] The reduction in production was attributed to the Coronavirus Disease of 2019[886] pandemic that affected the mining sector worldwide.[887] The Letlhakane mine, which is approximately fifty kilometres from the Orapa mine, produced 531,485 carats of diamonds in 2020.[888]

Diamond resource is the primary mineral resource and has played a significant role in the economic development of Botswana. It accounts for 53 per cent of all mining licences issued in Botswana.[889] Eighty per

[881] "About Us: Our History," Debswana Diamond Company.
[882] "Operations: Jwaneng Mine," Debswana Diamond Company, accessed October 19, 2021, http://www.debswana.com/Operations/Pages/Jwaneng-Mine.aspx.
[883] "Home," Debswana Diamond Company.
[884] "Home," Debswana Diamond Company. See also World Bank Group, *Botswana Mining Investment and Governance Review (*Washington DC: World Bank Publications, August 2016), 7, https://openknowledge.worldbank.org/bitstream/handle/10986/25225/109316.pdf?sequence=8.
[885] "Operations: Jwaneng Mine," Debswana Diamond Company.
[886] COVID-19
[887] "Operations: Jwaneng Mine," Debswana Diamond Company.
[888] "Operations: Jwaneng Mine," Debswana Diamond Company.
[889] World Bank Group, *Botswana Mining Investment and Governance Review*, 6.

cent of Botswana's total export earnings are usually from the export of mainly raw diamonds.[890]

Government revenue from mineral tax is around US$400 million per annum, approximately 9 per cent of the total revenue.[891] Also, revenue from mineral royalties and dividends is about US$1.2 billion per year, which amounts to 27 per cent of total revenue.[892] Concerning FDI, mining accounts for 44.6 per cent of FDI in the country.[893]

Between 1975 and 1998, the economy of Botswana grew at an annual rate of 7.7 per cent per annum due to mining.[894] However, the 2009 global crisis lowered economic growth to below 5 per cent per annum.[895] Between 2010 and 2014, the average economic growth raised to 7 per cent.[896] Another decline to an average of 2.6 per cent was experienced between 2015 and 2019 because of weakening global demand for diamonds and severe weather conditions that affected mining activities.[897] In 2020, COVID-19 restrictions affected the production and export of diamonds.[898] In particular, diamond production is estimated to have declined by 29 per cent, while the export of diamonds fell by an estimated 26 per cent in 2020.[899]

The World Bank projects that Botswana will experience a recovery of mining production in 2021, leading to a diamond-led economic recovery.[900] This is evident in the latest economic statistics, which indicate that during the second quarter of 2021, the mining and quarrying

[890]World Bank Group, *Botswana (*Washington DC: World Bank Publications, April 2021), https://pubdocs.worldbank.org/en/531121492188153196/mpo-bwa.pdf.
[891] World Bank Group, *Botswana Mining Investment and Governance Review*, 6.
[892] World Bank Group, *Botswana Mining Investment and Governance Review*, 6
[893] World Bank Group, *Botswana Mining Investment and Governance Review*, 6
[894] Robinson James, Daron Acemoglu and Simon Johnson, "An African Success Story: Botswana," in *In Search of Prosperity: Analytic Narratives on Economic Growth*, ed. Dani Rodrik (Princeton: Princeton University Press).
[895] World Bank Group, *Botswana.*
[896] World Bank Group, *Botswana.*
[897] World Bank Group, *Botswana.*
[898] World Bank Group, *Botswana.*
[899] Decline in global demand for diamonds also contributed to the reduction of exports in 2020. See World Bank Group, *Botswana.*
[900] World Bank Group, *Botswana.*

sector was the second major contributor to GDP at 14.2 per cent.[901] This was an improvement from quarter one of 2021, where it contributed 11.3 per cent.[902]

4.3.2. Botswana Mining Legal Framework

The main mining legislations in Botswana are the Constitution, the Mines and Minerals Act Chapter 66:01 of 1999, the Mines, Quarries, Works and Machinery Act Chapter 44:02 of 1973, the Environmental Assessment Act Chapter 65:07 of 2011, and the Precious and Semi-Precious Stones (Protection) Act Chapter 66:03 of 1969.

4.3.2.1. Mineral Concessions

According to Part II Section 3 of the Mines and Minerals Act Chapter 66:01 of 1999[903], all minerals belong to the Republic of Botswana. The minister responsible for minerals may grant a mineral concession to any individual or company to develop the country's mineral resources.[904] A mineral concession may be granted to non-citizens if the individual has been residing in Botswana for more than four years.[905]For a company, it must be domiciled in Botswana. However, in the case of obtaining a mining licence, the company must be incorporated under the Companies Act.[906]

A holder of a mineral concession is required to give preference to service agencies located in Botswana and owned by Botswana citizens and materials and products made in Botswana in the conduct of its operations under the concession and the purchase, construction and installation of

[901] Statistics Botswana, *Botswana National Accounts: Gross Domestic Product Stats Brief Q2, 2021* (Gaborone: Statistics Botswana, September 2021), https://www.statsbots.org.bw/sites/default/files/Gross%20Domestic%20Product%20%20%20Q2%202021.pdf.
[902] Statistics Botswana, *Botswana National Accounts: Gross Domestic Product Stats Brief Q2, 2021.*
[903] Mines and Minerals Act.
[904] Section 2 of the Mines and Minerals Act defines a mineral concession as "…a prospecting licence, a retention licence, a mining licence, or a minerals permit".
[905] Section 6 (a) (ii) of the Mines and Minerals Act.
[906] Section 6 (b) (I and ii) of the Mines and Minerals Act.

facilities.[907] This requirement is essential as it increases the production, manufacture and sale of locally produced goods and services.

The investor is also required to give preference to the employment of citizens of Botswana and conduct periodic training of the said employees to enable them to qualify for job advancement.[908]

Four mining concessions are recognised by the Mines and Minerals Act: a prospecting licence, retention licence, mining licence and mineral permit. The application for any of these licences and permits is done to the minister responsible for mining and must be done in the manner prescribed in the Mines and Minerals Act.

In the case of a prospecting licence, the applicant must append a proposed programme of prospecting operations to the application. When reviewing the application, the Minister considers issues such as (1) the financial resources, technical competence and experience of the applicant to carry on the prospecting operations effectively, (2) the adequacy of the proposed programme of prospecting operations, and (3) whether the proposed programme of prospecting operations makes proper provision for environmental protection to determine whether to grant or refuse the licence.[909]

The Minister shall inform the applicant in writing if the application is approved and issue a prospecting licence. The programme for prospecting operations shall be appended to the prospecting licence.[910] If the application is rejected, the applicant will be informed in writing, and reasons for refusal will be given by the Minister in writing.[911]

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[907] Section 12(1)of the Mines and Minerals Act.
[908] Section 12(2) and (3) of the Mines and Minerals Act.
[909] Section 14(1) of the of the Mines and Minerals Act.
[910] Section 16(2) of the Mines and Minerals Act. During the period of review of the application, the applicant is given an opportunity to make necessary amendments to the proposed programme of prospecting operations. See Section 17(5) of the Mines and Minerals Act.
[911] Section 15 of the Mines and Minerals Act.

The prospecting licence is for the duration applied, which shall not exceed three years.[912] The licence holder may apply for renewal at any time not later than three months before the expiry of the licence.[913] The maximum number of allowable renewals is two renewals of two years each.[914] However, the Minister may issue a further renewal where a discovery has been made and evaluation work has not been completed, despite reasonable efforts.[915]

The prospecting licence gives the holder the right to enter any land to which the prospecting licence is related and prospect for minerals, drill boreholes and make necessary excavations, and erect camps and temporary buildings to facilitate the prospecting operations.[916]

Where any minerals relating to the prospecting licence or of possible economic value are discovered during the prospecting period, the licence holder must inform the Minister within thirty days of such discovery.[917] In the event of the discovery of minerals not included in the prospecting licence, the licence holder is required to apply for an amendment of the prospecting licence.[918]

The minerals discovered should not be removed from the prospecting area except for mineral analysis, valuation and testing in Botswana.[919]The Minister may, however, allow the licence holder, in writing, to remove the mineral for other reasons.[920]

Section 21 of the Mines and Minerals Act imposes several obligations on the licence holder. Some of these obligations include: (1) informing the Minister of any minerals relating to the prospecting licence or of possible economic value discovered within thirty days of such discovery, (2) backfilling of any excavations, (3) removal of camps and equipment at

[912] Section 17 of the Mines and Minerals Act.
[913] Section 17(2) of the Mines and Minerals Act.
[914] Section 17(3) of the Mines and Minerals Act.
[915] Section 17(6) of the Mines and Minerals Act.
[916] Section 20 of the Mines and Minerals Act.
[917] Section 21 (c) and (d) of the Mines and Minerals Act.
[918] Section 18(1) of the Mines and Minerals Act.
[919] Section 24 of the Mines and Minerals Act.
[920] Section 24 of the Mines and Minerals Act.

the expiry of the licence, (4) repairing any surface of the ground damaged by machinery and equipment, (5) permanently preserve or make safe any borehole drilled and surrender to the government without compensation all boreholes drilled and water rights on termination of licence, and (6) submission to the Director of Geological Survey annual audited statement of expenditure directly incurred under the licence.[921]

According to the prospecting licence, the licence holder must expend the amount specified in the licence. Any money specified in the prospecting licence that is required to be spent and is not spent, and no limit or suspension to carry out prospecting per the programme of prospecting or expend sums of money specified in the prospecting licence under the prospecting programme is granted by the Minister as provided for in Section 22(2) of the Mines and Minerals Act, shall be a debt to the government recoverable in a court of competent jurisdiction.[922]

Another type of mining concession issued is a retention licence. This licence enables a prospecting licence holder to reserve an area within its prospecting licence for future mining operations.[923] The reserved area is referred to as a retention area and is specified in the retention licence.[924] An application for a retention licence is made to the Minister responsible for mining at least three months before the expiry of the prospecting licence.[925]

Before approving or rejecting the application, the Minister considers (1) whether the applicant has carried out a feasibility study that incorporates a proposed mining programme in respect of the deposit to which the application relates, (2) whether the feasibility study establishes that the deposit cannot be mined on a profitable basis at the time of the application, (3) whether the applicant has completed the approved prospecting programme in respect of the area applied for, and (4) whether

[921] Section 21 of the Mines and Minerals Act.
[922] Section 21 (1) (h) and (2) of the Mines and Minerals Act.
[923] Section 31 (a) of the Mines and Minerals Act.
[924] Section 31 (a) of the Mines and Minerals Act.
[925] Section 25 (2) of the Mines and Minerals Act.

the applicant is in default of any conditions of its prospecting licence.[926]An applicant is usually allowed to remedy any default identified within three months of notification of the default by the Minister before its application for a retention licence is rejected.[927]

A retention licence is granted for a maximum period of three years and may be renewed once for a further period not exceeding three years.[928] In exceptional circumstances, for example, where the licence holder establishes that the deposit cannot be mined on a profitable basis, the Minister has the discretion to renew the licence.[929] The licence holder must apply for such renewal no later than three months before the expiry of the retention licence.[930] The duration of the further renewal and the number of times the Minister can exercise this discretion is not specified in the Act and, thus, a possible area of abuse.

The licence holder can conduct prospecting operations in the retention area and any other type of investigation. Also, removal of any mineral or sample from the retention area incidentally won during prospecting for any purpose other than to sell or otherwise dispose of is allowed.[931] However, the mineral or sample removed should not be taken outside the country without the consent of the Director of Mines.[932] The licence holder is further permitted to erect necessary equipment, plant, and buildings in connection with future prospecting or mining operations.[933]

The licence holder is obligated to prepare and forward to the Director of Geological Survey and the Director of Mines (1) a quarterly report on any prospecting operations or any other investigations and operations undertaken within the retention area and (2) any mineral or mineral sample won and removed from the retention area.[934] Also, the licence

[926] Section 27 of the Mines and Minerals Act.
[927] Section 27(3) of the Mines and Minerals Act.
[928] Section 30(1) of the Mines and Minerals Act.
[929] Section 30(3) of the Mines and Minerals Act.
[930] Section 30(3) of the Mines and Minerals Act.
[931] Section 31(c) of the Mines and Minerals Act.
[932] Section 31(c) of the Mines and Minerals Act.
[933] Section 31(d) of the Mines and Minerals Act.
[934] Section 32 (2) of the Mines and Minerals Act.

holder should submit an updated feasibility study and an audited statement of direct expenditure incurred annually.[935] Further, the results of all studies, surveys and tests undertaken and the interpretation and assessment of the studies, surveys and tests should be immediately submitted to the Minister through the Director of Mines when available.[936]

To ensure that the government, through the Department of Geological Survey, has a record of up-to-date geological information of any area it has issued a retention licence and a prospecting licence, the licence holder is required to surrender all geological information, other than feasibility studies and proprietary information, relating to the retention licence and prospecting licences upon expiry of the first period of the retention licence.[937]

During the renewal period of a retention licence, the Minister, on notice to the licence holder, may authorise a third party to enter the retention area for purposes of collecting samples and data that it may require to apply for a mining licence.[938] Any geological data obtained by the third party must promptly be reported to the Director of Geological Survey, and a representative portion of each core sample got delivered to the Director of Geological Survey.[939]

Upon completion of the sample and data collection exercise, the third party is entitled to apply for a mining licence in respect of the retention area.[940] Where both the licence holder and the third party apply for a mining licence in respect of the retention area, the applications shall be considered on merit.[941]This ensures that a fair opportunity is given to interested local and foreign investors to exploit available minerals promptly.

[935] Section 32(3)(b) of the Mines and Minerals Act.
[936] Section 32(3)(a) of the Mines and Minerals Act.
[937] Section 33 of the Mines and Minerals Act.
[938] Section 34(1) of the Mines and Minerals Act.
[939] Section 34(2) and (3) of the Mines and Minerals Act.
[940] Section 35(1) of the Mines and Minerals Act.
[941] Section 35(2) of the Mines and Minerals Act.

The mining licence is the third type of mining concession available to foreign investors. A holder of a prospecting licence or a retention licence may apply to the Minister responsible for mining for a mining licence.[942] The application must be made not less than three months prior to the expiry of the prospecting licence or retention licence.[943] The application for a mining licence is limited to only companies incorporated under the Companies Act Chapter 42:01 intending to carry out mining business under the mining licence.[944] Where the prospecting licence and retention licence were issued to individuals, the individuals may incorporate a company wherein the licence holder is one of the company's proprietors.[945]

Applications for a mining licence to mine diamonds are treated slightly differently. Upon receipt of an application for a mining licence to mine diamonds, the Minister initiates a negotiation process between the government and the applicant to agree on government participation and all technical, financial and commercial aspects of the proposed mining operation.[946]The application fails if an agreement is not reached within six months or such extended period.[947]

Before granting a mining licence, the Minister considers various issues, such as the adequacy of the proposed mining operations programme in terms of the most efficient and beneficial use of the mineral resources, financial and technical capability of the applicant to undertake the mining operations proposed, and the experience of the applicant with regard to mining.[948] This also applies to applications for a mining licence to mine diamonds.

Once the Minister approves the application, a mining licence is issued for a duration not exceeding twenty-five years. It can be renewed at any time,

[942] Section 37(1) of the Mines and Minerals Act.
[943] Section 37(2) of the Mines and Minerals Act.
[944] Section 37(4) of the Mines and Minerals Act.
[945] Section 37(5) of the Mines and Minerals Act.
[946] Section 51(1) of the Mines and Minerals Act.
[947] Section 52(2) of the Mines and Minerals Act.
[948] Section 39 of the Mines and Minerals Act.

not later than one year before the expiry of the licence.[949]The decision to grant the renewal is guided by how the development of the mining area has proceeded.[950]For a mining licence to mine diamonds, the mining licence granted shall reflect the terms and conditions agreed upon in the negotiations discussed above.[951]

A mining licence, other than a licence to mine diamonds, permits the government to opt to take up to 15 per cent operating interest in the proposed mine.[952] This interest entitles the government to one Botswana Pula special share at par with the right to appoint up to two directors, with alternates.[953] Further, the government is entitled to receive dividends or other distributions proportional to its percentage of operating interest.[954]

The government must immediately communicate the decision to exercise its option to acquire an operating interest in the proposed mine upon issuing the mining licence to the applicant. The operating interest is not free. Like any other shareholder, the government will be required to contribute its share of operating interest of all audited arms-length expenditure incurred by the company relating to the mining licence acquisition, including relevant prospecting expenditure and all expenditures incurred after the issuance of the mining licence.[955] [956]

The mining licence confers several rights to the licence holder, such as the right to (1) erect the necessary equipment, plant and buildings for mining, transporting, dressing, treating, smelting, or refining minerals recovered during the mining operation, (2) dispose of any mineral product recovered, and (3) prospect within the mining area for minerals specified in the licence.[957] The licence may be amended, or a mining licence area enlarged on the licence holder's application, where further

[949] Section 42 of the Mines and Minerals Act.
[950] Section 42(4) of the Mines and Minerals Act.
[951] Section 51(3) of the Mines and Minerals Act.
[952] Section 40(1) and (3) of the Mines and Minerals Act.
[953] Section 40 (1)(a) of the Mines and Minerals Act.
[954] Section 40 (1)(a) of the Mines and Minerals Act.
[955] Section 40(1)(b)(i) of the Mines and Minerals Act.
[956] Section 40(2) of the Mines and Minerals Act.
[957] Section 44(1) and 52(7) of the Mines and Minerals Act.

deposits of the mineral or other minerals not included in the licence are discovered within or contiguous to the mining area.[958]

Mineral permits are the last type of mining concession. They are granted to investors who wish to undertake small-scale mining operations for minerals other than diamonds within a mining area not exceeding 0.5 square kilometres.[959] A mining permit can be issued for an area under a prospecting, retention or mining licence, provided the applicant obtains the consent of the licence holder.[960] It is issued for a period not exceeding five years and may be renewed for periods not exceeding five years.[961]

Foreign investors do not qualify for mineral permits to mine industrial minerals as they are reserved for citizens of Botswana only.[962]However, the foreign investor may obtain an exemption from the Minister if the Minister is satisfied that it is in the public interest to grant the permit or if the minerals won are not intended for sale or disposal for profit.[963]

4.3.2.2. Consents

For all mineral concessions, the consent of the President is required before the right holder exercises its rights under a licence or permit where the licence area is land dedicated as a place of burial, contains any ancient or national monument, or is set aside or used for government.[964] Also, the consent of the land owner or occupier is required where the licence area is (1) within two hundred meters of any inhabited, occupied or temporarily occupied house or building, (2) within one hundred meters of a cattle dip, tank, dam or private water, (3) within fifty meters of any land with crops or prepared for planting, or (4) land crops were reaped during the year immediately preceding.[965]

[958] Section 44(2) of the Mines and Minerals Act.
[959] Section 52(1) of the Mines and Minerals Act.
[960] Section 52(3) (c) of the Mines and Minerals Act.
[961] Section 55(1) of the Mines and Minerals Act.
[962] Section 53(1) of the Mines and Minerals Act.
[963] Section 53(2) of the Mines and Minerals Act.
[964] Section 60(1)(a) of the Mines and Minerals Act.
[965] Section 60(1)(b) of the Mines and Minerals Act.

Where the land owner or occupier unreasonably withholds consent, the Minister may authorise the mineral right owner to exercise its rights under the licence or permit.[966] The Minister may, however, impose conditions to exercise the rights, such as payment of reasonable compensation.[967]

The consent of the relevant government agency is also required in the case where the licenced area is within a national park, fifty meters of any railway track, and two hundred meters of the boundaries of a township or upon any street, road, highway, public place or aerodrome.[968]

Where the licenced area is not within a place where the consent of the land owner or lawful occupier is required, the licence or permit holder is required to issue the land owner or lawful occupier with at least fourteen days' notice of its intention to exercise its rights under a mineral concession.[969]

4.3.2.3. Rights of the land owner or lawful occupier

To facilitate peaceful co-existence between the licence or permit holder and the community, the Act retains the right of the owner or lawful occupier of any land within the area of a mineral concession to graze stock or farm on the land, provided that it does not interfere with the operations of the licence or permit holder.[970]The licence or permit holder is prohibited from creating unprotected pits, hazardous waste dumps or other hazards that would endanger the plants and livestock of the land owner or lawful occupier.[971]

However, suppose the holder of a retention licence, mining licence or mining permit wishes to have exclusive rights to the licenced area. In that case, it may negotiate a lease with the land owner or lawful occupier.[972]

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[966] Proviso under Section 601(b) of the Mines and Minerals Act.
[967] Proviso under Section 601(b) of the Mines and Minerals Act.
[968] Section 60(1) (c), (d), (e), and (f) of the Mines and Minerals Act.
[969] Section 60(3) of the Mines and Minerals Act.
[970] Section 61 of the Mines and Minerals Act.
[971] Section 61(4) of the Mines and Minerals Act.
[972] Section 62(1) of the Mines and Minerals Act.

The lease will entitle the land owner or lawful occupier to receive the agreed-upon rent in exchange for his or her right to graze or farm in the licenced area.[973]

Nevertheless, suppose the President considers that any land is required for developing or utilising the mineral resources contained thereon. In that case, he or she may compulsorily acquire the land on payment of prompt and adequate compensation to the land owner.[974] Such acquisition is deemed to be for a public purpose.[975]

The Act contemplates peaceful and expedited resolution of disputes between the mineral concession holder and the land owner or lawful occupier. It provides that all disputes concerning the two parties should be resolved through arbitration.[976]

4.3.2.4. Environmental Obligations

The government, through legislation, has placed several environmental responsibilities on a mineral concession holder. It commences with the requirement of a comprehensive Environmental Impact assessment to be included in the Project Feasibility Report, which is submitted with an application for a mining licence and a retention licence or their respective renewals.[977]

Upon the commencement of mining operations, the mineral concession holder has several obligations such as to (1) strive to preserve the natural environment in the conduct of its mining operations, (2) minimise and control waste, (3) avoid undue loss or damage to natural and biological resources, (4) not unnecessarily or unreasonably restrict or limit further development of the natural resource of the concession area or adjacent areas, (5) avoid pollution or promptly treat pollution and contamination

[973] Section 62(1) of the Mines and Minerals Act.
[974] Article 8(1)(a)(iii) and Article 8 (1) (b) of the Constitution of Botswana. See also Section 3 of the Acquisition of Property Act Chapter 32:10.
[975] Article 8 of the Constitution of Botswana protects its citizens from deprivation of property. However, the property can be compulsorily acquired under conditions specified in the Acquisition of Property Act Chapter 32:10. See Section 3 of the Acquisition of Property Act Chapter 32:10.
[976] Section 62(1) and 63(2) of the Mines and Minerals Act.
[977] Section 65(2) of the Mines and Minerals Act.

of the environment where unavoidable, and (6) periodically rehabilitate the concession area.[978]

Where the mineral concession holder fails to comply with these environmental obligations, the government may proceed to carry out the necessary restoration. The restoration cost incurred by the government is treated as a debt due to the government by the mineral concession holder and may be recovered through civil litigation or arbitration.[979]

4.3.2.5. Diamond Beneficiation[980]

In the early 1980s, the government decided to start a cutting and polishing industry to create more employment opportunities for its citizens.[981]DeBeers did not support the idea and argued that the cutting and polishing industry is not economically viable in Botswana.[982] Nevertheless, DeBeers established three cutting and polishing centres between 1980 and 1990.[983] These centres were not profitable, but the government continued to pressure DeBeers for beneficiation.[984]

In 2005, De Beers' mining licence was due for renewal. The government took advantage of its favourable bargaining power to require De Beers to establish a viable cutting and polishing industry. [985] The government was keen to make beneficiation work as the diamond resources were slowly

[978] Section 65(1) of the Mines and Minerals Act.
[979] Section 65(6) of the Mines and Minerals Act.
[980] Diamond beneficiation is the process of improving the economic value of mined diamonds by removing non-commercially valuable minerals. Roman Grynberg, "Diamond Beneficiation in Botswana," *Great Insights* 2, no. 2 (February-March 2013), https://ecdpm.org/great-insights/growth-to-transformation-role-extractive-sector/diamond-beneficiation-botswana/.
[981] Letsema Mbayi, "Linkages in Botswana's Diamond Cutting and Polishing Industry," (MMCP Discussion Paper No.6, University of Cape Town and Development Policy and Practice, March 2011), 20, http://www.cssr.uct.ac.za/sites/default/files/image_tool/images/256/files/pubs/MMCP%20Paper%206_0.pdf.
[982] Letsema Mbayi, "Linkages in Botswana's Diamond Cutting and Polishing Industry," 20.
[983] Letsema Mbayi, "Linkages in Botswana's Diamond Cutting and Polishing Industry," 20.
[984] Letsema Mbayi, "Linkages in Botswana's Diamond Cutting and Polishing Industry," 21.
[985] Letsema Mbayi, "Linkages in Botswana's Diamond Cutting and Polishing Industry," 21.

depleting. Thus, local processing of diamonds was becoming more critical to enabling the country to diversify by growing its manufacturing sector, creating sustainable revenue for the government, and increasing citizens' skills and employment opportunities.[986]

After the execution of the new mining contract with De Beers, the government invited established companies in the cutting and polishing industry to set up factories in Botswana and transfer cutting and polishing skills to the citizens. As a result, sixteen companies were licenced and started operations.[987]

After that, the government and De Beers established the Diamond Trading Company in 2008, an equal ownership joint venture. The company was established to undertake sorting and valuing of Debswana's production, local sales and marketing of diamonds to the sixteen cutting and polishing companies operating in the country and to support and develop the cutting and polishing industry.[988]

Concerning supporting and developing the local cutting and polishing industry, the Diamond Trading Company must sell a minimum of 500 million US dollars a year worth of diamonds to the industry and create over three hundred jobs.[989] On the other hand, the sixteen companies must employ and train locals in cutting and polishing to be allocated rough diamonds.[990]

A penalty clause for non-performance by De Beers in supporting beneficiation was inserted in the joint venture to ensure beneficiation

[986] Letsema Mbayi, "Linkages in Botswana's Diamond Cutting and Polishing Industry," 19.
[987] Letsema Mbayi, "Linkages in Botswana's Diamond Cutting and Polishing Industry," 21.
[988] Letsema Mbayi, "Linkages in Botswana's Diamond Cutting and Polishing Industry," 21.
[989] Letsema Mbayi, "Linkages in Botswana's Diamond Cutting and Polishing Industry," 21.
[990] Letsema Mbayi, "Linkages in Botswana's Diamond Cutting and Polishing Industry," 21.

succeeds. De Beers is now committed to making beneficiation succeed to avoid financial implications.[991]

Beneficiation has contributed to local employment since cutting and polishing diamonds is more labour-intensive than diamond mining.[992]Currently, the diamond cutting and polishing industry employ approximately three thousand workers, 94 per cent of whom are locals.[993] Also, the country's expertise in diamond polishing has increased, enabling its processed diamonds to compete in the international market.

4.3.2.6. Mineral Trading

Botswana is majorly dependent on its mineral resources and is thus intensifying efforts to diversify its economy away from diamonds. It has been encouraging investors to prospect for other minerals such as copper, nickel, silver, soda ash, chrome and salt.

As an export diversification strategy, the government of Botswana is supporting the establishment of a Multi-Commodity Exchange to take advantage of its locational and cooperative advantage. The Multi-Commodity Exchange will provide a platform to trade agricultural commodities, oil and metals across Africa.

The platform will eliminate the informal market structure dominated by intermediaries who distort market prices.[994] Further, the platform will enable buyers and sellers to trade together. It will boost intra-regional trade, thereby enabling Botswana to exploit the market opportunities offered by the Africa Continental Free Trade Area.[995]

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[991] Letsema Mbayi, "Linkages in Botswana's Diamond Cutting and Polishing Industry," 21.
[992] Letsema Mbayi, "Linkages in Botswana's Diamond Cutting and Polishing Industry," 7.
[993] Roman Grynberg, "Diamond Beneficiation in Botswana,".
[994] Staff Writer, "Botswana ready for a Multi-Commodity Exchange," *Botswana Business Weekly*, August 19,2022.
[995] Staff Writer, "Botswana ready for a Multi-Commodity Exchange,".

Other benefits of the platform include job creation, tax revenues and the transfer of technology and expertise to the country.

4.3.2.7. Fiscal Policy

The taxes that apply to mining are royalties, corporate tax of 22 per cent and withholding tax on dividends of 10 per cent. Other taxes applicable to other companies, such as Value Added Tax and Transfer Duty, also apply to mining companies.

A mineral concession holder must pay royalties to the Government on any mineral obtained under the mineral concession. The royalty payable is a percentage of the gross market value of the mineral type.[996] Therefore, the percentage payable varies with the mineral type. Ten per cent royalty is payable for precious stones such as diamonds, 5 per cent for precious metals such as gold and platinum, and 3 per cent for all other minerals such as copper, nickel and coal.

In addition to the royalty payable, mining companies are taxed using a variable rate income tax as opposed to the corporate income tax rate of 22 per cent of taxable profits payable by other companies.

The tax rate for the mining companies is, therefore, determined by the profitability of the mining company. The formula employed to determine the rate of tax is contained in the 12th Schedule of the Income Tax Act and is:-

$$\text{Annual Tax Rate} = 70 - \frac{1500}{X}$$

[996] The gross market value is defined as the sale value receivable at the mine gate in an arm's length transaction without discounts, commissions or deductions for the mineral or mineral product on disposal. An arm's length transaction is defined by the Mines and Minerals Act as transaction between a willing buyer and willing seller in the open market where the purchase price for the sale is not influenced by any special relationship or other arrangement between the parties to the transaction and is not affected by any non-commercial considerations and specifically excludes any barter, swap, exchange, or transfer price arrangements, restricted or distress transaction which is associated with special financial, commercial or other. See Section 66(3) and (6) of the of the Mines and Minerals Act.

where X is the profitability ratio, given by taxable income as a percentage of gross income.

Where the tax rate calculated following the formula is less than the corporate income tax rate of 22 per cent, the corporate income tax rate will be considered the minimum rate.[997]

This special taxation regime applies to all minerals except diamonds. Diamonds are taxed as per the agreement between the government and the investor.

One of the main benefits of such a special taxation regime for mining companies is that it ensures that the government can benefit from any windfall profits. However, it may lead to the mining licence holder implementing measures that enables it to move its profits outside the mining fiscal regime to the general corporate tax regime. For example, the licence holder may incorporate a company and contracts it to undertake all mining on its behalf. Thus, the licence holder's obligation is the service fee for the mining done on its behalf, while the company undertaking mining on its behalf pays corporate income tax under the general corporate income tax regime.[998]

In addition to the corporate income tax, the government of Botswana has invested in several mining companies such as Debswana, BCL, Tati Nickel and Botswana Ash, hence, a shareholder. As a shareholder in these companies, it is entitled to dividends. Also, the government benefits from withholding tax of 10 per cent on payments of dividends, interest and any surplus from the mine rehabilitation fund.[999]

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[997] PricewaterhouseCoopers (PwC), *Worldwide Tax Summaries*, accessed November 24, 2021, https://taxsummaries.pwc.com/botswana/corporate/taxes-on-corporate-income.

[998]Boriana Yontcheva et al., "Tax Avoidance in Sub-Saharan Africa's Mining Sector," (Working Paper, International Monetary Fund, volume 2021: issue 22, September 2021), 28, https://www.elibrary.imf.org/view/journals/087/2021/022/article-A001-en.xml.

[999] Deloitte Touche Tohmatsu, *Guide to Fiscal Information: Key Economies in Africa 202*1 (South Africa: Deloitte Africa Tax and Legal, 2021), 26, https://www2.deloitte.com/content/dam/Deloitte/za/Documents/tax/za-Deloite-Guide-to-fiscal-information-2021.pdf.

TABLE 3: GOVERNMENT'S INTEREST IN MINING COMPANIES IN BOTSWANA[1000]

MINING COMPANY	GOVERNMENT'S INTEREST
Debswana, jointly owned with De Beers	50%
Botash (soda ash producer)	50%
Tati Nickel Mining (placed on final liquidation on February 27, 2019	15%
De Beers	15%
BCL Limited (copper-nickel mine)- placed on final liquidation on June 15, 2017	94%
Diamond Trading Company Botswana	50%
Morupule Coal Mine (a subsidiary of Debswana). Indirect beneficiary shareholding	80.8%

To prevent tax avoidance through profit shifting, the government in July 2019 introduced transfer pricing legislation and thin capitalisation rules.[1001] Hence, if a transaction between a mining company and another related company is not at arm's length[1002], the income that would have accrued in a comparable arm's length transaction is considered the chargeable income. Also, where a foreign investor accesses financing

[1000] Onthisitse Melaetsa, "Is Taxation of Minerals in Botswana a Success Story- and what can other countries learn from this?" (Power-Point presentation, Principal Minerals Officer, Ministry of Minerals, Energy and Water Resources, 2012) , https://www.norad.no/globalassets/import-2162015-80434-am/www.norad.no-ny/filarkiv/5.-oks-2012---/is-taxation-of-minerals-in-botswana-a-success-story_min.-of-minerals-energy-and-water-resources.ppt.

[1001] Deloitte Touche Tohmatsu, *Guide to Fiscal Information: Key Economies in Africa 202*1, 27.

[1002] Meaning that one of the companies is not acting in its self-interest because of its relationship with the other company in the transaction.

from a related company at high-interest rates to reduce its profits, the thin capitalisation rules restrict the amount of interest on the debt.[1003]The disallowed interest may be carried forward for deduction in the following ten tax years.[1004]

Other taxes applicable to mining companies include Value Added Tax where the annual turnover is at least one million Botswanan Pula (approximately seventy-four thousand six hundred United States Dollars) and transfer duty, payable by a purchaser of property on the purchase price or value of an immovable property.[1005]Transfer duty is waived where VAT is paid.[1006]Transfer duty payable is higher for non-citizens. Non-citizens pay 30 per cent of the purchase price or value of the property for both agricultural and non-agricultural property, while citizens pay only 5 per cent.[1007]

To attract foreign investors, the government has several tax incentives. A mining company may approach the government and negotiate for tax incentives. These tax incentives include the Development Approval Order, which is available for any project that will benefit the economic development of Botswana and generate employment.[1008] This relief may take any form, so the investor and the government must negotiate the terms.

There is also the mining capital allowance, where 100 per cent of mining capital expenditure is allowed as a deduction in the year of expenditure.[1009]

[1003] Deloitte Touche Tohmatsu, *Guide to Fiscal Information: Key Economies in Africa 202*1, 27.
[1004] Deloitte Touche Tohmatsu, *Guide to Fiscal Information: Key Economies in Africa 202*1, 27.
[1005] Deloitte Touche Tohmatsu, *Guide to Fiscal Information: Key Economies in Africa 202*1, 28.
[1006] The Botswana currency is known as Botswanan Pula. One (1) United States Dollar is equivalent to 11.55 Botswanan Pula
[1007] Deloitte Touche Tohmatsu, *Guide to Fiscal Information: Key Economies in Africa 202*1, 28.
[1008] Deloitte Touche Tohmatsu, *Guide to Fiscal Information: Key Economies in Africa 202*1, 29.
[1009] Deloitte Touche Tohmatsu, *Guide to Fiscal Information: Key Economies in Africa 202*1, 29.

Other fiscal policies that attract foreign investors in Botswana include the absence of foreign exchange controls; thus, foreign investors may import or export capital and foreign currency without restrictions.[1010] Also, there is no restriction on the repatriation of profits by foreign investors.

In addition, foreign investors can carry forward losses for an unlimited duration. Hence, foreign investors can move a current year's net operating loss to a future year's profit, thereby reducing the future year's profit . This leads to lower taxable income in the future year hence a reduction in the tax payable.

Finally, the government established a Sovereign Wealth Fund (SWF) known as the Pula Fund in 1994 to preserve some of the income from the export of diamonds for future generations.[1011] Foreign exchange reserves that are more than what is estimated to be required in the medium term are also transferred to the Fund.[1012] In 1996, the Bank of Botswana Act Chapter 55:01 formalised the establishment of the Fund without expressly linking it to diamond revenues or savings for future generations.[1013] The Bank of Botswana invests the Fund in foreign fixed-income and equity investments only at the ratio of 50 per cent in fixed income, 45 per cent in equities, and 5 per cent in high-yielding opportunities.[1014]The government may vary this ratio.

The Fund is not a separate legal entity but is housed and managed within the Bank of Botswana, the central bank.[1015] It has a Government Investment Account, which is controlled by the government and a

[1010] Deloitte Touche Tohmatsu, *Guide to Fiscal Information: Key Economies in Africa 202*1, 29.
[1011] "Pula Fund," Bank of Botswana, accessed February 10, 2022, https://www.bankofbotswana.bw/content/pula-fund.
[1012] In periods where the government experiences surpluses in the balance of payments generated from export of rough diamonds, the surplus is accumulated in the foreign exchange reserves.
[1013] Chelsea Markowitz, "Sovereign Wealth Funds in Africa: Taking Stock and Looking Forward," (Occasional Paper 304, South African Institute of International Affairs, January 2020), 19, https://www.africaportal.org/publications/sovereign-wealth-funds-africa-taking-stock-and-looking-forward/.
[1014] Chelsea Markowitz, "Sovereign Wealth Funds in Africa: Taking Stock and Looking Forward," 19 and 22.
[1015] Chelsea Markowitz, "Sovereign Wealth Funds in Africa: Taking Stock and Looking Forward," 20.

Foreign Reserves Account, which the government has entrusted the Bank of Botswana to manage. [1016]

According to the 2012 Bank of Botswana Annual Report, the Fund operates as both a savings and stabilisation fund.[1017] Concerning fiscal savings, the government is prohibited by the Expenditure Rules from spending more than 40 per cent of GDP in a given year. This enables the government to save. Any fiscal savings are transferred to the government's portion of the Pula Fund.

With regard to the Fund's operations as a stabilisation fund, it has been used to stabilize fiscal expenditures in periods where diamond revenues have dropped sharply, fund budget deficits to avoid raising taxes and establish and fund the national public pension fund. [1018]This has been possible because the Fund has no explicit withdrawal restrictions.[1019]

All revenue collected by the government from the mining sector is deposited in the National Treasury and, after that, distributed per national development priorities.[1020]

4.3.3. Institutional framework

The primary mining institution is the Ministry of Mineral Resources, Green Technology and Energy Security, which has six departments. Three of the departments deal with mining-related matters. They are the Department of Mines, the Mineral Affairs Division and the Diamond Hub.[1021]

[1016] World Bank Group, *Botswana Mining Investment and Governance Review*, (Washington DC: World Bank Publications, August 2016), 19, https://openknowledge.worldbank.org/bitstream/handle/10986/25225/109316.pdf?sequence=8&isAllowed=y.
[1017] Chelsea Markowitz, "Sovereign Wealth Funds in Africa: Taking Stock and Looking Forward," 22.
[1018] Chelsea Markowitz, "Sovereign Wealth Funds in Africa: Taking Stock and Looking Forward," 22.
[1019] Chelsea Markowitz, "Sovereign Wealth Funds in Africa: Taking Stock and Looking Forward," 22.
[1020] World Bank Group, *Botswana Mining Investment and Governance Review*, 8.
[1021] "About Government: Ministries and Agencies - The Ministry of Mineral Resources, Green Technology and Energy Security," Government of Botswana, accessed February 10, 2022, https://www.gov.bw/ministries/ministry-mineral-resources-green-technology-and-energy-security-mmge.

The mandate of the Department of Mines is to ensure that mineral resources are prospected, developed and exploited sustainably; enhance the benefits of the mineral sector to the country; and monitor compliance of mining companies to legislation and policies governing the mining sector.[1022]

Gathering market intelligence in the mining sector is vital because the data collected is useful for planning and decision-making. For this reason, the Mineral Affairs Division is tasked with market intelligence and promoting mineral investment. It is also responsible for developing, implementing and monitoring policies for the mining sector.[1023]

The other key department is the Diamond Hub, which coordinates the development of diamond beneficiation industries and regulates diamond beneficiation operations in Botswana.[1024] The department is also responsible for overseeing the implementation of the Kimberly Process Requirements[1025] and providing business development services.[1026]

The parastatals under the ministry, which are relevant to the mining sector, are the Minerals Development Company Botswana, the Botswana Geoscience Institute and the Okavango Diamond Company.

The Minerals Development Company Botswana is the government's mining investment vehicle whose mandate is to hold and manage its

[1022] "About Government: Ministries and Agencies - The Ministry of Mineral Resources, Green Technology and Energy Security,".
[1023] "About Government: Ministries and Agencies - The Ministry of Mineral Resources, Green Technology and Energy Security,".
[1024] "About Government: Ministries and Agencies - The Ministry of Mineral Resources, Green Technology and Energy Security,".
[1025] The Kimberly Process is a commitment to remove conflict diamonds (rough diamonds used to finance wars against governments around the world) from the global supply chain. Thus, it brings together governments, civil societies and industry to reduce the flow of conflict diamonds. Botswana became a member in 2003.See "What is the Kimberley Process?", Kimberly Process, accessed February 10, 2022, https://www.kimberleyprocess.com/en/what-kp
[1026] "About Government: Ministries and Agencies - The Ministry of Mineral Resources, Green Technology and Energy Security,".

mining and mineral assets.[1027] It can invest in and out of Botswana to grow, optimise and diversify the mining and minerals portfolio.[1028] It also provides commercial and technical advisory services to the government.[1029] Currently, it has interests in De Beers Group, Morupule Coal Mine, and Minergy Coal.

The Botswana Geoscience Institute was established in 2014 through the Botswana Geoscience Institute Act No.29 of 2014 following the closure of the Department of Geological Survey.[1030] It is responsible for geoscience research for mineral exploration, provision of specialised geoscientific services, custody of geoscience information, advising on matters of geoscience and geohazards, geohazards management, and promoting sustainable exploration of minerals in Botswana.[1031]Currently, most of the country has been mapped, and a library of geological data has been developed.

Okavango Diamond Company is another parastatal under the Ministry of Mineral Resources, Green Technology and Energy Security whose role is the marketing of rough diamonds. Thus, it is an important supplier of diamonds sourced from Botswana, selling approximately five hundred million dollars per annum.[1032]

The Ministry of Mineral Resources, Green Technology and Energy Security is supported by other ministries and institutions relevant to the mining sector, such as the Ministry of Environment, Natural Resources

[1027] Chamber of Commerce, Industry and Agriculture, "Doing Business in Botswana: Business Climate and Opportunities." A presentation by Minerals Development Company Botswana during the webinar workshop held on September 21 2021. https://cbl-acp.be/webinar-investment-opportunities-in-botswana-september-2021/.
[1028] Chamber of Commerce, Industry and Agriculture, "Doing Business in Botswana: Business Climate and Opportunities."
[1029] Chamber of Commerce, Industry and Agriculture, "Doing Business in Botswana: Business Climate and Opportunities."
[1030] "Our History," Botswana Geoscience Institute, accessed February 10, 2022, https://www.bgi.org.bw/our-history.
[1031] "Strategic Priorities," Botswana Geoscience Institute, accessed February 10, 2022, https://www.bgi.org.bw/strategic-priorities.
[1032] "About," Okavango Diamond Company, accessed February 10, 2022, https://www.odc.co.bw/.

Conservation and Tourism, Botswana Unified Revenue Service and the Botswana Chambers of Mines, and the judiciary.

Botswana's mining institutions are stable and efficient; hence they have managed the country's mineral resources and revenue transparently and prudently. This is evidenced by its favourable ranking by the Ibrahim Index of African Governance (IIAG) of 2020 on the different sub-categories of the assessment, such as the absence of corruption in state institutions and the public sector, equal access to public services, institutional checks and balances, and accessibility to information. It ranked position five out of fifty-four (66.9 per cent) in overall governance; position three in security and the rule of law; position five on transparency and accountability; and position five on anti-corruption.[1033]

4.3.4. Key lessons from Botswana

Since independence, Botswana's government has enjoyed legitimacy. This has contributed to the economic success of its mining sector because of the low level of conflict and good governance. As a result, the government has been able to develop sound public policies and legislation for the mining sector and effectively implement them without political interference.

One of the lessons from Botswana is that it has a streamlined licencing procedure with clear timelines except with regard to a retention licence. Including timelines for processing licences creates certainty, which increases investor confidence. Also, the investor can appeal where timelines are not adhered to. Another critical lesson with regard to the licencing procedure is the automatic progression from exploration to mining hence security of tenure. This is important as it also increases investor confidence.

On dispute resolution, Botswana encourages peaceful and expedited resolution of disputes through arbitration. This is important as it protects

[1033] IIAG 2020 index report. https://mo.ibrahim.foundation/iiag.

an investor from interruptions by the community of its mineral exploration and production due to disputes, especially concerning land rights and land use.

There are also significant lessons from Botswana's fiscal policy. Botswana's economy has benefited from the government's involvement in mining activities by acquiring shares in mining companies. This strategy increases the government's economic rent. Also, enacting legislation such as transfer pricing legislation and thin capitalisation rules has enabled the government to reduce profit shifting, thus further increasing its revenue from the mining sector. Additionally, the Pula Fund and the expenditure rules are also important fiscal policies as they encourage the government to monitor its spending, save and cushion itself from economic shocks when the prices of minerals decline in the world market or when economic growth is below average.

The importance of value addition is evident in Botswana. Including the requirement of value addition in the new contract with De Beers after the expiration of their initial contract ensured that De Beers commits to value addition. Consequently, diamond beneficiation is now being undertaken in Botswana. The benefits experienced so far are job opportunities for locals and improved diamond cutting and polishing skills, making diamond processed in Botswana competitive in the international market.

From Botswana's experience, export diversification is an essential policy for the success of the mining sector. Botswana has not diversified its exports, as the mineral sector accounts for 80 per cent of its exports earnings.[1034] This makes the economy vulnerable to a decline in the prices of minerals in the world market as the revenue is negatively affected. Additionally, failure to diversify exports contributes to raising unemployment in Botswana as the mining sector worldwide is slowly

[1034] World Bank Group, *Botswana*.

automating hence requiring few workers. Currently, 17.7 per cent of the labour force is unemployed.[1035]

Other lessons include Botswana's environmental requirements, which align with international standards, and local content requirements. The local content requirements encourage the use of local goods, services and labour. In particular, certain services have been reserved for citizen contractors, such as drilling, catering, and supply chain.

4.4.CONCLUSION

The experiences of Chile and Botswana have brought out practices that are key in ensuring that a balance is achieved between the interests of investors and the host state. Both countries have managed to attract foreign investors and achieve economic growth due to the mining sector. Indeed, the government and foreign investors have benefited from the mining sector.

The best practices have been identified from the study of the regulatory framework of the two countries and summarised under key lessons. Some of the best practices identified include clear licencing procedure with timelines; security of tenure with regard to the acquisition of licences; dispute resolution through arbitration; value addition; export diversification; transparency and accountability of mining institutions; adherence to sound environmental practices; good fiscal regime; upholding property rights; promoting local content; promoting research and development; greening mining, embracing technology and good governance.

The following chapter will examine Kenya's regulatory framework in the context of the identified best practices to establish whether it strikes the right balance between the interest of the host state and that of foreign investors.

[1035] This is the 2020 unemployment figure. See "Botswana: Unemployment Rate from 2002 to 2021," Statista, accessed February 12, 2022, https://www.statista.com/statistics/407807/unemployment-rate-in-botswana/.

CHAPTER 5

5. BALANCING GOVERNMENT'S DUTY TO PROTECT FOREIGN INVESTMENTS AND ITS SOVEREIGN RIGHT TO REGULATE IN THE PUBLIC INTEREST: AN ANALYSIS OF KENYA'S REGULATORY FRAMEWORK AGAINST IDENTIFIED BEST PRACTICES

5.1.INTRODUCTION

Articles 61 and 62 of the Constitution of Kenya[1036] introduced the public trust doctrine in Kenya by providing that all minerals and mineral oils belong to the people of Kenya collectively as a nation, as communities and as individuals and are held by the national government for the people of Kenya. The doctrine is also provided for in Section 6 of the Mining Act, which provides that all mineral resources in Kenya are the property of Kenya and are vested in the national government in trust for the people of Kenya.

Therefore, the national government has been conferred with the obligation to act as either trustee or custodian of the mineral resources in Kenya while the mineral resources have been bequeathed to the people of Kenya.

In this regard, the government is required to take affirmative action for the effective management of resources. On the other hand, the citizens are empowered to question the ineffective management of mineral resources.[1037] Therefore, the government must ensure that its citizens, both current and future generations, benefit from the mineral resources

[1036] The current Constitution of Kenya was promulgated on August 27, 2010. It replaced the 1969 Constitution which had replaced the 1963 independence constitution.
[1037] Divyashree Baxipatra, "Failure of the States as Public Trustees of Mineral Resources".

and that it is publicly accountable for any decisions concerning the said resources.[1038]

The best way for the government to effectively manage mineral resources following the public trust doctrine is by ensuring its interests are protected through legislation. An analysis of the various national policies and legal documents in chapter two established that the national government, as the custodian of the mineral resources, is keen to utilise the mining sector to accelerate the socio-economic growth of the country in a sustainable, inclusive, equitable, accountable and environmentally friendly manner hence improve the quality of life of its citizens, both the current and future generations. Indeed, this is in line with the public trust doctrine. Thus, FDI is important for Kenya provided that it leads to sustainable development across all sectors.

The study of Chile and Botswana's mining sector regulatory framework has provided great lessons for mineral-rich developing countries on value addition, local content requirements, policy space, multi-sectoral collaboration, export diversification, and fiscal design and revenue management.

Indeed, the two developing countries have managed to encourage FDI while at the same time protecting and managing the wealth from the mining sector for the benefit of both the current and future generations. Nevertheless, they have also faced challenges that offer great lessons for Kenya.

This chapter juxtaposes Kenya’s regulatory framework discussed in chapter three with the identified best practices and lessons discussed in chapter four to establish whether it strikes the right balance between the interest of Kenya and that of foreign investors identified in chapter two.

[1038]Divyashree Baxipatra. “Failure of the States as Public Trustees of Mineral Resources”.

5.2.BEST PRACTICES

5.2.1. Enhancing Value Addition

According to the experience of Chile and Botswana, it is vital for the government to not only seek to optimise revenue collected from the mining sector, such as royalty, corporate income tax, profit share, dividends and licence fees but also strengthen the linkages between the mining sector and the rest of the economy through the processing of its raw minerals both at the upstream and downstream of the sector.

Upstream value addition entails enhancing the economic value of extracted minerals through processing or refining, for example, by washing, sizing and polishing of gemstones; separation, extraction and refining of metallic minerals; and refining gold through an accredited refinery.

Value addition in the downstream mining sector, on the other hand, entails manufacturing products from the minerals for the end user, such as jewellery from gemstones; building materials, for example, tiles from rock materials; electronic and steel from metallic minerals; and soap and drugs from non-metallic minerals.

Upstream and downstream value addition has both short-term and long-term benefits for Kenya. The short-term benefits are increased government revenue from the minerals, job opportunities, skills transfer, technology transfer, enhanced research, development and training in the mining sector, and spillover benefits to related industries. For example, Botswana's diamond cutting and polishing industry employ approximately three thousand workers, 94 per cent of whom are locals.[1039] The causal sequence is skills and technology transfer. Indeed, since the commencement of diamond beneficiation in Botswana, the quality of cut and polished diamonds exported from Botswana to the international market has increased.

[1039] Roman Grynberg, “Diamond Beneficiation in Botswana”.

Currently, the Mining Act has only two provisions on value addition. Section 117(2) of the Act requires value addition for investments that may exceed five hundred million United States dollars. For such investments, the Mineral Right Agreement must have a provision requiring that the whole or part of the minerals produced be processed in Kenya.

The other provision is section 171(5), which requires the Cabinet Secretary responsible for the mining sector to make regulations to govern value addition on minerals. These regulations are yet to be developed. Consequently, no value addition is required for foreign investments in the mining sector below five hundred million United States dollars. Hence, the minerals may be exported in their raw form.

Despite the limited value addition requirement and the lack of regulation on value addition, the government has been actively promoting and investing in value addition in the mining sector. As discussed in chapter 2, the government constructed and is currently equipping and operationalising the Gemstone Value Addition Centre in Taita Taveta County. Other value-addition projects the government is developing include the Granite Processing Plant in Vihiga County, a government-accredited gold refinery in Kakamega County, and a gypsum product manufacturing plant in Garissa County.[1040] In addition, the Ministry of Mining, Blue Economy and Maritime Affairs established a Directorate of Mineral Promotion and Value Addition under the State Department of Mining to deal with matters of value addition and promotion of minerals in the mining sector.

Indeed, value addition on gemstones, industrial minerals such as tourmaline and mineral sands would significantly benefit the country. Gemstones and industrial minerals are currently being extracted in Taita Taveta County. They are usually exported with minimal or no value

[1040] Medium Term Plan 2018-2022 at page xxii and 67.

addition. Value addition of gemstones by washing, sizing and polishing them and, after that, producing high-quality jewellery would significantly benefit the country through increased revenue, jobs for its citizens, and technology and skills transfer.[1041]

Similarly, mineral sands[1042] containing titanium minerals, namely rutile, ilmenite, and zircon, currently mined by Base Titanium Limited in Kwale County, would significantly benefit the country if value addition is undertaken.[1043] The titanium minerals ilmenite and rutile are used as raw materials to produce pigment for paint, paper and plastics.[1044]Also, titanium is used in toothpaste, sunscreen, and the production of titanium metal which is used to make medical products such as titanium knee caps for knee replacement surgeries and sporting goods.[1045] Zircon, another by-product of mineral sand, is used primarily in the production of ceramic tiles. It enables the manufacturers of ceramic tiles to achieve brilliant opacity, whiteness and brightness in the glaze and body of their products.[1046]

Base Titanium Limited, through its 100 per cent owned Kwale Mineral Sands entity, only undertakes mineral separation through its mineral separation plant, which cleans and separates the rutile, ilmenite and zircon.[1047] The minerals are, after that, exported in the form of concentrates. If value addition is undertaken, the country will benefit more through increased revenue, jobs for its citizens, technology and

[1041] The gemstones should be well-cut to international standards to compete in the local, regional and international markets. Cutting gemstones to international standards requires specialised skills. Hence, the government should invest in developing the capacity of the country's labour force in this area through training and exchange programmes.
[1042] Old beach and dunal sands.
[1043] These minerals are physically heavy, hence, are also referred to as heavy minerals. See "Base Resources Mineral Sands Fact Sheet: About Mineral Sands," Base Titanium, accessed March 16, 2022, https://basetitanium.com/
[1044] "Base Resources Mineral Sands Fact Sheet: About Mineral Sands," Base Titanium.
[1045] "Base Resources Mineral Sands Fact Sheet: About Mineral Sands," Base Titanium.
[1046] "Base Resources Mineral Sands Fact Sheet: About Mineral Sands," Base Titanium.
[1047] "Base Resources Mineral Sands Fact Sheet: About Mineral Sands," Base Titanium.

skills transfer, and affordable inputs for its manufacturing and construction industries.

Given the above, the government should develop a national value addition strategy to ensure that the state maximises the opportunities created through value addition and factors foreseeable challenges such as Kenya's competitive advantage[1048] and the effect of investing in value addition on other sectors of the economy. These two challenges are related.

Concerning the challenge of competitive advantage, Kenya does not have a comparative advantage in resource processing. Therefore, it must create a competitive environment for raw mineral processing by introducing policies that favour value addition to complement the heavy capital investment it is currently undertaking. Some factors the government should consider are making labour affordable, providing competitive energy costs, reducing capital risks, improving infrastructure, ensuring ease of doing business, favourable taxes and other fiscal and non-fiscal investment incentives. For example, the greening mining initiative in Chile, which is currently ongoing at Chile's Atacama Desert, will enable the country to have a cheap, permanent, reliable and sustainable source of electricity hence reducing the cost of production and operations across all sectors of the economy. Kenya can reduce its energy costs through similar renewable energy production projects.

With regard to the effect of investing in value addition on other sectors of the economy, the government should introduce value addition activities progressively to avoid straining government resources, thus affecting other sectors that Kenya has a comparative advantage. Since the government has already invested significantly in value addition infrastructure by constructing Value Addition Centres across the country,

[1048] Comparative advantage is an international trade theory that advocates that countries should focus and allocate more resources on goods that it is most efficient in producing.

it should focus on supplying the domestic market and the region instead of the larger international market. Hence, its priority should be mineral value addition that can be consumed locally by other sectors of the economy and, in the region, using the infrastructure and equipment in place. Once it has established itself locally, and in the region, it can expand to other international markets. This will ensure that the state reaps the benefits of value addition immediately without making further capital investments that would strain other sectors of the economy.

The proposed value addition strategy is vital as it will inform the revision of section 117(2) of the Mining Act, whose provision on value addition is inadequate. The strategy will also guide the development of a value addition regulation contemplated in section 171(5) of the Mining Act.

Some of the value addition strategies include incorporating a provision in the Mining Act restricting the export of raw minerals as an additional consideration for the grant of a mineral right. Generally, restricting the export of raw minerals will ensure that value addition activities are undertaken both upstream and downstream of the mining sector.

Botswana achieved this by building a diamond sorting centre in 2006 near Gaborone airport and, after that renegotiating the conditions of the De Beers mining licence during the renewal of its mining licence to include the requirement of value addition.[1049] Consequently, the government and De Beers established the Diamond Trading Company in 2008, an equal ownership joint venture. Under the joint venture agreement, the Diamond Trading Company must sell a minimum of 500 million US dollars a year worth of diamonds to the local cutting and polishing industry and create over three hundred jobs.[1050]

[1049] Letsema Mbayi, "Linkages in Botswana's Diamond Cutting and Polishing Industry," 21. See also Christopher Le Bec, "Botswana-South Africa: The Secret behind their Diamond Wedding," *theafricareport,* July 22, 2021.
[1050] Letsema Mbayi, "Linkages in Botswana's Diamond Cutting and Polishing Industry," 21.

Another value addition strategy is the value addition of locally extracted minerals and minerals from the region. Kenya is surrounded by resource-rich neighbours and geographically advantaged in terms of accessibility through sea, air, and road. Also, it has improved infrastructure such as rail, road and air transport; stable supply of electricity and information, communication and technology; improved ranking in ease of doing business ranking; an independent judiciary; and a stable political environment. These positive attributes make Kenya a suitable location for being the East and Central Africa Region Value Addition Hub.

Also, the strategy should provide for the extension of the services offered by the proposed value addition centres so that they also provide marketing services and other relevant services such as mineral export logistics services and market intelligence gathering. These services will enhance the mineral value addition industry in Kenya and make the products from the value addition centres competitive in the international market.

For example, since 2011, De Beers' diamond sales functions were moved from London to Gaborone. Hence, the rough stones are no longer shipped to London but sold through Botswana's Diamond Hub, which was established to transform Botswana into a competitive diamond centre.[1051] The Diamond Hub offers facilities and services for the diamond industry, such as cutting and polishing, trading rough and polished diamonds, banking and secure transport.[1052]Sorted diamonds from Botswana mines managed by De Beers and those from Namibia, South Africa and Canada are transported by air to Gaborone and marketed from there.[1053]

[1051] Christopher Le Bec, "Botswana-South Africa: The Secret behind their Diamond Wedding,".
[1052] "The World-Class Diamond Hub", *European Times*, https://the-european-times.com/diamond-hub/.
[1053] Christopher Le Bec, "Botswana-South Africa: The Secret behind their Diamond Wedding,".

Similarly, in Chile, the government-owned ENAMI offers mineral processing, smelting, refining, and marketing services.[1054]

Finally, the strategy should consider ways of encouraging local and foreign investors to invest in value addition by providing for the planning, financing and development of infrastructural projects that support value addition. Establishing a value addition entity and appropriate infrastructure for linkage development is capital-intensive. Also, specialised skills are required to produce high-quality and competitive products. Local investors should be supported to engage in value addition through affordable financial facilities, skilled labour training, market intelligence, and publicity for the industry.

Skilled personnel training is undergoing under the Botswana Diamond Trading Company local beneficiary programme. Approximately ninety-two local sightholders, responsible for evaluating the commercial potential of the diamonds, have in the past been trained for five to ten years. The training was undertaken by international experts who used to work for De Beers in London.[1055] Each sightholder specialises in a market segment for marketing purposes. The training enhanced their skills in marketing and the sale of diamonds.[1056]

Indeed, the proposed value addition strategy will be instrumental in informing the revision of section 117(2) of the Mining Act, as discussed above. Further, it will guide the Cabinet Secretary responsible for mining in developing the value addition regulations contemplated under section 171(5) of the Mining Act.

[1054] Japan International Cooperation Agency (JICA) and Empresa Nacional de Mineria (ENAMI), *Environmentally-Friendly Operation of Mineral Processing Plant Using Biotechnology in the Republic of Chile Report*, 2-5.
[1055] Christopher Le Bec, "Botswana-South Africa: The Secret behind their Diamond Wedding,".
[1056] Christopher Le Bec, "Botswana-South Africa: The Secret behind their Diamond Wedding,".

5.2.2. Local Content Requirements

Local content requirements encompass issues of procurement of local goods and services and employment of citizens of a host state. It is estimated that between 40 and 80 per cent of the revenue generated in mining is spent on procuring goods and services.[1057] Therefore, increasing the proportion of goods and services procured locally increases linkages between foreign investments and the local economy through domestic employment opportunities and improved industrial performance.

Currently, the Mining Act is the only legislation in Kenya providing for local content in the mining sector. As discussed in chapter 3, the Act has provisions requiring mineral rights holders to procure local goods and services from domestic suppliers provided that they are equal in quality, quantity and price to, or better than, goods and services that are obtainable outside the country.[1058] Also, the Act provides for the employment and training of locals.[1059]

In particular, a procurement plan and a plan for the employment and training of Kenyans must be submitted when applying for a mineral right.[1060] Upon issuing a licence, the approved plans form part of the conditions or obligations of the licence.[1061]

Adherence to the plans is monitored through yearly or half-yearly reports by the mineral rights holder to the Director of Mines.[1062] The Act criminalises making false and misleading statements in the reports and

[1057] Richard Dobbs et al., "Reversing the curse: Maximizing the potential of resource-driven economies," *McKinsey Global Institute Report*, December 2013, 13.
[1058] Regulation 5 of the Mining (Use of Local Goods and Services) Regulations, 2017.
[1059] Mining (Employment and Training) Regulations, 2017.
[1060] Regulation 6(1) of the Mining (Use of Local Goods and Services) Regulations, 2017 and Regulation 5(1) of the Mining (Employment and Training) Regulations, 2017.
[1061] Regulation 5 and 6 of the Mining (Use of Local Goods and Services) Regulations, 2017. Regulation 5(6) of the Mining (Employment and Training) Regulations, 2017.
[1062] Regulation 5(6), (7) and 10(1) of the Mining (Employment and Training) Regulations, 2017.

other related offences, such as failure to keep records required by the Act and fraudulently altering records.[1063]

Concerning research and development, the Mining Act provides that one year after issuance of the licence, the investor must submit to the director of mines a programme for the promotion of education, research and development.[1064] Investing in education and research and development (R&D) is important because it promotes export diversification. For example, Chile has substantially invested in mining education in Science, Technology, Engineering and Mathematics (STEM), technology and research and development. This has enabled local producers and suppliers to increase their capacity to compete in local and international markets. Notably, CODELCO has mining innovations which are currently undergoing extensive testing. Particularly, in 2019, it started testing its invention, the "uncrushable detector", which detects and extracts elements that may affect the operations of a crushing unit.[1065]

According to the Mining Act, local content requirements are monitored by the Department of Mines through mandatory reporting. Mandatory reporting contributes to the transparency and accountability of the mining industry, enables the government to monitor industry compliance with local content requirements and assists the mining companies in tracking their progress in contributing to the sustainable development of host communities and creating more inclusive workplace cultures.[1066]

Unfortunately, according to information obtained from the Department of Mining, reporting by mining companies is not being done.[1067] The department indicated that the lack of adequate financial resources to cater for the administrative costs to review reports and tabulate data across

[1063] Section 206(1) of the Mining Act, Act No. of 2016.
[1064] Regulation 9(2) of the Mining (Employment and Training) Regulations, 2017.
[1065] CODELCO, *Annual Report*, 2019, 47 and 48.
[1066] Intergovernmental Forum on Mining, Minerals, Metals and Sustainable Development (IGF), *Case Study- Chile: Direct Employment,* 31.
[1067] Department of Mines Interview Checklist.

projects is one of the reasons why the department is not monitoring and enforcing compliance.

This difficulty can be addressed in two ways. One, having a specialised local content agency or automating the reporting component by developing a centralised reporting system managed by the Department of Mines or the specialised local content agency. Data acquired through mandatory industry reporting can be fed into the system for analysis. From the analysis of Chile's mining industry in the previous chapter, Chile has embraced technology in the mining industry to deal with processing large amounts of data. The Department of Mines should learn from Chile and embrace digital solutions to deliver on its monitoring and enforcement mandate regarding local content requirements.

With regard to having a specialised local content agency, the Mining Act should be amended to establish the agency. The principal mandate of the agency will be monitoring and auditing compliance with the local content requirements prescribed in the Act. Other responsibilities of the agency will be (1) developing policies and measures to improve local content and (2) progressively enhancing the capabilities of local enterprises to compete effectively on quality, quantity, price and dependability in the supply of required goods and services.

For example, the agency may gather knowledge of the resource supply chain to get data on the status of the total value in terms of revenue and employment.[1068] The government may, after that, utilise this information to create an environment that promotes the achievement of local content requirements through establishing structures and programmes that support, for example, skills development of the local suppliers to meet required industry standards, financing opportunities and development of supplies infrastructure.

[1068] Richard Dobbs et al., "Reversing the curse: Maximizing the potential of resource-driven economies," 15.

Also, Section 221 of the Mining Act and Regulation 12 of the Mining (Use of Local Goods and Services) Regulations,2017, empower the Cabinet Secretary responsible for mining to publish and disseminate guidelines on local content requirements. Hence, the Cabinet Secretary should publish and disseminate guidelines to reserve specific categories of goods and services to citizen contractors, such as drilling, catering, security and supply of foodstuff, oil, and lubricants. In addition, the guidelines should provide percentage targets for local purchases of goods and services not in the reserved categories.

5.2.3. Human Capital Development and Research and Development(R&D)

For local content requirements to significantly impact the local economy, human capital and R&D must be enhanced. As indicated in the previous section, the Act requires the mineral right holder to undertake capacity building of its employees.[1069] Thus, the local content provisions in the Act are focused on the employment and training of employees within the establishment of the mineral rights holder. With the extractive industry becoming increasingly automated, direct employment opportunities and their skills enhancement may cease to be a viable aspect of local content in the coming future.

Foreign investors in the mining sector are investing more in mining technology to increase production. Indeed, with improved mining technology, the mining sector now demands higher skills hence highly skilled labourers. Therefore, it is vital for host states to introduce a policy shift and focus on developing linkages between foreign investors in the mining sector and domestic industries for purposes of enhancing indirect employment opportunities.

In this regard, the policy focus for Kenya should be to invest in R&D, innovation institutions and human capacity development in R&D and

[1069] Section 47(2) of the Mining Act.

innovation. Building R&D capabilities takes time, commitment and consistency.

The Chilean government began earnestly investing in R&D in the mining sector in 1967 by establishing research institutions, research funds and centres of scientific research and excellence. The establishment of R&D institutions was done simultaneously with human capital development since the local human capacity to undertake research was vital. This was done in different ways, such as incorporating mining programmes and courses that adapt to technological changes in the mining industry at both University and College levels and providing government scholarships to undertake master and postgraduate programmes locally and abroad for the citizens. Consequently, the government created links and associations between research institutions and mining companies to tap into the technological know-how of foreign companies operating in Chile.

Kenya's current mining regulatory framework is inadequate to promote human capital development and R&D. Human capacity development and R&D are not coordinated and results are not measurable. The Mining Act should be amended to establish a mining research and development fund. Mining companies will be required to contribute a prescribed percentage of their income to the fund. The fund will be utilised to establish innovation hubs, fund research and development in Kenya's universities and colleges and offer scholarships to build human capacity in innovation and R&D. There should also be a requirement for the creation of links and associations between local institutions of higher education and foreign mining companies for purposes of skills, knowledge and technology transfer. A monitoring and evaluation mechanism for the partnerships created should also be legislated to ensure compliance.

The long-term objective of these provisions is to enhance human capacity in mining technology and innovations for local consumption and export to the region and beyond.

5.2.4. Trade in minerals

As an economic diversification strategy, Botswana positioned itself as a regional diamond trading hub. This economic activity is gaining traction and will eventually contribute to increased revenue from the mining sector for Botswana. Another economic diversification strategy that the Botswana government supports is the establishment of a Multi-Commodity Exchange to take advantage of its locational and cooperative advantage. The Multi-Commodity Exchange will provide a platform to trade agricultural commodities, oil and metals across Africa.

Similarly, Kenya can position itself as the region's mineral and metals trading hub. The government of Kenya has invested heavily in infrastructure and its institutions, both public and private. Notably, transport infrastructure has undergone significant upgrades over the past five years, with the opening of the Northern and Southern Bypass and the Nairobi Express Way to decongest traffic in the city. Also, the Standard Gauge Railway from Mombasa to Nairobi has been operational for over five years and offers cargo and passenger rail transport services. For local air transport, there are local flights flying daily across the key counties.

In addition, global connectivity is easy with daily international flights to Nairobi from different countries. Further, Kenya adheres to the rule of law and has an independent judiciary that has embraced alternative dispute resolution for commercial matters. Also, the Nairobi Center for Dispute Resolution and the Chartered Institute of Arbitrators-Kenya Chapter are key institutions promoting alternative dispute resolution in civil and commercial disputes.

In the hospitality sector, which is vital for international business, international Hotel brands such as the Sheraton and Best Western have a presence in the country. There is also good internet connectivity, reliable financial institutions, and a democratic government. All these attributes and the favourable geographical location of the country are significant for making Kenya a global mineral and metals trading hub in Africa.

Kenya should take advantage of its positive commercial attributes to position itself as the Regional Mineral and Metals Trading Hub, which matches buyers and sellers and allows for re-export with minimal or no import and re-export tariffs. The gains for the country from being a trading hub will be foreign exchange by restricting trading to be in US Dollars, increased visibility of the country as a suitable investment destination, and increased business for the tourism and hospitality industry, transport services, logistic services, communication industry, and financial institutions.

This can be achieved by establishing a Mineral and Metals Commodity Exchange in Kenya. The Exchange will provide an organised marketplace for buyers and sellers in the region to trade in minerals and metals under strict rules set by the Exchange. Instances of money laundering, corruption, and terrorism linked to the mining sector will significantly be minimised.

Commodity exchanges have been established in different countries, both developed and developing, because of the benefits they offer. In particular, a commodity exchange sets the contract conditions except for the price and therefore provides a transparent and disciplined marketplace.[1070] In addition, it provides security on the quality and quantity of commodity traded, sets grades and standards, guarantees delivery of the goods, may guarantee logistics and has a mechanism for dispute settlement.[1071] All these are important to a trader because of price transparency and reduction in transaction costs such as discovery costs, marketing costs, and counterparty risks in commodity transactions.[1072]

[1070]Cedric Achille et al., *Guidebook on African Commodity and Derivatives Exchanges* (Tunisia: *Africa Development Bank Group,* 2013), 5-13.
[1071] Cedric Achille et al., *Guidebook on African Commodity and Derivatives Exchanges*, 5-13.
[1072] Cedric Achille et al., *Guidebook on African Commodity and Derivatives Exchanges*, 5-13.

Also, it makes the commodity being traded bankable, and hence, traders can get financial facilities such as loans and overdrafts.[1073]

A successful commodity exchange is ring-fenced through contract law and self-regulation.[1074] Participants in the exchange sign up to the conditions of the exchange and commit themselves to adhere to the rules of the exchange, its financial regulations, and the dispute settlement mechanism.[1075] This helps improve the conditions of physical trade.

Certain minimum conditions must be achieved for an exchange to operate optimally. They include sufficiently large supply and demand of the commodity, no price manipulation, grading and standardisation of the commodities, significant price fluctuations to warrant hedging, a functioning spot market,[1076] large group of speculators, well-developed infrastructure such as warehousing system, logistics and grading, a supportive legal and regulatory framework.[1077]

One of the challenges that are likely to face a Mineral and Metals Commodity Exchange in Kenya is that foreign investors may not use the institution because their marketing decisions are usually made outside of Africa; hence, if they want to manage risks, they would opt for established exchanges in the United States and the United Kingdom.[1078] However, because of Kenya's strategic geographical location, its positive commercial attributes and the growing demand for minerals and metals in other parts of the world, such as Asia and the Middle East, having a

[1073] Cedric Achille et al., *Guidebook on African Commodity and Derivatives Exchanges*, 5-13.
[1074] Cedric Achille et al., *Guidebook on African Commodity and Derivatives Exchanges*, 15.
[1075] Cedric Achille et al., *Guidebook on African Commodity and Derivatives Exchanges*, 15.
[1076] Spot market is where commodities are traded for immediate delivery. It is also referred to as a physical market or cash market where parties agree on a price and delivery is done immediately. This is unlike a futures transaction where price is agreed upon but delivery and transfer of funds is done on a future date.
[1077] Cedric Achille et al., *Guidebook on African Commodity and Derivatives Exchanges*, 15.
[1078] Cedric Achille et al., *Guidebook on African Commodity and Derivatives Exchanges*, 15.

Mineral and Metal Commodity Exchange in Kenya to cater for the region is still viable.

Section 28 of the Mining Act provides that the Cabinet Secretary responsible for mining shall facilitate the establishment of a Mineral and Metals Commodity Exchange that will promote efficiency and security in mineral trade transactions. Further, the Cabinet Secretary is required to establish regulations to prescribe the criteria for the establishment and function of the mineral and metals commodity exchange.

The above provision means that the government intends to take the lead in establishing the Exchange. The government should allow the Exchange to be private-sector driven with government support. In particular, the government should support the private sector in establishing a Mineral and Metals Commodity Exchange in Kenya through favourable fiscal and non-fiscal policies. One of the incentives could be zero import and export tariffs and Value Added Tax for minerals and metals imported by a seller solely for purposes of trading under the exchange and re-export to successful buyers.

The establishment of such an Exchange must be in accordance with both domestic, regional and international law. For example, local laws require approval of the Capital Markets Authority (CMA) for the establishment of the Exchange.[1079] Approval will be granted by CMA where (1) the applicant is a limited liability company whose liability is limited by shares, or as prescribed by the CMA, (2) it has a board of directors constituted in a manner prescribed by the CMA, and (3) has made and adopted rules in compliance with the Capital Markets Act and Regulations.[1080] The CMA allows Exchanges to be self-regulatory, provided they adhere to the provisions of the Capital Markets Act regarding self-regulatory organisations.[1081]

[1079] Section 11(3) (f) , 19 and 23(2) of the Capital Markets Act No.17 of 1989.
[1080] Section 20(2) of the Capital Markets Act No.17 of 1989.
[1081] Section 20(e) and Section 18B-18J of the Capital Markets Act No.17 of 1989.

Even though the Exchange is private sector driven, the government may nonetheless consider being a minority shareholder but should not have a controlling stake in the Exchange. To get the support of multinationals, the government should involve them in developing the Exchange to build their confidence in the Exchange. This would encourage them to participate in the Exchange as anchor buyers or sellers.

In view of this, Section 28 of the Mining Act should be amended to allow the Mineral and Metals Commodity Exchange to be more private-sector driven. Also, regulations should be developed under the Capital Markets Act specific to commodities exchanges since they operate differently from securities exchanges. For example, insider trading is treated differently in a commodity exchange.[1082] The regulations should provide for the management of the delivery process, identification and handling of cases of suspected market manipulation, and fiscal provisions that must be aligned with the relevant tax legal framework. Also, an independent body within the CMA should be established to oversee the commodity exchange since the securities exchange is wide; hence, resources may be channelled more to the securities exchange by CMA, thereby affecting CMA's role with regard to commodity exchanges.[1083]

5.2.5. State's Equity Participation

In Chile and Botswana, the state is actively involved in mining activities. For example, in Chile, the state-owned mining company, CODELCO, is the world's largest copper producer and produces approximately 29 per cent of Chile's copper yearly. [1084] In Botswana, the government of Botswana and the De Beers Group of companies own Debswana Diamond Company in equal shares. Currently, Debswana Diamond

[1082] Cedric Achille et al., *Guidebook on African Commodity and Derivatives Exchanges*, 38.
[1083] Cedric Achille et al., *Guidebook on African Commodity and Derivatives Exchanges*, 38.
[1084] CODELCO, *Annual Report*, 2019, 16.

Company is the world's leading diamond producer by value and volume and the largest contributor to Botswana's National Treasury[1085]

The advantage of state-owned mining companies or the state having a high equity state participation in mining companies is increased fiscal revenue for the government because of profit advantage. Also, where the state is a significant investor in the mining sector, it better understands the industry and the challenges investors face; hence, it will make balanced policies.

In Kenya, the National Mining Corporation (NMC) is the national government's investment arm for the mining sector.[1086] Therefore, the state's 10 per cent equity participation in large-scale mining operations is held by the NMC.[1087] The operationalisation of the NMC has been slow despite the development and gazettement of the Mining (National Mining Corporation) Regulations[1088] in 2017 by the Cabinet Secretary responsible for mining. The only progress to date is the appointment of an acting Chief Executive Officer. There is a need to hasten the operationalisation of the NMC for the country to (1) start benefiting from its equity participation in large-scale mining operations and (2) start undertaking mineral production, thus generating revenue.

Further, as the operationalisation is being fast-tracked, the government should consider lifting the moratorium on the issuance of mining licences that is currently in place since November 2019. This will ensure that once NMC is operationalised, it can immediately commence taking up its 10 per cent equity participation in all new large-scale operations being licenced and mining operations, thus increasing the government's revenue from the mining sector.

[1085] "About Us: Our History," Debswana Diamond Company. See also World Bank Group, *Botswana Mining Investment and Governance Review*, 7.
[1086] Section 22 of the Mining Act.
[1087] Section 48 of the Mining Act. See also Regulation 6 of the Mining (State Participation) Regulations, 2017 and Regulation 5(2) (a) of the Mining (State Participation) Regulations, 2017.
[1088] Mining (National Mining Corporation) Regulations Legal Notice No. 150 of 2017.

Also, the state should increase the percentage of its free carried interest in the share capital of the mineral right upon renewal of a mining licence.[1089] Consequently, upon renewal of a licence, the government's revenue will increase due to its equity participation. Hence, sections 114 and 116 of the Mining Act should be amended to increase the state's free carried interest in the share capital of the mineral rights during the renewal of mining licences.

5.2.6. Mutually Beneficial Partnerships

Mutually beneficial partnerships between the state, the private sector, civil society, local communities and other stakeholders in the mineral value chain are important. These partnerships have been beneficial in Chile. Through dialogue with the private sector, the Chilean government has been able to identify gaps in the mining sector and develop and amend policies to address the gaps. Also, the government and the private sector established a shared vision for the sector, which helped to avoid duplication of interventions, thereby increasing the private sector's financial and technical support of strategic government projects to improve the sector.[1090] In addition, the Chilean government has been collaborating with learning institutions for innovation and technological development.

In Kenya, the Community Development Agreement Committee[1091]is an important institution that brings together the government, community, licence holders, civil society, and local learning institutions.[1092] It not

[1089] According to section 107 of the Mining Act, the term of a mining licence is 25 years. The holder of the mining licence may apply to the Cabinet Secretary responsible for mining for renewal of the licence upon expiry for a further term not exceeding 15 years. See Section 114 and 116 of the Mining Act No.12 of 2016.
[1090] OECD, *Production Transformation Policy Review of Chile: Reaping the Benefits of New Frontier*, 131.
[1091] Established under Regulation 7(1) of the Mining (Community Development Agreement) Regulations, 2017. Its membership is wide as it includes the Governor, National Government representatives, a representative of women, a village elder, two representatives of the youth, civil society representative, a representative of the marginalized groups, a representative of Persons with Disabilities and the Member of Parliament of the area.
[1092] Regulation 7 of the Mining (Community Development Agreement) Regulations, 2017.

only monitors and evaluates compliance with the terms of the Community Development Agreement but also settles disputes and grievances between the licence holder and the community.[1093]

Compliance with the requirement for Community Development Agreements and Committees has been slow. Despite the gazettement of the Mining (Community Development Agreement) Regulations in 2017 by the Cabinet Secretary responsible for mining, Base Titanium Limited operating in Kwale County, is the only mineral right holder that has signed Community Development Agreements with the community. In particular, it signed agreements with three Community Development Agreement Committees from Msambweni, Lunga Lunga and Likoni in Kwale County in May 2021.

The slow progress could be attributed to the one-sided nature of the Community Development Agreements since the agreements focus on the needs of the community only, such as employment of community members, scholarships, training, and internship opportunities, support for infrastructural development such as schools, hospitals, roads, water and power, protection of the environment and natural resources, and special programmes for youth, women and persons with disabilities.[1094]

Mutual partnerships in the mining sector are essential. Hence, to ensure that the interests of the investors are also addressed within the Community Development Agreement Framework, the mandate of the committee provided for in Regulation 4 of the Mining (Community Development Agreement) Regulations in 2017 should be expanded to address issues such as (1) research within the community, (2) collaboration with learning institutions within the community, (3) regular dialogue for purposes of sharing information and identifying gaps in the

[1093] Regulation 4 of the Mining (Community Development Agreement) Regulations, 2017.
[1094] Regulation 3 of the Mining (Community Development Agreement) Regulations, 2017.

sector about mining within the respective community, and (4) making policy recommendations to the Cabinet Secretary.

5.2.7. Reporting, monitoring, compliance and enforcement

The experience of Chile and Botswana demonstrates that mining companies are subject to different obligations such as operational commitments, for example, submitted mining programmes, environmental obligations, workers' health and safety requirements, social responsibilities and reporting requirements. These obligations are contained in laws and contracts.

This is also the case for Kenya. The ability of the government to monitor compliance is vital to enable the state to benefit from the mineral resources.

The preamble of the Mining Act provides that the purpose of the Act is to give effect to Articles 60, 62(1)(f), 66(2), 69 and 71 of the Constitution. These provisions focus on the efficient, equitable, productive and sustainable development and management of natural resources in Kenya. The institutions responsible for implementing the Mining Act in the manner contemplated in its preamble were discussed in chapter 3 and included the Ministry of Mining and Petroleum, the Mineral Rights Board, the Directorate of Mines, the Directorate of Geological Survey, and the National Mining Cooperation.

Two issues are likely to affect the effective monitoring of compliance and enforcement: lack of multi-sectoral collaboration and inadequate inspection of mines.

From the analysis of Kenya’s mining regulatory framework, we established that different legislations govern the sector. Thus, other institutions are operating within the mining sector. They include the Ministry of Environment and Forestry, the National Treasury, the

Ministry of Lands and Physical Planning, the Ministry of Interior and Co-ordination of National Government, the Ministry of Foreign Affairs, the Ministry of Industry, Trade and Cooperatives, the Ministry of Devolution, the Ministry of Labour and Social Protection, the Ministry of Education, the Ministry of Information, Communication and Technology, the Ministry of Water and Sanitation, and the Office of the Attorney General and Department of Justice. Hence, the mining industry is a multi-disciplinary and multi-sectoral sector.

For the Department of Mines to effectively undertake its monitoring and enforcement responsibility, it is expected to partner and coordinate with other sectors, Government Ministries, Departments and Agencies (MDAs), and stakeholders. In particular, it relies on information from these institutions for monitoring and enforcement purposes.

According to Section 20 of the Mining Act, the Director of Mines, through the Principal Secretary, is mandated to promote cooperation between MDAs, and the county governments. This provision could be improved by requiring the identification and appointment of mining focal persons in the relevant MDAs and county governments to enhance effective monitoring and enforcement through access to information and transparency.

With regard to mine inspections, the cabinet secretary responsible for mining is mandated to gazette mine inspectors to undertake monitoring, compliance and enforcement on his or her behalf.[1095] The mine inspectors have the authority to enter and inspect land or premises subject to a mineral right and inspect books and documents on the condition that they properly identify themselves.[1096]It is a criminal offence to obstruct or hinder them from performing their task.[1097]

[1095] Section 196 of the Mining Act.
[1096] Section 197 of the Mining Act.
[1097] Section 205 of the Mining Act.

This model of monitoring compliance is ineffective as it is difficult for the mine inspectors to thoroughly consider the records and substantiate their content through merely periodic visits. Also, the Department of Mines indicated that it is experiencing challenges such as inadequate budgetary allocation, lack of vehicles to undertake the field inspections and lack of capacity building of the inspectors.[1098]

In Chile, lack of inspection resources was cited as one of the factors that contributed to the mining accident that occurred in the San Jose mine in 2010 where thirty-three miners were trapped underground for sixty-nine days.[1099] Some of the rescued miners sued the Chilean government for negligence. Their main claim was that the National Geology and Mines Bureau failed to inspect the mine properly.[1100]

Indeed, failure to adequately monitor compliance and enforcement may have serious consequences, such as the above experience of Chile. Therefore, it would be useful for the Ministry responsible for mining to consider having a resident mine inspector accountable for a specific geographical area. To increase accountability, the inspectors will be permanently stationed at the assigned geographical region and allocated clear monitoring roles and responsibilities. For example, the inspector may be responsible for verifying records, information and production reports kept by the holder of mineral rights within his or her geographical area and monitoring compliance with all required reports per the Act for the allocated mines. This will ensure that sufficient monitoring takes place and appropriate resources are allocated to support the resident inspectors. The resident mine inspectors should be periodically shuffled to guard against familiarity and corrupt practices.

[1098] Department of Mines Interview Checklist.
[1099] Erin Smith and Peter Rosenblum, "Government and Citizen Oversight of Mining: Enforcing the Rules, Resource Governance," (Revenue Watch Institute, 2011), 12-13, https://www.resourcegovernance.org/sites/default/files/RWI_Enforcing_Rules_full.pdf.
[1100] Erin Smith and Peter Rosenblum, "Government and Citizen Oversight of Mining: Enforcing the Rules, Resource Governance," 12-13.

Thus, the Mining Act should be amended to provide for the appointment and gazettement of resident mine inspectors.

5.2.8. Fiscal Design and Revenue Management

The analysis of Chile's and Botswana's fiscal design and revenue management undertaken in chapter 4 established that they are both focused on achieving a balance between maximising revenue from the sector and managing windfall profits, on one side, and attracting foreign investors on the other side.

Notably, Chile operates a uniform taxation model where the mineral sector is taxed like any other sector with no royalty on mineral production. On the other hand, Botswana requires the payment of royalties and operates a special income tax regime for the mining sector. Botswana's special income tax regime enables it to benefit from any windfall profits.

Also, the two countries have substantial equity participation in the mining companies operating in their territories and thus benefit from their profits. In particular, the government of Botswana has between 50 per cent to 80 per cent state interest in the mining companies operating in Botswana, while Chile has a successful state-owned mining company.

To effectively manage windfall profits, Chile has a stabilisation fund, while Botswana has a sovereign wealth fund which also operates as a stabilisation fund.

The two countries achieve a balance in the fiscal regime through incentives to foreign investors, such as the absence of foreign exchange controls, zero restrictions on repatriation of profits, and loss carry forward for an unlimited time. Since the state has substantial equity participation of up to 50 per cent in the mining companies, it still generates revenue despite these incentives.

According to the mining legal framework of Kenya, the government uses four fiscal tools to capture economic rents for the country from the mining sector. These are royalties, taxes, dividends for the state's equity participation through NMC, revenue from the mining operations of NMC, and fees or charges.

The regulations on royalties to prescribe the royalty base and the rate and distribution of the royalties collected between the National Government, County Government and the community where the mining operation is being undertaken are yet to be enacted. Hence, even though royalty is being collected on negotiated rates between the mining sector and the government, the royalties due to the different County Governments and communities are yet to be distributed by the treasury because of the lack of a regulation to guide the distribution of the funds. To effectively manage mining revenue, the two regulations contemplated by the Mining Act should be enacted.

According to the experiences of Chile and Botswana, a Sovereign Wealth fund is an important resource management tool for any developing country. It helps the government save revenue from mineral resources during periods of windfall, thus avoiding excessive allocations and discretionary spending. The fund is utilised for different purposes, for example, (1) as a savings fund to share wealth across future generations, (2) for the financing of fiscal deficits where the fiscal budget has been affected by external shocks such as currency depreciations and commodity price fluctuations, and (3) for infrastructure spending.

Currently, mineral revenues are paid to the consolidated fund and utilised through budgetary allocation. As the mineral sector continues to grow, it is crucial that a Sovereign Wealth Fund be established. It is noteworthy that the government is keen on establishing a sovereign wealth fund, as there is currently a Sovereign Wealth Fund Bill 2019. One of the sources of capital for the fund will be the natural resources royalties, licence fees,

and any other mineral revenue. The enactment of the Sovereign Wealth Fund should be fast-tracked.

5.2.9. According Policy Space in Bilateral Investment Treaties

If legislation is amended to provide for value addition, local content, revenue management and a favourable fiscal regime as suggested above, Kenya will expose itself to investor-state dispute with regard to BITs that are currently in existence.

As per the Foreign Investment Protection Act, most current BITs or special arrangements between Kenya and developed states do not accord Kenya policy space. For example, the BITs between Kenya and Germany and Kenya and the United Kingdom analysed in chapter three limit the ability of Kenya to regulate in the public interest. This is because the BITs do not have general exceptions, exceptions to the MFN and NT provisions, a definition of the term indirect expropriation, and an elaboration of what constitutes fair and equitable treatment. Thus, any foreign investor undertaking mining activities in Kenya from any of the two countries can invoke the provisions of the BIT in the event of a change of legislation by the government in the public interest, such as to protect the environment, for public health reasons, or to protect local industries.

For example, with regard to the non-discrimination provision under Article 3 of the BIT between Kenya and Germany, the phrase ‘like circumstances’ or ‘like or similar investors and investments’ is omitted. The implication is that the comparison of the treatment of foreign investors and investments will not be undertaken against the treatment of similar or like domestic or other foreign investors or investments. Hence, the comparison could be made against any category and type of domestic or other foreign investors or investments, including those outside the mining sector.

Under the NT Standard, any privilege, advantage, favour or immunity offered to any local investor in any industry must be likewise provided to foreign investors in the mining sector. In effect, the government is prevented from coming up with measures favourable to local mining investors only to promote domestic mining investors, mainly small-scale and artisanal miners. Also, any privilege, advantage, favour or immunity offered to any local investor in any industry, such as the tourism sector, manufacturing sector or agricultural sector, must likewise be provided to foreign investors in the mining sector. Hence, in the event of a dispute, the investor-state tribunal may compare unlike investments to establish a breach of the MFN and NT provisions.

The above position is similar to the case of the special arrangements between Kenya and Japan and Kenya and France concluded under the Foreign Investments Protection Act and analysed in chapter 3. Thus, there is an imbalance in protection in favour of foreign investors. Hence, the government is restricted from legislating and implementing new measures in the public interest.

Nevertheless, where BITs fail to balance host states' rights and duties to regulate in the public interest against foreign investors' rights, customary international law and the requirements of international human rights and environmental laws may be used by host states to interpret the BITs thus implement measures, for example, in the exercise of its sovereignty including its police powers.

However, the foreign investor may file a claim in an investor-state tribunal because the mere existence of a BIT means that the mechanism for investor-state dispute settlement provided in the BIT is applicable. Hence, a foreign investor is entitled to institute international arbitration proceedings against Kenya for violating its duty to protect foreign investments without the need to exhaust domestic remedies first.

The tribunals have, in the past, failed to interpret BITs in a way that a balance is achieved between the host states' rights and duties to regulate in the public interest against foreign investors' rights.[1101] In fact, the investor-state tribunals have interpreted states' obligations expansively and any exceptions to those obligations restrictively.[1102]

Also, defending claims in international tribunals is costly for developing countries like Kenya. For example, in the Cortec case, Kenya claimed costs of United States Dollars (USD) 6,452,858.42. Since the Tribunal has the authority and discretion to award costs pursuant to Article 61(2) of the ICSID Convention and the prevailing practice of international investment tribunals is to order costs to follow the event, Kenya was awarded costs of USD 3,226,429.21. In addition, the total arbitration cost was USD 645,122.28, and the claimant was ordered to pay Kenya's portion of the arbitration cost amounting to USD 322,561.14.[1103]

Given the challenges that the BITs Kenya has concluded pose, the government should consider reviewing and renegotiating the BITs and a freeze in the negotiation of new BITs until it develops an appropriate BIT policy framework that ensures there is a balance between its duty to protect foreign investments and its sovereign right to regulate in the public interest.

5.3.CONCLUSION

An analysis of the interests of foreign investors in the mining sector in Kenya undertaken in chapter two established that foreign investors invest in mineral-rich countries where the social, political and regulatory environment is favourable for achieving a high return on their investment.

[1101] Suzanne Spears, "The Quest for Policy Space in a New Generation of International Investment Agreements," *Journal of International Economic Law* 13, no.4 (December 2010): 1047.
[1102] Suzanne Spears, "The Quest for Policy Space," 1047.
[1103] Cortec Mining Kenya Limited, Cortec (Pty) Limited and Stirling Capital Limited v Republic of Kenya (ICSID Case No. ARB/15/29).

In particular, the regulatory framework for the mining sector should be transparent and predictable, promote good governance, and prompt international dispute resolution. Also, the government should adhere to the rule of law. An examination of Kenya's mining legal framework has established that all these favourable foreign investment attributes exist.

An analysis of Chile's and Botswana's mining legal frameworks has brought to the fore significant lessons for Kenya. Juxtaposing the lessons from the two countries against Kenya's mining legal framework reveals that Kenya's mining legal framework does not strike the right balance between the interest of Kenya and that of foreign investors. That is, it is skewed in favour of foreign investors. This is so because Kenya's mining regulatory framework (1) limits the state's equity participation in the mining companies, (2) does not have a comprehensive provision on value addition, including a value addition regulation, (3) its local content provision is inadequate, for example, there are no guidelines to reserve specific categories of goods and services to citizen contractors and to provide for percentage targets for local purchases of goods and services not in the reserved categories, and the provision on monitoring local content is inadequate, and (4) the R&D provision is inadequate.

To achieve the balance, this chapter extracted best practices from the lessons derived from Chile and Botswana and, after that, proposed improvements to Kenya's mining legal framework.

The improvements include (1) enhancing value addition and local content requirements, (2) establishing a mining research and development fund to strengthen R&D, innovation and human capacity development in R&D, (3) establishing partnerships between local institutions of higher learning and mineral right holders, (4) positioning the country to be a mineral trading hub in the region through a commodity exchange that is private sector driven, (5) increasing the state equity participation in mining companies, (6) enhancing multi-sectoral collaboration through focal persons and capacity building of the focal

persons, (7) enhancing reporting, monitoring, compliance and enforcement through resident mineral inspectors, (8) strengthening the fiscal design and revenue management through the enactment of a sovereign wealth fund and relevant royalty regulations, and (9) the need to review the current BITs to ensure that Kenya can adequately regulate in the interest of the public.

CHAPTER 6

6. CONCLUSION AND RECOMMENDATIONS

This study sought to establish (1) whether the current legal and regulatory framework for the mining sector protects the interests of Kenya, (2) whether the current legal and regulatory framework for the mining sector protects the interests of foreign investors, and (3) what key elements should be present in Kenya's mining legal and regulatory framework to attain an adequate balance between the interests of Kenya and that of foreign investors.

To answer the three research questions, the study relied on (1) a desktop review of primary and secondary sources, (2) key informant interviews, (3) case law analysis and (4) comparative studies.

Key terms such as sustainable development, international sovereignty over natural resources, foreign direct investment, right to regulate, the Constitution of Kenya 2010, the public trust doctrine, and the devolved structure of government in Kenya that feature extensively in this thesis were introduced in Chapter one.

Chapter two of the study examined the interest of Kenya and foreign investors in the mining sector in Kenya. To establish the interest of Kenya, the study analysed the country's policies, strategies and plans within the sector. Some of the documents examined include the Constitution of Kenya, the Mining Act, the Mining and Minerals Policy, Kenya Vision 2030, the Third Medium Term Plan (2018-2022) for Vision 2030, the Africa Mining Vision and the Kenya Country Mining Vision, the Sustainable Development Goals, and the Kenya Kwanza Manifesto. The analysis established that the interest of Kenya is to utilise the mining sector to accelerate the country's socio-economic growth in a sustainable, inclusive, equitable, accountable and environmentally

friendly manner hence improving the quality of life of its citizens, both the current and future generations.

Concerning the interest of foreign investors, the study examined the international investment framework and interviewed the Chief Executive Officer of the Kenya Chamber of Mines. It established that the interest of foreign investors in the sector is to obtain an adequate return on capital for taking exploration and development risks.

Chapter three of the study reviewed the regulatory framework of the mining sector in Kenya and its implementation by analysing case law. Several findings emerged from the review. One, sustainable development and inclusive growth have been prioritised by addressing key issues that have been affecting the mining sector in Africa, such as (1) land rights, (2) the environmental impact of mining activities, (3) rehabilitation of mining sites, (3) resettlement of communities, (4) local content, (5) access to information, (6) community development, (7) value addition, and (8) benefit-sharing. Two, there is inadequate monitoring of compliance and enforcement; thus, the full benefits of the regulatory framework are not being realised. Three, the special arrangement for investment promotion and protection, which are a replica of the BITs, are investor favourable at the expense of the host state's policy space. Four, the royalties so far collected and due to the different county governments are yet to be distributed by the treasury for the benefit of the communities because there is no regulation under the Public Finance and Management Act to guide the distribution of the funds. Five, the moratorium on the issuance of mining licences imposed in November 2019 by the Ministry of Mining has not been lifted; hence no new mining licences are being issued. Therefore, Kenya is losing FDI in the mining sector. Six, the National Mining Corporation has not been fully operationalised; consequently, it has not commenced undertaking mining activities. Finally, the study also established that despite the progressive provisions in the regulatory framework of the mining sector, some provisions are inadequate such as the provision on local content, value addition, state

equity participation, research and development, and monitoring compliance and enforcement. In effect, the country's ability to substantially benefit from the mineral resources is curtailed.

Chapter four examined the mining policy and regulatory framework of Chile and Botswana. The purpose of the examination was to identify lessons and best practices that are key in ensuring that a balance is achieved between the interests of the State and foreign investors in Kenya's mining sector. The following best practices and lessons were identified (1) regulatory oversight through effective monitoring of compliance and enforcement is essential for effective realisation of the benefits of the policy and regulatory framework of the mining sector, (2) trade liberalisation must be coupled with social inclusion to achieve sustainable economic growth, (3) because of the depleting nature of mines, use of technology and investing in research and development in the mining sector increases productivity of mines and enhances market access, and mine safety, (4) green mining reduces the cost of production and promotes environmental conservation, 5) a state's equity participation in the mining sector increases its economic rent, (6) a transparent, predictable and balanced fiscal regime creates certainty in the sector thus attracts foreign direct investment, (7) public-private partnerships facilitates the development of policies and laws that benefit both the government and foreign investors (8) a streamlined licencing procedure with clear timelines creates certainty in the mining sector thus increases investor confidence, (9) use of alternative dispute resolution mechanisms in disputes between the foreign investors and local communities expediates resolution of disputes thus prevents interruption of mining activities, (10) value addition in the mining sector and trade in minerals are key economic diversification strategies in the mining sector, (11) export diversification protects the state from economic vulnerability in case of decline in the prices of minerals in the world market and also creates employment and (12) local content requirements increase linkages between foreign investments and the local economy through

domestic employment opportunities and increased industrial performance.

Chapter five juxtaposed the best practices and lessons identified in chapter four with Kenya's mining regulatory framework reviewed in chapter three to establish whether the regulatory framework balances the interests of the state and that of the foreign investors. It established the following eight issues (1) the value addition provisions in the Mining Act are inadequate to spur value addition in the sector, (2) local content requirements are not comprehensive enough to reap the benefits of local content requirements, (3) local content requirements are not being adequately monitored and enforced by the department of Mines, (5) the provisions on investing on research and development and use of mining technology are inadequate, (6) the mining regulatory framework does not spur economic diversification for example through trade in minerals, (7) the requirement of state's equity participation in the mining sector is inadequate to increase economic rent from the mining sector, (8) the Community Development Agreements are one sided and therefore do not create a mutually beneficial partnership, (9) the monitoring and reporting model in the regulatory framework does not encourage effective monitoring and enforcement to take place and (10) there is no Sovereign Wealth Fund to ensure that the government saves during periods of windfall revenue from mineral resources.

In view of the discussions in the five chapters of this study, this study concludes as follows:

a. The current mining regulatory framework does not adequately protect the interests of Kenya in the sector;
b. The current mining regulatory framework adequately protects the interests of foreign investors; and
c. A balance between the interests of Kenya and that of foreign investors may be achieved by:

i. Developing a value-addition strategy and policy to inform the revision of the Mining Act for purposes of including appropriate value-addition provisions proposed in this study.

ii. Establishing a local content agency to monitor and enforce local content provisions in Kenya's extractive sector. Other responsibilities of the agency will be (1) the development of policies and measures aimed at improving local content in Kenya's extractives sector and (2) the progressive enhancement of the capabilities of local enterprises to compete effectively on quality, quantity, price and dependability in the supply of required goods and services.

iii. Establishing a centralised local content reporting system to be managed by the proposed local content agency.

iv. Section 221 of the Mining Act and Regulation 12 of the Mining (Use of Local Goods and Services) Regulations,2017, empowers the Cabinet Secretary responsible for mining to publish and disseminate guidelines on local content requirements. Hence, the Cabinet Secretary should publish and disseminate guidelines to reserve certain categories of goods and services to citizen contractors, such as drilling, catering, security and supply of foodstuff, oil, and lubricants. In addition, the guidelines should provide percentage targets for local purchases of goods and services not in the reserved categories.

v. Amending the Mining Act to establish a mining research and development fund. The fund will be utilised to develop innovation hubs, fund research and development and offer scholarships to build human capacity in innovation and Research and Development. Mining companies will be required to contribute a prescribed percentage of their income to the fund. There

should also be a requirement to create links and associations between local institutions of higher education and foreign mining companies for skills, knowledge and technology transfer. A monitoring and evaluation mechanism for the partnerships should also be legislated to ensure compliance.

vi. Reviewing and renegotiating the BITs and freezing the negotiation of new BITs until an appropriate BIT policy framework that ensures there is a balance between the duty of the State to protect foreign investments and its sovereign right to regulate in the public interest is developed.

vii. The government should take advantage of Kenya's positive commercial attributes and geographical advantage and facilitate the establishment of a Mineral and Metals Commodity Exchange in Kenya. The Exchange will provide an organised marketplace for buyers and sellers in the region to trade in minerals and metals under strict rules set by the Exchange. Instances of money laundering, corruption, and terrorism linked to the mining sector will significantly be minimised.

viii. Fast-tracking the operationalisation of the National Mining Corporation to promote the state's participation in mining activities, thereby increasing its revenue from the sector.

ix. Reviewing the Community Development Agreements Framework to expand the mandate of the Community Development Agreement Committee. Currently, the mandate of the Committee is community focused. Its mandate should be balanced so that it also considers the concerns of foreign investors concerning their mining projects within the community.

x. Developing a mining multisectoral collaboration framework within government. This will involve

mapping Government Ministries, Departments and Agencies (MDAs) relevant to the mining sector and appointing mining focal persons in the identified MDAs. Enhancing multisectoral collaboration will improve the efficiency of the mining sector, especially with regard to licencing and monitoring compliance with mining rights requirements.

BIBLIOGRAPHY

SCHOLARLY LITERATURE

Achille, Cedric, Lamon Rutten, Sofiane Sekioua, Jian Zhang, Max Magor, Yannis Arvanitis, Uche Duru, and Bleming Nekati. Guidebook on African Commodity and Derivatives Exchanges. Tunisia: Africa Development Bank Group, 2013.

African Union. Africa Mining Vision. Addis Ababa: Africa Union Publications, February 2009.

African Development Bank. *Chile's Fiscal Policy and Mining Revenue: A Case Study*. Abidjan: African Natural Resource Center, 2016.

Agosin,Manuel. "Trade and Growth in Chile." *CEPAL Review*, no. 68 (1999).

Akpabio, Emmanuel M. and Nseabasi S. Akpan. "Governance and Oil Politics in Nigeria's Niger Delta: The Question of Distributive Equity." *Journal of Human Ecol*ogy 30, no.2 (2010).

Aniegye, Ntewusu Samuel. "A Social History of Gold Mining in Bole, Northern Ghana: From Pre-Colonial to Recent Times." *Transactions of the Historical Society of Ghana*, no. 17 (2015).

Balefi, Tsie. "The Political Context of Botswana's Development Performance." *Journal of Southern African Studies* 22, no. 4 (1996).

Bell, Peter. "Democracy and Double Standards: The View from Chile." *World Policy Journal* 2, no.4 (Fall,1985).

Blumm, Michael and Rachel Guthrie. "Internationalizing the Public Trust Doctrine: Natural Law and Constitutional and Statutory Approaches to fulfilling the Saxion Vision." *University of California Davis Law Review* 45(2012).

Borzutzky, Silvia and Sarah Perry. "It is not about the 30 Pesos, it is about the 30 years: Chiles's Elitist Democracy, Social Movements and the October 18 Protests." *The Latin Americanist* 66, no.22 (June 2021).

Chamber of Commerce, Industry and Agriculture. "Doing Business in Botswana: Business Climate and Opportunities." A presentation by Minerals Development Company Botswana during the webinar workshop held on September 21 2021.

Chekera, Yolanda and Vincent Nmehielle. "The International Law Principle of Permanent Sovereignty over Natural Resources as an Instrument for Development: The Case of Zimbabwean Diamonds." *African Journal of Legal Studies* 6(2013).

Chuhan-Pole, Punam, Andrew L. Dabalen, and Bryan Christoper Land. "Mining in Africa: Are Local Communities Better of?" Africa Development Forum series. Washington DC: World Bank.

CODELCO, *Annual Report*, 2019.

Collier, Paul. "Economic Causes of Civil Conflict and their Implications for Policy." Economics of Crime and Violence Paper, World Bank, Washington DC, 2000.

Collier, Paul. "The Political Economy of Natural Resources." *Social Research* 77, no. 4 (2010).

Commission of Inquiry into the Illegal/Irregular Allocation of Public Land in Kenya. *Report into the Illegal/Irregular Allocation of Public Land in Kenya,"Ndungu Report"*.

Cullen, Michael and Bertrand Toiano. "Mining Royalties, Elections and the Constitution in Chile." *jdsupra.com*.

Daly, Herman. "Towards Some Operational Principles of Sustainable Development." *Ecological Economics* 2, no.1(1990).

Davis-Hamel, Ashley. "Successful Neoliberalism?: State Policy, Poverty, and Income Inequality in Chile." *International Social Science Review* 87, no.3/4 (2012).

Deloitte Touche Tohmatsu, *Guide to Fiscal Information: Key Economies in Africa 202*1 (South Africa: Deloitte Africa Tax and Legal, 2021.

Divyashree, Baxipatra. "Failure of the States as Public Trustees of Mineral Resources on the Face of Mining Scams." *Kalinga Institute of Industrial Technology Law School*, February 26, 2013. https://dx.doi.org/10.2139/ssrn.2225021.

Dobbs, Richard, Jeremy Oppenheim, Adam Kendall, Fraser Thompson, Martin Bratt, and Fransje van der Marel. "Reversing the curse: Maximizing the potential of resource-driven economies." *McKinsey Global Institute Report*, December 2013.

Dumett, Raymond E. "Sources for Mining Company History in Africa: The History and Records of the Ashanti Goldfields Corporation (Ghana) Limited." *The Business History Review* 62, no. 3 (1988).

Ellen, Hillbom. “Diamonds or Development? A Structural Assessment of Botswana’s Forty Years of Success.” *The Journal of Modern African Studies* 46, no. 2 (2008).

Ericksen, George. “Geology and Origin of the Chilean Nitrate Deposits.” Geological Survey Professional Paper 1188, 1981.

Federal Institute for Geosciences and Natural Resources (BGR). *Assessment of the Effects of Global Digitization Trends on Sustainability in Mining: Digitization Processes in the Mining Industry in the Context of Sustainability*. Hannover: September 2020.

Fleming, John. “The Nationalization of Chile's Large Copper Companies in Contemporary Interstate Relations.” *Villanova Law Review* 11, no. 4 (1973).

Fraser Institute, *Economic Freedom of the World 2020 Annual Report*.

Freire, Clovis. “Economic Diversification: Explaining the Pattern of Diversification in the Global Economy and its Implications for Fostering Diversification in Poorer Countries.” DESA Working Paper No. 150, ST/ESA/2017/DWP/150, United Nations Secretariat, 2017.

Grynberg, Roman. “Diamond Beneficiation in Botswana.” *Great Insights* 2, no. 2 (February-March 2013).

Hardoon, Deborah and Finn Heinrich. *Transparency International Bribe Payers Index 2011*. Berlin: Transparency International Publication, 2011.

Huffman, James L. "Speaking of Inconvenient Truths: A History of the Public Trust Doctrine." *Duke Environmental Law and Policy Forum* 18, no.1 (Fall 2007).

Humphreys, Macartan, Jeffrey Sachs, and Joseph Stiglitz. “What is the Problem with Natural Resource Wealth?” Initiative for Policy Dialogue Working Paper Series , September 2006.

Hunter, Tina and John Chandler. *Petroleum Law in Australia*. Australia: LexisNexis Butterworths, 2013.

International Finance Corporation. “The Art and Science of Benefit Sharing in the Natural Resource Sector.” World Bank Group Discussion Paper.

Intergovernmental Forum on Mining, Minerals, Metals and Sustainable Development (IGF). *Case Study- Chile: Direct Employment- The Mining Skills Council and Centralised Data Collection.* Ottawa: IGFMining, 2018.

James, Robinson, Daron Acemoglu and Simon Johnson. “An African Success Story: Botswana.” In *In Search of Prosperity: Analytic Narratives on Economic Growth*, edited by Dani Rodrik. Princeton: Princeton University Press.

Jamuna, Agarwal. "Determinants of Foreign Direct Investment: A Survey." *Weltwirtschaftliches Archiv* 116, no. 4 (1980).

Japan International Cooperation Agency and Empresa Nacional de Mineria. *Environmentally-Friendly Operation of Mineral Processing Plant Using Biotechnology in the Republic of Chile Report*. 2002 report.

Joyner, Christopher. "United Nation General Assembly Resolutions and International Law: Rethinking the Contemporary Dynamics of Norm-Creation.” *California Western International Law Journal* 11, No.3 (1981).

Kago, Caroline Wanjiku. “Chinese Investments in Africa: Legal ‘Mis-engineering’ and Unequal Returns on Investments.” LLM thesis, University of the Western Cape, 2009.

Kanyinga, Karuti. “Devolution and the New Politics of Development in Kenya.” *African Studies Review* 59, no.3 (2016).

Keith, Breckenridge. “Special Rights in Property: Why Modern African Economies are Dependent on Mineral Resources. ” BWPI Working Paper No. 62, November 2008. http://dx.doi.org/10.2139/ssrn.1311218.

Kenya National Bureau of Statistics. *Kenya Economic Survey 2020*. Nairobi: Kenya National Bureau of Statistics, 2020.

Kenya Vision 2030, Sessional Paper, 2012.

Kenya Third Medium Term Plan 2018-2022.

Kenya County Mining Vision (KCMV).

Kenya Voluntary National Review on SDGs, *2017 Report*.

Kidane, Won. “Contemporary International Investment Law Trends and Africa’s Dilemmas in the Draft Pan-African Code.” *George Washington International Law Review*, no. 50 (2018).

K, Lokesha B. and D.S. Leelavathy. "Determinants of Foreign Direct Investment: A Macro Perspective." *Indian Journal of Industrial Relations* 47, no. 3 (2012).

Korinek, Jane. *Mineral Resource Trade in Chile: Contribution to Development and Policy Implications*. Paris: OECD Publishing OECD, March 2013.

Laing, Aislinn, Dave Sherwood, and Fabian Cambero. "Explainer: Chile's inequity challenge: What went wrong and can it be fixed?" *Reuters*, October 24,2019.

Lawan, Mamman Alhaji. "The Paradox of Underdevelopment amidst Oil in Nigeria: A Socio-Legal Explanation." Ph.D. in Law thesis, University of Warwick, 2008.

Lazarus, Richard J. "Changing Conceptions of Property and Sovereignty in Natural Resources Law: Questioning the Public Trust Doctrine." *Iowa Law Review* 71 (1986).

Le Bec, Christopher. "Botswana-South Africa: The Secret behind their Diamond Wedding." *theafricareport,* July 22, 2021.

Libby, Ronald T. and Michael E. Woakes. "Nationalization and the Displacement of Development Policy in Zambia." *African Studies Review*, vol. 23, no. 1 (Apr. 1980).

Makau Mutua. "What is TWAIL?" American Society of International Law 94 (April 5-8,2000).

Mamalakis, Markos. "The American Copper Companies and the Chilean Government, 1920-1967." Economic Growth Center, Yale University, September 1967.

Markowitz, Chelsea. "Sovereign Wealth Funds in Africa: Taking Stock and Looking Forward." Occasional Paper 304, South African Institute of International Affairs, January 2020.

Mbayi, Letsema. "Linkages in Botswana's Diamond Cutting and Polishing Industry." MMCP Discussion Paper No.6, University of Cape Town and Development Policy and Practice, March 2011.

Mboya, Tom. "Kenya's Constitutional Crisis." *Africa Today* 5, no. 5, (September – October 1958).

McGowan, Charis. "Chile protests: What prompted the unrest?" *Aljazeera*, October 30,2019.

McSherry, J. Patrice. "Chile's Struggle to Democratize the State. " *Nacla*, February 24,2020.

Melaetsa, Onthisitse. "Is Taxation of Minerals in Botswana a Success Story- and what can other countries learn from this?" Power-

Point presentation, Principal Minerals Officer, Ministry of Minerals, Energy and Water Resources, 2012.

Meller, Patricio. “Review of the Chilean Liberalisation and Export Expansion Process (1974-90).” *The Bangladesh Development Studies* 20, no.2/3 (June-September 1992).

Mereghetti, Matilde, Sidonie Pichard, and Yana Stankova. “Chile: Investing to Maintain Leadership.” *Global Business Reports,* March 2012.

Milej, Tomasz. “Reclaiming African Agency: The Right to Regulate, the Investor-State Dispute Settlement and the 'Africanisation' of International Investment Law.” In *Investment Protection, Human Rights, and International Arbitration in Extraordinary Times*, edited by Rainer Hofmann, Julian Scheu, Stephan Schill, and Christian Tams, (forthcoming).

Miller, Duncan, Nirdev Desai, and Julia Lee-Thorp. "Indigenous Gold Mining in Southern Africa: A Review." *Goodwin Series*, no. 8 (Dec.2000). doi:10.2307/3858050.

Mining and Minerals Policy. Kenya: Sessional Paper No.7 of 2016.

Monfort, Brieuc. “Chile:Trade Performance, Trade Liberalisation and Competitiveness.” IMF Working Paper, Western Hemisphere Department, WP/08/128, 2008.

Moran, Theodore. *Multinational Corporations and the politics of dependence: Copper in Chile*. Princeton: Princeton University Press, 1974.

M, Sornarajah. *The International Law on Foreign Investment*. Cambridge: Cambridge University Press, 1994.

Muchlinski, Peter. *Multinational Enterprises and the Law*. Oxford: Oxford university Press, 2007.

Muingi, Solomon. “Voi Gemstone Center to Begin Works in March. ” *Star Newspaper*, December 2, 2021.

National Productivity Commission (Chile), *Report on Productivity in the Chilean Copper Mining Industry.*

National Treasury and Planning. *State Department for Planning Second Annual Progress Report 2019/20 on the Implementation of the Third Medium Term Plan (2018-2022) of the Kenya Vision 2030.* Nairobi: The National Treasury and Planning, March 2021.

Nwapi, Chilenye. “A Legislative Proposal for Public Participation in Oil and Gas Decision-Making in Nigeria.” *Journal of African Law* 54, no.2 (2010).

Ogendo, Okoth. “The Politics of Constitutional Change in Kenya Since Independence, 1963-69.” *African Affairs* 71, no.282 (January 1972).

Omorogbe, Yinka. “The Legal Framework for Public Participation in Decision-making on Mining and Energy Development in Nigeria: Giving Voices to the Voiceless.” In *Human Rights in Natural Resource Development: Public Participation in the Sustainable Development of Mining and Energy Resources*, edited by Donald M Zillman, Alastair Lucas and George Pring. Oxford: Oxford University Press, May 23,2002.

Organisation for Economic Cooperation and Development. *OECD Benchmark Definition of Foreign Direct Investment*. 4th ed. Paris: OECD Publishing, 2008.

Organisation for Economic Cooperation and Development. *OECD Economic Surveys: Chile 2018*. Paris, OECD Publishing, February 2018.

Organisation for Economic Cooperation and Development, *OECD Reviews of Foreign Direct Investment: Chile*. Paris: OECD Publishing,1997).

Organisation for Economic Cooperation and Development and United Nations. *Production Transformation Policy Review of Chile: Reaping the Benefits of New Frontier*. Paris: OECD Publishing, OECD Development Pathways, 2018.

Pearce, David, Anil Makandia, and Edward Barbier. *Blue Print for a Green Economy*. London: Earthscan, 1989.

Pereira, Ricardo and Orla Gough. “Permanent Sovereignty over Natural Resources in the 21st Century: Natural Resource Governance and the Right to Self-Determination of Indigenous Peoples Under International Law.” *Melbourne Journal of International Law* 14, no. 2 (2013).

PriceWaterhouseCoopers. *Corporate income Taxes, Mining Royalties and other Mining Taxes: A Summary of Rates and Rules in Selected Countries*. London, Global Mining Industry Update, June 2012.

Ranestad, Kristin. “The Mining Sectors in Chile and Norway,ca. 1870-1940: The Development of a Knowledge Gap.” EHES working

papers in Economic History, European Historical Economics Society (EHES), No. 105, November 2016.

Robert, Pritchard. “Participation of Indigenous Peoples in Natural Resource Development in Australia.” Energy White Paper, Australian Government, June 28, 2013.

Ross, Michael L. “The Political Economy of the Resource Curse.” *World Politics* 51(1999).

Rudy, Laguna Y., Orozco A. Alvaro and Bejarano P. Madeherik. “Mining Investment and a Fiscal Regime that Promotes the Investment: An Inter-Temporal Model.” *Journal of Economic and Financial Analysis* 1, (2018).

Sachs, Lisa. “On Solid Ground: Toward Effective Resource-Based Development.” *World Politics Review* (August 6, 2013).

Salacuse, Jeswald and Nicholas Sullivan. “Do BITS Really Work? An Evaluation of Bilateral Investment Treaties and their Grand Bargain.” *Harvard International Law Journal* 46, no.1 (Winter 2005).

Sanchez, Felipe and Philipp Hartlieb. “Innovation in the Mining Industry: Technological Trends and a Case Study of the Challenges or Disruptive Innovation.” *Mining, Metallurgy and Exploration* 37, (October 2020).

Sax, Joseph. “Liberating the Public Trust Doctrine from Historical Shackles.” *University of California Davis Law Review* 14 (1980).

Sax, Joseph. “The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention.” *Michigan Law Review* 68 (1970).

Smith, Erin and Peter Rosenblum. “Government and Citizen Oversight of Mining: Enforcing the Rules, Resource Governance.” Revenue Watch Institute, 2011.

Söderholm, Patrik and Nanna Svahn. *Mining, Regional Development and Benefit-Sharing*. Lulea University of Technology Report.

Spears, Suzanne. “The Quest for Policy Space in a New Generation of International Investment Agreements.” *Journal of International Economic Law* 13, no.4 (December 2010).

Taylor, Cliff D., Klaus J. Schulz, Jeff L. Doebrich, GretaJ. Orris, Paul D. Denning, and Michael J. Kirschbaum. "Geology and nonfuel mineral deposits of Africa and the Middle East." *U.S. Geological Survey* (2009).

Tesar, C.J and Sheila Tesar. "Recent Chilean Copper Policy." *Geography* 58, no. 1 (1973).

United Democratic Alliance. *The Kenya Kwanza Plan: The Bottom-Up Economic Transformation Agenda 2022-2027*. Government of Kenya.

United Nations Conference on Trade and Development. *Best Practices in Investment for Development, How to Attract and Benefit from FDI in Mining: Lessons from Canada and Chile. New York, United Nations Publications, 2011.*

United Nations Conference on Trade and Development, World Bank and International Council on Mining and Metals. *The Challenge of Mineral Wealth: Using Resource Endowments to Foster Sustainable Development- A Case Study of Chile*. London and Geneva: 2007.

United Nations Conference on Trade and Development. *World Investment Report 2015: Reforming the International Investment Governance*. New York: United Nations Publications, 2015.

United Nations Conference on Trade and Development. *World Investment Report 2019: Special Economic Zones*. New York: United Nations Publications, 2019.

United Nations Conference on Trade and Development. *World Investment Report 2007: Transnational Corporations, Extractive Industries and Development*. New York: United Nations Publications, 2007.

United Nations Development Programme. *Assessment of Development Results: Botswana*. New York: UNDP Publication, May 2009.

United Nations Economic Commission for Africa. *Minerals and Africa's Development: The International Study Group Report on Africa's Mineral Regimes*. Addis Ababa: United Nations Economic Commission for Africa, 2011.

United Nations Environment Programme. *Environmental Impacts of Trade Liberalization and Policies for the Sustainable Management of Natural Resources: A Case Study of Chile's Mining Sector*. New York and Geneva: UNEP Publications, 1999.

United Nations General Assembly. *Report of the World Commission on Environment and Development: Our Common Future*. Oslo: United Nations General Assembly, 1987.

United States Geological Survey. *Mineral Commodity Summaries*. U.S. Geological Survey, January 2020.

United States Geological Survey. *Mineral Commodity Summaries*. U.S. Geological Survey, January 2021.

Vergara, Rodrigo. "Productivity Performance in Developing Countries: Country Case Studies-Chile." Santiago: United Nations Industrial Development Organisation Publication, 2005.

Vision 2036. *Botswana Vision 2036*.

Waswa, Aaron and Christopher Nyamai. "The Geology and Mineral Resources Potential of Kenya." Symposium on Capacity Building in Sustainable Resource Development in Africa, Nairobi, 2016.

Weinthal, Erica and Pauline Jones Luong. "Combating the Resource Curse: An Alternative Solution to Managing Mineral Wealth." *Perspectives on Politics* 4, no.1, (2006).

Wenar, Leif. "Property Rights and the Resource Curse." *Philosophy & Public Affairs* 36, no.1(2008).

World Bank. *Mining Royalties: A Global Study of Their Impact on Investors, Government and Civil Society.* Washington DC: World Bank Publishing, 2006.

World Bank Group. *Botswana*. Washington DC: World Bank Publications, April 2021.

World Bank Group. *Botswana Mining Investment and Governance* Review. Washington DC: World Bank Publications, August 2016.

World Trade Organization. World Trade Report 2010: Trade in Natural Resources. Switzerland: WTO Publications, 2010.

Yager, Thomas R. "The Mineral Industries of Kenya and Uganda." 2012 Minerals Yearbook. U.S. Geological Survey. U.S. Department of the Interior.

Yontcheva, Boriana, Giorgia Albertin, Dan Devlin, Hilary Devine, Marc Gerard, Sebastian Beer, Irena Jankulov Suljagic, and Vimal V. Thakoor. "Tax Avoidance in Sub-Saharan Africa's Mining Sector." Working Paper, International Monetary Fund, volume 2021: issue 22, September 2021.

Young, Ralph A. "Privatisation in Africa." *Review of African Political Economy*, no. 51 (1991).

STATUTES

Kenya

Community Land Act No. 27 of 2016.

Companies Act No.17 of 2015.

Environment and Land Court Act Act No.19 of 2011.

Environmental Management and Coordination Act Act No.8 of 1999.

Explosives Act Chapter 115 of the Laws of Kenya.

Capital Markets Act No.17 of 1989.

Climate Change Act No. 11 of 2016.

Community Land Act No. 27 of 2016.

Energy Act (Chapter 314 of the Laws of Kenya).

Forest Conservation and Management Act No. 34 of 2016.

Foreign Investments Protection Act Chapter 518 of the Laws of Kenya.

Investment Promotion Act No.6 of 2004.

Kenya Citizenship and Immigration Act, No. 12 of 2011

Land Act No.6 of 2012.

Land Control Act (Chapter 302 of the Laws of Kenya).

Land Registration Act No.3 of 2012.

Mining Act, Act No.12 of 2016.

National Land Commission Act No. 5 of 2012.

Natural Resources (Classes of Transactions Subject to Ratification) Act No. 41 of 2016.

The Petroleum (Exploration and Production) Act (Chapter 308 of the Laws of Kenya).

Wildlife Conservation and Management Act Act No. 47 of 2013.

Community Land Regulation, 2017.

Environmental Management and Co-ordination (Noise and Excessive Vibration Pollution)(Control) Regulations, 2009.

Environmental (Impact Assessment and Audit) Regulations, 2003.

Mining (Community Development Agreement) Regulations, 2017.

Mining (Dealings in Minerals) Regulations, 2017.

Mining (Employment and Training) Regulations, 2017.

Mining (License and Permit) Regulations 2017.

Mining(National Mining Corporation) Regulations, 2017.

Mining (Reporting of Mining and Mineral Related Activities) Regulations, 2017.

Mining (State Participation) Regulations, 2017.

Mining (Use of Assets) Regulations, 2017.

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

Mining (Work Programmes and Exploration Reports) Guidelines, 2017.

Land(Allocation of Public Land) Regulations, 2017.

Land (Assessment of Just Compensation) Rules, 2017.

Land (Conversion of Land) Rules, 2017.

Land (Extension and Renewal of Leases) Rules, 2017.

Land Registration (General) Regulations, 2017.

Land Registration (Registration Units) Orders, 2017.

Land Regulations, 2017.

Chile

Basic Law on Environment, Law 19.300 of 1994.

Closure of Mining Works and Facilities, Law No. 20,551.

Foreign Investment Statute, Decree Law No 600.

Mining Code, Law No. 21,420.

Organic Constitutional Law on Mining Concessions, 1982.

Political Constitution of the Republic of Chile, 1980.

Botswana

Acquisition of Property Act Chapter 32:10.

Bank of Botswana Act Chapter 55:01.

Botswana Geoscience Institute Act No.29 of 2014

Constitution of Botswana.

Companies Act Chapter 42:01.

Environmental Assessment Act Chapter 65:07 of 2011.

Mines and Minerals Act Chapter 66:01 of 1999.

Mines, Quarries, Works and Machinery Act Chapter 44:02 of 1973.

Precious and Semi-Precious Stones (Protection) Act Chapter 66:03 of 1969.

CASES

Beatrice Wanjiku and another v the Attorney General and others, High Court Petition No.190 of 2011 [2012] eKLR.

Benson Ambuti Adega and two others v Kibos Sugar and Allied Industries and four others, and Kenya Union of Sugar Plantation and Allied Workers (Interested Party) [2019] eKLR.

Cortec Mining Kenya Limited v Cabinet Secretary Ministry of Mining and nine others [2017] eKLR.

Cortec Mining Kenya Limited, Cortec (Pty) Limited and Stirling Capital Limited v Republic of Kenya (ICSID Case No. ARB/15/29).

Geoffrey Muthinja & Another v Samuel Muguna Henry and 1756 others [2015] eKLR.

Haji Ibrahim Ali Hussein & 21 others v Cabinet Secretary Ministry of Energy and Petroleum & 6 others and the County Government of Wajir (Interested Party) [2020] eKLR.

John Muraya Mwangi & 495 others & six others v Minister for State for Provisional Administration & Internal Security & four others [2014] eKLR.

Karen Njeri Kandie v Alassane Ba and another, Court of Appeal 20 of 2013 [2015]eKLR.

Kasigau Ranching Limited v John Gitonga Kihara & 4 others [1998] eKLR.

Katra Jama Issa v Attorney General and three others [2018] eKLR.

Kenya Small Scale Farmers Forum and six others v Republic of Kenya and two others [2013] eKLR.

Kiriro Wa Ngugi and 19 others v Attorney General and two others [2020] eKLR.

KM and nine others v Attorney General and seven others [2020] eKLR.

Kwanza Estates Ltd v Kenya Wildlife Services[2013] eKLR.

Lilian Mercy Mutua t/a Lilian M Gems v Elizabeth Wangechi Olonginda & 3 others [2013] eKLR.

Luka Kitumbi & 8 others v Commissioner of Mines and Geology and another [2010] eKLR.

Megalith Mining Company Limited v Cabinet Secretary Ministry of Mining [2019] eKLR.

Merafong Demarcation Forum and others v The Republic of South Africa and others, CCT 41/07 [2008] ZACC 10.

Methanex Corporation vs United States of America, NAFTA/UNICITRAL, August 3,2005.

Minister of Health and Another vs New Clicks South Africa (Pty) Limited and others, 2006(2) SA 311 (CC).

Moffat Kamau and nine others v Aelous Kenya Limited and nine others[2016] eKLR.

Mohamed Hussein Haji v Abdinoor Ahmed and five others [2018] eKLR.

Mui Coal Basin Local Community & 15 others v Permanent Secretary Ministry of Energy & 17 others [2015] eKLR.

Mutanga Tea and Coffee Company Ltd v Shikara Limited and another [2015] eKLR.

Nairobi Metropolitan PSV SACCOS Union Limited and 25 others v County of Nairobi Government and three others [2013] eKLR.

Okiya Omtata Okoiti and two others v Attorney General and three others [2014] eKLR.

Patrick Musimba v National Land Commission and four others [2016] eKLR.

Peter Nzeki and 14 others v Base Titanium Limited and four others [2021] eKLR.

Republic v Mohamed Dadi Kokane and six others Criminal Case (Murder) No.21 of 2010 at Mombasa High Court [2014] eKLR.

Rodgers Muema Nzioka and two others v Tiomin Kenya Limited [2001] eKLR.

Saluka investments BV vs Czech Republic, Partial award, PCA – UNICITRAL Arbitration rules, 17 March 2006.

Société Général de Surveillance S. A. v. Philippines, Decision of the Tribunal on Objections to Jurisdiction, ICSID (W. Bank) Case No. ARB/02/6 (2004).

Texaco Overseas Petroleum Company vs The Government of the Libyan Arab Republic (1979) 177 et seq.

Tom Mboya Odege v Cabinet Secretary, Ministry of Petroleum and Mining and three others [2019] eKLR.

Virendra Ramji Gudka & 3 Others v Attorney General [2014] eKLR.

Waweru vs Republic [2006]1 K.L.R. 677, 677 (H.C.K.).

Were Samwel & 14 others v Attorney General & 2 others [2017] eKLR.

APPENDIX 2: RESEARCH CHECKLIST

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CAROLINE SARONI RESEARCH CHECKLIST

Introduction

This checklist is for purposes of guiding the above referenced researcher when interacting with the Kenya Chambers of Mines and the Ministry of Mining, Blue Economy and Maritime Affairs.

1. **Employment and Training Requirements – Mining (Employment and Training) Regulations, 2017**

   A. Have foreign investors been submitting to the Director of Mines:

   i. A programme for promoting education, research and development one year after issuance of a reconnaissance, prospecting or mining licence?

   Tick appropriate answer

   Yes [ ] **No** [✓]

   ii. Yearly reports on its performance on employment, training, research and development?

   Tick appropriate answer

   Yes [ ] **No** [✓]

iii. Half yearly reports on the employment and training activities

Tick appropriate answer

Yes		No	✓

B. What action has been taken against foreign investors who fail to comply as above? **Kindly give an example of action taken for non-compliance.**

None

C. How has the Director of Mines been utilizing the reports?

Unknown

2. **Use of local goods and services - Mining (Use of Local Goods and Services) Regulations, 2017.**

   A. Have licence holders been submitting to the Director of Mines

   i. Half-year reports containing a list of all contracts and purchase orders exceeding Kenya Shillings 100,000,000 awarded in the previous half-year

Tick appropriate answer

Yes		No	✓

ii. Annual reports on local content

Tick appropriate answer

Yes		No	✓

3. The Cabinet Secretary, Petroleum and Mining, may permit a foreign investor to engage a foreign engineering firm where it demonstrates that there is no Kenyan company with the capability to offer the engineering services it seeks.

   Kindly share examples of foreign investment companies in the mining sector that have been so permitted by the Cabinet Secretary and indicate the foreign engineering company engaged.

Unknown

4. Does Kenya have local capacity to offer insurance services to foreign investors as contemplated in Regulation 14(2) of the Mining (Use of Local Goods and Services) Regulations, 2017?

   Tick appropriate answer

Yes	✓	No	

5. Has any foreign investor engaged the services of an offshore insurance company? If yes, give details of some foreign investors and the offshore insurance companies engaged.

Unknown

6. Depreciation of owned equipment used in exploration is recognized as an allowable exploration expense in the Seventh Schedule of the Mining (Work Programmes and Exploration Reports) Guidelines. To track the depreciation of owned equipment used in mining activities, the Mining (Use of Assets) Regulations, 2017 requires a licence holder to maintain a complete, up-to-date and accurate register of all its immovable and movable assets.

   How is the Ministry tracking compliance with this component?

Unknown.

7. **Reporting, monitoring, compliance and enforcement**
   The Mining (Reporting of Mining and Mineral Related Activities) Regulations,2017 and the Mining (Work Programmes and Exploration Reports) Guidelines guide reporting, reporting, compliance and enforcement

   For the Cabinet Secretary to effectively monitor compliance and take enforcement action where necessary, he is mandated to gazette Mine Inspectors to undertake monitoring, compliance and enforcement on his behalf.

   i. Have any Mine Inspectors been gazetted?

   Tick appropriate answer

   Yes [✓] No [ ]

ii. If yes, have they been undertaking inspections?

Tick appropriate answer

Yes	✓	No	

iii. What challenges have Mine Inspectors faced in the performance of their task?

Lack of funds. Moratorium on issuance of mineral rights.

iv. What changes can be made to improve Mine Inspection?

Proper budget allocation. Procurement of vehicles for field inspections. Empowering field offices so as to have footprint in the regions.

v. How has the Ministry utilized their reports?

Filing for use in following up on progress reports submitted by licence holders.

END