



Impact assessment

KCM: Mining & regulatory reform

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This impact assessment report has been researched and written by John Kabaa

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Business Advocacy Fund, Prosperity House, Nairobi

020-4453789 | www.businessadvocacy.org | info@businessadvocacy.org

Impact assessment

KCM: Mining and regulatory reform

1. Background

The Kenya Chamber of Mines (KCM) is a membership organisation formed to represent the interests of Kenya's miners, exploration companies, mineral traders, suppliers and professionals in the mining industry. They represent and promote the interest and competitiveness of the mining industry through advocacy, and contribute to the improvement of the business environment.

Kenya has a variety of minerals including soda ash, fluorspar, titanium minerals, rare earth elements, gold, coal, gemstones, manganese, iron ore, gypsum, carbon dioxide, diatomite, chromite, silica sand and limestone. Various international mining giants had abandoned Kenya due to its ineffective land acquisition and compensation policies. In 2004, the government removed all excise taxes on capital mining equipment to attract investors. However, this did not result in any significant subsequent capital investment. The legal provisions and regulations for the mining sector were mainly based on the Mining Act (Cap 306)¹ which had been enacted way back in 1940. This meant that the industry was operating within an archaic legal framework which was out of touch with the constitution and current industry needs and international best practices. Cap 306 did not cover several minerals that were mined and quarried on a commercial basis. Its guidelines on procedures and timelines for licensing and supervision were unclear, leading to cases of speculators selling or hoarding mineral rights.

Consequently, the Kenya mining sector faced many obstacles and disadvantages caused by the poor regulatory framework. Most of the mineral resources in Kenya remain unexploited due to a poor legal framework and lack of incentives e.g. ineffective land acquisition and compensation policies. The lack of proper infrastructure and policies failed to encourage investment and production in the mining industry. The country's mining sector had been operating without an overarching policy leading to issues being addressed in an ad hoc manner. This led to unpredictability and uncertainty and hence low investment.

The government recognized that the mining sector could contribute significantly to economic development but there was a need, to improve the environment to attract investment. Currently, the sector contributes 0.8 per cent to Gross Domestic Product (GDP) per annum². The Government is hoping that mining's contribution to GDP will increase to 10 per cent by 2030 according to the Medium Term Plan, 2013-2017³. This objective required an appropriate and comprehensive policy to guide the development of the sector and meet the challenges presented by both local and global economic dynamics.

¹ The Mining Act (Act 29 Cap 306, 1940; last amended 2012). Accessed from www.kenyalaw.org

² Economic Survey 2018 (Table 2.2). Kenya National Bureau of Statistics. The Government Printer.

³ Second Medium Term Plan, 2013 -2017; Transforming Kenya: Pathway to devolution, Socio-economic development, equity and National Unity. Accessed from www.devolutionplanning.go.ke

2. The problem

KCM started lobbying the government to persuade it to agree to conform to standard international mining legal principles. This led to the national mineral resources and mining policy in 2007 that sought to establish a thriving minerals industry by attracting more investment. The policy stated that their objectives were to diversify exports, to widen the tax base to generate skilled employment, to create demand for local goods and services, to contribute to infrastructure development and to act as a catalyst for wider investment in the economy. KCM needed to get a Mining Act that responded to industry needs and provided clear and predictable processes to any service required by the industry.

KCM sought to refine the proposed mining policy and regulations so that they offered an investment-friendly royalty regime that would attract foreign direct investment. This would accelerate development creating employment, alleviating poverty and creating wealth with the adoption of good mining practices. From 2009, with KES 1.2 million support from BAF, KCM engaged in dialogue with the then Ministry of Environment and Natural Resources (MoE&NR) on the policy and legal framework with the objective of creating an appropriate regulatory environment for the mining industry. The government agreed that the existing legislation was too limited, failing to address emerging issues such as environmental concerns, the importance of communities and equitable sharing of benefits, devolution of decision making, in line with the new constitution, as well as licensing, accountability, efficiency and predictability. And all parties recognised that there was a need for a complete overhaul of the legislation rather than just further changes.

KCM then consolidated the industry's policy position⁴ and lobbied for its inclusion in the revised Mining Act. The result was a draft National Mineral Resources and Mining Policy in 2010.

In 2012, KCM sought additional BAF support in the amount of KES 4 million to include its policy position in the draft national mineral resources and mining policy and bill. Their position targeted amendments including detailed recommendations to amend a substantial number of clauses and to draft papers, each setting out a policy position to address a specific issue in detail: These were

- the need for landowner consent for prospecting, exploration and mining;
- governance and regulation of the sector by the government;
- licensing and royalties; and
- '*state participation*' – that is, the state's expectation that it should effectively receive a dividend and even free shares in mining companies in addition to royalties and the usual taxes.

⁴ Policy Position Paper (Munyiri, S.K). Proposed amendments to the Mining and Minerals Bill 2009. Accessed from www.businessadvocacyfund.org

3. Outcome

3.1 The Mining Bill, 2014

KCM engaged various agencies on the Bill and this advocacy process identified various clauses that required amendment, exclusion and inclusion. The draft policy was published on the Ministry's website in January 2014 and KCM was invited by the Ministry for a consultative forum with the CS on sector issues with the draft policy being central to the discussion. This was then put on hold to tackle the Mining Bill first.

KCM met with the Cabinet Secretary (CS) in a ministerial round table in February 2014 but felt that he was not sufficiently receptive to its concerns. The government went ahead and published the Mining Bill, 2014⁵. KCM then presented their views to amend the bill after which led to a KCM/MoM joint submission was sent to the parliamentary committee on Environment & Natural Resources (ENR) on May 2014.

Details of further lobbying by KCM is detailed by the extensive report on the case study in public sector advocacy⁶. The chair of the parliamentary committee on Environment & Natural Resources (ENR) was a champion on the Bill (balancing KCM and government interests). Out of nine drafting changes presented to ENR, six were adopted and incorporated into the committee's revised proposals.

In total, 110 amendments were proposed, 84 of which originated from ENR via KCM. Most of the ENR amendments were adopted as proposed, while other proposals – perceived by KCM as detrimental – were either defeated on the floor of the house or withdrawn by their proponents. The Mining Bill was agreed by the committee of the whole house and sent to the National Assembly for its third reading in October 2014. Overall, according to the chair of the ENR, the Committee incorporated over 95 per cent of KCM's amendments on the broad issues. In November 2014, the speaker of the National Assembly (NA) sent the Bill to the speaker of the Senate so that they could review the provisions affecting counties. They were on clauses on revenue sharing and consent from the county government.

The Senate Standing Committee on Land and Natural Resources started its own hearing – with public submissions – at the end of February 2015 with their report being completed in May 2015. The vote finally took place in September 2015 approving some 29 amendments to the Bill. Thereafter in October 2015, the NA ENR rejected 11 of the Senate's amendments and so the Bill was sent to be considered by a mediation committee. They produced their report and proposed a final version of the Bill, in March 2016. This was then sent back to both Houses for approval and in May, the Mining Bill was approved by both Houses and sent to the President for assent.

⁵ National Assembly Bill No. 8 published on 17 March 2014 in the Special Issue of the Kenya Gazette Supplement No. 28. [Online] www.kenyalaw.org

⁶ The Kenya Chamber of Mines: A Case Study in Public Sector Advocacy by David Irwin and Kariuki Waweru. www.businessadvocacy.org

The Mining Act No. 12 of 2016⁷ was gazetted in May 2016. The Bill was passed by Parliament and was assented to by the President. The Act is now the legislation that guides the mineral sector of Kenya. The process succeeded in engaging the:

- Players involved in the mineral development and members of KCM on the provisions included in the Mining Bill, 2014.
- Ministry on the Bill where the rationale on the position established by industry players is discussed. This exercise was aimed at proposing amendments to the zero draft to generate the first draft. Some of the positions established by the industry players were taken and others dropped.
- NA to push for better inclusion of the private sector position emanating from the engagement with industry players as identified from the zero draft.
- Senate to make them understand the impact of various provisions in the zero and first drafts. The National Assembly and the Senate could not agree on some provisions leading to the formation of a mediation committee. KCM engaged with the committee as it tried to clarify further the impact various provisions had to the growth of the mineral sector.

The new Act repealed the old Mining Act (Chapter 306), the Trading in Unwrought Precious Metals Act⁸ and the Diamond Industry Protection Act⁹. Any regulations made under the repealed laws continue in force as long as they are consistent with the Act - until such a time when they are revoked by the CS. The Act applies to the minerals specified in the First Schedule¹⁰. Notably, the Act does not apply to petroleum and hydrocarbon gases¹¹.

The Mining Act introduces a grid system to limit mineral rights disputes due to overlaps in licensed areas. There is additional clarity on the licence and permit classes, procedures, as well as conditions that would lead to revocations and suspensions. The new law also provides structures for negotiating mineral agreements and stipulates that mineral agreements will include terms and conditions for minimum activity and spend for work programs, structure for payments (i.e. royalties, fees, etc.), and other provisions.

3.2 The Mining and Minerals Policy, 2016

The Ministry was more interested in developing the legal framework first and so the policy took a back seat, though the draft Bill was largely aligned to the spirit of the draft policy. As the Mining Bill approached finalisation, the Ministry sought also to finalise the Mining and Minerals Policy¹² which was approved by the Cabinet in April 2016. The development of this policy was done in a consultative

⁷ The Mining Act 2016 published on 13 May 2016 in the Special Issue of the Kenya Gazette Supplement No. 71 (Acts No 12). [Online] www.kenyalaw.org

⁸ The Trading in Unwrought Precious Metals Act (Act 2 of 1933 Cap 309; amended 2012). [Online] www.kenyalaw.org

⁹ The Diamond Industry Protection Act (Act 5 of 1949 Cap 310; last amended 2012). [Online] www.kenyalaw.org

¹⁰ The classification of minerals under first schedule includes: A. Construction And Industrial Minerals; B. Precious stones; C. Precious Metal group; D. Semi-precious stones group; E. Base And Rare Metals Group; F. Fuel Mineral Group; and G. Gaseous Mineral

¹¹ These fall under the domain of the Energy Act, No. 1 of 2019, Laws of Kenya; and Petroleum Act, No. 2 of 2019, Laws of Kenya.

¹² Mining and Minerals Policy Sessional Paper No. 7 of 2016. [Online] www.mining.go.ke

manner with input from the KCM, mining companies, academic and research institutions, development partners, members of the parliamentary committee on ENR, civil society, representatives of mining communities and the general public. The policy, therefore, represents the aspirations of key stakeholders in the mining sector and its full implementation will enable the realization of sustainable mineral exploration and development.

This policy informs and underpins the Mining Act, 2016. The overall goal of the Mining and Mineral Resources Policy is to set out frameworks, principles and strategies to provide for exploration and exploitation of mineral resources for the country's socio-economic development. The policy will be reviewed every five years to ensure that it remains relevant and conforms to the prevailing best practices in the industry.

The Mining Act seeks to achieve the right balance between investor interest and public interest and aligns the country's mining industry with the industry global trends and best practices. The Ministry in charge of mining retains responsibility for policy, a role it has already commenced with the publication of the policy.

The table below shows the institutional framework of directorates and specialised agencies:

Table 1: Directorates and specialised mining agencies

<i>Institution</i>	<i>Role</i>	<i>Notes</i>
Directorate of Mines	Is in charge of administration and management of policies and laws affecting the sector; provision of technical services; automation of licensing for exploration and mining concessions; compilation and management of mining data; arbitration of mining disputes; and environmental issues	Takes up the chief role in monitoring and enforcement of provisions under the Mining Act and works through appointed inspectors of mines. Supervises and promotes activities related to the development of the exploitation of minerals and mineral resources.
Directorate of Mineral Promotion and Value Addition	Is in charge of marketing opportunities in investments in minerals.	It leads the promotion of value addition of minerals as well as providing technical assistance and extension services on mineral processing and value addition to small scale and artisanal miners.
Directorate of Mineral Management and regulations	Performs the functions of mining and minerals development. Will have the mandate to develop policy around the extractive industry	In charge of mineral exploration and the mining policy and management. Also, they will determine policies on the management of quarrying and mining of rocks and industrial minerals E.g. limestone, building stone, clay, gemstones, cement, sand, coal etc.
Directorate of Mine Health, Safety and Environment	Is in charge of the management of health and safety conditions in mines	
Directorate of Resource	Is mandated to collect, store, analyse, update and disseminate geospatial information on	

Surveys and Remote Sensing	natural resources, including land use and land cover mapping.	
Directorate of Geological Survey	Consolidates the governments' efforts in collection and storage of geological data related to prospecting in a national repository. It conducts systematic geological mapping and mineral exploration at various scales to provide data relating to rock types, structural geological styles, prospective areas of mineralization and characterization of rocks and minerals thus continuously enhancing the understanding of geology and updating the mineral inventory of the country.	Participates in various geological surveys including geo-environmental studies. Facilitates promotion of private sector interest and investment in mineral exploration.
Minerals and Metal Commodity Exchange	The Exchange facilitates efficiency and security in mineral trade transactions.	In the interest of enhancing commerce and trade in minerals, the Mining Act also provides for the MoM to establish a commodities exchange.
Mineral Audit Agency	Determines the rightful royalties and taxes payable to government from minerals produced; prevent the smuggling of minerals and evasion of royalties; monitor and audit minerals produced and exported; audit capital investments and operating costs of mining companies; and advise on competitiveness of Kenya's mining environment and fiscal regime in relation the rest of the world.	

3.3 The Mining Regulations

In July 2016, the Ministry published 13 draft regulations and guidelines on its official website and on the same day wrote to KCM. Operationalization of the new law commenced following Parliamentary approval of the regulations in June 2017. 13 Mining Regulations have been published as follows:

1. Use of Assets Regulations, 2017¹³
2. Use of Local Goods and Services Regulations, 2017¹⁴
3. Employment and Training Regulations, 2017¹⁵
4. State Participation Regulations, 2017¹⁶
5. Work Programmes and Exploration Reports Guidelines, 2017¹⁷

¹³ The Mining (Use of Assets) Regulations (No. 12 of 2016) published on 19 May 2017 in the Special Issue of the Kenya Gazette Supplement No. 78 (legal notice 80). [Online] www.kenyalaw.org

¹⁴ The Mining (Use of Local Goods and Services) Regulations (No. 12 of 2016) published on 19 May 2017 in the Special Issue of the Kenya Gazette Supplement No. 78 (legal notice 81). [Online] www.kenyalaw.org

¹⁵ The Mining (Employment and Training) Regulations (No. 12 of 2016) published on 19 May 2017 in the Special Issue of the Kenya Gazette Supplement No. 78 (legal notice 82). [Online] www.kenyalaw.org

¹⁶ The Mining (State Participation) Regulations (No. 12 of 2016) published on 19 May 2017 in the Special Issue of the Kenya Gazette Supplement No. 78 (legal notice 84). [Online] www.kenyalaw.org

¹⁷ The Mining (Work Programmes and Exploration Reports Guidelines) Regulations (No. 12 of 2016) 19 May 2017 in a special issue of the Kenya Gazette Supplement No. 78 (legal notice 85). [Online] www.kenyalaw.org

6. Dealings in Minerals Regulations, 2017¹⁸
7. License and Permit Regulations, 2017¹⁹
8. Community Development Agreement Regulations, 2017²⁰
9. Strategic Minerals Regulations, 2017²¹
10. National Mining Corporation Regulations, 2017²²
11. Mine Support Services Regulations, 2017²³
12. Reporting of Mining and Mineral Related Activities Regulations, 2017²⁴
13. Award of Mineral Rights by Tender Regulations, 2017²⁵

4. Impact

4.1 A new framework

The adoption of the Mining and Minerals policy provides a framework to:

- Ensure sustainable utilization of mineral resources;
- Harmonize mining and environmental legislation;
- Mainstream activities of artisanal and small-scale miners;
- Promote local participation in the mining investment ventures;
- Provide a well-structured mining fiscal regime; and
- Ensure equitable sharing of benefits.

The policy provides a firm foundation and basis for the establishment of an enabling framework for accelerated and sustainable development of the country's mining and minerals resources sector. At the same time, it ensures that benefits from the growth of the sector accrue to all stakeholders, including investors, local artisanal and small scale miners, national and county governments, local communities and the people of Kenya.

The Mining Act 2016 addresses the key areas that will regulate and facilitate the development of the county's mining and mineral industry. These include a provision on:

¹⁸ The Mining (Dealings in Minerals) Regulations (No. 12 of 2016) published on 24 May 2017 in the Special Issue of the Kenya Gazette Supplement No. 82 (legal notice 88). [Online] www.kenyalaw.org

¹⁹ The Mining (Licence and Permit) Regulations (No. 12 of 2016) published on 24 May 2017 in the Special Issue of the Kenya Gazette Supplement No. 81 (legal notice 87). [Online] www.kenyalaw.org

²⁰ The Mining (Community Development Agreement) Regulations (No. 12 of 2016) published on 28 July 2017 in the Special Issue of the Kenya Gazette Supplement No. 116 (legal notice 148). [Online] www.kenyalaw.org

²¹ The Mining (Strategic Minerals) Regulations (No. 12 of 2016) published on 28 July 2017 in the Special Issue of the Kenya Gazette Supplement No. 116 (legal notice 149). [Online] www.kenyalaw.org

²² The Mining (National Mining Corporation) Regulations (No. 12 of 2016) published on 28 July 2017 in the Special Issue of the Kenya Gazette Supplement No. 116 (legal notice 150). [Online] www.kenyalaw.org

²³ The Mining (Mine Support Services) Regulations (No. 12 of 2016) published on 28 July 2017 in the Special Issue of the Kenya Gazette Supplement No. 116 (legal notice 151). [Online] www.kenyalaw.org

²⁴ The Mining (Mineral Related Activities) Regulations (No. 12 of 2016) published on 28 July 2017 in the Special Issue of the Kenya Gazette Supplement No. 116 (legal notice 152). [Online] www.kenyalaw.org

²⁵ The Mining (Award of Mineral Rights by Tender) Regulations (No. 12 of 2016) published on 28 July 2017 in the Special Issue of the Kenya Gazette Supplement No. 116 (legal notice 153). [Online] www.kenyalaw.org

- Ownership of minerals, mineral rights and mineral agreements;
- Surface rights, compensation and dispute resolution;
- Health, safety and environment issues as they relate to mining;
- Local equity participation;
- Prescribed fees and distribution of royalties from minerals among the national and county governments, and community where mining operations occur; and the
- Establishment of new mining institutions and bodies such as the National Mining Corporation and the Mineral Rights Board.

The Mining Act and the 13 regulations will radically change the way natural resource companies operating in Kenya will need to do business. While the Act contains transitional provisions that defer the application of some of the Act's key provisions for entities holding mining leases issued under the previous Act, certain regulations impose compliance obligations on all entities holding leases, licences, locations, exclusive prospecting licences and prospecting rights issued under the old Mining Act. Estimated impact analysis of the Act has been performed by Africa Legal Network (ALN)²⁶ in Kenya²⁷.

The State Department of Mining through the MoM is the lead stakeholder in the mining sector and hence responsible to develop the laws, rules and regulations that seek to attract local, regional and international investors into the sector for the benefit of the country. Alignment between policy and laws provides investor reassurance and certainty of government direction.

There has been a 50 per cent significant improvement in the sector as attested by KCM.

KCM stated that the direct interest and participation of the government, albeit through the National Mining Corporation (NMC) is a positive step towards ensuring that the mining companies declare all the deposits and profits accrued as well as safeguarding the interests of local communities at all stages of mining activities. There has been past reported cases of non-disclosure and non-declaration by the mining companies in the country and this requires the government to have its own watchdog on the ground to curb the vice, hence the need for the NMC. The corporation is also useful in promoting capacity building in the sector as far as the exploration of minerals in the country is concerned.

KCM plans to play a big role in assisting the government on this front in order to serve the needs of their small scale members. KCM seeks to help govt to implement the policy to create a system to track ASM production of minerals as well as the process chain of traders. This will, in turn, earn revenue to the government via taxes.

The MoM addressing mining issues around the vulnerable segment of the population by registering and supporting over 10 women groups who have been

²⁶ ALN is an alliance of leading corporate law firms currently in 15 African jurisdictions namely Algeria, Ethiopia, Guinea, Kenya, Madagascar, Malawi, Mauritius, Morocco, Mozambique, Nigeria, Rwanda, Sudan, Tanzania, Uganda and Zambia.

²⁷ Various opinion articles in the New Mining Act Series. (Rebelo D.) [Online] <https://www.africalegalnetwork.com>

registered in Tabaka and Borabu in Kisii County, and one in Kakamega County. The government has led efforts in the resolution of the local communities - developer conflict in the Kwale Mineral sands project. About 11 youth groups have so far been registered, one in Kwale County²⁸. Others are five in Kisii and four in Taita Taveta Counties. The registration targeting the ASMs which is expected to cover all counties. County governments now have a role under the new legislation and will be involved in the provision of consents for licensing operations and surface rights, promoting community engagement in mining operations and selection of the mining sector operators. The MoM plans to:

- Gazette expired licence areas and ensure mandatory surrender of 50 per cent of the areas on renewal of prospecting Licences;
- Establish and operationalize artisanal mining committees in the first 10 Counties (Migori, Homa Bay, Vihiga, Taita Taveta, Kakamega, Siaya, Turkana, Kilifi, Kwale and Kitui); and
- Identify 4 areas in Kakamega, Migori, Siaya and Turkana for licencing of Artisanal Mining.
- Train 70 ASMs on financial literacy, technical, environmental management, health & safety, policy, legal and regulatory framework.

KCM is focusing on formalising ASM supply chains in both gold and gemstones by aiding the MoM in the ASM management strategies integrated within the legalisation. Specifically, they are targeting capacity building to the ASM sector's diverse stakeholders.

4.2 Contribution to safety

The issue of mine accidents is a challenge to mining activities, especially during the rainy season when incidences of mine collapse rise. Other concerns in regard to safety include poor health and safety standards (lack of protective gear) and inefficient and rudimentary working tools and perilous processing chemical/techniques, such as the use of mercury.

In Migori, extensive use of mercury in the extraction of gold is a significant environmental and occupational health and safety issue. In Taita Taveta, the main environmental and health risks associated with ASM relate to poor conditions at mine camps and within the mine operation areas. The nature and severity of environmental and occupational risks in Taita Taveta's mines are tied to water scarcity.

In the case of gold processing, KCM is taking measures to minimise, manage, and mitigate risks from mercury misuse, including gender-sensitive approaches. These include suitable technical responses to minimise mercury use and improve its handling and management, including sensitisation campaigns, coupled with the introduction of retorts, more efficient gravity separation methods and waste containment systems. Kenya signed the Minamata Convention on Mercury on 10

²⁸ Mining sector is now an important cog in moving the state's Big Four Agenda forward, 21 May 2019. Report by Maina, I. [Online] www.mygov.go.ke/environment-and-natural-resources/mining-sector-is-now-an-important-cog-in-moving-the-states-big-four-agenda-forward/. Accessed on 13 July 2019.

October 2013 as part of the Intergovernmental Forum on Mining and sustainable development which entered into force on 16 August 2017²⁹. The Convention is a crucially important global treaty aimed at protecting human health and the environment from the adverse effects of mercury use.

The State Department of Mining is currently addressing all these. To curb or mitigate mine accidents, the MoM is working with the respective county governments to establish and train Rapid Rescue (RR) teams to respond to distress calls at the mining sites. They are encouraging miners to wear protective gears during mining at the site for their safety. The Ministry will undertake initiatives to establish 2 RR emergency units for ASMs in Migori and Kakamega counties³⁰.

4.3 Investor fora

The KCM in conjunction with the MoM has held Investment conferences to showcase recent achievements in the country's mining sector while marketing investment opportunities in the sector. The Kenya Mining Forum is an exclusive annual international platform for mining professionals in Kenya and the East African region. KCM hosted the event in November 2018. The event was a stakeholder-led gathering focused on a specific delegate profile with a distinct end goal – the search for credible investors in Kenya and the region's mining industry as well as associated support services.

The participation of key KCM members is incentivising international participation to market the minerals in the country. It enables East Africa mining stakeholders to share and present their policies set in the region. The mining conference toward a regional exhibition will allow us to create a consistent platform for Kenya, Tanzania, Ethiopia and Uganda, existing solid trade partners. There was an East and Central Africa Mining Forum to be held in Rwanda in October 2019. Discussions with the Ministry of Petroleum and Mining and other private sector key stakeholders in the region highlighted the fact that now is the opportune time to promote investment in Kenya as the new mining act has been implemented and regulations are being made; providing more transparency and credibility for investors.

4.4 Impact of licensing regulations

4.4.1 Dealers can get licences

The MoM prioritized regulations that facilitate the mining activity. These are employments, use of goods, reporting, licensing, etc. Apart from the royalty regulations, these are the essential regulations required by the mining operator to allow for concessions with the OMC regulating the issuance of licenses and permits for mineral rights and dealings in minerals.

²⁹ IGF Welcomes Entry into Force of Minamata Convention on Mercury, Stresses That More Work Needs to be Done. Press Release by the Intergovernmental Forum on Mining, Metals, Minerals and Sustainable Development (IGF). [Online] <https://www.igfmining.org/announcement/minamata-convention-mercury/>. 14 August 2017. Accessed on 13 July 2019.

³⁰ Maina (op. cit.)

The Mining Act and the Dealings in Minerals Regulations sought to track the removal of minerals from Kenya. The broad sweep of the Mineral Dealer Regulations captures several steps in the extractive value chain for large scale operators and persons providing supporting services. Mineral dealings are defined in the Mining Act, as "buying minerals, selling minerals, bartering minerals, depositing or receiving minerals as a pledge or security, or cutting, polishing processing, refining and treating minerals. The categories of mineral dealership affected by these regulations are:

- Construction, industrial, gaseous minerals and coal;
- Precious and semiprecious stones (all gemstones except diamonds);
- Precious and rare metals; and
- Base metals.

The Act greatly simplifies the types of mining rights that may be granted to investors as well as the acquisition process for such rights. Prospecting and mining rights will now be in the form of either a permit (for small scale operations) or a license (for large scale operations). The old restriction on prospecting licenses being held by a company has also been lifted (formerly they could only be granted to an individual "as an agent of the company"). These regulations are meant to curb this illegal business and specifically spells out the duties of the holder of a mineral dealers licence. However, these regulations are not to apply to the export and import of rough diamonds.

KCM had arguments to include the needs of the mineral processors and traders that led to the now Dealings in Mineral Regulations. The outcome was the introduction of the mineral dealers trading licenses for buying and selling and the mineral dealers processing license for those who are processing. This means that more players in the industry are now looking to have their operations formalised. However, enforcement of these licenses has been difficult. This is exemplified by the continued reports of smuggling of gold and other precious stones in and of the country³¹. It is estimated that Africa is losing over USD 60 billion annually due to the illicit mineral trade³².

In a paper exploring the loopholes in the mining regulations, there is a need to ensure that the taxation and royalties regime is regularized and that the same is friendly not only to the multinationals but also the artisanal miners in the country as an incentive to discourage them from dealing with illegal traders in and outside the country³³. It is therefore unlikely that these regulations alone, without

³¹ Petroleum CS Munyes exposes minerals smuggling cartels (Mnyamwezi, R.) Standard Digital. Published on 21 August, 2018. [Online] <https://www.standardmedia.co.ke/article/2001292787/kenya-losing-billions-to-minerals-smuggling-cartels>; Government red tape killing mining sector, claims lobby (Otieno, R.) Standard Digital. Published on 17 April, 2019. [Online] <https://www.standardmedia.co.ke/business/article/2001321316/government-red-tape-killing-miningsector-lobby>; Accessed 20 Aug 2019.

³² Nairobi to process gold and gemstones at value addition centre, (Senelwa, K.). The East African. Published on 20 February 2017. [Online] <https://www.theeastafrican.co.ke/business/Nairobi-to-process-gold-andgemstones/2560-3820176-n8dw6hz/index.html> Accessed on 20 Aug 2019.

³³ Regulating Mining: A New Vision for Kenya? Muigua, K. (July 2019). [Online] <http://kmco.co.ke/wp-content/uploads/2019/07/Regulating-Mining-A-New-Vision-Kariuki-Muigua-12th-July-2019.pdf> Accessed 20 Aug 2019.

the support of other security institutions across the region, will curb the illegal dealings in trade.

In addition, the Licence and Permit Regulations seek to regulate ASMs operations in line with the Mining Act 2016, by granting permits. However, there is a need to ensure that the same are not used as a political tool in awarding permits for corrupt dealings in artisanal mining activities.

The artisanal miners may smoothly get licences and permits (which will cost money to apply), there may be a funding challenge. It has been observed that acute cash shortage caused by poor linkages with the financial sectors of the economy is one of the biggest impediments to the growth of the artisanal and small-scale mining sector. This is mainly attributed to the fact that being a capital intensive and high-risk sector, it is difficult for local banks to finance it. However, KCM working alongside MoM government intervention can go a long way in addressing the funding challenge. For example, KCM is seeking to create a funding kitty to help ASMs competitively carry out mining activities. Such a kitty would be similar to those in other African countries whose artisanal and small scale mining sectors are doing well.

Kenya has huge deposits of limestone, marbles and dolomites mostly utilized in cement manufacturing and construction industries. The MoM is promoting the mining and processing of building and construction minerals for the affordable housing agenda. Specifically, they are facilitating the grant of mining licenses supporting the manufacturing pillar such as in the case of gypsum used in making ceiling boards, Limestone used in the manufacture of cement, Marble used in the manufacture of tiles and ceramics, aggregates used in the construction industry, Clay and Kaolin used in the manufacture of tiles among others³⁴.

Under the agriculture and food security agenda, the MoM will regulate the production of lime which is used as a soil enhancer, salt, iron ore used to enrich soils, limestone, pumice used in greenhouse and hydroponic farming, Phosphate used in the manufacture of fertilizer as well as volcanic rocks – used in greenhouse farming, guano used to enrich soils and carbon dioxide used in preservation of carbonated drinks.

Under the healthcare agenda, KCM plans to assist small scale traders and mineral process who are involved in healthcare production materials e.g. the case of barite otherwise also called heavy spar which is used as barium feed for imaging, gypsum used in making plaster, titanium pigment used in making toothpaste, sodium silicate produced from fusing silica sand with soda ash and dolomite used in manufacture of soaps and detergents.

4.4.2 Mineral Dealers (Processing) Licence

Persons engaged in processing of minerals will require a processing license. A mineral processing license application shall include particulars of proposed sources of minerals for processing and local procurement and employment plans. Processing license holders may appoint agents to carry out any activity

³⁴ Maina (op. cit.)

authorized under the license on their behalf. Processing license holders will be entitled to:

- buy minerals for the sole purpose of processing them;
- process minerals on behalf of mineral rights holders; and
- dispose of minerals won from processing

If such disposal requires exportation, processing license holders must apply for an export permit. In addition, if the processing activity on behalf of third parties is in relation to imported minerals, an import permit is required.

4.4.3 Mineral Dealers (Trading) Licence

The mining dealers are now being licensed by the mining dealing regulation (mineral dealers' licence). This creates an immense potential to contribute to the development of the country's mining industry by generating employment and income; widening the tax base; adoption of safer, healthier and more environmentally compliant standards; and creation of synergies with the formal large scale mining sector.

Persons who will be trading in minerals (export, import, or removal of minerals for sampling or assaying) must obtain a mineral trading license. Holders of a mineral trading license are entitled to appoint agents to carry out any activity authorized under the license on their behalf and must commence trading within 30 days of being issued with a license.

Ultimately all mineral supply chain actors (i.e. wholesalers, retailers, exporters, importers and some mineral expert professionals) will have to be registered by the MoM. This will reduce the prevalence of both unauthorized personnel working in the industry and the prevalence of counterfeit minerals.

4.4.4 Licences required for mining 'common minerals'

Because industrial and construction minerals are now classified as minerals that require mining licenses, persons mining soda ash, limestone, sand, phosphate, gypsum and other minerals formerly classified as 'common minerals', will now be required to apply for mining permits or mining licenses, depending on the scale of their operations, and to comply with the expanded procurement, employment, and local content obligations in addition to existing environmental compliance requirements.

The Mining Act expanded the scope of these minerals which adds an additional barrier to new entrants to the market and a few more legal obligations to the existing business. However, in the long run, this will have a positive impact on the industry. KCM is aiding new companies in this measure to encourage investment into the sector.

4.4.5 Market entry considerations

Consent of landowners

Applications for mineral rights will only be granted with the consent of the landowner to which the mineral rights relate. Consent is defined specifically in the Licencing Regulations and appears broader in scope than a lease or a licence over

the land in question. Consent entails a three-way process of engagement between the landowner(s), the license applicant, and the county government.

The Licencing Regulations do not distinguish between leases over private land and other types of consent, making them broader in scope than the Mining Act, which requires a legally binding agreement between the licence applicant and a private landowner. Instead, the regulations require mandatory consultation between the license applicant, the county government and the community which is likely to make the consent process for applicants particularly difficult where private land is concerned.

Local listing requirement

A holder of a mining licence whose planned capital expenditure (CAPEX) exceeds the prescribed amount shall list at least 20 per cent of its equity on a local stock exchange within three years of commencement of production. This could deter foreign investors. The CAPEX thresholds have not yet been published. The dilutive impact of this requirement should be factored into any market analysis prior to entry into the Kenyan mining sector. How the listing requirements will mesh with the existing requirements for listing on the NSE and the potential lack of liquidity in the Kenyan market is yet to be seen.

On 30 August 2017, the CS for Mining published a notice notifying interested parties that all pending applications for mineral rights were determined pursuant to the Mining Act, 2016 (the new Act) and required all holders of mineral rights prior to 27 May 2016 whose rights had expired prior to the appointment of the Mineral Rights Board, to submit applications for new licenses or permits in accordance with the provisions of the new Act. It stated that the failure to submit a complete application in accordance with the new Act would in the removal of the non-compliant application from the OMC on 31 October 2017. Despite these gazette notice, KCM lobbied to have that extended and the president extended that to 31 December 2017. KCM argued that the administrative burdens like achieving of Company Registry director and shareholding official statement and tax certificates are time-consuming which would make compliance difficult. This helped in the compliance burdens and even to date the MoM is lenient in its enforcement. KCM is in discussions with the Chair of the MRB to ensure that they are allowed adequate time despite passing the deadline.

This gave the business community time to comply with these regulations without undue pressure. It would have been illuminating to say how many mineral rights holders complied with the regulations and how many new holders have been approved and the potential value to the economy, the MoM was unable to share this information even after several attempts.

All mineral rights granted under the new Act and those granted before the commencement of the new Act remained in force and were being made available on the OMC. Mineral rights granted under the new Act were made available on the OMC within thirty days from the date of grant while existing rights were made available within six months after the coming into force of the Reporting Regulations by 4 February 2018.

4.5 Employment concerns regulations

The Employment Regulations restrict the ability of licensed mining companies to hire expatriates without the prior approval of the CS. The CS has wide discretion but may only approve expatriate recruitments if satisfied that no Kenyan possesses the requisite qualifications, skills and experience to occupy the position. The CS may also require the licensee to either advertise for a particular job which no Kenyan was deemed suitable or qualified to occupy or recruit from the pool of specialists or database to be established by the Director of Mines under the Employment Regulations.

On 26 November 2018 (being 18 months from the date on which the Employment Regulations came into force) large scale mining companies were required to update their mine plans in relation to conditions of employment, health and safety, management of the environment and community social investment in order to comply with the Employment Regulations. In order to comply with the Employment Regulations, the mining companies are reviewing expatriate contracts and initiating succession plans or exploring the possibility of entering into new contracts with expatriate staff on an independent contractor basis.

4.5.1 Disclosure and record-keeping obligations

The Employment Regulations and the Local Content Regulations impose significant obligations in relation to half-yearly and annual reporting on employment and procurement matters. Mining companies may have to invest in technology or devote additional resources to manage and maintain employment and procurement records in order to comply with the detailed reporting requirements prescribed under the regulations.

Holders of reconnaissance, retention and prospecting licences are required to provide exploration reports on a quarterly, biannual and annual basis. The exploration reports remain confidential for the term of the relevant permit or licence and become the property of the Government of Kenya upon the termination of the permit or licence.

Processing and trading licence holders must submit quarterly reports of all purchases and sales made under every permit or licence to the Ministry. In addition, processing and trading licence holders must submit copies of any sales contracts or agreements with buyers, sellers or holders of mineral rights. Export permit holders are also required to disclose sales or marketing agreements between the exporter and any buyer or any refining contracts or off-take agreements that may be in place. The quarterly reports to the Ministry of Mines must also disclose any royalty liability in relation to the minerals bought and sold. In addition, the Mineral Dealer Regulations require licence holders to keep complete and accurate records of all processing or trading activities carried out under the licence at their registered offices and to submit a true copy of these records to the CS.

The (Work Programmes and Exploration Reports) Guidelines provide guidance to applicants for, and holders of, reconnaissance licences, prospecting licences, prospecting permits and retention licences on how to prepare work programmes and exploration reports; and are to assist the Director of Geological Surveys to

review work programmes and exploration reports that shall be submitted by applicants for or holders of mineral rights.

Although specific Regulations, such as the Work Programme Regulations, contain confidentiality exceptions for certain types of information, the Mining Act does not provide for confidentiality exemptions to protect information disclosed to the MoM. To the extent that such contracts or agreements contain confidential or market-sensitive information, such disclosure obligations may add difficulty to those in the industry.

The reporting obligations come with penalties for non-compliance, including up to 24 months imprisonment or fines of up to one million shillings, or both. This issue is particularly relevant because the Director of Mines will have the right to access the licence holder's premises, systems and records to verify information submitted as part of the annual disclosure obligation in relation to local content and to employment planning.

This means that existing mining companies may have to invest in technology or devote additional resources and procedures to manage and maintain employment and procurement records in order to comply with the detailed reporting requirements prescribed under the Employment Regulations. This adds to the total cost of operations for the companies.

4.5.2 Mandatory education, research and development programmes

On 26 November 2018, holders of mining leases or special mining leases valid on the date the Mining Act came into force, mining companies were required to submit a programme to the Director of Mines for the promotion of education, research and development in the mining sector based on the guidelines to be developed by the Director of Mines in consultation with various stakeholders.

The guidelines are yet to be developed and the consultation process is yet to be undertaken. Companies holding mining leases or special mining leases will need to factor in the costs of developing and supporting such programmes into their existing budgets on an annual basis and should engage with stakeholders and the Director of Mines to identify an effective means of complying with these requirements.

The Employment and Training Regulations is to promote job creation through the use of local expertise in the mining industry, the entire mining value chain and to retain the requisite skills within the country; develop local capacities in the mining industry value chain through education, skills and technology transfer, research and development; and achieve the minimum local employment level and in-country spend across the entire mining industry value chain. They are geared towards ensuring that the mining sector creates jobs, employment and results in specialized training for the Kenyan people

The issue with reliance on foreigners to create expertise through technology transfer is the risk of not yield the desired results. The MoM work with the local institutions of higher learning through sponsoring courses for specialized training and to gain experience. There is also a need to ensure that the jobs offered are not menial in nature since, if left unsupervised, as the foreign companies may not be willing to place local experts in critical positions within the entire mining value chain as required by the law. The MoM should offer technical and financial

support to its people in order to uplift them to levels where they can competitively take up key positions in the mining sector and specifically represent the interests of the MoM and the country at large within these companies.

4.6 Impact of local content requirements

The purpose of the Use of Local Goods and Services Regulations is to promote job creation through the use of local expertise, goods and services, businesses and financing in the mining industry value chain and their retention in the country. Also to:

- Achieve the minimum local level and in-country spend for the provision of the goods and services in the mining industry value chain;
- Increase the capability and international competitiveness of domestic businesses; and
- Create mining and mineral-related support industries that will provide jobs and sustain economic development.

Some of the regulations such as the Mining (Use of Local Goods and Services) Regulations, 2017; Mining (Employment and Training) Regulations, 2017 are meant to directly empower the local communities by promoting job creation and the market for locally produced goods. The regulations require that the holder of a licence, its contractors and sub-contractors shall, to the maximum extent possible, when purchasing goods and procuring services required with respect to operations or any activity to be conducted under a licence, give first priority to materials and goods made in Kenya; and services provided by citizens of Kenya or entities incorporated and operating in Kenya or owned and controlled by Kenyans: provided that such goods and services are equal in quality, quantity and price to, or better than, goods and services obtainable outside of Kenya.

The MoM plans to alleviate poverty in any mining region by empowering the local people through creating markets for locally produced goods and services. However, there is likely to arise a challenge in getting the mining sector players, both local and foreign, to abide by these rules. They are likely to bypass them on grounds equality in quality, quantity and price to, or better than, goods and services obtainable outside of Kenya. Considering that there are many factors (such as supply and demand, cost of raw materials, machinery, amongst others) that may influence the production cost of goods and services which may ultimately push up the price of these goods and services or worse compromise their quality, it is likely that the companies in question may use such loopholes to source for the same either from their home countries (for foreigners) or other cheaper and better quality goods from foreign countries for the locals.

This provision may be questioned because, as it may be proved through statistics, there are many factors of production that may, and have indeed, been making locally produced goods more expensive when compared to imported ones. Thus, as long as investors can prove that they can source such goods and/or services at more competitive prices or those with better quality, they will easily bypass the requirements of these regulations. The manufacturing sector and other factors affecting the local production of goods and services may thus need to be fixed before these regulations can effectively be implemented.

While implementing these regulations KCM plans to work with the MoM as well as other stakeholders to first address these challenges before local traders, service providers and communities can benefit from the legal framework.

4.6.1 Procurement plans by existing mineral rights holders

On the 24 August 2017 as per the Local Content Regulations, holders of existing mineral rights that were valid on the date of the enactment of the Mining Act were required to submit procurement plans to the CS. Such procurement plans must:

- Set target levels of local procurement Based on a procurement list to be developed and communicated by the Director of Mines
- Indicate specific support to be provided by mineral rights holders to local providers or suppliers as well as other measures being implemented to develop the supply of local goods and services including broadening access to opportunities and technical support.

The existing mineral rights holders are evaluating their existing procurement arrangements to ensure that the nationality of existing suppliers of goods and services is adequately documented with a view to complying with the Local Content Regulations.

4.6.2 Contracting with foreign engineering service providers

The Local Content Regulations also require engineering services to be rendered by Kenyan engineering companies registered with the relevant regulatory bodies or by foreign engineering consultants working in collaboration with firms or companies licenced to provide such engineering services in Kenya.

Licensees may no longer be able to engage expatriate or foreign engineering companies without the prior consent of the CS for Mining and the Engineering Board of Kenya (EBK). Where there is no qualified Kenyan person or entity to provide specific engineering services, the CS, in consultation with the relevant professional body may permit the licence holder to engage an expatriate or foreign company subject to such terms and conditions as the CS may prescribe.

Licensees need to evaluate their existing contractual arrangements to ensure compliance with the Local Content Regulations. Currently, the EBK does not register mining engineers, as these are not a class of engineers presently regulated under the Engineering Act, 2011³⁵. While the EBK may recognize new classes of engineers for registration, the Mining Engineers Society of Kenya (MESK) is not accredited by the EBK. KCM is engaging the Ministry of Mines to ensure that waivers can be granted in relation to this provision until the necessary institutional arrangements are in place, and to allow for the waiver of the requirement to hire Kenyan engineering companies where joint venture partners are capable of providing such services based on internal expertise, particularly in specialized areas of mining.

³⁵ The Engineers Act, 2011. Act No 3 of 2012, 27 January 2012. Accessed from www.kenyalaw.org

4.6.3 Contracting with local geologists

The Work Programme Regulations require exploration reports submitted by reconnaissance, retention and prospecting licence holders to be prepared and signed by a qualified geologist recognized by the Geologists Registration Board of Kenya (GRB) who is actively involved in carrying out the work programme. This meant that licence holders who had contracted geologists who are not permanent residents of Kenya will need to ensure that the geologists apply for temporary registration with the GRB.

4.7 Local insurance requirements

Licensees, contractors and subcontractors need to ensure that all insurable risks related to their respective reconnaissance, prospecting and mining businesses or operations are insured with companies licenced with the Insurance Regulatory Authority of Kenya (IRA) for such purposes. No insurance may be placed offshore without the written approval of the IRA. Licensees are therefore re-evaluating their existing insurance coverage to identify insurance arrangements that may not conform and begin to evaluate local insurance providers to assess comparable local coverage options.

4.8 Impact of end of operations requirements

One of the most contentious provisions of the Mining Act is the provisions requiring holders of large scale mineral rights to surrender all moveable and immovable assets upon termination of a mining right (unless the operator intends to use the assets in another mining operation in Kenya). "Movable assets" are broadly defined in the Act as tangible assets (meaning all types of goods including motor vehicles, crops, machinery and livestock) and intangible assets (including receivables, deposit accounts, electronic securities and intellectual property rights).

The regulations present uncharted territory for operators seeking to manage the life cycle of their projects and need to be carefully reviewed by new and existing licensees Immoveable assets

4.8.1 Use of Assets

The Use of Assets Regulations applies to holders of mining licences requiring them to maintain a complete, up to date and accurate register of all its immovable and movable assets.

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

Under the Assets Regulations, transportation facilities, port facilities, power, water and sewerage facilities, schools, hospitals, clinics, recreational facilities, offices, staff accommodation, and warehouses automatically vest in the national

government upon issuance of a written notice by the CS. Upon publication of the notice, the mining operator loses their rights of occupancy or use of any of the assets.

It is not clear how the implementation of the Use of Assets Regulations will affect a licensee's obligations under the Capital Markets Authority Act³⁶ where a licensee has listed on the Nairobi Securities Exchange (NSE).

4.8.2 Moveable assets

Fully depreciated moveable assets such as plant, machinery, equipment and other facilities automatically vest in the county government upon issuance of written notice by the CS. Neither the Mining Act nor the Assets Regulations allow for fair compensation to large scale operators. Mining companies may, therefore, have resort to the terms of existing bilateral investment treaties between Kenya and the relevant home countries in which such investors are domiciled.

4.9 Contribution to green growth: Environment and Social Protections

Environmental protection has not been overlooked in the law and the measure of how well these issues are addressed will depend on the relationship between the regulations on environmental management and their interactions with the related legislation on environmental matters. The Act also contains a range of environmental and social provisions which include requirements to use locally produced goods and services, engage companies or businesses owned by Kenyan citizens, and submit detailed mine closure plans.

Applicants for mining licenses must provide an environmental protection bond or similar security, sufficient to cover the costs associated with the implementation of their environmental and rehabilitation obligations. The Act also requires miners to invest in and facilitate social responsibility activities with local communities, which includes capacity building, skills transfer, and giving priority to Kenyans when employing staff for mining projects.

4.9.1 Land

The National Land Commission, the constitutional body in charge of the management of land in Kenya, also has a role in the licensing of mining operations, especially where such operations involve the acquisition of land and resettlement of communities.

The Mining Act 2016 has provisions that promote good practice, for example, provisions to allow inspections and audits of mineral operations. The stipulation of legal ownership of sub-surface resources along with provisions that ensure clarity on surface rights and access to land for mining operations is another marker of good practice. Matters of land access are especially important for Kenya where mining operations compete for allocation with livelihood activities such as agriculture and pastoralism. Good practice in this regard maintains that amounts of land covering mining operations be reasonably matched to the size of expected operations in order to limit land footprint competition with other livelihood activities. The various license and permit classes have defined

³⁶ The Capital Markets (Amendment) Act, 2000 (Cap 485A). Act No. 3, Assented on 1 August 2000. Accessed from www.kenyalaw.org

maximum areas, which take this into consideration, with the exception of Artisanal Mining permit and the Reconnaissance permit.

The new mining code does not mention how the progression to competitive bidding would be made. This might mean that amendments would have to be made unless the Mineral Rights Board has the ability to change procedures in collaboration with the CS's office. KCM expects that these changes be debated as National Geological Data becomes more uniformly available and most operations are at more advanced stages. This will make the job of marketing the country to investors easier. In terms of licensing and permit tenures, best practice would be to limit exploration rights to be less than 10 years. The law adequately manages the duration of rights holders with the maximum anticipated length of licensing for exploration being 9 years.

4.9.2 Environmental and Local Community Concerns

KCM is working with the National Environment Management Authority (NEMA) to create awareness amongst the affected communities on the Environmental Impact Assessment (EIA) process to promote their meaningful participation in the process. It is hoped that future Taita Taveta National Mining Corporation will be set up which would incorporate the views from the affected communities in Taita via the EIA processes.

KCM is requesting that their member companies promote transparency and engagement with communities, based on best practices such as the Free, Prior and Informed Consent standards³⁷. This provides for indigenous peoples' rights and good practices for local communities and is a requirement under the guidelines documented by the Ministry of Environment and Natural Resources.

For example, the research document to assess Tullow Oil's implementation of Free Prior Informed Consent (FPIC) in the Turkana oil fields was premised on Tullow's application of FPIC in Turkana given that one of the project partners exploring and developing the blocks in the South Lokichar Basin, Africa Oil, received funding from the International Finance Corporation (IFC). As the operator of fields and as a condition for IFC funding, Tullow Oil is obliged to comply with the IFC Performance Standards, including the requirement to obtain Free, Prior and Informed Consent of communities of indigenous peoples affected by their operations. The research was also informed by the need to assess Tullow's performance against its own Human Rights Policy which requires the company to obtain 'broad community support' and 'the informed agreement' of communities affected by projects. While the primary focus of the research was on Tullow and its implementation of FPIC, the research findings and recommendations provide important lessons for other companies and other stakeholders in the extractive sector including local communities, civil society, government and project financiers.

³⁷ Free, Prior and Informed Consent (FPIC) is a principle protected by international human rights standards that state, 'all peoples have the right to self-determination' and linked to the right to self-determination – 'all peoples have the right to freely pursue their economic, social and cultural development'

4.9.3 Affected communities issue – working with Civil Society Organizations

One of the major obstacles to the sustainable development of the mining sector in Africa is conflicts. These conflicts emanate from various sources. However one of the key sources of misunderstanding is lack of communication between the rights holders (community) and duty bearers (government and corporate) and this breakdown of communication is due to poor or non-existent mechanisms of involvement of affected communities in decision making and ignorance. Key among the greatest barriers to communal participation is ignorance regarding mining activities and also the language of instruction. Most rural people are uneducated and yet a large number of communications and notices are in English. Poor management of expectations is also a critical source of misunderstanding and leading to conflict. Poor communal organization and lack of some sort of recognized authority gives room for disorder and hence poor channels of communication.

KCM members, for instance, have had been queries on how to manage expectations of the local people living within the mining areas in order to avert possible conflicts in future. KCM is helping create awareness on the licensing processes amongst the affected communities as this will promote their participation at different stages of the resolution of a grievance. KCM monitors operations of the MRB to ensure its compliance with the laid down procedures in making recommendations for issuance of licences. KCM also support the affected communities in seeking redress for violations that may arise as a result of a lack of adherence to laid down procedures in awarding various licences.

For example in September 2019³⁸, the Kenya National Commission on Human Rights (KNCHR), in a report on the region, said most landowners do not have title deeds in areas of active mining. Therefore, their land is taken and they languish in poverty. KNCHR states that that unresolved land disputes in the county hindered the affected communities from benefiting from mining rights.

KCM is proactively seeking information on the different mineral licensing processes to effectively engage with mining companies and government departments. They are ensuring adequate representation at all forums where deliberations on minerals take place.

KCM is working with Transparency International (TI)-Kenya who will also spearhead capacity building targeting affected communities to empower them with knowledge on mining processes. TI-Kenya has planned several activities including stakeholder engagements in the mining sector. Advocacy interventions around strengthening policy and legal framework will be conducted with an aim of promoting transparency, accountability and good governance in the mining sector. TI-Kenya welcomes partnerships with all stakeholders in the mining sector to work towards promoting accountability in the sector.

³⁸ Muingi, S. (2019 Sep 19) Mining in Taita is often a curse, says KNHCR, The Star. Retrieved from www.the-star.co.ke.

4.9.4 Green Economy Strategy and Implementation Plan

In July 2017, the CS for Ministry of ENR launched the Green Economy Strategy and Implementation Plan, 2016 – 2030 (GESIP)³⁹. GESIP is a blueprint for enhancing low-carbon, resource-efficient, equitable and inclusive socio-economic transformation. Furthermore, it focuses on binding social-economic constraints towards attaining Kenya Vision 2030 and is aligned with the outcomes of the United Nations Conference on Sustainable Development. It will ensure a low carbon, resource-efficient, equitable and inclusive socio-economic transformation. The growth strategy will also benefit from the exploitation of “green growth” opportunities such as the use of carbon credits (especially in reforested catchment towers), clean energy use in geothermal, hydro, wind and solar power, the promotion of natural products initiatives, promotion of resource efficiency and clean production systems.

The government will mainstream a green jobs approach in the various infrastructural projects and programmes. Mapping of current green jobs and future green jobs opportunities in various sectors will be finalized and human resource training strategy in green processes and technologies will be developed and implemented. Priority will be accorded to sectors with high potential for the creation of green jobs such as tree planting and re-forestation programme, urban waste collection and recycling projects and renewable energy projects.

KCM’s reforms have contributed to green growth in that one of their largest members, Base Titanium is committed to achieving sustainability and biodiversity objectives including:

- Locating facilities such that critical habitats are not disturbed and impacts to threatened species are minimised;
- Achieving a net positive biodiversity outcome; and
- Maintaining ecosystem services.

Base Titanium’s environmental programmes are aimed at identifying and exploiting opportunities for positive outcomes and include initiatives that will be progressively implemented over the life of the mine.

4.10 Impact of Community Development Regulations

The Act requires, among other things, that mining operations take into account the local community values as well as the conditions of community development. Land is the subject of mineral rights and is almost always most likely owned by local communities. The Act requires that the consent of such communities and their county governments is obtained before mineral operations are carried out on their land. The Act requires, among other things, that mining operations take into account the local community values as well as the conditions of community development.

³⁹ Green Economy Strategy and Implementation Plan: 2016 -2030 A low carbon, resource efficient, equitable and inclusive socio-economic transformation Accessed from www.environment.go.ke

Example: Kwale Project

A number of global mining companies have run operations in Kenya over the years or have shown the interest of venturing into the country as the government continues to create a conducive and sustainable environment for the growth of the mining sector. These companies include Base Titanium which is mining heavy mineral sands in Kwale County and is currently the leading mineral exporter. They shipped their first consignment worth KES 31 billion in 2014.

Base Titanium represents large-scale miners on the Executive Council of KCM. Base Titanium is the owner and operator of Kenya's first large-scale modern mining project, the Kwale mine. Representing close to 60 per cent of Kenya's mineral output value, the Kwale mine has been recognized by Vision 2030 as a flagship project due to its transformative impact on the country's mining sector. It has positioned itself as a unique operator within the mineral sands space – operating as a mid-cap, pure-play mineral sands company.

Titanium ores and concentrates have gained prominence as a major export commodity since 2014 with domestic exports of the commodity amounting to KES 15 billion in 2018. To date over 140 individual projects have been completed for an investment of over KES 1 billion. The Kwale Project is expected to contribute around KES 22.5 billion to the Government of Kenya indirect tax and royalty payments and close to KES 100 billion in GDP contribution over the 13-year life of the mine, in addition to considerable indirect taxation and other economic benefits⁴⁰. The company paid KES 1.1 billion tax and royalties to the Kenyan government in the six months ended December 2018, when its net profit more than doubled to KES 2.1 billion. The multinational stated, in a regulatory filing, that it paid KES 467 million income tax and KES 636 million royalties in the review period⁴¹. The Kwale project generates a total of KES 18.6 billion in economic output per year. At current mineral prices, the export value from the Kwale mine of KES 20 billion per annum represents 66 per cent of Kenya's minerals output value (Titanium mineral ores) and elevates the sector to the country's fourth most important export commodity according to the 2019 Economic Survey⁴².

There have been many stand out highlights since acquiring and developing the Kwale mine – the rapid and successful development of Kenya's first large-scale, modern mining project, plant commissioning and ramp-up, a justifiably proud safety record, upskilling and developing the Kenyan workforce. Over 1,000 people are currently employed by Base and its contractors. Of these 67 per cent are from Kwale County and 98 per cent are Kenyan. The Project supports an additional 2,800 jobs through indirect (supply chain) and induced (consumer spending) activity.

Additionally, it has established community development environmental rehabilitation programs. Various programs have been designed to meet the agreed goals with many projects completed so far. Strong links have already been

⁴⁰ Economic contribution of Base Titanium efforts to Kenya. Accessed from <http://basetitanium.com/kwale-project/project-economic-contribution>.

⁴¹ Base Titanium shifts mining operations within Kwale (Mohamed A). The Business Daily Africa. Published on 13 June 2019. Accessed from <https://www.businessdailyafrica.com/corporate/companies/Base-Titanium-shifts-operations-within-Kwale/4003102-5156514-ucuqv3/index.html>.

⁴² Economic Survey 2019 (Values of Principal Domestic Exports and International Trade and Balance of Payments Summary). Kenya National Bureau of Statistics. The Government Printer.

established with international donor agencies, community development organizations and other like-minded businesses with a view to working together towards assisting the Kwale and Mombasa county governments to achieve their strategic development objectives. The project has high international visibility; serves as a positive example for successful mining investment in Kenya; and establishes a model for effective development of the mining industry in Kenya.

Base Titanium's prioritized employment system and heavy investment in training to further ensure the transfer of skills and develop manpower for the mining sector, Base Titanium works closely with local educational and training institutions to implement a number of external training opportunities including graduate, apprenticeship and internship programs. Through these, they are exposing Kenya's youth to skills needed for employment in a new sector in Kenya and equipping them with the skills necessary to drive its growth. Also strongly highlighted are their community programs, which include the provision of social infrastructure, investing in sustainable livelihood programs centred on agriculture and a variety of health and education programs. All this is in line with the Sustainable Development Goals established to achieve specific targets in global development by 2030.

4.10.1 Business for Development Community Projects

Base Titanium (BT) engaged a specialist to look into improving agricultural productivity and diversity in Kwale. Base Titanium has invested in a variety of commodities that are targeted to add smallholder farmers into the value chain. BT started cotton, sorghum, potatoes, and chicken farming for locals in Kwale.

Through market analysis, discovered that cotton was grown well in the community in the past. A pilot was created with 100 farmers to test whether it could be grown under current market dynamics. The community rallied around the crop and the quality of the output was exceptional. Through extension work, the program is looking to upscale up to 10,000 farmers and their families by 2020. Cotton On Group, an Australian retail multinational, not only invests in the project but importantly is the offtake partner for the sustainable cotton. Importantly, to compliment the cotton crop, the by-product of cotton is being made into cottonseed cake which is used in feed for animals, namely chickens. As a result, women in the communities are empowered to increase their income. Also, rotation cropping is being utilised with sorghum and potatoes.

In terms of life-cycle, this partnership has proven to work and is now scaling-up for. BT and the many other partners; Non-Governmental Organisations, donors, private sector companies are forming collaborative partnerships to undertake truly transformative work with farmers. In a time frame of five years, this program is seeking to be self-sustaining. This means, with appropriate structure, a livelihood micro-economy has been established which will out-last the mine and seeks to have an impact for thousands of members of the Kwale community for decades to come.

4.11 Community Infrastructure

- BT is working with local non-governmental and community-based organizations in the area of enterprise development, such as village savings

and loans association schemes for volunteer community health workers and enterprise development for youth and women's groups.

- Longer-term benefits derived from the mine will have a significant influence on the socio-economic environment in the region. On ultimate closure of the mine, infrastructure to be handed over to local authorities, valued at KES 6 billion, includes:
 - The Mukurumudzi dam and Msambweni boreholes will contribute enormously to the regions irrigation and water supply requirements.
 - The 132kV transmission line and substation are a further step to realising the targets to establish the East Africa power pool.
 - The mine access road will assist with links from the current Mombasa – Tanzania highway to roads planned in the future further inland.
 - The port facility will be an important contributor to the industrial development of Likoni and the south coast region.
- BT's special mining lease specifies that, on completion of mining, the land will be rehabilitated for the benefit of the community. Their mine closure plan is the driver for identifying post-mining land use (via small-scale farming, commercial farming, forestry, community wildlife sanctuary, etc.) with affected communities and other stakeholders. Consultations will be undertaken to inform their rehabilitation strategy in a timely manner.

4.12 Community Health

- BT has provided much-needed health infrastructure to nearby communities and works closely with other stakeholders and Kwale county government to tackle a number of key health issues in the region. BT is supporting the Ministry of Health in the implementation of its community health strategy which aims to improve the health status of Kenyan communities. Two recent construction projects, both associated with health service delivery, represent some of the largest infrastructure development programmes BT has undertaken:
- The maternity wing constructed by BT at Likoni Hospital was completed in 2017 and includes the provision of 18 maternity beds.
- As part of a health impact assessment carried out by BT, a health development framework was prepared in 2013 in partnership with the Kwale county health department. The framework identified the need for a blood bank facility in the county to address the problem of acquiring blood supplies from Mombasa, which were often delayed, adversely impacting emergency cases.

Community Health Units ("CHU")

CHUs provide the first level of health care with trained volunteer health workers providing basic healthcare such as hygiene, sanitation, maternal and child health. Each health worker is responsible for 20 households. Assistance has been provided to expand the Kwale and Mombasa counties Health Departments' Community Strategy Programme by providing funding for training and logistical support. BT now supports 7 CHUs with 241 community health volunteers covering 46 villages from the host site, mine site and the Likoni port facility areas.

Health Campaigns

During the Health Impact Assessment baseline study, several ailments were noted that had a debilitating effect on households. One of them is infestation with the jigger flea larvae which affects mostly children and can lead to loss of mobility and often, inability to attend school. CHUs have also been empowered to deal with the emerging bedbug infestation menace through training in fumigation procedures and provision of fumigation equipment to enable them to deal with the problem in their respective communities.

Hospital Equipment

- Long-term plans for the Msambweni Referral Hospital are to upgrade it to a level that will be able to handle almost all emergency and routine medical procedures. A four-wheel-drive ambulance was provided to the hospital as an alternative to another dispensary in the area.
- Discussions are underway with a number of interested stakeholders to plan for the delivery of such improvements. In agreement with local committees, the dispensary planned for the mine site was replaced with the Magaoni Health centre which was built by BT and opened by the Kwale Governor, Salim Mvurya in July 2014.
- BT also provided equipment for the Bwiti Dispensary which was completed in 2012 at the host resettlement site at the Mrima Bwiti.
- They are also assisting in the development of programs to improve service delivery at the Kenya Medical Training College at Msambweni.

Support for Health Authorities

Health authorities are often faced with challenges when trying to reach remote rural areas. BT has supported sub-counties throughout Kwale and in Likoni with logistics to enable them to complete important tasks such as mass net distribution, polio vaccination campaigns and drug-resistant TB awareness campaigns.

Prevention of Mother to Child Transmission (PMCT) Project

Base Titanium supports this HIV control programme through the Mentor Mothers Programme. The project operates through 24 mentor mothers placed in 12 health facilities within Kwale County. The mentor mothers play a critical role in promoting improved healthcare and uptake of adherence, retention-in-care and psychosocial support provided to HIV-positive mothers as they draw from their own experiences as beneficiaries of the PMCT programme to inspire behavioural change in their peers. By September 2017, close to 800 HIV positive pregnant mothers have been enrolled into care and 11,000 HIV negative pregnant mothers reached with preventive messages. In addition, 600 defaulters were traced and 400 of them successfully brought back into their treatment regime.

4.12.2 Other Community Educational, Social and Livelihood Initiatives

Maritime course training

As a community initiative geared towards improving livelihoods near the company's ship loading facility at Likoni, Base Titanium donated a fishing boat

and equipment to the Likoni Beach Management Unit (BMU). It also facilitated the attendance of 50 members of the BMU at the Dar es Salaam Maritime Institute in Tanzania to receive training in fishing and marine safety. The company's investment in this initiative totalled KES 14 million.

Forklift operator training

Base Titanium supported forklift operator training for 30 members of the Kibuyuni community in Likoni to improve employability and livelihoods of its neighbouring communities.

Scholarships

Both private and public sector funds are mobilised to ensure that bright students in Kwale have access to secondary and tertiary level education. BT has established its own scholarship programme, managed with input from its local liaison committees, to ensure fairness and transparency in the award of its scholarships. It supports pupils transitioning from public primary into public secondary schools and to tertiary level students accepted into an accredited institution of higher learning. As of December 2017, BT has supported over 1,050 local students from Kwale county and Likoni sub-county who are studying at a variety of institutions across the country. Since 2013 the company has invested KES 164 million in providing scholarships.

KCM board's reforms have worked with other partners in:

- 'Hatua Likoni': BT has provided the organisation with KES 18 million for its scholarship programme and other community initiatives. These funds have supported over 200 students.
- 'Friends for Life': BT has supported over 20 tertiary level students from Kwale and Mombasa through this programme to date by providing funding of KES 7 million.
- Aga Khan Academy Mombasa: Through BT's contribution of KES 1 million, in 2017 two students from Kwale were selected through the Academy's talent identification programme to join the 58 beneficiaries from across East Africa, including those from underprivileged backgrounds.
- Al Kahf Foundation: BT has partnered with Al Kahf through the provision of logistical support to over 40 students to enable them to study courses in law, medicine and business at the International University of Africa in Sudan.
- Ummah Initiative Group (UIG): UIG seeks to economically empower the youth to prevent them from falling prey to extremism. The partnership between Base Titanium and UIG dates back to 2012 and has so far seen more than 3,000 local youth benefit through scholarship opportunities, career guidance, gainful employment and entrepreneurship as sources of income.

Additional projects include:

- Two schools, a social hall and three boreholes at the Mrima Bwiti resettlement site;

- Working closely with the Kwale county government to assist with the construction of early childhood development centres, agricultural training facilities, and water infrastructure;
- Refurbishing existing schools in Kwale and Mombasa counties to create a better learning environment;
- Improving educational facilities for special needs children in both areas.

4.13 Contribution of the mining sector to the country's GDP

According to the economic survey, the mining sector contributes 0.8 per cent to the country's GDP. These statistics are however not a true reflection of the entire mining value chain. For instance, the statistic does not include the contribution of cement plants which utilize limestone, iron ore and gypsum in their operations. The country is the leading producer of cement in the region with a large investment in cement manufactured by Bamburi, Mombasa, Athi River Mining, East African Portland, National, Simba, Savannah and Rai cement companies. Tata Chemicals Magadi Limited, which has its operations in Lake Magadi area in the Great Rift Valley, is Africa's largest soda ash producer and also one of Kenya's major exporter of minerals. The quantity of soda ash exports were 343,000 tonnes in 2017.

Government revenue from mining in 2011/12 was just KES 26 million rising to KES 1.3 billion in 2013/14. From 2014 to 2016, GDP growth in mining and quarrying grew by 9.5 per cent following enhanced exploration of minerals. The KCM CEO stated that the reason in these increases was due to that before 2013, minerals were being governed by the Department of Mines and Geology. When the transition happened to the Ministry of Mining, there was more government expenditure due to extra overhead costs. Government spending in mines doubled according to the KNBS. The workforce and wage bill went up for decision-making and other govt. Later on, the Mining ministry was expanded to the petroleum-based exploration efforts. All this happened when there was no exploration or mining going on due to the reforms.

Gold outputs recorded significant growths, from 0.2 thousand tonnes in 2016 to 0.5 thousand tonnes in 2017. The increase in gold output was partly due to an upsurge in gold mining activities following the abolition of the special gold license which was prohibitively expensive. The total value of mineral output increased by 2.1 per cent from KES 23.3 billion in 2016 to KES 23.8 billion in 2017. Earnings from gold more than doubled from KES 653 million in 2016 to KES 1.5 billion in 2017.

In 2015, Kenya had worked with McKinsey on a 20-year mining plan that already highlighted the potential of USD 62 billion mining revenues⁴³. This would work towards the MoM objective to contribute to 10 per cent of the GDP in 2030 against 1 per cent in 2014 and 2015. Certain aspects of the fiscal regime have been provided for in the law though there is a reliance on regulations to provide details of how royalties, fees, and other charges will be distributed. Three-fold

⁴³ Kenya Is Hiring McKinsey to Help Unlock Its Mining Potential, Posted 26 June 2015. Report by David D. Accessed from <https://www.bloomberg.com/news/articles/2015-06-25/kenya-government-hiring-mckinsey-to-help-unlock-mining-potential>. Accessed on 13 July 2019.

growth in revenues generated from permits and licences lifted earnings of the mining ministry to KES 6.8 billion to June 2018. According to the Kenya National Bureau of Statistics, the growth in revenue is due to the enactment of the Mining Act 2016.

Further to earlier discussions between the MoM and various international mining companies, the Act requires the CS of the MoM to facilitate the establishment of a Minerals and Metals Commodity Exchange in Kenya to help address the difficulties in accessing capital faced by entities investing in the country. They have a strategy to increase the value of mineral production for export from KES 22 billion to KES 29 billion to increase the volume of mineral exports from 865 thousand tonnes to 1.1 million tonnes by end of 2019. This will increase the royalties earned by 30 per cent.

In 2017 Kenya jumped 16 places to position 86 from 102 in the most attractive global mining destinations, according to a survey the Fraser Institute since the Mining Act was implemented. Whilst Canada bagged the top spot as the most attractive country to invest in the mining sector, Kenya limped in as the second-worst place in the world as a destination for mining investment⁴⁴. The survey considers both policy and mineral potential in the Investment Attractiveness Index. The report states that when considering both policy and mineral potential in the Investment Attractiveness Index, Kenya ranks as the least attractive jurisdiction in the world for investment. This was due to the fact that from 2014 to 2015, the main obstacles to a conducive business environment included dealing with government attempts to use power to trounce on mining rights. From 2013 to July 2017, there was a hiatus in the mining industry as no mining licenses were being issued. Additionally, only gazette notices were being issued to prolong expired licenses. This led to a loss of investor confidence due to uncertainty around what rules and regulations would arise and would affect the business environment.

Foreign Direct Investment (FDI) improved in 2015 with total inflows of KES 220 billion. Mining was one of the leading sectors that attracted FDI in 2015 which accounted for 21 per cent. Net financial inflows grew by 22 per cent from KES 547 billion in 2017 to 665 billion in 2018. The State Department of Mining was unable to provide what per cent of these FDI was attributed to the mining sector after the policy changes. Currently, the MoM lacks methodology of tracking the progress of how the mining and mineral resources sector would contribute 10 per cent of the GDP by 2030. This is due to the fact that the monitoring aspect of the policy is yet to be implemented. This poses a challenge to the MoM's objective to increase exports originating from the sector and to attract more investment in accordance with targets in the Vision 2030 agenda.

While these statistics paint a hopeful picture with the figures increasing, there is still a lot of room for not only growth in these figures but also a positive contribution of the mining sector to the lives of the ordinary citizens especially those to be found within the localities where such mining takes place.

⁴⁴ Fraser Institute Annual Survey of Mining Companies Report, 2017. Accessed from <https://kenyachambermines.com/kenya-ranked-2nd-worst-mining-destination-in-the-world/>, 23 February 2018.

There are specifications of best practice as related to mining agreements – but there is not a model provided by the Mining Act and we are thus unable to assess whether those specifications are met. We anticipate that the regulations to be published will provide these details along with the opportunity to discuss the extent to which the Act promotes good practice in major mineral project agreement provisions.

The KCM CEO mentioned that a high number of their members are stating that there is an increased cost of doing business. However, there was no quantifiable information on these costs by the small scale members as they were awaiting the formal gazette of fees for permits and licences. Without increased inspection and motoring of the operations, smuggling and illegal trade may also increase due to increased cost of doing business.

Until the regulations are implemented, it is difficult to assess whether best practice has been employed. However, it is noted that there is clarity on which license or permit classes and minerals are subject to royalty payments and the types of fees due to each. As with most things law and policy, the key to how the legal and regulatory framework will impact the mining sector remains predicated on implementation and enforcement. KCM stated that there are significant investments to be made in this regard, and the speed with which MoM takes on this undertaking remains a critical success factor of which KCM continues to play its part in the industry.

If the Mining and Minerals Policy, Act and Regulations are well implemented, it is expected that there would be better management and quality controls in the mining industry value chain. This is defined as “the processes involved in the mining industry which include but are not limited to exploration, development, production, refining, smelting, polishing and marketing of minerals.” Thereafter, a further assessment would be required to estimate the macro-economic impact of these regulations on the Kenyan economy.

5. Current advocacy

The implementation of the policy regime is not fully developed, particularly on the share of revenue among local communities, government and investors. KCM stated that the local technical capacity is also low, including town/land use planning in mining areas and ensuring green and sustainable development. Minerals are local resources that relate closely to local communities and the counties. It is therefore important that local communities and counties are involved fully in the planning and development of the mining and quarry sector.

It is also important that adequate land use planning is undertaken before the development of mining projects. The mining code provides clear guidelines for the regulation of the mining sector in Kenya and places great responsibility on MoM to ensure that activities are conducted efficiently, ethically, and sustainably. The capacity to enforce is a major consideration in ensuring that the objectives of the new mining code and policy will be achieved. KCM stated that the MoM will require staff who are technically qualified and adequately equipped to perform their duties. Equally, county governments whose role will be vital in coordinating artisanal mining efforts will require staff with expertise and training to undertake compliance monitoring and enforcement activities.

President Kenyatta has set a target of 4 per cent of GDP for the mineral industry and much needs to be done to achieve this. KCM is fully committed to playing its part in making this a reality. The new law has many implications for existing and future large-scale mining investors. While many of the new provisions are benign or positive, there remain a number of clauses that will require KCM to play an active role in seeking amendments or mitigation measures through the development of regulations. The KCM plays a proactive and prominent role in engaging with the MoM to ensure thorough consultations take place in the development and finalization of regulations and proposals for future amendments. To achieve this effectively, it is important that committees be set up to engage the MoM and other stakeholders in a structured and formalized manner.

Moses Njiru, who is currently KCM's CEO, was the former Commissioner of Mines at the MoM. Due to his past accomplishments at the ministry, he is in a great position to influence the ministry on their current issues. He saw KCM successfully influence the CS during meetings by building a rapport with the ministry, developing a plan and presenting their arguments in a well-researched objective manner. Having been on both sides of the advocacy process he is in a position to better understand the differences that arise during discussions. This allows him to strategize the best approach well when dealing with the MRB. For example, he is attempting to create sector committees to cater to all the KCM members (especially for the small scale miners) in order to tackle the issues presented fairly. These committees are grouped into those that are:

- Looking for mining licences;
- Enhancing exploration;
- Composed of ASM / small scale miners; and
- Enhancing processing and manufacture of minerals.

KCM seeks to strengthen and reposition themselves in the industry and are gearing to make the business environment-friendly to investors. They are:

- Helping their existing members with the registration at the Ministry the OMC portal via KCM's office administrator;
- Seeking to create markets for mineral dealers like the small scale artisanal miners. Primarily they are helping in the creation of markets by having ready buyers. This, in turn, would help a mineral dealer export their product;
- Discussing more exploration projects which are expected to lead to new mineral discoveries in the country;
- Improving their announcements - KCM seeks to have monthly meetings to create a greater audience as well as have a voice and an impact; and
- Seeking to resolve issues for mineral processors as they consume the majority of the minerals.

One issue is around business sustainability. Cement is the leading mineral product and ties to developing one of the 'big four' manufacturing agenda specific to housing. This will be done with the help of the Kenya Association of Manufacturers (KAM) to tackle their issues. To avoid the closure of industries e.g. East African Portland Cement Company that laid off all its staff pending a

reorganisation of the state-owned company⁴⁵. Also in October 2018, the creditors of ARM Cement approved the sale of a subsidiary and assets worth KES 5 billion to reduce its debt⁴⁶.

In addition, tile manufacturing companies, limestone, fluorspar, etc. however they face stiff competition from imports which are cheaper due to low production costs. KCM alongside KAM strives to make their tile prices more competitive. To resolve this KCM is also engaging government to lobby for favourable royalty regimes, considering locally manufactured mineral products versus imported ones. Incentives and tax holidays are suggested to have a positive influence on the service industries, which increases employment.

KCM is lobbying for more mining regulations drafts which are ready for release to the industry with subsequent review and stakeholder consultation. They are busy pushing for the gazettment of all the necessary mining regulations as well as the enforcement of the existing ones. The KCM CEO is using the strategy of engaging the CS first before the PS in all advocacy cases. This will ensure that the PS does not move on with issues without all knowledge of the CS department as this has been an issue recently that hindered their advocacy approach. KCM is advocating mainly through the PS to ensure the Joint Working Groups formed by KCM Board members, Kenya Private Sector Alliance (KEPSA) and the MoM to tackle these issues as they involve other ministries.

KCM also plans to have more workshops:

- To update their members as and keep them updated as regulations are being drafted.
- In their planned fora, KCM would work together with the MoM to sensitize companies, affected communities and all the other relevant stakeholders on the use of the newly re-configured and upgraded OMC to improve their knowledge on the online licensing system and steps involved in the acquisition of mineral rights to new companies.
- For all the above sector committees on the fees and charges issues e.g.
 - Quarry operators in Nairobi: to determine the impact of the Nairobi County charges and link that to their businesses output and thus the delivery of the housing agenda initiative in Kenya.
 - Mineral Dealers for the buyers and sellers of raw uncut minerals versus those charges converting them to jewellery.

Even as the regulations are meant to streamline the mining sector in the country by ensuring that some of the main provisions in the Mining Act 2016 are fully and efficiently implemented, KCM sees the need for ensuring that the constitutional principles of public participation, inclusive decision making, environmental protection and conservation, respect for human rights and respect for occupational health and safety are taken into account when engaging investors in the mining sector in order to avoid any potential conflicts as well as ensuring that

⁴⁵ Cement maker Portland sends home hundreds of staff. Wafula, P. Published on 8 Aug 2019. The Daily Nation. Retrieved from <https://mobile.nation.co.ke> Accessed 20 Aug 2019.

⁴⁶ Reuters (21 May 2019) ARM Cement's Kenyan assets sold for \$50 million. The East African. Retrieved from <https://www.theeastafrican.co.ke/business/ARM-Cement-Kenyan-assets-sold-for-50-million/2560-5124824-86yswdz/index.html> Accessed 20 Aug 2019.

these natural resources benefit communities as well. KCM plans to ensure that the mining activities do not only go on smoothly but also that they benefit the local communities even as they contribute to the national development agenda.

The new law has many implications for existing and future large-scale mining investors. While many of the new provisions are benign or positive, there remain a number of clauses that will require KCM to play an active role in seeking amendments or mitigation measures through the development of regulations. During the current transition period, their implementation of the legislation is going through some challenges. KCM is currently ironing out inconsistencies, questions and concerns in the Mining Act and the 13 regulations e.g. there are immediate concerns raised in respect to consent on land leases, local content and mining permits. Some are outlined below:

5.1 Challenges in Licensing of Mineral rights

Licensing has now resumed and KCM has sought to address the new challenges. During 2018, KCM has had several meetings with the MRB to address issues that are affecting the business environment. The issues are:

5.1.1 Types of licences and permits

There are a few areas which might need further clarity on the new mining licencing regulations. One of those areas concerns ambiguity in eligibility and restrictions within license class provisions. For instance, for small scale operations, the law is not clear whether the prospecting permit confers exclusive or non-exclusive rights. In another example, the reconnaissance permit under small scale operations takes a departure from the OMC system in defining the area and leaves specifications quite open.

5.1.2 Fees and Charges of licences and permits and their duration

Licence holders must obtain a permit from the CS on the recommendation of the Director of Geological Survey (DGS) before removing any mineral from a reconnaissance, prospecting or mining area for analysis, valuation or testing and provide access to the DGS or any authorized officer to inspect and examine the samples before any permit is issued.

The Mineral Dealer Regulations do not specify the term of the relevant licences and permits issued or the fees payable for issuance or renewal. Given how critical the licences and permits are to operations, the fee structure needs to be urgently put in place for business continuity and planning purposes.

There is no timeline prescribed for the issuance of such licences and permits nor the fees payable for issuance or renewal, which could significantly delay the evaluation of prospective mineral discoveries. In addition, because there are few suitable testing facilities in Kenya, the DGS may in practice be required to submit any samples provided for testing outside the country, adding to the cost and delay of the process. Given how critical the licences and permits are to operations, the fee structure is required to be in place for business continuity and planning purposes.

KCM is engaging with the MoM to address this concern. In March 2018, the Board and Executive Council of KCM met with the current CS, John Munyes, and

gave an extensive presentation on solutions to the many issues and bottlenecks facing the industry in terms of fees. The Ministry agreed to form a team drawn from the KCM Board and to meet quarterly with a mandate to address issues and problems and forge a way forward.

5.1.3 Export permits

Export permits are granted only to holders of mining licenses, mining permits or dealers' licenses. Applications for export permits are made to the Director of Mines. As drafted, the Dealings in Minerals Regulations require that "every export or shipment of minerals shall require an export permit." It is not clear from the regulations whether this means that each shipment requires a specific permit, or whether the export permit will cover all shipments made by the permit holder. This might imply that the export permit would cover all shipments, but since the drafting is not clear this point KCM is seeking clarification due to its practical implications on mining operations in Kenya. As a result, after obtaining and/or processing minerals, which are destined for the export market, the miners, traders and processes are experiencing challenges e.g. bottlenecks on the export permit processing procedure.

5.1.4 Assignment, transfer and mortgage of mineral rights

There are challenges in Licensing of Mineral rights Section 51 of the Mining Act requires the prior consent from the CS (on the recommendation of the MRB) for the assignment, transfer, mortgage or trade of a mineral right. The CS's decision is to be notified to the mineral rights holder within 30 days of receipt of the application to assign, transfer, mortgage or trade the mineral right. However, the Licencing Regulations prescribe a 90 day notification time frame for large scale operations and a 60 day notification time frame for small scale or artisanal permits. This ambiguity is being addressed by KCM urgently as the negative impact on transaction timelines will be significant for market entrants.

5.1.5 Transparency and accountability

New entrants may enter the market through Greenfield projects⁴⁷ or acquisition of existing operators. In either case, MRB approval is required. The Licensing Regulations permit the MRB to vote on and permit any member of the board who discloses interest in any matter under discussion by the board to participate in deliberations and to also vote on such matter. This would appear to be a significant breach of transparency and accountability in relation to the MRB and potentially hampers its credibility as an independent organ with respect to its recommendations in relation to licenses or other matters that are under its purview.

KCM noted that this may lead to an avenue whereby the MoM employees use unethical means to be appointed to the NMC. There is considerable jockeying for positions on new organisations such as the MRB, the NMC and the Minerals and Metals Commodities Exchange, with investors pushing hard to be represented.

⁴⁷ The Greenfield project means that a work which is not following a prior work. In infrastructure the projects on the unused lands where there is no need to remodel or demolish an existing structure are called Green Field Projects. That means that it lacks constraints imposed by prior work. The projects which are modified or upgraded are called brownfield project.

5.2 Royalty Payments Issue

The royalty regulations would dictate what the operator would be paid. KCM is also attempting to influence and ensure that the MoM is aware of the profit margins so as not to stifle the growth of the sector. The royalty regulations would dictate what the operator would be paid. Up to now, the royalty rates being which were prescribed in August 2013. These fiscal regimes in the Mining Sector and royalty payments are being addressed by KCM.

For example, gold trade declined due to (the Mining (Prescription of Royalties on Minerals) Regulations, 2013). This regulation stipulated that a mineral dealer shall pay a royalty of 2 per cent of the gross sales value of the gold to be exported. That meant that if one purchased gold from a small scale artisan and would like to export, one had to pay the 2 per cent royalty tax which siphoned off the trader's profit after expenses. As gold prices were not high this meant that it was no longer feasible to trade in gold due to the international competition being too high leading to little or no profit margins after taxes.

In October 2018, KCM had meetings with the Manager of the Taxes Large Taxpayers Office at the KRA to address this. The discussion was around gold trading being a non-existent in Kenya. The main reason being dealings in minerals licensing and concessional management.

5.3 Use of assets

There are no guidelines or provisions on the manner in which the handover of such assets is to be undertaken or to whom. The risks of vandalism, theft and misappropriation are high. In addition, since the staff operating these assets are presumably employed by the licensee, it is not clear who will take over the operation, maintenance and use of the assets once handed over to the Government. If the operation, maintenance and use of the assets are undertaken by third parties under contract with the licence holder, there are no provisions concerning the assignment or novation of such contracts to the Government. This opens up the temptation for exploitation, especially where controls are not in place or if so, are not regularly assessed.

Land Rights

The Assets Regulations are unclear with respect to the treatment of land. The regulations refer to compulsory acquisition of the land on which immovable assets are located by the national government. Compulsory land acquisition by the national government would need to follow the provisions of the Constitution and the Land Act⁴⁸ and cannot merely be 'deemed' to occur by gazette notice under the Assets Regulations. If the national government does not compulsorily acquire the land on which the immovable assets are located, they must enter into an agreement with the landowner. If the licensee remains the landowner at the time the licence is terminated or surrendered it would be required to enter into an agreement with the national or the county government in relation to the land,

⁴⁸ The Land Act, 2012. Act No. 6, Assented on 27 April 2012. Accessed from www.kenyalaw.org

which makes the ability to use the land for other purposes difficult. The contentious issue is a matter of high concern with KCM.

5.4 Health and Safety

With regards to mine closure, neither the mining act nor the assets regulations provide any clarity on what a mining company's continuing obligations shall be in relation to such disclosures. The CS may prescribe regulations for site rehabilitation and mine closure. These have not yet been provided for. Large scale mining companies are required to disclose potentially hazardous substances, excavations and buildings in the mineral right area in accordance with health and safety regulations and the environmental laws of Kenya.

The MoM has requested KCM to support them in drafting the health and safety regulations. In Early 2019, the KCM CEO sent a Memorandum of Understanding to the PS to facilitate the process of not only drafting the health and safety regulations but as well as be involved in the entire review process.

The proposed KCM sector committees would provide feedback to the included in the draft regulations, such as mercury exposure issue by the small scale miners. They are currently being developed. The same committee members will be used for sensitization workshops and public participation notifications. KCM is working alongside NEMA and the Directorate of Occupational Safety and Health Services (DOSHS). Environment, health, and safety provisions have been strengthened with the legislation making provisions for mine closure through a requirement for operators to deposit environmental protection bonds with the ministry.

5.5 Tax concerns

5.5.1 Under assets regulations

The Assets Regulations raise a host of tax issues in relation to the compulsory acquisition of the assets on termination of a mining licence. The tax analysis of the Act has been performed by ALN Kenya⁴⁹. They proposed that the compulsory acquisition of the assets would be deemed to be a taxable supply and will, therefore, be subject to Value Added Tax Act⁵⁰ (VATA) at the rate of 16 per cent. It would seem that the transfer of the assets will not qualify as a transfer of a business as a going concern (which is VAT zero-rated) as the Government will not be taking over the mining business.

The vesting of assets in the national and county governments will also be deemed to be a transfer for capital gains tax (CGT) purposes under the eighth schedule to the Income Tax Act⁵¹ (ITA). As a result, CGT will be payable on any gain made by the mining company on such assets. The gain on the transfer of the immovable property will be the difference between the historical costs in the acquisition and development of the immovable property and the transfer value to the government. Because the Mining Act states that the transfer will be made for no consideration, the gain would be based on the difference between the historical

⁴⁹ Various impact analysis opinion articles in the New Mining Act Series. (Rebello D.) Accessed from <https://www.africalegalnetwork.com>

⁵⁰ The Value Added Tax Act (Act 20 of 1989 Cap 476; last amended 2012). Accessed from www.kenyalaw.org

⁵¹ The Income Tax Act (Act 16 of 1974 Cap 470; last amended 1989). Accessed from www.kenyalaw.org

costs of acquisition and the market value of the property fewer development costs. In the event that the assets compulsorily acquired are subject to wear and tear allowances under the second schedule to the ITA, and assuming that the assets are acquired at a value higher than their written down value, any difference between the acquisition price paid by the government and the written down value would constitute a balancing charge subject to income tax at the general corporate tax rate.

If a mining company chooses to enter into an operating lease over its assets it may lose the benefit of the tax deductions/exemptions at the start of operations thereby increasing their start-up costs. Such mining company would lose the benefit of paragraph 30 of part I of the first schedule to the VATA which exempts from VAT any taxable supplies (excluding motor vehicles) imported or purchased for direct and exclusive use in mining, prospecting or exploration by a company granted a mining license in accordance with Mining Act.

5.5.2 Under licensing regulations

Another area of ambiguity concerns the fiscal regime. Taxation is not expressly addressed, except to note that mineral rights holders are under obligation to pay taxes and provide evidence of the same from time to time. It is also not clear if mineral agreements will have separate negotiated provisions for addressing taxation. In other references in the law, the requirement to have performance bonds is referenced but not explained in detail. The new law provides that mining rights under the previous law will have a transition period of 18 months. Considering the administrative and operational timelines in the sector, the period might be a challenge even though other jurisdictions have successfully utilized similar provisions. It could be argued, however, that the relatively low level and scale of operations coupled with a move to impose a "use it or lose it" policy on inactive licenses might it possible to have a fairly quick transition. While it is not unusual for mining codes to rely heavily on separate regulations, there is a risk that the deference in the primary legislation to clarify administrative procedures and interpretation of the law into practice might subvert the effort to provide a stable legal and regulatory framework.

KCM will tackle the two issues above on their next meeting with the Manager of the Taxes Large Taxpayers Office at the KRA.

5.6 Reporting obligations

5.6.1 Annual reporting obligations

Asset reporting

Licensees must conduct an annual physical count of all moveable and immovable assets to verify actual assets in hand and the value thereof and ensure the accuracy of related financial records. A copy of the asset audit for each year must be submitted to the Director of Mines not later than 90 days from the end of the year.

The Assets Regulations do not specify whether the year in question is a financial year or a calendar year. If required by the calendar year it may be disruptive for mining operations that operate on a different financial year. KCM is advising their

members and aspiring new entrants into the mining sector are aligning accordingly.

Financial statements

Within three months following the end of each financial year licensees are required to submit copies of their audited annual financial statements (prepared in accordance with International Accounting Standards) to the CS and the Kenya Revenue Authority (KRA). The Mining Act provides that the CS is supposed to prescribe the form and contents of the financial statements. To date, this has not been done. KCM is requesting the CS to prescribe the form and content of the financial statements since this is not an area governed by the Mining Act.

5.6.2 Half-yearly reporting obligations

Procurement

Licensees are required to submit a list of all contracts and purchase orders exceeding KES 100 million awarded in the preceding six months including details of the value of the contract, successful contractor or vendor, primary location of work, estimated Kenyan content and commencement and completion dates. Kenyan content is defined as “the quantum of composite value added to or created in the Kenya economy by a systematic development of capacity and capabilities through the deliberate utilization of Kenyan human and material resources and services rendered in the mining industry value chain”. There are no guidelines in place concerning the types of specific support envisioned under the Local Content Regulations and the procurement list has yet to be issued by the Director of Mines. KCM seeks to add this to the list to review with the MoM.

Statements of Expenditure

Holders of reconnaissance, retention and prospecting licences are required to submit separate annual statements of expenditure in relation to the exploration activities carried out under each permit or licence held by the licensee. The Work Programme Regulations set out the allowable expenditures for inclusion in the report. Overseas headquarters costs, overseas staff-related costs, financing costs and costs of non-project related costs are excluded from the schedule of allowable expenditures. It is not clear whether “financing costs” that are excluded are limited to those incurred by the headquarters or whether they extend to finance costs relating to the operations in Kenya. If they extend to finance costs incurred in Kenya, it would appear to contradict the provisions of the ITA which only limits the deductibility of interest on loans to the extent that the loans borrowed by a foreign-controlled mining company exceed two times the equity of the Kenyan company⁵².

5.6.3 Quarterly reporting obligations

The Mineral Dealer Regulations require licence holders to keep complete and accurate records of all processing or trading activities carried out under the licence at their registered offices and to submit a copy of these records to the CS.

⁵² Various opinion articles in the New Mining Act Series. (Rebelo D.) [Online] www.africalegalnetwork.com

Processing and trading licence holders must submit quarterly reports on all purchases and sales made under each permit or licence. In addition, processing and trading licence holders must submit copies of any sales contracts or agreements with buyers, sellers or holders of mineral rights. Export permit holders are also required to disclose sales or marketing agreements between the exporter and any buyer or any refining contracts or offtake agreements that may be in place. The regulations also do not have a time frame within which such reports are to be filed at the end of each quarter and KCM seeks further clarification on the matter.

While these reports would go a long way in enhancing the right of access to information for the local people as far as the activities of the mining companies are concerned, there is no evidence of any such reports being made public since 2017 or even any being filed with the government agencies at all. As such, there is a need to ensure that these Regulations are not only enforced but also such reports should be made available to the public in light of the right of access to information as guaranteed under Article 35 of the Constitution of Kenya 2010 and Access to Information Act, 2016⁵³.

The Regulations have yet to be finalized and might take a considerable time to implement. It is worth considering whether the sector might bear the costs of being over legislated. The new law defines elaborate application processes which require extensive review of license applications and supporting information by both the MoM and the MRB. This requirement extends to all modifications or changes to licenses and permits. It is the intention of the law to lend both transparency and decentralized decision making, but this comes at a high administrative cost which might, in the end, lengthen approval processes and undermine the intention of promoting investment in the sector.

6. Lessons

It is particularly interesting to note the changes in leadership that occurred at KCM and the government since KCM started its lobbying. In February 2016, Monica Gichuhi, KCM's former CEO was appointed to be the Policy, Strategy and Institutional Advisor at the MoM. In April 2016, Moses Njiru, was appointed as KCM's new CEO and in May 2016, Stephen Mwakesi moved from KCM to take up a position as Private Secretary to the CS, where he sees his role as being to promote fairness, objectivity and balance in order to achieve a 'win-win' for both public and private sectors. During KCM's advocacy there have been two ministerial changes. The CS for Mining, Dan Kazungu, and the PS, Dr Ibrahim M. Mohamed, were appointed on 18 Dec 2015, Then on 20 Feb 2018 John Munyes took over as the new CS and John Omenge as the new PS. This has meant that KCM has worked hard to build new relationships and has sustained their lobbying to the government over the years consistently providing information to them on the sector needs while at times educating government officials on the sector.

KCM has done well in its advocacy and is working hard to build on those foundations. There is a commitment to dialogue and KCM has demonstrated that it can provide detailed evidence and make compelling arguments. The

⁵³ The Access to Information Act, 2016 (No. 31 of 2016). Accessed from www.kenyalaw.org

appointments of KCM staff into government and MoM staff to KCM should make it much easier for KCM to develop and maintain relationships and to be able to continue influencing the government with regards to the mining policy. However, this is not the case as there have been internal communication breakdowns within the ministry (with the directorates, PS and CS) that have hampered the progress to follow-up on advocacy issues. KCM's advocacy has:

- Enabled the investment environment for mineral development through conducive Mining Policy and Law;
- Attracted Foreign Direct Investment (FDI) in Kenya's mineral industry;
- Created employment to help alleviate poverty via its members and strategy;
- Increased the industry's contribution to GDP;
- Helped to develop infrastructure in remote areas;
- Reduced/reversed rural-urban migration; and
- Created a good rapport between the mining sector and host communities in the mining areas due to reduced conflict over land and mineral rights.

The key lessons from KCM's advocacy are:

- Advocacy could be a very expensive or simple process depending on the understanding of the parties involved, especially if there is a bipartisan element to the issues at hand.
- Candid engagement and sustained lobbying is the best key to meaning full advocacy.
- Justifying arguments with concrete information improves the quality of arguments and increase the likelihood of acceptance to a certain position on an issue.
- It is important to maintain good relations with the government in order to influence effectively. For example; KCM has consistently engaged with the Ministry Regulatory Board in the process of lobbying for change. The KCM chair is consistently providing information to the State Department of Mining on the sector needs and at times informing newly appointed government officials on the sector.

Importance of updating their members on the progress and regularly seeking their input. Constant updates made KCM members feel part of the process and helped them to understand where and when to contribute.