



Supporting Inclusive Resource Development (SIRD)
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NATIONAL RESOURCE GOVERNANCE TOOLS IN POLICY INSTRUMENTS FOR ACHIEVING POLICY GOALS
BY
RAYMOND MUTISO



THE CANADIAN
BAR ASSOCIATION



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GOVERNMENT TOOLS IN NATIONAL POLICY INSTRUMENTS FOR ACHIEVING POLICY GOALS

Scope of the Presentation

- Policy Goals and principles in governance of revenues from extractives
- Kenyan national policy instruments in mineral resource (revenue) governance
 - Extractives revenue management policies & frameworks
 - Gender mainstreaming policies
 - Social policy objectives
 - Economic policy objectives
- Gaps and areas of possible intervention in the implementation of the policies
- Importance of negative media publicity in pressurizing and encouraging implementation



GOVERNMENT TOOLS IN NATIONAL POLICY INSTRUMENTS FOR ACHIEVING POLICY GOALS

Definition of Natural Resource Governance:

- Refers to policies, frameworks, institutions and processes that determine how power and responsibilities are exercised, how decisions are taken and how citizens – women, men, youth, indigenous people, local communities – participate in and benefit from the management of natural resources



GOVERNMENT TOOLS IN NATIONAL POLICY INSTRUMENTS FOR ACHIEVING POLICY GOALS

Policy considerations in extractives Revenue Management goals:

- Benefits across generations
- Benefits across the nation
- Domestic Vs foreign investments
- Managing volatility
- Growing domestic economy
- Managing expectations
- Avoidance of resource curse- Dutch Disease
 - increased domestic pricing & exchange rate
- Accountability to citizens by establishing strong institutions



GOVERNMENT TOOLS IN NATIONAL POLICY INSTRUMENTS FOR ACHIEVING POLICY GOALS

Governing Principles and goals:

- Create the greatest value from country's resources
 - Create revenues for country to re-invest
 - Promote growth in local economies as part of value creation
- Be equitable to both government and investors
- Promote a stable and sustainable business environment
- Be administratively simple
- Be competitive



GOVERNMENT TOOLS IN NATIONAL POLICY INSTRUMENTS FOR ACHIEVING POLICY GOALS

- **National Governments' Sources of Revenue in Extractives**

- Sale of mineral concessions
- Royalties
- Shares
- Taxes
- Dividends & Bonuses

- **Challenges**

- Fluctuations in commodity prices globally
- Poorly negotiated contracts and tax concessions, holidays and waivers
- Poor, weak and corrupt enforcement institutions
- Transfer pricing - avoidance of tax by use of international rules, manipulation of trading values, underpricing (non use of arms-length rule in pricing of commodities)



GOVERNMENT TOOLS IN NATIONAL POLICY INSTRUMENTS FOR ACHIEVING POLICY GOALS

National Kenyan Governance Policies for the Mining Sector

- The African Mining Vision of 2009
 - Regional Policy to which Kenya is a signatory
 - Promote utilization of mineral resources for broad based inclusive development
 - Mining Act 2016 is to a larger extent aligned to the African Mining Vision
- Kenya's Vision 2030
 - Aims to transform Kenya to a middle income Country by 2030
 - The three pillars are; Social pillar (Improving quality of life for all Kenyans, Political pillar (improving political democratic system and Economic pillar (improving prosperity of Kenyans)
 - Mining is the and Mineral Resources Sector is a priority under the economic pillar
- The Constitution of Kenya – 2010
- The Mining Act 2016
- Mining Regulations
- Various Affirmative Actions, Gender Mainstreaming Policies



The Constitutional Provisions

Chapter 5: Land and Environment

- **Article 60(1) (c) & (e)** – Requirement for equitable, efficient and sustainable exploitation, utilization, management and conservation of land and the environment
- **Article 62 (1)(f) and 62(3)** - All minerals (as public land) are vested in the national government in trust of people of Kenya.



The Constitutional Provisions Cont'd

- **Article 62(4)**– Management of land based natural resources be done through legislation, enacted by Parliament
- **Article 69(1)(d)** – Greater public participation in the management of natural resources, protection and conservation of the environment



The Constitutional Provisions Cont'd

- **Article 66(2)**– Ensure that use of land, investments in land and property benefit local communities and their economies
- **Article 69 (1)(a)** – ensure equitable sharing of accruing benefits from (sustainable), exploitation, utilization, management of environment and natural resources
- **Article 69(1)(h)** – Utilize the environment and natural resources for the benefit of the people of Kenya



The Constitutional Provisions Cont'd

Chapter 4: Bill of Rights

- **Article 42 - On environment;**
 - Every person has the right to have the environment protected for the benefit of present and future generations through legislative and other measures
- **Article 42 – Economic and social rights;**
 - Right to highest attainable standard of living in terms of health, housing, sanitation, adequate and quality food, clean and safe water in adequate quantities, education, social security, etc



The Constitutional Provisions Cont'd

Chapter 4: Bill of Rights

- **Articles 52, 53, 54, 56, & 57:-** Gender Mainstreaming;
 - The right of:-
 - ❖ **Children** – to nationality from birth, education, nutrition, shelter and health, etc
 - ❖ **Persons with disabilities** – to treatment with dignity, access to educational institutions and facilities for persons with disabilities, and other facilities to ensure their economic and social wellbeing – state to ensure at least 5% of members of the elective and appointive public bodies are persons with disabilities



The Constitutional Provisions Cont'd

Chapter 4: Bill of Rights

- **Articles 52, 53, 54,56,& 57:-** Gender Mainstreaming;
 - The right of:-
 - ❖ **Youth** – to have access to relevant education and training, opportunities to be represented and participate in social, economic spheres of life, access to employment, protection to harmful cultural practices and exploitation
 - ❖ **Minorities and marginalized groups**– to participate and be represented in governance and all spears of life, provision of special opportunities in education, economic fields and access to education



The Constitutional Provisions Cont'd

Chapter 4: Bill of Rights

- **Articles 52, 53, 54, 56, & 57:-** Gender Mainstreaming;
 - The right of:-
 - ❖ **Older Members of Society** – to participate in the affairs of the society, pursue their personal development, live in dignity, respect and be free from abuse



The Constitutional Provisions Cont'd

Chapter 4: Bill of Rights

- **Article 59** - Establishment of Kenya National Human Rights and Equality Commission, its functions include;
 - promotion of human rights, gender equality and equity, gender mainstreaming in national development,
 - Protection and observance of human rights in public and private institutions
 - Monitor, investigate, report observance of human rights in the republic, compliance with various treaties, report and investigate any complaints,



The Constitutional, Policy and Legal Provisions

- **Article 62(4)** - **requires that** management of land based natural resources be done through legislation, enacted by Parliament –
- All Kenyan policies & laws were to be aligned with the Kenya Constitution 2010, through public & stakeholder participation
- In 2016, Kenya formulated the Mining and Minerals Policy
- In 2016, the Mining Act 2016 was enacted effective from 27th May 2016



The Legal Provisions Cont'd

- In 2017, 13 regulations were developed and gazetted (via various legal notices) for the operationalization of the Mining Act 2016,
- The regulations were subjected to stakeholder participation, including the mining industry, communities, counties and the parliament (National Parliament and Senate)



The Legal Provisions Cont'd

- Mining Regulations Developed in 2017**

S/N	Regulation	Legal Notice No.	Kenya Gazette/ Legislative Supplement & date
1	The Mining (Use of Assets), Regulations 2017	80	Special Issue / Kenya Gazette Supplement No 78, Legislative Supplement No 38 of 19 th May 2017
2	The Mining (Use of Local Goods and Services) Regulations, 2017	81	"
3	The Mining (Employment and Training) Regulations, 2017	82	"
4	The Mining (State Participation) Regulations, 2017	84	"
5	The Mining (Work Programme and Exploration Reports) Regulations, 2017	85	"
6	The Mining (Licence and Permit) Regulations, 2017	87	Special Issue / Kenya Gazette Supplement No 81, Legislative Supplement No 40 of 24 th July 2017



The Legal Provisions Cont'd

- Mining Regulations Developed in 2017**

S/N	Regulation	Legal Notice No.	Kenya Gazette/ Legislative Supplement & date
7	The Mining (Dealings in Minerals), Regulations 2017	88	Special Issue / Kenya Gazette SupplementNo 82, Legislative SupplementNo 41 of 24 th July 2017
8	The Mining (Community DevelopmentAgreement) Regulations, 2017	148	Special Issue / Kenya Gazette SupplementNo 116, Legislative SupplementNo 58 of 28 th July 2017
9	The Mining Strategic Minerals) Regulations, 2017	149	"
10	The Mining (National Mining Corporation) Regulations, 2017	150	"
11	The Mining (Mine Support Services s) Regulations, 2017	151	"
12	The Mining (Reporting of Mining and Mineral Related activities) Regulations, 2017	152	"
13	The Mining (Award of Mineral Rights by Tender) Regulations, 2017	153	"



The Legal Provisions Cont'd

Requirements for equitable Share of Accruing Benefits:-

- Benefits from Mining revenues can be direct payments, employment, procurement and provision of services, equity participation, etc
- **Section 183 of Mining Act 2016- Royalty Sharing**
 - The Cabinet Secretary shall prescribe royalty rates payable in respect of various mineral classes won by virtual of mineral rights

Challenge – Still in use are royalties prescribed vide Legal Notices No 187, No 220 and 221 of 2013 under the repealed Mining Act Cap 306 of 1940 – which are still applicable under the transposal provisions – Section 225(2) of the Mining Act 2016



The Legal Provisions Cont'd

- **Section 183 of Mining Act 2016- Royalty Sharing**
 - Royalties to be shared between the national Government, County Government and communities where mining operations take place in the ratio of 70% , 20% and 10% respectively
- **Challenge** – No royalty has been shared due to lack of sharing framework - resulting in resistance to operations by communities and counties
- **Sovereign Wealth Policy** and **Sovereign Wealth Bill** not finalized



The Legal Provisions Cont'd

Requirements for equitable Share Accruing Benefits:-

- **Section 183 of Mining Act 2016- Royalty Sharing (Challenge Cont'd)**
 - Royalties are revenues to Government and paid to the Consolidated Fund- can only be voted out by Parliament
 - A **Minerals Royalty Fund** was suggested for establishment under proposed **Minerals Royalty Fund Regulations**, anchored under the Public Finance Management Act –Regulations were drafted in May 2017 and forwarded to the National Treasury – are yet to be finalized



The Legal Provisions Cont'd

- Examples of other jurisdictions with benefit sharing

Country	Sharing Framework		
Nigeria (Federal)	46% to Central Government	22% to producing region	32% to other state governments
Cameroon	75% to Central Government	25% to local government	
Ghana	80% Central Government	10% Mineral Development Fund	10% to administrators of stool lands
Uganda	80% to the Central Government	17% to the Local Government	3% to the owner of land
DR Congo	60% to the National Government	40% to the provinces	10% to the local communities
Brazil (Federal)	39.4% Federal	33.9 States	26% Municipalities



The Legal Provisions Cont'd

- Examples of other jurisdictions with benefit sharing**

Country	Sharing Framework		
Peru (Unitary)	20% to government districts containing the mining sites	-20% to the municipal government of province where mining sites are - 40% to the municipal regional governments where mining occurs	
Mexico (Federal)	60% of oil taxation is shared among all states based on federal revenue sharing arrangements	Major part goes to the federal government	
Colombia (Unitary)	Royalties : 10% to Science, Technology and Innovation Fund	10% for Pension Savings	
China	60% of oil and gas taxes are retained by the central government	40% of other companies including mining are retained by local government	
Italy (Unitary with Regions)	Royalties: 55% to the producing regions	15% to the producing municipalities	30% to county governments
Peru (Unitary)	20% to government districts containing the mining sites	-20% to the municipal government of province where mining sites are - 40% to the municipal regional governments where mining occurs	
Mexico (Federal)	60% of oil taxation is shared among all states based on federal revenue sharing arrangements	Major part goes to the federal government	



The Legal Provisions Cont'd

Requirements for equitable Sharing of Accruing Benefits:-

- **Sections 46(3) and of Mining Act 2016- Employment and Training (Local Content)**
 - The Mining (Employment and Training) Regulations 2017 -of May 2017
 - Requirement for preferential employment and training to community and Kenyans through elaborate plan for employment and training of Kenyans by applicants for mineral rights and **report annually on expatriates employed, Kenyans employed / trained and training cost**
 - Where an experienced expatriate is necessary, a plan for progressive replacement by a Kenyan is required

Challenge - Lack of local human capacity (trained, experience & exposure) and gender parity in mining professionals



The Legal Provisions Cont'd

Requirements for equitable Sharing of Accruing Benefits:-

- **Sections 50 and of Mining Act 2016- Preference for local products - Use of local goods and services**
- The Mining (Use of Local Goods and Services) Regulations 2017 - of May 2017
 - Requirement for holder of mineral right to give preference to the maximum extent possible to products and materials made in Kenya, services offered by the community and Kenyan citizens, companies or businesses owned by Kenyan citizens and **report annually on details and value of local goods and services procured**
- **Challenge** – Lack of locally manufactured mining equipment, local mining professional capacity & entrepreneurship and the gender parity in the mining profession and entrepreneurship



The Legal Provisions Cont'd

Requirements for equitable Sharing of Accruing Benefits:-

- **Section 109 (i) and of Mining Act 2016- Community Development agreements**
- The Mining (Community Development Agreement) Regulations 2017 - of July 2017
 - Requirement for holder of large scale mining licence, within 3 months of grant of licence, to sign a community development agreement with the community where mining operations are to be carried out.

Community Development Agreements (CDA):-

- Ensure that at least 1% of gross revenues from large scale mining operators in every calendar year finance projects in the communities they operate



The Legal Provisions Cont'd

Requirements for equitable Sharing of Accruing Benefits:-

Community Development Agreement;

- **Community is defined as:-**
 - Group of people living around an exploration and mining operation area – sub-county
 - A group of people who may be displaced from land intended for exploration and mining
 - A group of people living in an area that has been identified in an environmental and social impact assessment as per EMCA requirements
- Purpose of CDA is to ensure that;
 - Benefits of mining are shared between the holder and the community
 - Mining is consistent with continuing economic, social and cultural viability of the community
 - Mining has significant contribution to the improved economy and social wellbeing of the community
 - There is accountability and transparency



The Legal Provisions Cont'd

Establishment and composition of Community Development Agreements Committee:-

1. Governor or his representative
2. National Government representative of the administration at the County (County Commissioner's Rep)
3. County Assembly Rep (Ward Rep / MCA)
4. One Rep of women elected by the community
5. One rep of village elders– elected by the Community
6. One youth Rep of either gender (=2 youth reps)
7. One rep of civil society
8. One rep of Marginalized groups, ethnic & other minority groups
9. One Rep of persons with disability
10. Area MP
11. 3 reps of the holder / operator
 - Elected / elected members to serve for a renewable term of 3 years
 - **Challenges**– Political influence / interference in election of various members for elective posts



The Legal Provisions Cont'd

Functions of the Community Development Agreements Committee:-

- Monitor and evaluate compliance with the terms of agreement
- Provide a platform for community to debate on use of revenues provided by the holder to fund community priority development projects
- Facilitate continuous engagement and serve as the link between the community and the holder
- Settle all disputes that may arise between the parties to the Agreement in respect to any matter in connection with or under the Agreement
- Settle any other issue, matter, grievance or complaint that is not related to the Agreement that may be made or raised by the holder or community



The Legal Provisions Cont'd

Requirement for equitable Share Accruing Benefits:-

- **Local equity participation (Section 49 of Mining Act 2016)** - Requirement for a holder of Mining Licence, whose capital exceeds the prescribed amount, within 3 years after commencement of production, to list at least 20% of their equity at the local stock exchange –
- communities need to position themselves to buy shares in the mining companies operating within their localities and in Kenya
- The local enterprises and communities to benefit extractives revenues through payment of dividends from profits



The Legal Provisions Cont'd

Requirement for equitable Share Accruing Benefits:-

Local equity participation (Section 49 of Mining Act 2016)

- **Challenges**

- The investment threshold for local listing has not been prescribed
- Mining operations require huge capital investments hence local companies and individuals / communities may not raise the amounts of equity required
- There gender disparities in economic empowerment which disadvantage women and may result in women not participating in mining company's equity
- Nairobi Securities Exchange has not put the necessary structures for implementation of the off loading of the 20% equity by mining companies



The Legal Provisions Cont'd

Section 48; State Participation in Mining Licence- Requirement for 10% free carried interest by State:-

- **Mining (State Participation) Regulations, 2017 of 19th May 2017–**
- State is entitled to 10% free carried interest in share capital of large scale mining operations
- The state may further participate in additional equity through agreement with the operator
- State is entitled to revenue through dividends of the declared profits from large scale mining operation
- The National Mining Corporation shall on behalf of the state, be the investment arm of the government in respect of all prospecting or mining operations
- **Challenges**
 - National Mining Corporation not fully operational
 - It is not clear if exiting mining operations prior to the coming into effect of the act are subject to the 10% free carried interest



The Legal Provisions Cont'd

Assets on Termination: Section 149(6) of the Mining Act 2016; requires that after termination or surrender of a mining licence;

- i. all immovable assets shall vest in the Republic after the effective date of surrender or termination;
- ii. All movable assets which are fully depreciated for tax purposes shall vest in county government
- iii. For any property not fully depreciated the County government or Republic shall have the right of first refusal for the sale such

- **Rationale**

- Minerals are vested in government – government property
- Equipment, plant and any accessories and material for mining and mine structural development are except of tax
- The companies are allowed to recover infrastructural costs – through revenues from minerals (otherwise minerals – property- vested in Government)

- **Challenges**

- i. The mining industry has objected and raised concerns of the vesting of assets to state
- ii. It is not clear if exiting mining operations prior to the coming into effect of the Mining Act 2016 will be subject to the provision



Role Negative Media publicity in pressurising accountability and implementation

- Media should be seen as a partner in implementation of various governance policies, regimes and frameworks as a **promotion of transparency and accountability**
- Negative publicity afford the regulatory authorities an opportunity to give factual information and facts as they counter the negative publicity – **encourage disclosure, transparency and accountability**
- Negative media publicity is a wake up- call to the regulators and can be taken as an opportunity
- Promotes transparency
- Can be a form of a monitoring and evaluation tool
- It is a form of feed back, good or bad and pushes regulators to do better
- Make regulators / implementers awake from the risk of history (mistake) repeating itself
- Raises the red flag and brings up administration to own up mistakes
- Make institutions grow strong



Case Study : Base Titanium Limited

- Extract Mineral Sands from Kwale County, Kenyan Coast
- Employ about 900 people directly
- There are 3 CDA Committees – Mine Site (Ramisi Sub – County), Ship loading facility (Likoni-sub county), Host (resettlement) – Lunga -Lunga Sub-County
- Gross Revenues 2018 US\$ 200 million
- Royalty at 2.5% = US\$5 million (at 5% = US\$ 10 million)
- Royalty sharing National Government, County Government, Community (Ratio: 70%, 20% and 10%)
 - 2.5% (US\$ 3.5 million, US\$ US\$ 1.0 million & US\$ 0.5 million respectively)
- Minimum 1% gross revenue community development funding (community Development Agreements) =US\$ 2 million
- Total community share (0.5 +2) = US\$ 2.5 million



THANK YOU
(ASANTE)

