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**LEGAL AND REGULATORY FRAMEWORK OF THE EXTRACTIVES INDUSTRY
IN KENYA: ENVIRONMENTAL ASPECT**

**A DISSERTATION SUBMITTED IN PARTIAL FULFILLMENT OF THE
BACHELOR OF LAWS DEGREE**

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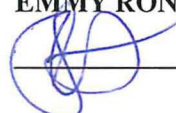
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List of acronyms and abbreviations

AMV	African Mining Vision
AU	African Union
CSR	Corporate Social Responsibility
EI	Extractive Industries
ES	Extractives sector
EIA	Environmental Impact Assessment
EITI	Extractive Industry Transparency Initiative
EMCA	Environmental Management Coordination Act
ESIAs	Environmental and Social Impact Assessments
NEMA	National Environment Management Authority
NLC	National Land Commission

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1.0 INTRODUCTION

Sustainable development, which means economic growth that is environmentally sound, is a practical necessity as environmental goals cannot be achieved without development.¹ Natural resource discovery can result in the boost of a country's economic growth if well managed, thus ensuring income creation as well as a sustained economic development in a country. There seems to be a broader understanding that sustainable development in the mining sector means that mineral development around the globe should be sustainable in environmental, economic and social terms, taking into consideration market dynamics, technological innovation, community involvement, health and safety, environmental impacts, and institutional setups.²

African countries have been endowed with natural resources both renewable and non-renewable which can be a blessing or a curse. One such instance this can be the latter is due to the direct negative impact this can have on the environment affecting a large number of individuals surrounding such areas where mining activities have taken place. Due to the lack of proper legislation on ensuring protecting these laws, many players in the extractive industries driven by greed among other motives have sought to neglect the adverse effects of their activities to the environment.³ This paper will take a bird's eye view of the oil and gas sector and mining sector as part of the larger extractive industry.

In Kenya, the Extractives sector contributes 1% to the country's economy and less than 2% of the country's export earnings.⁴ This is in light of a growing extractives sector where there is ongoing oil and mineral discoveries in Kenya. This for example is seen in the discovery of oil in Turkana County, Coal in Kitui county and deposits of Titanium in Kilifi county.⁵ Kenya also recently made announcements of having world class deposits of rare earth elements in the coastal region of the country. The recent discoveries are estimated to be worth USD 62.4B and will propel Kenya to the list of top five countries with rare earth deposits in the world. In addition, the country has the world's top six deposits for Niobium.⁶ Commercial deposits of coal have been discovered in the north eastern region of the country and are

¹ Sachs J and Reid W, 'Investments towards Sustainable development', 19th May 2006, Vol. 312,

² Africa Mining Vision, 2009,

³ Mghanga M, , *Mining in Taita Taveta County: Prospects and problems*, Heinrich Böll Foundation

⁴ Information Centre for the Extractives Centre, Kenya,

⁵ Information Centre for the Extractives Centre,

⁶ Kenya Mining Handbook 2015

currently under review for potential uses and production⁷. This emerging extractives sector means that more attention is to be given to the environmental, social and economic dimensions of the sector. The impact of the Oil and Gas industry on the environment is great, as such attracting international concerns resulting in the signing of both international and regional treaties. One such example is the 1958 Geneva Convention and the 1992 OSPAR Convention⁸ which focused on ensuring a better management of the effects of the oil industry.

The Constitution of Kenya, as the supreme law of the land, provides that land ought to be used in such a manner that is equitable, efficient, productive and sustainable. Additionally, Article 42 provides the right to a clean and healthy environment and right to go to court in instances of this breach.⁹ Part 2 of chapter 5 of the Constitution is dedicated to Environment and Natural Resources. The overarching law on environmental conservation and management in Kenya is the Environmental Management and Coordination Act (EMCA). Regarding the country's long term development strategy, Vision 2030 is the national long term strategy that aims at transforming various sectors in the country by ensuring development while ensuring a clean and sustainable environment.¹⁰ This will be achieved through minimising pollution and ensuring effective waste management in the country. Currently, representative laws are being reviewed in Kenya including EMCA. The National Mining and Mineral policy 2010 is aligned to other policies in the sector. These include the Energy and environmental policy. It is worth noting that this policy is inclusive of all Minerals found in Kenya excluding the oil and gas sector. The National Mineral and Mining Policy¹¹ recognises environmental degradation as a key challenge in the Extractives sector as well as a weak legal and regulatory framework.

One such area that has a direct impact on the environment is the extractive industries sector.¹² This study will seek to analyse the various laws affecting the mining sector and the Oil and Gas sector, and analyse the possible impact on the environment.

⁷ Kenya Mining Handbook 2015,

⁸ It replaced the Oslo and Paris Convention. It is concerned with the prevention and elimination of pollution from offshore sources,

⁹ Art. 70 Constitution of Kenya (2010),

¹⁰ Vision 2030, Kenya,

¹¹ 2010,

¹² EMCBC, Mining and Environment Primer: <http://www.miningwatch.ca/emcbc-mining-and-environment-primer-environmental-impacts-mining>, Accessed on 17/10/2015,

It is important to formulate legislations backed by policy to ensure passing of informed legislation to ensure its effectiveness. The Mining Act 1940¹³ and the Petroleum (Exploration and Production) Act¹⁴ are largely ineffective in matters regarding waste management as well as ensuring equitable sharing of revenue¹⁵.

The research will seek to provide a comparative analysis of the mining and Oil and Gas extraction regulation as evident in other jurisdictions to come up with various recommendations on how to better improve our legal and legislative framework to adapt to the dynamic nature of the extractive industries sector.

This will provide for a study of the laws and policies in these regions and the extent to which they have put measures to ensure protection of the environment and based on these studies come up with a conclusion on the possible effects of the effectiveness of the current laws in place in safeguarding the environment.

1.1 STATEMENT OF THE PROBLEM

It has been argued whether sustainable development is achievable in Africa.¹⁶ Whether natural resources are the panacea for poverty alleviation and more importantly whether the democratic system of government and governance ideology underpinning capitalism can sustain these apparently noble dreams? Can the African dream be realised within the contemporary structure of governance, and relations of power and production? Poteete does not seem to agree.¹⁷ On the contrary, other leading authorities on Development theory and globalization suppose that it could be possible to make mining sustainable.¹⁸

The wake of the extractives sector highlights the ills of globalization that hinder the realization of sustainable development- that is, inequities in wealth, environmental degradation, and unfair labour practices that are endemic of globalization.¹⁹

¹³ 1940, Cap 306 Laws of Kenya,

¹⁴ Cap 308 Laws of Kenya,

¹⁵ Institute of Economic affairs, *A primer to the extractive industry in Kenya. A resource bliss dilemma or curse?*,

¹⁶ Amy Poteete, 'Is Development Path Dependent or Political? A Reinterpretation of Mineral-Dependent Development in Botswana' 45/4 *Journal of Development Studies*, p. 544, 544 (2009).

¹⁷ *ibid*

¹⁸ Pedro and Fred Cawood et al., *Mining, Minerals and Economic Development and the Transition to Sustainable Development in Southern Africa* (Mining, Minerals and Sustainable Development (MMSD) Project, September 2001

¹⁹ Hernann K, *Corporate Social Responsibility and Sustainable development, 2015*,

Environmental conservation is a key element in achieving sustainable development. The emergence of the extractive industries in Kenya poses both an opportunity and a challenge for development and governance in the country in the wake of globalization. This development arises amid a debilitated legal and regulatory framework in Kenya.²⁰

It is the paper's hypothesis that there indeed is a lack of adequate legislation and regulation to ensure sufficient protection of the environment.²¹ The existence notwithstanding of other convergent factors with mixed impacts on the environment due to extractive activities, seemingly notes the crucial role of the legislative and regulatory framework in environmental conservation.

1.2 JUSTIFICATION OF THE PROBLEM

It is evident that current trends of production and consumption, reinforced by globalization have led to a failure of development in the management of our human environment.²² The exploitation of natural resources, climate change, food- and water shortage, poverty and other factors have put the world on an unsustainable trajectory that threaten human welfare.

Bringing the context back home, the existing environmental legislation and policy in the sector is largely fragmented and different crucial roles in administering the environment are carried out by different government administrators. This poses a great danger of coordination rendering the legislative framework ineffective and inefficient.

The biggest problem in Kenya is not only the absence of relevant laws, but also the failure to implement them.²³ This springs from the lack of compliance with the players in the extractive industry and enforcement from the government legislation.²⁴ The paper will tend to justify that indeed, the legal framework does not sufficiently seek to efficiently put measures in place to ensure compliance by the players in the industry to promote environmental protection. The paper will further briefly look into the role of Corporate Social Responsibility in ensuring environmental protection in developing countries and whether it will serve as a more effective tool in mitigating environmental problems in the Extractives Sector (ES).

²⁰ Second Medium Term Plan 2013-2017,

²¹ Africa Mining Vision, February 2009,

²² Bruntland Report, 1987,

²³ Mghanga M, , 'Mining in Taita Taveta County: Prospects and problems',

²⁴ Mghanga M, , 'Mining in Taita Taveta County: Prospects and problems',

Environmental damage caused by the extractive industry may result in other social issues and impact on human rights such as the loss of land for other economic livelihood uses, e.g. agriculture which leads to greater dependency on the mining companies for pay-outs to remediate this damage, which leads to the imposition of handout dependency.²⁵

Environmental rights are not sufficiently protected by environmental legislations. Human rights thus have a wider conceptual framework in which environmental rights are contextualized. For example, The Rio Convention on environment and development²⁶ which highlights that environmental issues are best handled with the participation of Citizens at the relevant levels. For instance, at the National level, this ought to be manifested through access of information regarding hazardous activities going on in their communities.²⁷

This study thus directly contributes to the country's overarching National Vision, particularly Vision 2030 Second Medium Term Plan²⁸ as it examines the legal framework pertaining to the environment as envisaged under the Constitution of Kenya 2010.

1.3 RESEARCH QUESTIONS

The main research question in this paper is *'What is the justification for effective environmental laws in the extractive industries? Will sector specific laws on the environment be the solution for mitigating environmental degradation by players in the extractive industry? Concluding, In the Kenyan context, will the National legislative framework (Public regulation), Private initiatives or Corporate Social Responsibility be the most effective tool employed in ensuring environmental protection in light of globalization?'*

²⁵ Deepankar S, and Priya B, 'Corporate Social Responsibility of Mining Industries', National Law University, Jodhpur,

²⁶ 1972, Principle 10,

²⁷ 1972, Principle 10,

²⁸ 'Transforming Kenya: The pathway to devolution, Socio economic Development, Equity and National Unity.'

This will be guided by the following questions.

- To what extent have other developing countries succeeded in protection of the environment pertaining to the extractive industry through their legal framework?
- What other tools have been found to be more effective in preventing environmental protection in developing countries?

1.4 ASSUMPTIONS

Certain assumptions held are that:

- That mining and Oil and Gas extraction has a great negative impact on the environment.
- That stronger laws and regulations will assist the mitigation of this impact.
- That Kenya lacks strong environmental laws to deal with degradation in the extractive industry.

1.5 SCOPE AND LIMITATIONS OF THE STUDY

This paper will take a bird's eye view of the oil and gas sector and mining as part of the larger extractive industry in Kenya.

The greatest limitation the researcher is likely to face is time constraints. The paper sought to employ qualitative research to adequately complement the research findings. However, due to time constraints, a comprehensive quantitative analysis approach was taken.

1.6 CHAPTER BREAKDOWN

Chapter one will be the introduction. This chapter will seek to analyse, the evolution of laws pertaining to environmental protection with particular regard to the extractive industry. Further the chapter will discuss the theoretical or conceptual framework and Methodology. This will serve to show the lens through which I examine the various topics and thus provide

a context for interpreting the findings of my study. This chapter will also discuss the various method/s chosen for data collection and the justification for the use of the various methods.

Chapter two will discuss the legal and regulatory framework in Kenya as it currently stands. This chapter will review the legal framework governing national resource management and environmental conservation in Kenya. This will aim at highlighting the coherences and possible overlaps in addressing the dynamic Extractives sector challenges and risks.

Chapter three will endeavour to present a comprehensive comparative analysis with other jurisdictions. This will be through studying the laws and regulations in place in other jurisdictions with best practice and thus produce a detailed comparison with the local situation in Kenya; as well as to analyse the aim of mining laws and policies vis-à-vis safeguarding the environment due to activities carried out by the players in the extractive industries.

The last chapter will discuss the roles of Corporate Social Responsibility in environmental protection in the Extractives sector Vis a Vis national legislations. This will seek to analyse the effectiveness of both tools in a developing country context in safeguarding the environment. Lastly, this chapter will discuss and review the findings arising therein addressing the various gaps earlier identified in the sector thus demonstrating the contribution of the research to the study. The researcher intends to put forward various recommendations as evidenced from the findings of the research.

Sustainable development lies in progress within three dimensions, environmental protection, social cohesion and economic development.²⁹ For extractive industries, sustainability is about balancing the demands of communities, and the imperative to protect the environment, with the ever present need to make profit.³⁰ The environmental impact of natural resource exploitation should be minimised and land rehabilitated to allow successive use.³¹ This paper shall seek to address the environmental protection aspect in realizing sustainable development.

²⁹ Jenkins H.M, 'Corporate Social responsibility in the mining Industry: Exploring trends in social and environmental disclosure.' *Journal of Cleaner Production*, Vol 14 (2006) 271-274,

³⁰ Jenkins H.M, 'Corporate social responsibility and the mining industry: conflicts and constructs' *Corporate Social Responsibility and Environmental Management*, 11 (2004), 23-34,

³¹ Sanchez L.E. , *Industry response to the challenge of sustainability: the case of the Canadian nonferrous mining sector environmental Management*, 22 (4) (1998), 521-531,

1.7 THEORETICAL FRAMEWORK

This paper will seek to analyse environmental impact of the Mining Legislation from an economic perspective. One of the main proponents of this school of thought is Ronald Coase. This perspective can be defined, ad hoc, to its normative and attitudinal characteristics.

The economic perspective normative goal is to maximise social welfare, i.e. the sum of private welfare for each individual in a society.³² This means that pollution and other forms of degradation are indeed by products of profitable economic activity. Consequently reduction of pollution of the environment as a consequence of mining activities will only be deemed socially acceptable if it increases the welfare of the victims of such pollution by more than it decreases the welfare of the perpetrators of the pollution.³³

The attitudinal characteristic suggests that pollution is a natural response of rational response of rational individuals who seek to further their own self-interests.³⁴ It is important to note that in this school of thought, there are varying degrees of faith in the beneficial effects of government actions to safeguarding the environment.

Contrary to this, Garden Hardin, in his classic work, 'The Tragedy of the Commons'³⁵ believes so much the use of the coercive powers of the government to prevent excessive exploitation of the environment. This in his view is seen in his analogy of a herder in the commons, each with an incentive to add cattle to the jointly owned pasture with an aggregate consequence of depletion of this resource. Thus, any industry contemplating the discharge of pollution sees the same calculus as the herder, i.e. receiving a benefit from adding pollution.

Thus, it may seem that there needs to be government intervention in protection of the environment and thus not merely a voluntary act (CSR) of the industries to ensure greater environmental checks are employed by them during and after extractive activities have ceased. There is however, a socially optimal amount of degradation which ought to be factored in in making legislation to prevent any imbalance which then would cause grave consequences to the environment. One argument as advanced by (MALER 1974) suggests that environmental regulations provide no incentives for polluters to reduce emissions below the allowable standards. This is particularly so in the extractive industry where the rate of

³² Revesz, Richard L, *Environmental Law and Policy*, Thompson/Foundation Press, 75th Anniversary, New York, 2008, 5,

³³ Revesz, Richard L, *Environmental Law and Policy*,

³⁴ Revesz, Richard L, *Environmental Law and Policy*, 5,

³⁵ Hardin J, *Science* 13 December 1968: Vol. 162 no. 3859 pp. 1243-1248 DOI: 10.1126/science.162.3859.124,

pollution changes over time. It is further shown that the optimal omission standard in an extractive industry must be a time varying one, the allowable emissions being progressively reduced as the industry approaches exhaustion of the resource.³⁶

1.8 RESEARCH METHODOLOGIES

The research will undertake a comparative analysis study method. This is indeed with specific regard other jurisdictions and analyse the laws applicable in the said jurisdictions.

The proposed methodologies for this research will be purely qualitative research in arriving at various recommendations and findings throughout the paper.

The researcher intends to use both primary and secondary Sources of data to enable a comprehensive research on the intended topic. Primary sources will include laws made by the authoritative bodies be they regional or International bodies. Secondary sources will include books, journals, reports, newspaper and Internet Sources.

³⁶Kenneth R. Stollery. *Environmental Controls in Extractive Industries .Land Economics* . Vol. 61, No. 2 (May, 1985), pp. 136-144 .Published by: University of Wisconsin Press .DOI: 10.2307/3145806,

2.0 LEGAL AND REGULATORY FRAMEWORK FOR THE EXTRACTIVE SECTOR IN KENYA

This chapter will discuss the legal and regulatory framework in Kenya as it currently stands. This chapter will review the legal framework governing national resource management and environmental conservation in Kenya. This will aim at highlighting the coherences and possible overlaps in addressing the dynamic Extractives sector challenges and risks.

The legal and regulatory framework governing the extractives sector determines the extent to which an economy will achieve meaningful and sustainable development from its exploitation of its natural resources.³⁷

The recent growth of the Extractives sector in Kenya called for a rethinking of the ability of the Extractives sector to be a key driver of growth and development. Kenya's Vision 2030 has included oil and other mineral resources as the seventh priority sector³⁸ with a high potential of boosting the country's economic growth and development. It is at the heart of the Constitution of Kenya³⁹ and Kenya's vision 2030 to ensure that economic development is achieved taking into account environmentally sound practices.

There are various laws and policies in Kenya governing aspects of Environmental management for the Extractives Sector. This chapter will seek to review the legal framework governing national resource management and environmental conservation in Kenya. This will aim at highlighting the coherences and possible overlaps in addressing the dynamic Extractives sector challenges and risks.

Currently, there are several laws that govern the environment in Kenya. Those that particularly govern environmental regulation of this sector include, The Constitution of Kenya 2010, The Environmental Management and coordination Act No. 8 of 1999, The Environmental and Land Court Act, The Petroleum Exploration and production Act Cap 309 and the Mining Act cap 306. There are also various sectoral laws pending at various stages. These are: The Mining Bill 2014, The Petroleum Exploration and Production Bill 2014, The Environmental Management and Coordination Bill 2014, The community Lands Bill 2013 as well as the Access to Information Bill.

³⁷ Institute of Economic Affairs, *A Primer to the Emerging Extractives Sector in Kenya, Resource Bliss or Dilemma or Curse?* 2014,

³⁸ Vision 2030, Medium term Plan 2013-2017,

³⁹ Article 69 (1) (a),

Overarching		Constitution (2010) Vision 2030 (2010) Country Government Act (2012) National Policy for the SD [of...] Arid Lands Access to Information Bill (2013) Statute Law (Miscellaneous Amendments) Bill 2013 Public Benefit Organisation (PBO) Act, 2013
Oil Governance		National Energy Policy (2014) Petroleum Exploration and Production Act (1986) Energy Act (2006) Energy Bill (2014) Petroleum (Exploration and Production) Act (1986) Mining Bill (2014) Natural Resources (Counties Royalties) Bill 2013 Petroleum Master Plan (PMP) (in dev.)
Biophysical	General Environment	Environmental Mgt and Coordination Act (1999) and (2013) EIA and Audit Regulations (EIAAR) (2003) Draft EMCA (Deposit Bonds) Regulations (2014)
	Biodiversity	Wildlife Policy (2013) Wildlife Conservation and Management Act (2013) Land Act of 2012 National Museums and Heritage Act (2006)
	Water	Water Policy (1999) Wetland Policy (2013) Water Act (2002) Wetland Regulations Water Quality Regulations
	Waste and Soils	EMCA (Waste Management) Regulations (2006)
	Air and Noise	EMCA (Noise [...] Control Regulations of 2009 EMCA (Air Quality Standards) Regulations of 2007
	Livelihoods	Land Act (2012) National Land Commission Act 2012 Land Registration Act of 2012 Community Land Bill (2013) [...] Assistance to Internally Displaced Persons [...] Act (2012)
Socioeconomic (NB. Many safeguards incorporated in overarching legislation)	Human Rights	Bill of Rights Private Security Bill (2014)
	Cultural Heritage	National Museums and Heritage Act (2006)

Fig.1: Summary of the various laws and policies in Kenya.

Source: Gombolok R Jones, M.I (2015) Oil governance in Uganda and Kenya

2.1 THE CONSTITUTION

The Constitution of Kenya, evidently the Supreme Law of the Land, governs natural resources in Kenya. Article 2 (6) of the Constitution⁴⁰ states that, ‘Any *treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution*’. Article 71 thereafter expounds on agreements relating to natural resources, and consists of two parts.

The first part states:

A transaction is subject to ratification by Parliament if it –

(a) Involves the grant of a right or concession by or on behalf of any person, including the national government, to another person for the exploitation of any natural resource of Kenya;

and (b) is entered into on or after the effective date.

Kenya is party to 16 international environmental treaties⁴¹, which are designed to protect various aspects of the environment, including biological diversity, natural resources, marine and coastal environment, the ozone layer, wetlands, culture and natural heritage, pollution, international trade in wild flora and fauna, and combating desertification, among others. Article 71 of the Constitution subjects the exploitation of natural resources to further scrutiny by Parliament, thereby increasing control on the use of natural resources in the country. The second part states: ‘Parliament shall enact legislation to give full effect to the provisions of this Part’. The timeframe provided for this is five years and it is presented in the Fifth Schedule.

With specific regard to provisions governing environmental protection obligations in the Extractives sector, Article 60 requires that land be held, used and managed in a manner that is equitable, efficient, productive and sustainable, and in accordance with a set of principles including sustainable and productive management of land resources; sound conservation and protection of ecologically sensitive areas. Importantly, Public land is defined to include all minerals and mineral oils as defined by law.

⁴⁰ Article 2(5) and (6), Constitution of Kenya 2010. It is however important to note the provisions of the *Treaty Making and Ratification Act, 2012* (No. 45 of 2012), which is an Act of Parliament to give effect to the provisions of Article 2(6) of the Constitution and to provide the procedure for the making and ratification of treaties and connected purposes,

⁴¹ E. Alitsi, *Important Environmental Treaties and Conventions Kenya is Signatory to* (Report presented at the Kenya NGO Earth Summit 2002 Forum on Civil Society Review of the Implementation of Agenda 21 in Kenya, February 2002),

Further, Article 69 (1) (a) of the Constitution bestows on the State the responsibility to ensure sustainable exploitation, utilization, management and conservation of the environment and natural resources, and to ensure the equitable sharing of the accruing benefits. The State is required to utilize the environment and natural resources for the benefit of the people of Kenya. Article 42 recognises that everyone has an entitlement to a clean and healthy environment.

Subject to the provisions of the new constitution, new land laws were established to align the regulatory framework with the Constitution of Kenya. Consequently new laws were enacted such as the Environment and Land Court Act⁴², The Land Act and the National Land Commission (NLC) Act. They were passed to give effect of the constitutional provisions to provide for the sustainable administration and management of land and land-based resources.⁴³

The Constitution of Kenya through the introduction of a devolved system of governance introduced county governments as players in the governance of the Extractive Industry. As most functions relating to this sector are purely National functions, the county governments as provided for under Article 174 providing for a participatory decision making for both the County government and the National government. The allocation of roles is provided for under Schedule IV of the Constitution of Kenya 2010. With respect to environmental management, this is purely a role reserved for the National government. However this can be inferred through provisions of Section 116 of Cap 242⁴⁴ which imposes a duty on every local authority to take all lawful necessary and reasonably practicable measures for maintaining its district at all times in a clean and sanitary condition and for preventing the occurrence therein or for remedy or causing to be remedied any nuisance or condition liable to be injurious or dangerous to health. It also imposes on the Local Authority the responsibility to take action against any person causing or responsible for the continuance of any such nuisance or condition.

⁴² 2012, Cap 12A Laws Of Kenya

⁴³ Article 60, Constitution of Kenya 2010.

⁴⁴ Public Health Act, Laws of Kenya

2.2 THE DRAFT MINERAL AND MINING POLICY AND THE DRAFT NATIONAL ENERGY POLICY

The mining sector has had no policy framework to guide the implementation of laws made for the sector. This has resulted in incoherent and often unlawful implementation of sector laws in many instances.⁴⁵ There is a proposed draft National Mineral and Mining Policies which sets out principles and policies to assist the government in reforming mining sector regulation and promotion of mineral investment to enhance the contribution of the sector to the national economy.

The policy objectives set out in the draft are stated to include ensuring that Kenya's mineral endowment is managed on a sustainable economic, social and environmental basis and that there is an equitable sharing of the financial and developmental benefits; encouraging local and foreign private sector participation in the exploration for, and commercial exploitation of, mineral resources. Further it seeks to achieve a socially acceptable balance between mining and the physical and human environment and ensure that all participants in the mining sector observe internationally accepted standards of health, mining safety, and environmental protection, among others.

2.3 ENVIRONMENTAL MANAGEMENT AND COORDINATION ACT

Evidently, the overarching legislation in Kenya governing the environment is the Environmental Management and Coordination Act.⁴⁶ This is the primary legislation and any other legislation enacted is enforced subject to the consistency with the Act. Primarily, this act was formed subject to the objectives of the Stockholm Conference on the Human Environment.⁴⁷

One of the general principles of environmental management provided under EMCA is sustainable development. The specific principles of sustainable development include *inter alia* the principle of environmental protection. Section 3(5) (a) of EMCA provides that in exercising the jurisdiction conferred upon it under subsection (3)⁴⁸, the High Court shall be guided by the principles of sustainable development. This was asserted in the case of

⁴⁵ Mghanga M, , 'Mining in Taita Taveta County: Prospects and problems'

⁴⁶ Kenya, Environmental Management and Coordination Act, EMCA (Act No 8 of 1999, Kenya Gazette, Supplement No. 3, Acts No. 1, January 2000),

⁴⁷ Stockholm, Sweden from June 5–16 in 1972,

⁴⁸ Application to High Court for redress on alleged violation of the entitlement to clean and healthy environment,

Waweru v Republic⁴⁹ where it was noted that *‘In order to achieve sustainable development environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it.’*

This Act establishes the National Environment Council (NEMA)⁵⁰ to exercise general coordination supervision and over all matters relating to the environment. Subsidiary legislation, The Environmental (Impact Assessment and Audit) Regulations of 2003⁵¹, prescribes procedures for environmental regulation. Further to addressing principles for sustainable development that promote responsible use of natural resources, EMCA also spells out the requirements for environmental impact assessment for industrial activity which includes mining activity. It confers the responsibility to the National Environmental Management Authority (NEMA) for EIA planning and implementation as well as environmental audit and monitoring. The Act further establishes the Standards Enforcement and Review Committee⁵² whose principal function is to set standards for air and water quality, classification of waste for purposes of proper handling, and ionizing radiation.

Only upon satisfaction with the EIA will NEMA issue an Environmental Impact assessment license. It is worth noting that the implementation of the EIA, its requirements, plans and recommendations remain the purview of the project owner.⁵³ This is indeed a challenge as there is no proper oversight mechanism or procedure put in place at the National level.

Various regulations have been gazetted by NEMA as authorised by EMCA. These are;

- Environmental Management and Coordination (Conservation of Biological Diversity and Resources, Access to Genetic Resources and Benefit Sharing) Regulations, 2006 Legal Notice No. 160.
- Environmental Management and Coordination (Water Quality) Regulations, 2006 Legal Notice No.120.
- Environmental (Impact Assessment and Audit) Regulations, 2003, Legal Notice No. 101.

⁴⁹ (2007) AHRLR 149 (KeHC 2006),

⁵⁰ Section 7 (1), EMCA, 1999, Laws of Kenya,

⁵¹ Environmental (Impact Assessment and Audit) Regulations, 2003, Legal Notice No. 101,

⁵² Section 70 (1), EMCA, 1999, Laws of Kenya,

⁵³ Kenya Mining Handbook 2015,

- The Environmental (Prevention of Pollution in the Coastal Zone and Other Segments of the Environment) Regulation, 2003.
- Environmental Management and Coordination (Waste Management) Regulations, 2006 Legal Notice No. 121.
- The Environmental Management Coordination (Fossil Fuel Emission Control) Regulations, 2006 Legal Notice No. 65.
- The Environmental (Impact Assessment and Audit) (Amendment) Regulations, 2009.
- The Environmental Management and Coordination (Wetlands, River Banks, Lake Shores and Sea Shore Management) Regulations, 2009 Legal Notice No. 19.
- The Environmental Management and Coordination (Noise and Excessive Vibration Pollution Control) Regulations, 2009 Legal Notice No. 61.

The Act does not specifically address the Mining and Oil and gas sector activities as it generally states that all new projects that are likely to affect the environment to compulsorily undertake an EIA which is to be approved by NEMA after review. Further, it does not have specific provisions for conducting Environmental and Social Impact assessments (ESIAs) in the Extractives sector. Further the requirement that the proponent of a project to hire an EIA expert limits the operational independence of such an audit given the pecuniary relationship between a proponent and the person tasked with conducting the audit. It also limits the public participation element in the carrying out of ESIAs. With regards to obtaining a mining license, one of the main weaknesses of the Act is that environmental licenses are not a precondition for the obtaining of a mining license. This has led to the abandonment of sites and the carrying out of mining activities without fully appreciating the potential impact to the environment.⁵⁴

⁵⁴ Institute of Economic Affairs, *A Primer to the Emerging Extractives Sector in Kenya, Resource Bliss or Dilemma or Curse?* 2014,

2.4 PENDING LEGISLATIONS

2.4.1 The Mining Bill

The Mining Bill⁵⁵ seeks to review the old Mining Act.⁵⁶ With regards to matters environmental management, the bill has set fort certain requirements. It seeks to give effect to Articles 62 (1) (f), 66 (2) and 69 of the Constitution.

The bill requires holders of permits and license to:

“Use the land in question in accordance with the terms of the permits and ensure sustainable land use through restoration of abandoned mines and quarries, avoid seepage of toxic waste in water bodies, ensure that blasting and related activities are kept at reasonable and permissible levels and land is restored after the end period of mining. It precludes the issuance of any license, save for the case where the applicant has submitted site rehabilitation and mine-closure plans for approval.”⁵⁷

Another development is that license holders are required to provide an environmental bond.⁵⁸ This bond shall serve as a form of financial security sufficient to cover the costs associated with the implementation of the Environmental and rehabilitation obligations.⁵⁹

The Bill gives power to the Director of Mines to “advice on the development policy to ensure compliance with international conventions and national policies relating to the sustainable development of the mineral resources and ensure that mining operations take into account local and community values.”⁶⁰

It has also sought to improve transparency issues through public awareness as required under article 35 of the Constitution and the status be made available on the website of the ministry.

⁵⁵ Kenya Gazette Supplement NO.28

⁵⁶ 1940, Laws of Kenya

⁵⁷ Section 152, Mining Bill (a)-(d),

⁵⁸ Section 154,

⁵⁹ Section 154

⁶⁰ Section 20 (N)

2.4.2 The Petroleum Exploration and Production Bill 2014

The Petroleum Exploration and Petroleum Bill, A bill to “ *Provide a framework for the contracting, exploration, development and production of petroleum; cessation of upstream petroleum operations; to give effect to relevant articles of the Constitution in so far as they apply to upstream petroleum operations; and for connected purposes.*”⁶¹

This bill specifically seeks to give effect to Articles 60, 62 (1) (f), 69 and 71 of the Constitution in so far as they apply to upstream petroleum operations and for connected purposes.

One of the improvements noted is the importance of a National policy on upstream petroleum operations which is to be incorporated and reviewed at least every five years.⁶² This imposes a duty on the Cabinet Secretary to develop this policy and to develop, publish and review upstream petroleum strategic plans.⁶³

The Bill further proposes the formation of new institutions including an inter-ministerial Committee known as the National Upstream Petroleum Advisory Committee.⁶⁴ The functions of this committee are⁶⁵

- (a) advise the Cabinet Secretary on upstream petroleum operations;*
- (b) participate and advise the Cabinet Secretary in the negotiation and granting of petroleum agreements;*
- (c) advise the Cabinet Secretary on the suspension, revocation or termination of the petroleum agreement or the recall of security for compliance;*
- (d) submit a report to the Cabinet Secretary on the terms negotiated with contractors;*
- (e) develop the criteria for negotiation of petroleum agreements;*
- (f) participate in the evaluation of the bids and applications for*

⁶¹ Petroleum Bill 2015, Laws of Kenya.

⁶² PART II, Section 5, Petroleum Bill 2015

⁶³ Ibid

⁶⁴ S. 13, Petroleum Bill 2015

⁶⁵ S.13, Petroleum Bill 2015

awarding of upstream petroleum blocks.

This Committee will including other members, comprise of a representative from NEMA. This will seek to improve the accountability of the companies in this sector regarding their environmental obligations.

Further, the bill proposes new requirements decommissioning a petroleum field. S.68 of the Bill states that an application for the grant of a production permit in accordance with the Act shall be accompanied by a decommissioning plan. This was previously not a precondition for obtaining a production permit in the Petroleum Act. The bill also proposes the establishment of a decommissioning fund which the Contractor must contribute to when petroleum production has reached 50 per cent of the aggregate recoverable reserves or 10 years prior to the expiry of the production permit.⁶⁶

More awareness on the possible negative impacts on the environment is seen in the proposed bill. The bill makes the provisions of EMCA and its subsidiary legislations applicable in the Petroleum sector.⁶⁷ S. 96 of the bill states that “a *contractor shall carry out upstream petroleum operations in the contract area in accordance with all the applicable environment, health, safety and maritime laws and best petroleum industry practices.*” This has seen proposals to ban the flaring and venting of oil and natural gas and oil save for emergency situations or upon authorization by the state.⁶⁸

Importantly, transparency issues are addressed through a framework for reporting, transparency and accountability. The Cabinet Secretary is required to develop a framework for transparency and accountability in the upstream petroleum sector, which includes the annual publication of all records, accounts, and reports of revenues.⁶⁹

2.5 CONCLUSION

While there are generally existing national laws relating to environmental social and human rights safeguards, there is often a lack of their effective implementation.⁷⁰ This may arise from a combination of factors including absence of regulations, capacity, political will,

⁶⁶ S.76 Petroleum Bill 2015,

⁶⁷ Section VIII, Petroleum Bill 2015,

⁶⁸ S. 99, Petroleum Bill

⁶⁹ S. 121, Petroleum Bill 2015,

⁷⁰ Mghanga M, for Heinrich Böll Foundation, ‘Mining in Taita Taveta County: Prospects and problems,

resources, as well as monitoring, reporting and accountability including legal redress. As identified, there is often also a lack of laws being informed by policy.

While the existing sectoral laws are generally in conformity with EMCA, there is conflict of roles arising from the role of the Ministry of Environment who is the regulator in matters environmental management. EMCA Act and other environmental laws and subsidiary legislations as well as industry best practices will be applied; the overall discretion to manage environmental matters is placed outside the scope of NEMA and the Ministry of Environment. This conflict can result into poor coordination of environmental matters in the absence of clear roles of mandates according to the respective mandates of the relevant agencies. Assignment of clear roles and duties is one essential characteristic in realizing an enforceable legislation.

Furthermore, the country's environmental laws governing the extractives sector are weak as this role is mostly taken up by the respective ministries handling the extractive sector. This is a latent weakness that could make environmental regulation weak in the absence of a strong oversight mandate within the parent ministry. This is because key decisions affecting the environment extend beyond the regulations developed by NEMA and would require a broader mandate.

3.0 COMPARATIVE ANALYSIS

In order to effectively put forward recommendations to improving the legal framework in Kenya, it is important to undertake a comparative analysis of other jurisdictions. There have been various initiatives on the International level providing guidelines on how the legal and policy sector governing the ES should be in order to ensure an effective Extractives Sector.

Recent developments in extractives regulation in Africa have seen major regional and continental developments. These include the Africa Mining Vision⁷¹, significant reports by The United Nations Economic Commission for Africa (UNECA) as well as the development of The African Initiative on Mining, Environment and Society (AIMES) as an initiative formed by civil societies

For purposes of this benchmark, the paper will discuss the African Mining Vision as well as a comparative analysis of South Africa and Norway. A detailed comparative analysis of South Africa and Norway was chosen as they have a highly developed legal system regulating extractive activities in the Extractives Sector.⁷²

3.1 AFRICA MINING VISION

As noted in the first chapter, the first African Union, successor of the Organisation of the African Union (OAU) adopted the African Mining vision (AMV).⁷³ The Africa Mining vision is “Transparent, equitable and optimal exploitation of mineral resources to underpin broad-based sustainable growth and socio-economic development.”

According to the AMV this shared vision will comprise of “A sustainable and well-governed mining sector that effectively garners and deploys resource rents and that is safe, healthy, gender & ethnically inclusive, environmentally friendly, socially responsible and appreciated by surrounding communities.” The AMV notes that although the benefits of mining to certain national economies could be evident, local costs (environmental impacts and social

⁷¹ African Union, African Mining Vision (2009), available at http://www.africaminingvision.org/amv_resources/AMV/Africa%20Mining%20Vision%20english.pdf. The Africa Mining Vision is informed by the outcomes of several initiatives and efforts made at sub-regional, continental and global levels to formulate policy and regulatory frameworks to maximize the development outcomes of mineral resources exploitation. Accessed on 10/01/2016,

⁷² OSISA, Found at <http://www.osisa.org/books/regional/what-laws-each-country-say>, accessed on 10/01/2016,

⁷³ Africa Mining Vision, February 2009,

and cultural disruptions) associated with mining especially to local communities were not being adequately compensated for.

One of concerns noted in the AMV for such impacts is that most of the reform process was and has been government-centred. It has been argued that as a reflection of asymmetrical power relations, processes for communication, consultation and decision-making would tend to favour bipolar initiatives (government and private sector) and outcomes and would not be sufficiently representative and participatory.⁷⁴ Thus, development outcomes could be narrow-minded and only take into consideration government and mining companies' perspectives. This individualistic approach thus means that in deriving profit from extractive activities, little or no regard will be taken to ensure sound environmental management during and after such activities.

The participatory aspect is quite important in every legal system. The Constitution of Kenya⁷⁵ sets forth the requirements for public participation. Well-developed strategies for public participation build trust, promote accountability especially with regard to environmental management, strengthen commitment of all stakeholders towards improved governance, and directly limit the potential for corruption.⁷⁶

Importantly, Agenda 21⁷⁷ under chapter 23 calls for full public participation by all social groups, including women, youth, indigenous people and local communities in policy-making and decision-making. It states that one of the fundamental prerequisites for the achievement of sustainable development is broad public participation in decision-making.⁷⁸ *The Draft Principles on Human Rights and the Environment*⁷⁹ also under Principle 18 proclaims that all persons have the right to active, free, and meaningful participation in planning and decision-making activities and processes that may have an impact on the environment and development. This includes the right to a prior assessment of the environmental, developmental and human rights consequences of proposed actions.

⁷⁴ Ibid

⁷⁵ Articles 201 and 232

⁷⁶ United Nations Human Settlements Programme, „Public Participation Tools“, available at http://ww2.unhabitat.org/cdrom/TRANSPARENCY/html/2b_8.html. Accessed on 5/01/2016

⁷⁷ Agenda 21 is an international framework agreement for pushing for global sustainable development that was endorsed by national governments, including the Kenyan Government, at the 1992 Rio Earth Summit.

⁷⁸ Ibid, clause 23.1. “Critical to the effective implementation of the objectives, policies and mechanisms agreed to by Governments in all programme areas of Agenda 21 will be the commitment and genuine involvement of all social groups.”

⁷⁹ E/CN.4/Sub.2/1994/9, Annex I (1994)

The AMV notes that African countries have weak governance structures and institutions in the Extractives sector. It notes that there is no “one size fits all” strategy for strengthening African resource governance and institutions. Nonetheless, there are a few broadly applicable strategies such as accession to international protocols (e.g. APRM, EITI) and the establishment of critical institutions to facilitate the optimal exploitation of natural resources. Notably, Kenya has not yet signed the Extractives Industry Transparency Initiative (EITI).⁸⁰ Kenya acceded to the AMV however little has been done to domesticate it.⁸¹

3.2 CASE STUDY

3.2.1 South Africa

South Africa is Africa’s largest producer of gold and coal⁸². It is also the world’s biggest supplier of platinum, Manganese and chrome.⁸³ The Extractives sector contributes to 18% of South Africa’s Gross Domestic Product.⁸⁴

The country has a complex and detailed legal and regulatory framework for the Extractives sector.⁸⁵ The sector is regulated by various laws and has different institutions that play a key role in policy, administrative and regulatory functions.

South Africa has Department of Mineral resources (DMR)⁸⁶ whose mandate is to formulate and implement an overall minerals and energy policy to ensure the optimum use of minerals and energy. Within the DMR, the Minerals Policy and Promotion Branch is responsible for formulating and promoting a policy which will encourage investment in the mining and minerals industry, with a view to expanding this sector of the economy and promoting development. As a consequence of significant environmental damage caused by mining, the DMR has contracted the Council for Scientific and Industrial Research (CSIR), the Council for Geo-Science (CGS) and Mintek to develop solutions to rehabilitate closed mines and

⁸⁰ Golombok, R., Jones, M. I. (2015) Oil Governance in Uganda and Kenya: A review of efforts to establish baseline indicators on the impact of the oil sector in Uganda and Kenya. UNEP, Nairobi, Kenya

⁸¹ Golombok, R., *Oil Governance in Uganda and Kenya*,

⁸² Iwayemi, Akin. Energy Sector Development in Africa,

⁸³ USGS, Mineral Commodity Summaries accessed from <http://minerals.usgs.gov/minerals/pubs/mcs/>, accessed on 05/01/2016

⁸⁴ USGS, Mineral Commodity Summaries,

⁸⁵ Ferguson W, Department of Zoology and Entomology, University of Pretoria accessed from www.engineeringnews.co.za/article/environmental-compliance-implications-for-south-africa-companies 2014-09-15, accessed on 19/01/2016,

⁸⁶ <http://www.dmr.gov.za>, accessed on 19/01/2016,

protect the environment. This resulted in Sustainable development through a sustainable development strategy for minerals and mining and mine environmental management guidelines.⁸⁷

The various legislations that are concerned with the Extractives industry sector and environmental issues include, The Minerals and Petroleum Resources Development Act (MPRDA),⁸⁸ The National Environmental Management Act (NEMA),⁸⁹ The National Water Act,⁹⁰ The National Environmental Management: Air Quality Act⁹¹; and the National Environmental Management: Waste Act.⁹²

South Africa's NEMA forms the backbone of its environmental legislation. One of the fundamental strengths of this Act is that it assigns clear responsibilities for environmental consequences resulting from development.⁹³ This assignment of responsibilities and the accompanying liabilities for non-compliance is the corner stone of an enforceable legal system.⁹⁴ This is further strengthened as any person can initiate legal proceedings against a company that is not fulfilling its environmental protection obligations as required by the law.

Regarding matters of compliance with the National environmental standards, the National Environmental Management Act identifies the Minister of Mineral Resources as the Authority to ensure such compliance. One way this is realised is through regular inspections, these are environmental management inspectors. These so called 'green scorpions' are tasked to inspect companies who are suspected to be involved in actions that negatively affect our environment. This initiative has been successful for curbing pollutions such as soil, water or unauthorised utilization of natural resources. The Department of Mineral and Energy affairs has since started the training of Mining environment Inspectors. This thus ensures that companies are subjected to compliance with legal requirements.

Amid the rapid development of South Africa's environmental legislative framework, South Africa has promulgated a single coherent compliance structure applying to both mining and the rest of the South African industry.

⁸⁷ Ibid

⁸⁸ 2002 (No. 28 of 2002)

⁸⁹ 107 of 1998

⁹⁰ Act 36 of 1998

⁹¹ 39 of 2004

⁹² 59 of 2008

⁹³ Chapter 3, National Environmental and Management Act 107 of 1998

⁹⁴ Extractives Industries Value Chain: Africa Region Working Paper series #125, March 2009

South Africa has not only advanced its environmental legislation, it has also seen the expansion of the implementation of Industry driven environmental management systems. The companies have sought to voluntarily implement such systems such as the ISO14001 environmental management standard.⁹⁵ Environmental Management systems are intended to formalize procedures for managing and reducing environmental impacts.⁹⁶ The EMS is audited regularly and public reporting is done. In implementing these systems, companies thus become compliant with the environmental legislations in place as the companies benchmark its environmental impacts against the existing legal framework in play.

3.2.2 Norway

The Norwegian economy is a prosperous mixed economy, with a vibrant private sector, a large state sector. The government controls key areas, such as the vital petroleum sector, through extensive regulation and large-scale state-majority-owned enterprises. The country is richly endowed with natural resources - petroleum, hydropower, fish, forests, and minerals - and is highly dependent on the petroleum sector, which accounts for the largest portion of export revenue and about 30% of government revenue.⁹⁷ Norway is the world's third-largest natural gas exporter; and seventh largest oil exporter, making one of its largest offshore oil finds in 2011.⁹⁸

Norway faces unique circumstances compared to Kenya as the state's benefit from the sector is largely through direct and indirect taxation with a special petroleum tax rate of 51%, a normal corporate tax of 27% as well as indirect taxes including Value Added Tax (VAT), environmental taxes and area fees.⁹⁹ Also, unlike Kenya, Norway is a huge producer of oil producing 2023000 barrels of oil per day.¹⁰⁰ It is a traditional exporter of oil as its domestic needs are met by hydroelectric power.

⁹⁵ Gwen Christini, Michael Fetsko and Chris Hendrickson, *Environmental Management Systems and ISO 14001 Certification for Construction Firms*. Journal of Construction engineering and management. May/June2004

⁹⁶ Ibid

⁹⁷ Index Muindi, Norway economic profile 2014, found at http://www.indexmundi.com/norway/economy_profile.html accessed on 11/01/2016

⁹⁸ Ibid

⁹⁹ Deloitte Taxation and Investment guides, Oil and Gas Taxation in Norway,

¹⁰⁰ Norwegian Petroleum Directorate, Production figures as at December 2015, Accessed from <http://www.npd.no/en/news/Production-figures/2015/December-2015> on 11/01/2016

Since 1972, Norway has separated policy, regulatory and commercial functions in the government's administration of petroleum development.¹⁰¹ Norway has administered its petroleum resources using three distinct governmental bodies:

- The National Oil company (NOC), STATOIL, engaged in commercial hydrocarbon operations
- A government Ministry, whose function is to direct policy
- A regulatory body whose function is to provide oversight and technical expertise.

The Norwegian Petroleum sector is regulated by a number of key legal instruments. Specifically those that pertain to environmental management include: the Petroleum Act,¹⁰² its related regulations on health, environment and safety; scientific research for natural resources; the Minerals Act of 2009 and the Pollution Control Act.¹⁰³

One general objective of Norwegian environmental policy is to integrate environmental considerations in sector specific legislation and the decision making procedures of relevant authorities.¹⁰⁴ This is indeed an important development that can inform the development of the Extractives sector legislative framework in Kenya.

In accordance with the objective to ensure that mining activities respect the principle of sustainable development, section 2 of the Minerals Act states that: "the administration and use of mineral resources pursuant to this Act shall ensure that the following interests are safeguarded; b) the nature foundation of Sami culture, commercial activity and social life; c) the surroundings and nearby areas while operations are being carried out; d) the environmental consequences of extraction; and e) long-term planning relating to subsequent use or reclamation of the area."

A broad range of environmental consequences are mandatory considerations when exercising public authority under the Act. A failure to take into account such consequences must be regarded as an error that could lead to the annulment of a decision to award a permit.¹⁰⁵ This ensures public administrators are vigilant and thorough when exercising public authority in

¹⁰¹ Mark C Thurber, David R Hults, Patrick R.P. Heller, "Exporting the 'Norwegian Model' : The effect of administrative design on oil sector performance." Revenue Watch Institute, New York NY10019, USA, 14 June 2011

¹⁰² 29 November 1996 No. 72

¹⁰³ Act of 13 March 1981 No.6 Concerning Protection Against Pollution and Concerning Waste

¹⁰⁴ I. L. Backer "Integration principle - there is no better option" In Backer, Fauchald and Voigt (eds) *Pro Natura. Festschrift til Hans Christian Bugge på 70-årsdagen*, ENGLISH VERSION (Oslo, University 2012) pp. 42-62.

¹⁰⁵ Public Administration Act, Norway, 10 February 1967

granting permits. Against this background, the main concern regarding the Norwegian reliance on pollution permits is that they do not appropriately take into account the fact that mining companies must be regarded as operators of waste facilities and that they fail to sufficiently address environmental issues regarding marine waste facilities.¹⁰⁶

The law requires the conducting of an EIA before opening up new areas for petroleum exploration. When developing an oil and gas field, an operator is required to submit an EIA as part of the development plan. Before submitting plans for development, licensees must present to the Ministry a proposed programme for environmental impact assessment with a short description of issues including the development.¹⁰⁷

In Mining, an EIA is mandatory for mining that involves extraction of more than 2 million m³ of matter or that affects a surface area of more than 0.2 km².¹⁰⁸ In addition, EIAs shall be carried out based on a case-by-case assessment of impacts of the planned project, including impacts on protected areas, wilderness, vulnerable species and nature types, and recreational use, as well as pollution.¹⁰⁹

¹⁰⁶ Fauchald O.K, "*Regulating Environmental Impacts in Norway.*"

¹⁰⁷ Petroleum Act, Environmental regulations,

¹⁰⁸ Regulations on environmental impact assessment, FOR-2009- 06-26-855, S. 2 and annex I, section A.3,

¹⁰⁹ Ibid. Section 3 and 4, and annex II section 10,

4.0 CONCLUSION AND RECOMMENDATIONS

It is evident that there is a clear lack of strong environmental laws pertaining to environmental protection in the Extractives industry. This springs not only from the absence of sector specific legislations but poor compliance mechanisms in place. There is a clutter of cross administrative duties spread among various institutions thus proving ineffective.

Various recommendations thus can be put across as to how to improve the extractives sector's environmental aspects:

Firstly, there is need to establish sector specific laws pertaining to environmental protection in our legislative framework. This can be inferred from Norway's case. The current laws in place are too general and do not specifically address the mining or oil and gas sectors. The current laws did not envisage the dynamic aspects of this sector and thus unable to adapt to the rapid changes experienced in this sector. This old law fails to address the peculiarities of this dynamic sector and its impact on the country's environment. The aspect of globalization is an important factor as MNEs in the sector are likely to ignore environmental obligations imposed by the laws in place due to the 'laxity' of the laws in ensuring environmental compliance of these players.

It has been seen that NEMA deals with a wide array of issues regarding the environment.¹¹⁰ Such broad jurisdiction over environmental matters from monitoring radiation emissions to noise controls among others, NEMA is thus unable to effectively ensure oversight and compliance with environmental standards as required by the law. One way of ensuring greater compliance will be through the formation of an independent institution to be put in place to ensure effective oversight of players in the Extractives industry.

In order to ensure effectiveness, as noted in the case of Norway, here ought to be distinct roles assigned to different institutions. The Key institutions involved in regulating the oil and gas sector is the Ministry of Energy and the National Oil Corporation of Kenya Limited (NOCK). There is no separate industry regulator. Thus an independent regulator ought to be established as an oversight body to ensure transparency in the industry.

Environmental bonds are financial arrangements between a resource developer and a regulator to provide financial surety against the potential environmental impacts of

¹¹⁰ Section 7 EMCA 1999

development.¹¹¹ These bonds are a form of risk management for the government and the society in instances where the company may default on its obligations. There is need to develop legislation to strengthen EMCA on environmental bonds putting into place an implementation framework to manage the environment and community welfare.

Kenya is a signatory to various international agreements as well as various regional and continental agreements. Kenya acceded to the African Mining vision but is yet to domesticate it. Domestication and implementation of provisions and requirements of the African Mining Vision will see a greater improvement on the governance structure of the Extractives industry. Policy wise, Kenya needs to join the Extractives Industry Transparency Initiative (EITI) which is a global initiative on improving the legislative and Regulatory framework in the Extractives Industry.

Regarding the failure of the environmental laws to assign roles and duties efficiently, the role of the Ministry of environment as the regulator should be highlighted in order to avoid its conflict with other sectoral laws. The wide discretion mandate that extend beyond the regulations developed by NEMA shows the absence of strong oversight mandate within the parent ministry. NEMA thus needs to be strengthened as the body mandated to supervise and coordinate environmental matters.

One of the fundamental questions in this paper was whether laws would be the only or most effective tool employed in ensuring environmental protection in the Extractives Sector. More specifically, in analysing the most effective tool in ensuring environmental protection and informing policy, the question thus arises as to whether controls or regulations are the only means to achieving effective emission controls.

Vast research concerning environmental and social consequences of extractive industries has suggested that industry actors and National governments advocate private or voluntary forms of regulation. Others as in the case of Bolivia and Venezuela propose public regulation through legislation or direct state ownership.¹¹²

¹¹¹ Sustainable Development Solutions Network, "Harnessing natural resources for sustainable development: challenges and solutions. 18th September 2013

¹¹² Eduardo Canel , Uwafiokun Idemudia PhD & Liisa L. North (2010). *Rethinking Extractive Industry: Regulation, Dispossession, and Emerging Claims*, Canadian. Journal of Development Studies / Revue canadienne d'études du développement, 30:1-2, 5-25,

Herrmann,¹¹³ notes Corporate Social Responsibility as an initiative touted as possible remedy for the ills of globalization¹¹⁴ that hinder the realization of sustainable development. One of these ills inevitably is environmental degradation among other challenges such as inequalities of wealth and unfair labour practices.

For developing countries, market integration causes the rise of economic interdependence bringing about reliance on developing countries for resources used in or for production.¹¹⁵ In the wake of the rise of many foreign investors in the country such as Tullow Oil, lower environmental standards are more appealing to such foreign investors. This is because such 'laxity' boosts production efficiency and increases competitiveness in the short term thereby enhancing bottom line profits and productivity.¹¹⁶ Thus these developing countries may regret such foreign companies violating these lax environmental policies causing detriment to the host country and the same time reaping the benefits of increased profits due to lesser regulation.

As noted rightfully by Herrmann, developing countries are in a unique situation. This is due to the need to attract foreign investors Vis a Vis creating a stringent legal framework on compliance with environmental standards. Foreign investors will likely invest in a developing country with 'soft' compliance and environmental protection rules. Most developing countries refrain from putting in place strict environmental protection provisions in order to attract foreign investors in the sector. Thus, as noted by Hunter (2010) in order to develop an appropriate regulatory framework for the ES, it must balance the interests of both the investors and the state.

¹¹³ Kristina K Herrmann, *Corporate Social Responsibility and Sustainable Development: The European Union as a case study*. Indiana University School of Law.

¹¹⁴ John S. Applegate & Alfred C. Aman, Jr., *Introduction: Syncopated Sustainable Development*, 9 IND. J. GLOBAL LEGAL STUDIES 1, 3-4 (2001),

¹¹⁵ John S. Applegate, *Introduction: Syncopated Sustainable Development*,

¹¹⁶ See Westfield, *supra* note 2, at 1082 (citing David Montgomery, *Labor Rights and Human Rights: A Historical Perspective*, in HUMAN RIGHTS, LABOR RIGHTS, AND INTERNATIONAL TRADE, 1996,

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