



Enhancing Transparency & Accountability in Community Development and Revenue Sharing and Management in Kwale County

Policy Brief No. 2 of 2020

About ILEG

The Institute for Law and Environmental Governance (ILEG) is a leading not-for-profit public interest policy research and advocacy organization based in Nairobi, Kenya. The organization's mission is to promote good governance and management of the environment and natural resources. We support effective use of governance tools – principally laws and policies – to promote evidence-informed equitable, inclusive and sustainable use of the environment and natural resources in Kenya and the East Africa region.

ILEG policy briefs

These policy briefs cover a range of content relevant to good governance and management of the environment and natural resources. They may focus on current issues, debates and enduring challenges facing sustainable development policymakers, programme managers and practitioners. They synthesize or draw on relevant findings from research, programmes, projects, workshops, seminars and other events conducted by ILEG, as well as other rigorous evidence, to offer new analyses, findings, insights and recommendations.

About this policy brief

This policy brief, Enhancing Transparency & Accountability in Community Development and Revenue Sharing and Management in Kwale County, synthesizes insights from the 12th Extractive Sector Forum hosted by ILEG on December 10th 2020 at Kaskazi Beach Hotel in Ukunda, Kwale County. Themed 'Enhancing Transparency & Accountability in Community Development and Revenue Sharing and Management in Kwale County', the forum sought to promote dialogue and action towards enhancing openness and accountability by public institutions and the private sector in the management and utilization of mineral resources and revenue in the mineral-rich county of Kwale. Specifically, it aimed at: acquainting stakeholders with the status of transparency and accountability (T&A) policy, practice and initiatives in the county; identifying and prioritize local challenges with regard to T&A; and exploring opportunities and strategies to address the challenges.

This policy brief synthesizes the ESF discussions and provides policy recommendations on how to enhance transparency & accountability in the way extractive resources in the country are managed, allocated and utilized. The content of the policy brief is the sole responsibility of ILEG and does not represent the individual opinion of any participant at the ESF. Any errors and omissions are also the sole responsibility of ILEG. Please direct any comments or queries to ileg@ilegkenya.org.

1. BACKGROUND

Kenya is endowed with vast deposits of minerals across many of its counties. The minerals include soda ash, fluorspar, titanium, niobium and rare earth elements, gold, coal, iron ore, limestone, manganese, diatomite, gemstones, gypsum and natural carbon dioxide. Renewed interest and investments in exploration, development and production of these minerals are expected to have a significant impact on the country's economy, which has traditionally relied on agriculture, floriculture and tourism. Indeed, a number of global mining companies are already running mining operations in different parts of the country.

Kwale is one of the counties with vast potential for mineral exploitation. According to Kwale County Integrated Development Plan 2018-2022, some of the already discovered minerals in the county include Titanium (rutile, ilmenite, zircon) at Nguluku and Shimba Hills; Gemstones at Kuranze; Rare Earth Elements (niobium, phosphates) at Mrima Hills and Samburu; and Silica Sands at Waa, Tiwi and Ramisi. Others are Zinc, Lead and copper at Mkang'ombe, Mwache, Dumbule and Dzitenge; Baryte at Lunga-lunga; Coal at Maji ya Chumvi; Sandstones at Mariakani; Limestone at Shimoni and Waa; Coral rocks at the coastline and a potential for offshore oil and gas.

So far, the Kwale Mineral Sands Project by Base Titanium Limited (BTL) is the largest and most advanced mining project in the county and indeed in the country. In fact, it is not only Kenya's largest mine but also the first globally significant, large-scale mining project in the country. According to BTL, the project has opened up a new sector of the economy, propelled minerals into the top four export earners, and awakened international investor interest in Kenya's mineral potential.

An assessment by Ernst and Young on Base Titanium's economic contributions in Kenya indicates that the Kwale Mine has an export value of US\$200 million per annum representing 65% of Kenya's minerals output value, and adds an estimated US\$108 million to Kenya's GDP annually. According to the report, the contribution to GDP over the life of the mine will be close to US\$1 billion while estimated revenues to the government through royalties and direct taxes will be around US\$225 million. The project provides employment to over 1,000 people 67% of whom are from Kwale County and 98% are Kenyan, and supports an additional 2,800 jobs through indirect (supply chain) and induced (consumer spending) activity. The project further contributes to local and national economic development through employee tax contributions, local content, legacy projects, community development, post-mining land use.

In efforts to prepare itself to harness the benefits of her rich endowment of minerals, Kenya has initiated massive developments in the extractive sector ranging from creation of the Ministry of Mining and subsequent adoption of the Minerals and Mining Policy of 2016 and the Mining Act, 2016, to adoption of the Petroleum Act, 2019, capacity building of government agencies to the interventions by civil society organizations and development partners. Subsequent efforts include the development of the Mining Cadaster and the development of Community Development Committee guidelines which have subjected mining companies to fairly increased scrutiny. While these are indeed commendable developments, pundits believe their success will depend to a great extent on good governance principles put in place and implemented. The importance of the extractive sector's potential contribution to national and local (county) economic growth cannot be gainsaid. However, it is essential that such economic growth is in line with the Constitution and international standards and best practices, in particular, those relating to good governance including sustainability, effective citizen participation, transparency and accountability.

Indeed, even as the said policy developments are going on, concerns abound over lack of openness, limited information flow, secrecy of mining and oil & gas contracts and sector institutions and companies that are for the most part, not willing to be answerable to citizens for their actions nor pay for failure to meet their obligations. In Kwale, concerns range from opaqueness of the licensing processes and speculative land acquisition in mineral-rich areas to claims of community representatives in community liaison committees being compromised by mining companies. Another simmering source of tension is that despite the county accounting for a huge proportion of the country's mineral value and despite the elaborate legal framework on benefit sharing as per the Mining Act 2016, the county is yet to benefit directly from the mining activities. This has been blamed on delays by the national treasury in establishing mechanisms for disbursing funds from the national government to counties and local communities. These are exacerbated by other corruption risk factors that generally characterize the mining sector in Kenya, including a weak anti-corruption legal and judicial system, political capture and interference, conflict of interest and shortcomings in corporate integrity measures.

As part of initiatives to promote dialogue and action towards accountable and sustainable mining, ILEG organized the 12th Extractive Sector Forum (ESF) under the theme, 'Enhancing Transparency & Accountability in Community Development and Revenue Sharing and Management in Kwale County'. The forum brought together local communities, civil society, county government, and the private sector from Kwale to discuss the status, opportunities and challenges of achieving greater transparency and accountability in the extractives sector in Kwale County. Specifically, it sought to acquaint stakeholders with the status of transparency and accountability (T&A) in the extractives sector in the county, identify and prioritize challenges impeding openness and accountability, explore opportunities and strategies to address such challenges. This policy brief synthesizes insights from the forum and general literature and prevailing practice on transparency and accountability in relation to mining in Kwale county.

2. WHY TRANSPARENCY & ACCOUNTABILITY ARE KEY TO THE EXTRACTIVE INDUSTRY

Transparency refers to a situation in which substantive and procedural information is available to, and broadly understandable by, people and groups in the society. This may be subject to reasonable limits e.g. to protecting security and privacy. On the other hand, accountability refers to procedures requiring officials and those who seek to influence them to follow established rules defining acceptable processes and outcomes, and to demonstrate that they have followed those procedures. Transparency and accountability, are now widely acceptable as some of the key principles of good environmental governance. While transparency and accountability are key to the success of any sector, certain unique characteristics of the extractive industry make it extremely vulnerable to weaknesses or lack of transparency and accountability. These unique characteristics include: the fact that resource extraction often occurs in remote locations; the industry is highly technical; the industry is often characterized by volatility in terms of production and markets; the industry is capital intensive and also involve large and sudden revenue inflows. These characteristics have implications for effective management of the sector and the accruing benefits. At the same time, they provide opportunities for corruption, mismanagement and misallocation of accruing revenue. This therefore calls for transparency and accountability as a central pillar of the good governance framework required to catalyze the extractive sector's contribution to socio-economic development.

3. NATIONAL POLICY INSTRUMENTS ON TRANSPARENCY & ACCOUNTABILITY IN THE EXTRACTIVE SECTOR

The promulgation of the Constitution of Kenya 2010 coupled with discovery of oil in the country in 2012 and renewed interest in mining activities in the country around the same time have resulted in considerable developments in the country's extractive sector regulatory environment. These developments range from detailed and progressive treatment of land and natural resources in the Constitution to adoption of new Petroleum and mining laws as well as related laws, policies and regulations. These laws and policies have made considerable advances in promoting disclosure of information related to the rules for how the petroleum sector is managed, and procedures for awarding exploration and production rights. This section reviews these legislative and policy developments since 2010 in relation to how they address transparency and accountability in the extractive sector.

To start off, Vision 2030 which is Kenya's overarching long-term development blueprint, underscores Kenya's aim to have "transparent, accountable, ethical and results-oriented government institutions" by 2030. This involves pursuing strategies like: strengthening the legal framework for anti-corruption, ethics and integrity; promoting results-based management within the public service; encouraging public access to information and data; introducing civilian oversight around the key legal, justice and security institutions; and strengthening Parliament's legislative oversight capacity. Vision 2030 also reiterates that the government will intensify efforts to bring about an attitudinal change in public service that values transparency and accountability to the citizens of Kenya.

This vision is indeed anchored in the Constitution of Kenya 2010 which addresses itself to promoting prudent management and utilization of natural resources. Among other issues, the Constitution provides for legally binding national values and principles of governance including good governance, integrity, transparency and accountability and public participation. The Constitution also emphasizes the right to access information (Article 35(1)) by giving every citizen the right to access information held by the state or another person if such information is required for the protection of a human right. It further directs the state to publish and publicize any information that affects the nation (Article 35(3)). To give life to this provision, Parliament enacted the Access to Information Act, 2016, whose objective is to ensure citizens have access to information they need to participate meaningfully in democratic processes and that public officers are accountable to the citizenry. Notably, the Act clearly stipulates that the right to access information is not affected by reasons the person seeking information gives, nor by the belief of the public officer or entity as to the reason given by the person seeking information.

After protracted discussions, Parliament enacted the Mining Act in 2016 and the Petroleum (Exploration, Development and Production) Act in 2019. The Mining Act has very progressive provisions with regard to transparency and accountability. Article 119 obliges the Cabinet Secretary to ensure access to information, including ensuring that mineral agreements are available in the official website of the responsible Ministry. The Cabinet Secretary is also mandated to make regulations to provide for accountable and transparent mechanisms of reporting mining and mineral related activities, including revenues paid to the government by mineral right holders, as well as production volumes under each licence or permit. Further, the Cabinet Secretary is to publish on the ministry website, annually, records, reports, mineral agreements and any other relevant information. Similarly, the Petroleum (Exploration, Development and Production) Act, 2019 (Article 111) requires the Cabinet Secretary to develop a framework for reporting on transparency accountability in the upstream petroleum accountability. This

includes the publication of all petroleum agreements, records; annual accounts and reports of revenues, fees, taxes, royalties and other charges; as well as any other relevant data and information that support payments made by the contractor, and payments received by the national government, county governments, and local communities.

Additionally, the Natural Resources (Classes of Transactions Subject to Ratification) Act, 2016 deals with classification of transactions regarding natural resources so as to make their granting subject to ratification by Parliament in accordance with Article 71 of the Constitution. Section 12 of the Act obligates the Cabinet Secretary to maintain a register of transactions on agreements relating to natural resources, and to publish a report of the transactions submitted on an annual basis.

Other than these, there are a raft of laws relevant to transparency and accountability such as the Public Finance Management Act and the Economic Crimes Act and Ethics and Integrity Act. In addition, land laws including the Community Land Act also have provisions on transparency and accountability.

4. CHALLENGES WITH TRANSPARENCY & ACCOUNTABILITY IN THE EXTRACTIVE SECTOR IN KWALE

i. Opaqueness and information asymmetry

In policy and public statements, the government of Kenya always reiterates its commitment to transparency and accountability in mining and oil and gas licencing and operations. Indeed, in Kenya's Open Government Partnership (OGP) National Action Plan III 2018-2020, the government commits to disclose contractual information relating to mining and petroleum. As discussed, this commitment is supported by the Petroleum Act 2019, Mining Act 2016 and a host of related legislations and policies. Similarly, most multinational mining and oil & gas companies operating in Kenya, including Base Titanium and Tullow Oil have variously publicly expressed support for contract transparency. However, despite the advances in the regulatory framework and these public statements, opaqueness around petroleum and mining contracts and licenses, and discriminatory procedures for accessing the same persist to date. Most mining companies, including Base, have to date not taken their cue to make public their production sharing contracts and licences. As a result, only a few government officials know the details of contracts signed with foreign companies operating in the country. Participants at the ESF in Kwale were concerned that such information asymmetry potentially undermines oversight and enforcement by regulators, parliaments and advocates of good governance. Indeed, it has caused worries and public suspicion particularly within the civil society and community quarters that that corruption could be deeply entrenched not only in the way the licencing was done but also in the way accruing revenue is being allocated and used.

ii. Capacity of citizens and local community to be proactive in seeking and using information.

The importance of access to timely and accurate information in a bid to hold key stakeholders in all forms of development at both national and subnational level accountable cannot be gainsaid. The forum noted the poor flow of information, especially regarding licencing, revenue collection and allocation, community development projects. The forum also underscored the need for the general public and local community members to be proactive in knowing the kind of information they need and in seeking the same from the right offices. Community members were also urged to strengthen existing structures to enhance flow of information accurate and timely information.

iii. Weaknesses in reporting on extractive issues

Additionally, the forum noted weaknesses in reporting extractive-related news. This was attributed to security threats on journalists covering such issues, political interference and in-house editorial policies within media houses. Lack of expertise and inadequate knowledge and experience by journalists in covering environmental issues was also blamed for poor reporting on extractive issues. In many cases, journalists report one-sided stories without getting perspectives from all parties when conflicts especially between communities and mining companies occur.

iv. Lack of political good will

Despite the formidable progress in the regulatory framework, genuine openness and accountability in mining processes still remains a challenge in Kenya. During the forum in Kwale, participants complained of persistent opaqueness and information asymmetry regarding the licencing, mining and revenue collection and allocation processes; speculative and irregular land acquisition processes. Lack of good will from the government is increasingly becoming apparent as a possible reason for the slow progress in realizing genuine transparency and accountability. Some participants at the forum posited that the national government is neither sincere nor open, citing the delays by the national treasury in establishing mechanisms for disbursing funds from the national government to counties and local communities. They also cited poor coordination between the private sector and the national government on the one hand and county governments on the other. While mining agreements are constitutionally their duty, the national governments should recognize county governments as important cogs in the mining value chain. They should at least be kept informed and involved in key mining processes such as land acquisition. The national government should also avoid undue delays in disbursing funds meant for counties.

v. Complicity of community members

Transparency and Accountability is in many ways not to be freely given but it is to be demanded of those in authority since governments at both levels and businesses are not always in business of social protection. It therefore really starts with the general public, the citizens especially at the time they elect representatives to the government. Citizens have a duty to hold their leaders responsible to foster Transparency and accountability, especially in community development and revenue sharing and management. Participants at the Kwale event challenged one another to identify and elect leaders with integrity who are able to push the T&A agenda without being compromised, blaming corruption in Kwale county on corrupt local leaders. Some community members believe that some of their elected leaders and community representatives in liaison committees with companies have been compromised by the mining company to minimize community agitation.

5. RECOMMENDATIONS

- i. The Ministry of Petroleum and Mining, Base Titanium and other mining companies should be more forthcoming and open with information regarding not only their mining contracts and licenses but also revenue collection, allocation and utilization. This will not only ensure they not only obtain and sustain their social license to operate but also

comply with the Constitution and national laws as well as international best practices on good governance.

- ii. Citizens and local community should be more proactive in seeking and using mining-related information including those concerning mining contracts, revenue, beneficial ownership of mining companies and community development projects.
- iii. The national and county government and mining companies should work with community members to enhance their capacity in terms of knowledge and awareness on mining and related laws so that they do not get unfairly exploited. This includes through providing simplified and user-friendly documents, and civic education programmes on the enacted laws and policies to explain the existing laws to people of all education levels and ensure that they know their rights, duties and responsibilities.
- iv. The national and county government should work to protect journalists who cover mineral exploitation and other extractive issues in the county.
- v. Journalists and media houses should invest in enhancing the capacity of journalists to better understand the technical and complex extractive industry in order to better report the industry issues.
- vi. Media houses, politicians and government should accord journalists a free and conducive environment to research, report and inform citizens on the intricate extractive industry issues without undue political and editorial policy interference.
- vii. The national government should go beyond policy and public statements by demonstrating good will in implementing the laid down laws and policies around transparency and accountability. This can be done for instance by signing in to the Extractive Industries Transparency Initiative (EITI) and fast-tracking development of guidelines necessary to implement such laws.
- viii. Citizens and local community members should be steadfast and be good examples of what they expect of national leaders and companies. For instance, they should elect leaders of integrity who can champion transparency and accountability. Community leaders elected or selected to champion community rights should also work with integrity and selflessness by always keeping the community needs above their own selfish benefits.