



COUNCIL OF GOVERNORS

INAUGURAL EXTRACTIVES FORUM DRAFT FORUM REPORT

OCEAN BEACH RESORT AND SPA HOTEL, MALINDI
APRIL 4 - 6, 2018

DRAFT FORUM REPORT

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INAUGURAL EXTRACTIVES FORUM |



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Abbreviations and Acronyms

AHADI	Agile and Harmonized Assistance for Devolved Institutions
CDAs	Community Development Agreements
CECM	County Executive Committee member
CIDP	County Integrated Development Plan
CoG	Council of Governors
CSI	Community Social Investment
CSR	Community Social Responsibility
EIAs	Environmental Impact Assessments
EITI	Extractive Industries Transparency Initiative
EMC	Environmental Management and Coordination Act
H.E	His Excellency
KCM	Kenya Chambers of Mines
KES	Kenya Shillings
MoM	Ministry of Mining
MRB	Mining Rights Board
NEMA	National Environment Management Authority
NMC	National Mining Corporation
USAID	United States Agency for International Development

Background

The Council of Governors (CoG) and Agile and Harmonized Assistance for Devolved Institutions (AHADI) with support from the United States Agency for International Development (USAID) held the Inaugural Extractives Forum, on April 4 - 6, 2018. It brought together counties with extractives activities that are historic, present and emerging both large and small scale. In attendance were members of the Council of Governors' (CoG) Committee on Water, Forestry and Mining, experts and representatives from AHADI.

The meeting was aimed at enhancing understanding, participation and charting a way forward on the critical issues faced by county governments in implementing mining and oil activities.

The specific objectives of the forum were as follows.

- To increase awareness of county governments on the extractives and mining developments in the country.
- To create a platform for dialogue and peer learning among governors and other stakeholders engaged with the county governments.
- To identify institutions' capacities needed, and areas where the CoG could seek technical assistance to elevate the implementation of extractives agenda, for the counties and country at large.

The expected results of the forum included the ones below.

- Increase the capacity of county governments and the CoG Secretariat on technical, economic and policy aspects of the extractives agenda in Kenya, particularly, counties endowed with extractable natural resources
- Develop a concrete road map for CoG's strategic engagement in the extractives' agenda of the country
- Develop a systematic mechanism/platform by which the counties can exchange experiences, ideas and learn from each other and selected partners about the extractives industry
- Create a clear avenue for the involvement of the National Government, civil society actors and selected technical experts in engagement with the CoG to create a mutually beneficial partnership resulting in joint capacity development on extractives, shared advocacy initiatives and effective policy reform.

The meeting started at 11.00 am with a word of prayer from Ikal Ang'elei who also led participants through introductions.

Opening remarks

H.E. Amason Kingi, Host Governor, Kilifi County

In his opening remarks, H.E. Amason Kingi welcomed participants to the forum and noted with concern the fact that counties were grappling with insufficient revenue collection. He, however, pointed out that the extractives and mining sector offered remedy and opportunity for increased revenue to counties.

The Governor observed that although the extractives sector was very important for counties, existing laws relating to the sector were inhibitive since the sector was forgotten in matters of legislation. He decried the fact that a colonial piece of legislation had governed such a vital sector for a very long time and lauded the enactment of the Mining Act 2016. He stated that it was necessary to investigate how the Act will impact counties, and further observed that conflicts in Africa were mainly fought over resources which were potentially either a blessing or a curse.

He reiterated four important points to be noted by the participants: the need for a working legislative arrangement between the National and county governments; a critical examination of the Mining Act to establish whether it cushioned the interests of the counties; fair stakeholder representation in the Mining Rights Board (MRB) and; counties having their specific legislation to govern the sector's operations. He affirmed that the important points listed would help streamline and minimize conflicts between the National and county governments and with communities.

The Governor stated that the forum aimed at taking the country forward, and thus called on the participants to engage in a sober way towards the attainment of the envisaged goals for the noble cause. He emphasized that suggestions were necessary on how to allocate revenues from extractives between the National and county governments. He also stated that the forum's recommendations would inform a road map and policy to streamline the extractives and mining sector in the country. The Governor concluded by declaring the forum officially open.

Remarks by Waceke Wachira, Chief of Party, AHADI

Waceke Wachira gave a brief introduction of AHADI, noting that the institution offered a devolution technical support program with assistance from USAID and DFID. She explained that AHADI was working in 22 counties in Kenya and that the institution was engaging with counties, key national institutions and other entities supporting devolution. According to her, although the extractives sector was not devolved, AHADI was already working progressively with the counties in a variety of areas. She further noted that there was excitement with the recent discovery of oil in northern Kenya, and therefore, that the forum presented the best platform to discuss how to effectively manage the extractives, to avert a possible resource 'curse' and instead foster development.

According to the Director, for the sector not to be politicized, it was important to address key foundation issues towards proper management of mineral resources. She said that the participants were privileged to have a forum to interrogate institutional, policy and legal frameworks for effective management of the growing sector. Wacheke expressed optimism that the forum would provide a clear way forward to help steer the country's extractives sector, and further invited participants to what, she assured them, was going to be an interesting, exciting, and informative discussion.

Keynote address by Chair Council of Governors, H.E. Josphat Nanok

In his keynote address, the Governor Turkana County H.E. Josphat Nanok, the Chair of the Council of Governors, welcomed participants to the inaugural extractives forum. He told participants that the noble work to explore or to strengthen the sector had begun earlier with Turkana County engaging with AHADI before he requested the engagement to be expanded to accommodate other important players in the sector.

Governor Nanok noted that the extractives sector was emerging as an important segment of the country's economy and that its potential was recognized by various development plans in Kenya. He further noted that the sector would generate revenue to support counties to generate additional resources. The Chair however observed that the country was in the formative stages in the exploration of its mineral potential and that untapped mineral exploration had reduced Kenya to a less significant mineral producer and exporter compared to its peers.

Despite low production levels characterizing the sector, the Governor observed that mining and quarrying were ranked as the 3rd highest growing sub-sector by the Economic Survey of 2017. He expressed optimism that the sector will emerge as one of the highest contributors to the Kenyan economy when its growth and regulation is structured through collaboration between the National and county governments.

He stated that there were recent oil and mining discoveries in different counties across the country with active off-shore mineral exploration already in progress. He, however, called on the government to pay attention to emerging socio-economic issues that encompassed environmental implications, community obligations and rights, a tenable governance framework and effective utilization of the resources generated. The Chair emphasized the need for balancing between sustainable growth for the country and equitable distribution of resources to the host communities.

The Governor cited lack of knowledge and capacity; non-recognition of the role of county governments; competition and interplay with the laws on land and physical planning; and the disharmony in strategies for marketing, promotion and value addition of minerals, as some of the challenges afflicting the sector. He acknowledged that these factors resulted partly from lack of adequate geological data which is aggravated by low investment in the sector. According to him, the forum had an opportunity to determine a road map that would favour

small scale miners in harnessing maximum returns from mineral wealth. The Chair noted that counties, in partnership with other actors, played a vital role in mobilizing and sensitizing communities on their rights to inclusion and to opportunities to participate in social and environmental impact management activities, revenue sharing, decision making on upcoming projects and formulation of policy and legislative frameworks applicable to extractives and mining. He stated that there was a need to harmonize related laws and policies and hoped for the development of workable solutions to the challenges afflicting the counties moving into the future.

The Chair emphasized the need for defining ‘local content’ and formulating county laws to regulate local consent to exploit community land, among other aspects of extractives and mining in the counties. He observed that with the National government’s prioritization of the establishment of robust legal, policy and institutional framework, counties should engage and further cascade the same to ensure the development of sustainable structures to facilitate the country’s success in extractives production. The Governor reiterated the greater responsibility that the counties had in ring-fencing and safeguarding accrued benefits from the discovery of extractives for present and future generations to ensure sustainable development of local communities. He noted that it was against this backdrop that the Council of Governors proposed amendments to the Petroleum and Energy Bills to increase local community share of the revenue from extractives from 5 to 10 per cent.



Governor Nanok expressed optimism that the forum would create a concrete road map for the Council of Governors to upscale the extractives sector to immensely contribute to Kenya’s economy. He called on participants to engage constructively during the forum to safeguard devolution and uphold the Constitution of Kenya, 2010 for the betterment of the country.

1

Overview of the History and Developments of the Oil, Gas, and Mining Industry in Kenya

Introducing the session, Ikal Ang'elei outlined the history and background of the extractives sector in Kenya as follows:

- i. Extractive activities have been undertaken in Kenya for slightly over 100 years.
- ii. Oil and minerals present an opportunity for alleviating poverty, improving standards of living and can boost the economy and create broad-based development across the country.
- iii. International experience provides lessons for developing countries on the challenge of translating mineral wealth into peace and prosperity amid probable or even ongoing resource induced conflict.
- iv. Although the national government in Kenya is committed to adopting progressive policy and legislative frameworks for the extractives sector in line with international standards, the existing legal regime is, however, inadequate for a vibrant extractive industry considering that counties have been largely ignored, yet they too have a key role to play in the progress of the sector.
- v. Ongoing risks in the extractives sector which include:
 - Policy incoherence and overlap, together with institutional arrangements that do not consolidate benefits accrued from the sector. These may lead to misallocation of revenues and failure to benefit host communities.
 - Social unrest relating to misinformation about the benefits of extractive resources.
 - Lack of transparency and accountability mechanisms resulting in national government negotiating with companies rather than direct bidding.
 - Little or no consultation with host mineral county governments and communities by the National government and mining firms.
 - Failure to protect land rights at the acquisition of land for exploiting extractives amid varied interests
- vi. The National Government conducts geological surveys and seals contracts without the participation of the counties.

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- vii. Projected activities for extractives governance interventions should seek to increase transparency for more effective local and overall stakeholder consultation and participation. They should also seek stronger institutional and governance structures to support management and oversight and further provide a platform for enlightened public dialogue and cooperation.
 - viii. The national government should always work in partnership with the county governments to ensure best-negotiated deals given the latter is interested in gains from the sector.
 - ix. Counties are struggling to manage the extractives sector amid inadequate funding, although the CoG offers a remedial platform for dialogue and sharing of lessons and experiences.
 - x. Environmental control and community support were necessary for meaningful county engagement.
 - xi. There is a need for an honest discussion on gaps in institutional, policy and legal frameworks for effective management of the extractives sector.



2

Policies and Legislative Development; Experiences from the Mining Sector

Hon Amina Abdalla in her presentation titled: Breathing Life into the Mining Act, 2016: Building on Experiences from the Enactment of the Law, highlighted the following:

The Bill delayed due to several factors namely:

- a. Lack of mining policy, since the Bill was not grounded on an approved policy
- b. Resistance by sponsors of the Bill to comply with constitutional requirements
- c. The technical nature of the sector as members of parliament and staff lacked capacity and expertise in mining
- d. The required input from artisanal miners who were not formally organized
- e. The Council of Governors was at its infancy stage.
- f. Strong mining lobby by the Kenya Chambers of Mines (KCM) and its surrogates which was biased in favour of investors at the expense of communities and government.
 - i. The Act was able to balance industry, government and community interests and has a whole new section catering specifically for the administration and regulation of artisanal miners. Positive provisions from the section should be operationalized with support infrastructure to benefit the miners.
 - ii. The Act is a progressive piece of legislation, but counties have to invest in building their capacity to take full advantage of it. They need to work with mining companies to ensure that employment and right-skill development plans are in place.
 - iii. The Act established the Mining Rights Board (MRB) which promotes a transparent, timely and efficient licensing regime with the issuance of licenses at the county level permitted.
 - iv. The Act requires the signing of community development plans by mining companies shifted away from the philanthropic approach of Community Social Responsibility (CSR) to Community Social Investment (CSI).
 - v. The Act also stipulates that local content should go beyond procurement and instead encompass local ability to own shares in the mining companies through the Stock Exchange.
 - vi. In the Act, mining rights as an option should be tendered to ensure transparency upon in-depth geophysical survey. To bolster transparency, Article 71 stops sector crooks/peddlers from getting unwarranted exemptions. The mineral

agreements threshold is at KES500 million which reduces mining companies' eligibility for tax breaks and opaque contracts.

- vii. There is a need to create transitional mechanisms for existing mining operations to comply with the licensing regimes in the Act.
- viii. The 21-day timeline provided for in the Act for counties to give consent for mining in community land was not enough and required revision. Counties thus require a support structure for public participation and citizen input.
- ix. The COG successfully lobbied for the inclusion of its representative in the MRB.
- x. Under equitable sharing of accruing benefits, it is important to define 'who the community is' to effectively facilitate the development of community social investment plans, employment plans and also help build capacity.
- xi. Counties must appropriately and deeply engage with regulations development and review to uphold the spirit of the Act.
- xii. On environmental protection, the National Environment Management Authority (NEMA) does not have the technical capacity to review and or supervise Environmental Impact Assessments (EIAs) in the extractive sector and as such, these EIAs are mere public relation exercises.
- xiii. Nineteen years after the passing of the Environmental Management and Coordination Act (EMCA), NEMA is yet to gazette the required regulations on environmental bonds. Counties should lobby for a review of structure and design, gazettement and operationalization of EMCA if NEMA is to become an effective regulator.
- xiv. The issue of a County Sovereign Fund Act should be revisited if benefits from extractives are to be invested for future generations.
- xv. A national geophysical survey is necessary if tendering for mineral rights is to become the norm.
- xvi. There is a need to have a platform for intra-sector information sharing and monitoring and evaluation for extractives.
- xvii. The collapsing of petroleum and mining into one ministry places the extractives sector under one roof which may prevent turf wars that inhibit intra- sector sharing of policy, statutory and implementation good practice. Hopefully, the integration may facilitate more effective management of the sector.

3

Unbundling of the Extractive Legislations with a Focus on Institutional Frameworks, and roles and Mandates of Extractive/Mining Sector Institutions

Wachira Maina, the CoG's nominee to the MRB, in his presentation, titled: The Institutional Framework for Extractives with Special Focus on Institutions, Legislation and Policy Gaps outlined the following.

- i. The extractives sector is potentially a major source of revenues and employment and likewise a potential source of conflict.
- ii. The sector poses the danger of creating “Dutch disease” economies, characterized by abandoning of low wage but essential activities such as food production. Further, governments that do not require taxes because they live off mineral rents usually become repressive.
- iii. The extractives sector requires clear policy direction and enforceable government obligations since revenues realized from the extractives should benefit current and future generations.
- iv. The constitutional foundations for the extractives sector include those listed below.
 - The Constitution of Kenya in Article 60 provides that the principles of the land policy apply to all aspects of mining.
 - The Constitution in Article 62 (1) (f) provides that all minerals and mineral oils form part of public land and are held by the national government in trust for Kenyans and administered on their behalf by the National Land Commission.
 - The policy framework should spell out what the elements of the ‘trust’ are to be read alongside principles of public finance and inter-generational equity.
 - There was a need to interrogate whether the 70 per cent; 20 per cent and 10 per cent mineral benefits shared among the National Government, county governments, and host communities respectively, were adequate for the communities, or if the benefits to the local community should increase with time as the minerals are exploited. It was necessary to revise the formula for awarding royalties.
 - It was crucial to look at the local component of monitoring extractives activities in the context of sustainable environmental use and inter-generational equity.
- v. The Mining Act, 2016 replaced the 1940 Mining Act which was obsolete and did not provide for the technological, economic, and environmental progress of the sector. Highlights of the new Act include:

The Act allows for the national government to make agreements on the management of extractives that may lead to unconstitutional legislation.

- The mining law differentiates between small scale operations, artisanal mining operations and large-scale operations, where different licenses and permits exist under each type of operations. Thus, there is a need to recognize artisanal miners and give them legal status and the required facilitative support.
- The Act provides clear guidance on mining activities in the country and offers more transparency and accountability measures for licensing and management of mineral rights and permits.
- The Act also introduces Community Development Agreements (CDAs) and ratio for sharing of royalties among the national government, county governments, and the local communities.
- The Act aims at implementing the Constitution of Kenya, 2010 and streamline the mining sector so that it may contribute to the economy whilst ensuring environmental conservation and sustainable development.
- The Act aligns the mining sector with the latest global trends on local content, value-addition and technology use and transfer and further de-concentrates mining regulations from the national level structures by bringing counties into mining operations.
- The key attributes of the Act include providing for pre-emptive rights overall strategic minerals in Kenya before they are sold because the national government enjoys a 'first option to buy' before offers are made to other buyers in the market.
- The Act also provides broad powers for the cabinet secretary in charge to make regulations on exploration, mining, processing, amount of royalties, financial provisions and export of strategic minerals. This, however, raises a red flag on missing legislation, which could provide mechanisms to deal with lack of geological information due to unmapped resources, or cases of low product standards and non-adherence to related constitutional provisions.
- The Act decentralizes decision-making which is carried out by different allied institutions.

vi. It was important to interrogate the 'local content' requirement on the National Mining Corporation (NMC) and also, establish whether artisanal miners could participate in the minerals market through 'mining cooperatives' under the Mineral and Metal Commodity Exchange.

vii. Highlights of the new institutional framework are

- The establishment of the Mineral Rights Board whose advice was not binding on the Cabinet Secretary. The Ministry of Mining should, therefore, ensure diversity by including MRB representation from other associated ministries.

- The establishment of the Directorate of Mines which faces severe capacity constraints.
- The creation of a Directorate of Geological Survey whose geological database was fragmentary and poor.
- The setting up of an Artisanal Mining Committee which lacks linkage with the county governments and communities and thus counties have no role to play in it as currently constituted

i. Local content issues that encompass the following.

- Local content processes which should benefit the country now as well as later after mineral reserves are exhausted. However, there was a need to clearly define 'local content'.
- The state's ownership in mining which builds the country's capacity improves monitoring of activities and allows the State to get financial benefits.
- There is no standard rule for State's equity participation, however, the Act follows the practice of many francophone countries allowing the state to acquire 10 per cent free carried interest in the share capital of large scale mining operations, and further reserves the right to obtain further interests at arm's length prices.
- Preferential or free equity can, however, deter investment, or when accepted by investors, may often be negotiated as part of trade-offs on lower corporate taxes, rebates on other licenses, value-added tax, customs duties or even lower royalties, and thus may be considered by companies as part of the fiscal package.
- Large-scale miners are required to enter into CDA's, yet existing provisions are weak without mechanisms for equity participation by counties.
- A mining license must not be granted without an EIA, an approved environmental management plan, and environmental protection bonds. These requirements are supposed to be undertaken before and at the end of and not during the mining process. However, there lacks ongoing environmental monitoring because no environmental bonds have been executed.
- Although extractive companies are under obligation to give preference to Kenyan citizens in employment opportunities, the jobs earmarked for locals tend to be mainly unskilled without real transfer of knowledge.

ii. Financial issues in the extractives sector include

- Mineral rights being only assigned or transferred on the evidence of tax compliance
- Transfer pricing provisions are focused more on products while they ignore essential issues such as interrogating how companies finance their mining operations.

- Mineral right holders are required to pay royalties for various minerals according to prescribed rates. Similarly, the holders are required to file regular royalty returns, failure to which may lead to revocation of their licenses or permits.

iii. A summary of extractives sector key institutional, policy and legislative issues that needed to be addressed is provided below.

- Revisit the composition and functions of the MRB considering the design and dominance of the Ministry of Mining (MoM).
- Review licensing and permits procedure which includes the processing of community consent, the role of county governments in the processing of consent, and community and county feedback to the MoM for revocation or variation of terms of license or permit.
- Artisanal mining issues such as
 - ♦ Supporting infrastructure that includes cooperatives, mining associations, and their relationship with large mining companies, especially in bulk building
 - ♦ Safety and health regulations of the artisanal sector, especially when they are sub-contractors of large miners.
- Regulatory issues which include
 - ♦ Environmental regulation during mining and extraction activities
 - ♦ Compliance and implementation of CDAs
 - ♦ Geological information collected by private companies and mapping of resources
 - ♦ Alignment of natural resource laws with other laws in the country on revenue, land, and Nairobi Securities Exchange listing, among others
 - ♦ Application of the Extractive Industries Transparency Initiative (EITI) standards
 - ♦ Over-regulation, which leads to averting of scrutiny by downloading key technical issues where they are difficult to spot
- Local content issues such as
 - ♦ Definition of the relevant level of engagement it is national, county or sub-county.
 - ♦ Types, nature, and mechanisms for local content. Specifying whether it is procurement, employment, or equity participation.

- Financial arrangements touching on
 - ♦ Taxation and Free Carried Interest issues:
 - » Locking down Free Carried Interest so that it is not an excuse for investors to evade taxes
 - » Transfer pricing issues remain open-ended as applicable regulations are under the Treasury and thus prone to opacity
 - ♦ Royalties formula (Should it be static or dynamic?):
 - » Whether the community interest should grow progressively as the mineral is depleted (wasting of resources)
 - » How to manage the Community Patrimony Fund (Sovereign Funds)
 - ♦ Revenues of the National Mining Corporation
 - » Should its revenues be shared according to the royalties formula or according to some other formula to be developed?
 - » Should counties hold equity in the NMC with entitlement to board representation?
 - » Should NMC be subject to local content requirements?

Plenary and feedback (comments, questions and responses)

Participants reacted to the forum presentations as follows.

Migori County Governor H.E. Zachary Okoth Obado

Question:

- Why do counties have a minimal role to play in licensing of artisanal miners, yet governors were entitled to nominate a representative to the MRB, which is charged with the issuance of mining licenses?

Response:

- There was a need to identify favourable policy direction on the issue(s) at hand and more so to look for specific devolution issues.
- There is no mechanism for community/county feedback on licensing and permits

Taita Taveta County Deputy Governor H.E. Majala Mlaghui

Questions:

- If formalized, will there be competition on benefits sharing between the envisaged County Mining Corporations and the National Mining Corporation?

Response:

- County mining corporations will not be competitors to the National Mining Corporation since the latter can work through county structures in respective counties. Counties have an important role to play in the extractives and mining sector.

Kakamega County Executive Committee Member for Water, Environment and Natural Resources John Wangwe

Question:

- In the conflicting relationship between geophysical planning and spatial planning, what does the law say on the mining activities that infringe on other infrastructure installations?

Response:

- In cases where mining activities affect other forms of infrastructure developments, compensation is in place by law.

Nyandarua County Governor H.E. Francis Kimemia

Comment:

- There was a need to develop a simple matrix on issues raised during the forum proceedings with clear actions, time frame and who is responsible. The simple road map will inform appropriate action.

Response:

- Towards the end of the forum, the next steps will be developed to guide action accordingly.

Comment:

- It was necessary to provide structures for security in the extractive areas of the counties to safeguard communities and minerals.

Response:

- Insecurity is sometimes seen to be good for mining as it is viewed as an easier way of getting concessions in insecure areas.
- Need to address persisting socio-cultural issues to avert a possible resource 'curse'.

Comment:

- Mapping of the forest, water and natural resources should be done from the national level to avoid resource induced conflicts since the next war grounds are not minerals but rather renewable resources.

Response:

- There is a loophole in the operations of the Water Services Board and regional water bodies and thus the need to harmonize related policies since water is not a 'free resource'.

Kilifi County Deputy Governor H.E. Gideon Saburi

Comment:

- A law on value addition in mining is important and beneficial to the community.

Response:

- There is a need to clearly define 'local/community content' to understand value addition in the community context.

Chair Council of Governors H.E. Josphat Nanok

Comments:

- There is a need to develop a summary of sector issues to enable counties to articulate relevant areas for subsequent legislation making.
- The Mining Act is a recipe for conflict with community land and therefore raises the key legislative question.

Hon Amina Abdalla

Comment:

- The 21-days timeframe for counties to give consent for mining in community land can only be realistic in law but difficult to implement since public participation requires ample time.

Tharaka Nithi County Governor H.E. Onesmus Muthomi Njuki

Comment;

- There is a need to control the compensation of community land to curb the escalating costs involved.

Participant

Questions:

- Considering the support that counties offer to small scale mining operators, what is the county entitlement to the revenue sharing?

Response:

- Royalties paid are set by the framework for managing minerals in Kenya at 70:20:10 ratios shared among the National government, county governments and local communities respectively. However, more focus should shift on establishing whether profits are shared too and that royalties are tied to pricing.

4

Sharing of Experiences on Extractives and Mining from the Counties (Experiences, Challenges, and Opportunities)

Kakamega County experiences as shared by the CEC Water, Environment and Natural Resources \ John Wangwe:

- a. Youth were dropping out of school to venture into mining activities
- b. An alternative conflict resolution mechanism was in place at the community level with conflict resolution committees addressing issues on encroachment, noise pollution and environmental degradation
- c. Brickmaking was rampant yet the practice lacked a regulatory framework with a resultant adverse effect on the environment
- d. Compliance and enforcement in the sector were difficult due to the clandestine nature of some of the activities
- e. Product standards verification was difficult to ascertain and thus the challenge of not meeting global market standards

Turkana County experiences as shared by the Governor H.E. Josphat Nanok and Stella Opakas; Director In Charge of Mineral Resources:

- a. Opportunities have been missed out in the past due to lack of technical expertise/ knowledge. This has mainly been blamed on high levels of illiteracy among local community members.
- b. There are inadequate required human resources to support the sector and as such hampering mining activities.
- c. There is a lack of legal and policy frameworks at the county level as the County only depended on the national frameworks. The County was in the process of developing its frameworks aligned with national frameworks.
- d. Gold mining uses rudimentary methods which harm the environment.
- e. There is a breakdown in communication between the National government and county government and contractors in the sector.
- f. The lack of policy and legal frameworks on mining often leads to tension in the community.
- g. Poor infrastructure limits the transportation of minerals and access to markets.
- h. Brokers exploit local communities and therefore a special directorate to deal with mineral resources has been formed to effectively address the problem.

- i. If there was a county engagement framework in place for community participation tasked with building capacity and entrepreneurial skills to support communities to develop competitive skills and value addition, it would enable the community to sustainably develop beyond the depletion of extractive resources.
- j. The County will develop a strategy to guide the extractives sector.
- k. Local politics often hinder the management of minerals.
- l. A clear way forward was necessary on extractives' benefits sharing.

Taita Taveta County experiences as shared by the Deputy Governor H.E. Majala Mlaghui:

- a. The County has been known as a mining region for 50 years.
- b. Mining activities in community land at times lead to evictions.
- c. Sixty-two per cent of the mining areas in the County are found in the Tsavo National Park and some mining sites lie within protected areas with restricted access, thus rife grounds for conflict between the community, elites and authorities.
- d. Some community land in Wundanyi area was not adjudicated.
- e. There is a lack of data to quantify mineral deposits speculation.
- f. There is a need to support small scale miners to understand minerals rights and operate profitably.
- g. It was necessary to develop requisite frameworks that empower county governments to engage more robustly with the National government within the sector.
- h. There is a major gap in documenting small scale trading, negotiations, and royalties on minerals as the emphasis is often put on exports.
- i. There is a need to build the capacity of local miners so that they can realize more returns through innovative value addition.
- j. It is essential to develop infrastructure to facilitate mining operations and transportation of minerals to the markets.
- k. It is important to ensure accountability and transparency on the management of revenue obtained from minerals.
- l. The County Patrimony Fund should be renamed the 'County Heritage Fund.'

Migori County experiences as shared by the Governor H.E. Zachary Okoth Obado:

- a. All interested parties in the mining sector should work in partnership.
- b. Mineral resources mapping is vital for extractives sector planning.

- c. There is a need to support small scale miners in their operations.
- d. The extractives sector has the potential to spur socio-economic growth through the creation of employment opportunities and revenue generation.
- e. If the extractives sector can be managed well then it can empower communities and further propagate peace and prosperity.
- f. There is a need to fast-track county licensing boards in line with the Mining Act, 2016.
- g. It is important to deal only with serious investors in the sector and shun peddlers.
- h. There is a need to address environmental degradation such as restoration of destroyed water catchment areas, which may hamper other productivity activities in the community.
- i. It is important to work with NEMA, law enforcement agencies and concerned ministries on enforcement matters.
- j. There is a need to revise punitive guidelines in the mining sector.

Kwale County shared experiences as shared by the CEC for Mining and Natural Resources

- a. The county has enacted Quarrying Act with accompanying regulations already in place.
- b. Prospecting licenses are usually issued but would be miners never come back to undertake actual mining operations.
- c. There is need for suggestions on large scale projects that companies can do to benefit communities.

Kilifi County experiences as shared by the Deputy Governor H.E Gideon Saburi:

- a. Exploration activities are often not done the right way amid lack of technology leading to accidents, pollution, substandard products, and other adverse effects on the community.
- b. The County has enacted an Environmental Act and formulated quarrying regulations.
- c. Geologists have been enlisted and an Environmental Impact Assessment unit is in place ready to conduct resource assessments and audits.
- d. Controlled extraction measures are in place like issuance of permits based on guarantee on safeguarding the environment.

Nyandarua County experiences as shared by the Governor H .E Francis Kimemia:

- a. There is a need for a policy framework to cater for the extraction sector in the county.
- b. It was important to develop an agreeable framework for sharing mineral proceeds.
- c. Community participation was vital in the extraction and mining engagement in the County.
- d. It is essential to build inter-county friendship and harness the diversity therein.

Tharaka Nithi County experience as shared by the Governor H.E. Onesmus Muthomi Njuki:

- The County was planning to engage a geologist to conduct a survey to help in mapping and consequently ascertaining the actual existence of minerals.

Wajir County shared experience through the CEC Mining:

- The process of mapping for mineral resources was ongoing.

Garissa County shared experiences as shared by CEC for Mining:

- a. There was no proper legal and policy framework for quantifying and exploring resources.
- b. Although mining is not a devolved function, relevant legislation was under development on the floor of the county assembly.
- c. Constructors have been plundering resources that should generate revenue for the county.
- d. Environmental hazards have been recorded on the fragile environment in the county.
- e. Mining has been suspended on environmental protection grounds.

Narok County shared experiences through the CEC for Mining

The county government lacks control over ownership of community land.

- a. Artisanal miners are using traditional methods of extraction due to a lack of appropriate technologies.
- b. There is a need for a geological survey to know the scale of minerals present in the county.
- c. The county requires geothermal experts around Suswa since the area is not supportive of human livelihood.
- d. There is environmental degradation due to poor methods of extraction, particularly pollution.

- e. There is an incursion on the county's mineral areas by neighbouring counties such as Kisii and Migori counties.

Tana River County shared experiences through the CEC for Mining

- a. The locals have not benefitted from the mineral reserves in the County.
- b. There is serious environmental degradation as a result of extraction activities.
- c. Mining was being conducted on grazing land and thus it is a recipe for conflict.
- d. Water catchment areas have been destroyed by the mining and extraction activities.
- e. There is a lack of a legal framework to remedy and manage mining operations.

Homa Bay County experiences as shared by through the CECM Fred Odera:

- a. The community was using rudimentary methods of extraction.
- b. There is a need for a clear policy to cover the interests of the investors, the community, the National government and the County government.
- c. It is important to foster collaboration on mitigating environmental degradation with support from NEMA.
- d. It is essential to embrace public-private partnerships within the sector.
- e. Licensing mechanisms should be streamlined.

Kajiado County shared experiences through the CEC Mining, Lands and Natural Resources:

- a. Exploration of several minerals was ongoing.
- b. There is a lack of policy and legal framework to manage the sector.
- c. NEMA had failed in its mandate by relying on investors to do its EIA reports.
- d. The National Government was approving projects without the involvement of the County Government.
- e. School-going children were engaging in sand harvesting activities in the County.
- f. The county had banned sand harvesting for the next three months amid aggravated cases of soil erosion.
- g. Buildings were cracking due to the extraction of ballast and gypsum.



Kitui County shared experiences through the CEC Mining

- a. The county had banned sand harvesting amid drying up of rivers, soil erosion and degradation.
- b. It is important to put relevant regulations in place to govern the sector.
- c. Private land with minerals may set grounds for conflict.
- d. There was a need to construct roads that lead to mineral sites to ease operations and transportation of mineral products to markets.
- e. There was a need for partnership in the mapping of mineral resources in the County
- f. An Environmental Committee was gazetted.
- g. There were pending compensation issues pitting investors and the community.
- h. The local political class lacked agreement on the best way to manage the mining sector because of constant feuding.
- i. There is a lack of security in coal and limestone mineral sites.

Plenary and feedback (comments, questions and responses)

Participants reacted to the county experiences/key issues as follows:

- compensation was expensive and therefore it was important to encourage community partnerships in projects and infrastructure development to address the land issue.
- Counties roles should be strengthened in land rehabilitation and environmental audits.
- It is important to ensure collaboration between various counties in managing extractives sector issues.
- The forum should generate one common understanding/standardized framework across counties on the sector.
- It is important to establish a better framework for counties' sharing and profiting from mineral royalties and avert related conflicts.
- There is a lack of frameworks for exploring extractive resources at the county level since mining was not a devolved function.
- Geological surveys had not been carried out to establish presence, distribution and quantities of mineral deposits.
- It is crucial certain actions to be undertaken by counties' and the National government after depletion of extractive resources to curb environmental degradation.

- It is vital to monitor mining activities in the counties for safety, financial and environment purposes.
- There is no clear and distinct boundary between abuse of community heritage and investment ventures.
- The CoG should lobby for operationalization/enforcement of Extractive Industries Transparency Initiative (EITI) standards.
- The CoG should lobby for the good parts of the Mining Act to be operationalized to aptly address pressing issues within the sector.
- It is necessary to revise the untenable provisions of the Mining Act, those touching on licensing.
- There is a concern on the likelihood of lack of spirit by the Mining Act with the possibility of misinterpretation during its implementation.
- Counties should facilitate the development of a framework for Community Development Agreements (CDA)s
- It was essential to list state and county corporations within the sector.
- Corporate Social Responsibility (CSR) should be aligned with the county integrated development plans (CIDP) and the priority issues of counties and not to be used to reduce what should be shared as royalties. CSR should not be prescriptive but rather embrace the community ownership approach.
- Counties should facilitate the development of 'local content' frameworks since there was an ongoing engagement on how communities can fit in the extractives value chain based on skills and capacity.
- The envisaged 'local content' framework should also cater for lack of capacity among small and medium scale miners to benefit from existing opportunities. At the community level, corruption was rampant in the form of bribes and inferior materials supply, among other forms.
- There is a need to develop the capacity of communities to be able to supply goods and services constantly to the companies and not to fully depend on the sector but rather diversify into other sectors and forms of livelihoods.

Key issues; opportunities and challenges

Wachira Maina in his presentation highlighted key issues in the extractives industry. The emerging issues from the forum proceedings were summarized into four main categories as follows.

a. Elements of the extractives' policy framework which include:

- There lacked a comprehensive policy framework on extractives in Kenya.

- The policy on extractives must articulate a clear strategy on how mining will contribute to the country's economic wellbeing. It must guide sustainable mineral production, enhanced earnings for governments and communities, improvement of tax performance of the sector and promotion of research and development, among other attributes.
- The policy must address the labour question by guiding matters on unemployment, transfer of skills and safety and health of workers.
- The policy should strive to achieve an appropriate balance between investment and environmental protection with clearly spelt out sustainability goals for the sector. This would include an effective environmental monitoring plan.
- The policy should clearly state ways to incentivize the extractives sector to contribute to the social wellbeing of communities on healthcare, housing and education and training. Additionally, it should guide how to assess and maximize the industry's social footprints.
- The policy should capture inter-generational equity and the balance between current consumption and building sustainable wealth for the future. The policy should also design implementation mechanisms; establish whether to adopt Sovereign Wealth Funds or Community Heritage Funds and further set out detailed structure and content of 'local content' beyond local employment and procurement.

Resolution on the Extractives' Policy Framework

Action point

- Develop a CoG Issues Paper for policy discussion with the national government.
- b. Improving the law by looking at the operational and legislative gaps and issues.**
- Need to review the composition and design of the Mineral Rights Board. At the time, the Chair of the board was a junior employee in the Ministry of Mining.
 - Strengthen the role of communities and counties in consents for licenses and permits and seal gaps in processing.
 - Strengthen the framework for artisanal mining through the support of co-operatives, health and insurance, environmental regulation, and their interaction with big mining companies.
 - The Cabinet Secretary has powers to make regulation on too many subjects yet scrutiny and monitoring over the said subjects were weak and legislation by parliament has not worked either.
 - Environmental monitoring by NEMA during mining/extraction activities was weak.
 - There were no mechanisms for ensuring that companies comply with and implement CDAs.

- Financial arrangements should address how to link taxation and Free Carried Interest issues, negotiation, and payment of royalties especially royalties payable since 2016 and how to treat the state's investment in the National Mining Corporation.
- Clearly define and develop 'local content' since too much focus had been put on procurement and employment with very little attention being given to equity participation by national/county governments and communities. Similarly, support to the development of local supply chains and workforce, in-county industrial capacity and creating of linkages between the mining sector and other economic sectors also received little attention.
- With the development of a local content policy already underway, there is a need to have a broader understanding of 'local content'.
- Insufficient comparative learning has been undertaken to strengthen local content.

Resolution on the Extractives' Legal Framework

Action points

- Prepare a briefing on the legal issues that need attention distinguishing those that are operational from those that are legislative.
- Engage the Ministry of Mining on amendments necessary to the Mining Act.
- Carry out advocacy through stakeholder consultations and briefings on why the changes are necessary.

c. The counties approach at the CoG level (What counties should be doing in the mean-time)

There are things that counties could be doing even as the policy memorandum and legal briefing are being prepared. The key areas for county action are

- Design mechanisms for oversight on environmental degradation during prospecting and mining.
- Develop a framework to regulate artisanal mining.
- Identify areas of conflict between the National and county governments - laws on spatial planning being county governments mandate and mining and other extractive laws being under National Government's jurisdiction. No negotiation with selected leaders should be encouraged.
- Leading communities in the design, development, and implementation of CDAs. Should also support training programs
- Develop county programs that support the development of local supply chains and workforce, in-county industrial capacity and creating linkages between the mining sector and other economic sectors in the respective county.

- Design a process for county engagement and involvement in the geophysical survey.
- Develop CoG's capacity as a clearinghouse and host of a database for information on policy-appropriate for mining in counties.

Resolution on what counties could be doing in the meantime

Action point

- CoG to provide leadership in working with counties to develop the necessary county laws and policies to address the issues raised.

d. What to do about the pending Petroleum and Energy Bills as well as the local content policy process.

Resolution on pending legislation and policy

Action points

1. Concerning pending legislation and policies, especially; The Petroleum (Exploration, Development and Production) Bill, 2015; The Energy Bill; The Local Content Policy and The Local Content Bill, the CoG should organize a forum that takes a critical look at these.
2. The CoG should follow-up by doing a memorandum on the pending legislation and policies.

Plenary and feedback (comments, questions and responses)

Participants reacted to the summary presentation of key issues as follows.

Comments by Chair Council of Governors H.E Josphat Nanok

- the issues raised should be anchored on existing laws.
- The issues of communities consent to having minerals on their land extracted requires further elaboration.
- The Mining Act takes Kenya as 'local content' and therefore it was important to devise ways on how to describe and domesticate 'local content' at the county level for purposes of sharing benefits.
- Local content can even be given a different name to reflect all counties.

Comments by Taita Taveta County Deputy Governor H.E. Majala Mlaghui

- Ensure appropriate policy and legal frameworks to spur progress for the sector.
- Invest in building the capacity of local people.

- There were immigration issues that affected the smooth running of the sector. An example was foreigners using tourist visas to buy minerals without valid minerals licenses and business permits. The dealers also did not work with the local traders, and they did not pay appropriate royalties due.
- Economic zones should be linked and the development of transport supported to develop infrastructure to aid mining the sector.
- Marketing of minerals is only done at the national level, yet it can create more opportunities at the county level.
- Harmonize local licensing and consenting issues together with applicable fees between counties, especially as counties are not individual silos.
- Use county structures, such as engaging identified ward representatives and members of county Assemblies, to avert political interference, and in turn sensitize communities on the necessary knowledge on mining.
- Although the Artisanal Mining Committee was in place already, there was a need to clearly define ‘artisanal’ and ‘small scale mining’.
- It is important to address key mining issues in the community and offer timely solutions.

Comments by Tharaka Nithi County Governor H.E. Onesmus Muthomi Njuki

- Procurement laws allow for open tendering where supplies can be procured from elsewhere away from the locality.
- At times, the required skills by the extractives and mining sector are not available in the community.
- The laws to drive the sector at the county level should be aligned to the Constitution of Kenya, 2010 and related legislation.

Response

Some international bodies such as the World Bank specify exemptions from the competition in the tendering process and even at times prefer the highest bidders.

Comments by Nyandarua County Governor H.E. Francis Kimemia

- The matrix for key issues and actors responsible for undertaking the action should encompass delivery timelines.
- Since adding value to extractive resources is expensive, there was a need to put a framework in place for value addition.
- There was a need to develop consensus on the passing of related pending legislations.
- Minerals should be avenues for friendship between county governments and

the National government, and not grounds for conflict based on their attributes concerning heritage, poverty alleviation, and community engagement and ownership.

- Counties should readily share best practices for extractives for mutual benefit.
- A human resource development strategy for the sector at both county and the National levels is required. One is to introduce and support scholarships on skills required in the sector.
- It is important to harmonize geo-physical planning and spatial planning measures in the country.

Response

Counties should conduct skills audits to position themselves for profiteering from minerals.

Comments by Hon. Amina Abdalla

- Article 225 (5) of the Mining Act provides that companies should present their closing plans. Counties should, therefore, push for compliance on related issues around the environment, safety and health.
- Public participation is vital in the extractives' management process
- The mean of 'local content' should be made clear and specify the context of respective communities.
- Artisanal miners should be facilitated by counties to formally deal in minerals and be further supported to build systems for progressing towards expanding their enterprises.
- The CoG should demand consultation on related pending legislations.

Response

- According to Article 225 (5) of the Mining Act, environmental Audit is to be done on an annual basis.
- Environmental laws are not regulated.

Comments by Kajiado County CEC Mining

- There is concern that there are too many laws in existence relating to the extractive sector that are not harmonized.
- National Assembly acts in contravention of good legislative practise bypassing untenable related legislations.
- More should be invested in sensitizing communities and ensuring public participation in sector affairs.

Response

- There was sub-optimal compliance with the laid down guidelines to manage the extractives sector.
- It is important to conclusively determine and agree on how to measure legislative success by looking at the number of laws made, among other parameters.
- There were factors to consider on whether to legislate or not. The cost of putting the law in place should be weighed against its merits and demerits of the law. If the demerits outweigh the merits, then the law is not plausible and therefore should not be passed.

Comment by Kwale County CEC Mining

- The law was clear on how to divide payable royalties in the sector.

Question

What frameworks exist for counties to deal with exhausted mineral grounds concerning environmental degradation?

Response

- The companies concerned should fill the gaping holes left behind because of the extraction activities by treating/reclaiming the affected areas.
- The CoG should engage further on conflicting issues in the sector. It should determine how to handle cases where mining contracts were entered into before the respective laws came into force, and then give direction on which provisions should apply on environmental degradation.

Way Forward

Participants agreed on the time-action matrix with relevant actors as summarized in the table below

Action	Actor	Timeline
1. Write-up on the things counties need and can do right away i.e. develop generic laws and frameworks for CDAs, participation, artisanal mining, etc.)	<ul style="list-style-type: none"> Relevant Committees to brief Council of Governors on resolutions of the forum CoG Secretariat 	Immediate
2. CoG Policy Brief on extractives (also develop inputs into local content policy currently under development)	<ul style="list-style-type: none"> CoG Secretariat to provide leadership Relevant Committees AHADI/Adam Smith 	By May 8, 2018
3. Legal Briefing on Mining: -Operational issues and amendments NEMA (identify actions for NEMA/Law; harmonization with other extractive laws)	<ul style="list-style-type: none"> CoG secretariat to provide leadership Chair (CoG) - Representational leadership with the Ministry of Mining. Chairs of relevant Committees AHADI/Adam Smith 	By May 8, 2018
4. Revisit the Petroleum Bill before it goes to the Senate (harmonization with other extractive laws) 5. Review Local Content Bill Plan for review of Energy Bill and provide comments	<ul style="list-style-type: none"> CoG Secretariat AHADI Adam Smith Individual governors to be available for discussions with consultants on local content 	By May 8, 2018

Vote of thanks

In his vote of thanks, Kilifi County Deputy Governor H.E. Gideon Saburi expressed pleasure on behalf of his County for having played host to the forum and thanked the CoG, AHADI and other partners for organizing the meeting. He also thanked the participants and noted, on their behalf, that they had learnt a lot during the forum. He reiterated the need to compile the information gathered during the meeting into good reports which should, in turn, inform better laws in support of the extractives sector.

Closing remarks

In his closing remarks, the Chair Council of Governors H.E. Josphat Nanok observed that unlike previous meetings, the forum was productive since it had come up with the envisaged matrix of a clear road map. He expressed hope that the forum's report will be shared by all governors for subsequent endorsement so that counties can domesticate the extractives' legislative framework moving forward. The Chair reaffirmed that the participants had learnt a lot as they exchanged ideas and thanked them for their invaluable input that will support the devolution process.

The Governor stated that the Constitution of Kenya, 2010 allowed counties to raise to 50 per cent of taxable income and therefore confirmed that counties will use the same information to accelerate revenues. He, however, cautioned the participants that the road ahead would not be smooth since fighting over resources was commonplace. He called on the participants to remain assertive and work together towards positive gains for the people and further urged them to brief those who did not attend the meeting about the proceedings. The Chair also called on the CoG Secretariat to create a communication channel for sharing information on extractives at the county level. He concluded by declaring the forum officially closed.

Key forum deliverables/outputs

The forum's outputs are listed below.

1. Write-up on the things counties need and can do right away i.e. develop generic laws and frameworks for CDAs, participation, artisanal mining, etc.)
2. CoG to come up with a policy brief on extractives and develop inputs into the Local Content Policy under development.
3. A legal briefing on mining should be compiled addressing the issues below.
 - Operational issues and amendments
 - Actions for NEMA relating the extractives sector and harmonization with other extractive laws
4. A workshop/forum on pending legislation and policies should be convened
5. The Extractives forum proceedings report should be completed and shared with counties for endorsement

Annexe

Program for the Meeting

PROGRAMME FOR THE EXTRACTIVES FORUM HELD ON

APRIL 4-6, 2018 AT OCEAN BEACH RESORT AND SPA HOTEL, MALINDI

APRIL 4, 2018

2.00 p.m. - 4.30 p.m.: Visit an extractive site in Kilifi County
Hosted by the Office of the Governor Kilifi County

DAY ONE: APRIL 5, 2018

Time	Activity	Facilitator
08.30 a.m. - 09.00 a.m.	Arrival and Registration	Eric Muriithi Ann Patliz Wambui
09.00 a.m. - 10.00 a.m.	Opening prayer and Introductions Welcome Remarks H E Amason Kingi, Host Governor, Kilifi County Waceke Wachira - Country Director, AHADI Keynote Address H E Josphat Nanok, Chairman, the Council of Governors	Eva Sawe
10.00 a.m. - 10.30 a.m.	This session focuses on the history of the oil, gas and mining industry in Kenya and provides the status of the sector to date, giving depth to the forum's objectives. Forum Objectives History and background of the Extractives Sector in the country	Ikal Ang'elei
10.30 a.m. - 11.00 a.m.	HEALTH BREAK	
11.00 a.m. - 11.45 am	Policies and legislative development- Experiences from the mining sector	Hon. Amina Abdalla
11.45am - 01.30 p.m.	Unbundling of the Extractive legislation with specific reference to the institutional framework, roles and mandates of extractives/mining sector institutions. Key issues for discussion: Critical analysis of Kenya's legal and policy framework relevant to the oil, gas, and mining sector with the lens of the devolved system of governance. Role of the county governments in the Mining Sector.	Wachira Maina
	Plenary and Feedback	

1.30 p.m. - 2.30 p.m.	HEALTH BREAK	
2.30 p.m. – 4.00 p.m.	Sharing of experiences on extractives and mining from the counties (experiences, challenges and opportunities). Speakers: Governors: Kakamega, Turkana, Taita Taveta, Migori, Kwale, Kilifi and Isiolo	Ikal Ang’elei
	Plenary and Feedback	
DAY TWO: APRIL 6, 2018		
8.30 a.m. - 9.00 a.m.	Recap of day one	David Wanjohi
9.00 a.m. - 9.30 a.m.	Comparative studies of the Extractive Sector in Kenya and other countries.	Ikal Ang’elei
9.30 a.m.- 10.00 a.m.	Key issues-Opportunities and Challenges	Wachira Maina
10.00 a.m. -10.30 a.m.	HEALTH BREAK	
10.30 a.m. -12.30 p.m.	Next steps and implementation framework of the Mining/Extractive sector	Ikal Ang’elei / Wachira Maina
12.30 p.m. -1.00 p.m.	Closing Remarks	
1.00 p.m. - 2.00 p.m.	LUNCH AND DEPARTURE	





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