EXTRACTIVE INDUSTRIES FOR SUSTAINABLE DEVELOPMENT

KENYA GAP ANALYSIS REPORT

UNITED NATIONS DEVELOPMENT PROGRAMME (UNDP)

By George Lwanda and Maria Melby

BACKGROUND

The study assesses the extent to which the Kenyan national mining policies and legislation are aligned with the Africa Mining Vision (AMV). The AMV's main goal is to promote "transparent, equitable and optimal exploitation of mineral resources" in order to underpin "broad-based sustainable growth and socio-economic development". An action plan comprising nine clusters - mineral rents and management, geological and mining information systems, human and institutional capacities, artisanal and small scale mining, mineral sector governance, research and development, environmental and social issue and linkages and diversification – was approved in December 2011 as the continental tool for guiding the prudent, transparent and efficient development and management of Africa's mineral resources.

The study adopted a "two stage" conceptual approach. The first stage or the "constitutionality stage" assessed the extent to which Kenya has ratified Africa Union (AU) treaties that are related to the Africa Mining Vision. In this regard, it was found that 21 out of the 49 African Union treaties were related to at least one pillar of the AMV. The study then examined how many of the 21 AMV related treaties that Kenya has ratified and how long this has taken. This was an attempt to gauge the extent to which Kenya has domesticated AU treaties related to the AMV, an integral part of domesticating the AMV.

The second part of the study assessed the coherence of national policies and legislation to the AMV. Admittedly, this is the analytical stage required flexibility to national context. Nonetheless, the study was guided by the AMV action plan. The study, in this regard, assesses the extent to which the Kenyan national policies and legislation align with the action plan.

It is important to state that the report only examined the Kenyan Mining policy and legislation framework and excluded oil and gas. This is largely because the Kenyan petroleum governance regime is currently undergoing reform with a new regime expected to be in place once the current Bill is passed. It was therefore felt that it would be more meaningful to analyse the oil and gas regime once the law has been passed.

Additionally, the Kenya mining Act is new and was only enacted in June 2016. This means that it is still in its early stages of implementation and a number of new institutions and regulations are yet to be developed and implemented. This limited the extent to which the study could assess the implementation of the new regime.

BRIEF OVERVIEW OF THE EXTRACTIVE SECTOR

Kenya is endowed with gas, minerals and oil. Recent announcement of oil discovery and other minerals has propelled Kenya as a new player in the global market for hydrocarbon and valued minerals. The Mrima Hills in Kwale County, for example, has one of the largest rare earth mineral deposits in the world. According to the International Monetary Fund (IMF), oil production in Kenya is expected to start in four to six years from now, giving the country time to prepare for managing its endowment to achieve its development goals as stipulated in the 2030 Vision.

The extractive sector contributes an estimated 4.2% of the national GDP and 3% of national export earnings. The mining sector in particular contributes around 1% to GDP. However, recent discoveries have pointed to the potential of extractives, with the sector forecast to account for up to 10% of GDP by 2030. In 2012, Tullow Oil (UK) and Africa Oil (Canada) announced an oil discovery in block 10BB (Northwestern Kenya) and a subsequent discovery in block 13T. Kenya is estimated to have current oil resources of around 600 million barrels

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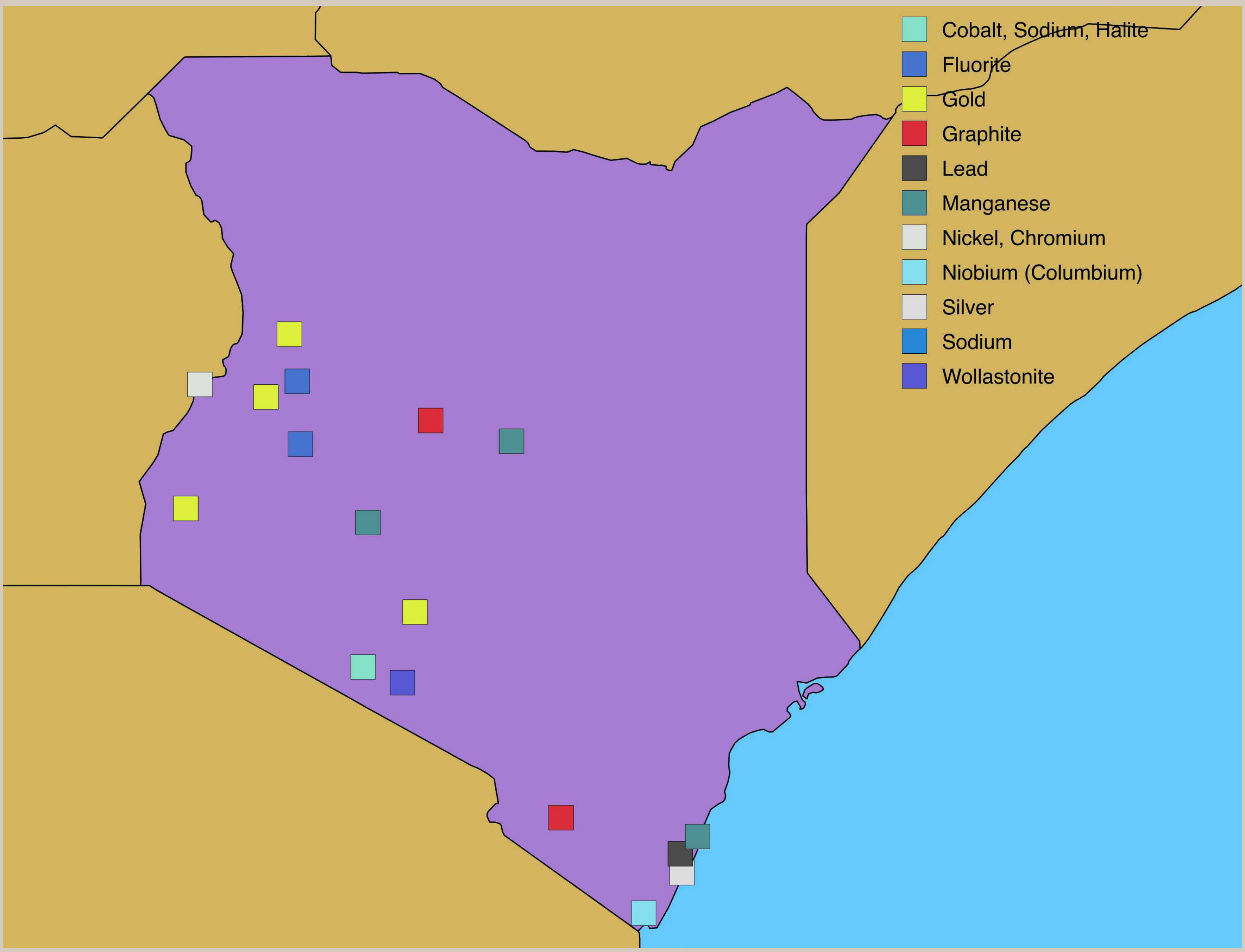
Kenya has several different ores and minerals that are being exploited (see Figure 1). The scale of mining ranges from artisanal and largely illegal mining operations to large-scale commercial operations like Base Titanium. Whilst the value and scale of mining in Kenya is not forecast to be more than that of the merging petroleum sector, mining operations will remain an important source of employment, income and general local economy activity in individual counties as well as mining communities.

Figure 1: Known Mineral Deposits



Of the 49 African Union treaties, 21 are related to at least one pillar of the AMV. Of those related to the AMV, 19 (73%) are related to either the mineral governance or environmental and social issues pillar of the AMV, 2 to research and development and one each to ASM and building human and institutional capacities. Of the 21, Kenya has ratified and deposited 8 treaties and is not a signatory to six (see table below). On average, it has taken the country nearly three years between signing and depositing AU treaties related to the AMV.

1318 average number of days between *signature* and *ratification*

49 average number of days between *ratification* and *deposit*

STATUS OF AU TREATIES

12	14	23
NEITHER SIGNED NOR RATIFIED	ONLY SIGNED	RATIFIED AND DEPOSITED

1037 average number of days between *signature* and *ratification*

88 average number of days between *ratification* and *deposit*

STATUS OF AMV RELATED AU TREATIES

6	7	8
NEITHER SIGNED NOR RATIFIED	ONLY SIGNED	RATIFIED AND DEPOSITED

AMV PILLARS		# AU TREATIES LINKED TO AMV PILLAR	NEITHER SIGNED NOR RATIFIED	ONLY SIGNED	RATIFIED AND DEPOSITED
BUILDING HUMAN AND INSTITUTIONAL CAPACITIES	III	1	1	0	0
ARTISANAL AND SMALL SCALE MINING	IV	1	1	0	0
MINERAL SECTOR GOVERNANCE	V	10	3	4	3
RESEARCH AND DEVELOPMENT	VI	3	1	1	1
ENVIRONMENT AND SOCIAL ISSUES	VII	9	0	4	5
LINKAGES AND DIVERSIFICATION	VIII	3	2	0	1

Source: African Union OAU/AU Treaties, Conventions, Protocols & Charters: http://www.au.int/en/treaties
The following three legal instruments do not require signatures and are counted as signed in the analysis; Phyto-sanitary Covention for Africa; Cultural Charter for Africa; Additional Protocol to the OAU General Convention on Privileges and Immunities. The following legal instrument does not require signature or ratification and has come into effect upon its adoption by the Assembly on 4 February 2009. The instrument is counted as signed and ratified in the analysis: Statute of the African Union Commission on International Law (AUCIL). Time between signature and ratification are calculated for instruments that were signed before being ratified. Instruments that were ratified without needing to be signed for whatever reason are not included in the calculations

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OVERARCHING POLICY AND LEGAL ENVIRONMENT

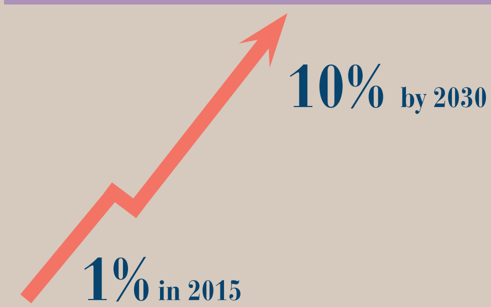
CONSTITUTION OF 2010

THE OVERARCHING LAW THAT GOVERNS NATURAL RESOURCES IN THE COUNTRY. THE CONSTITUTION MANDATES THE STATE WITH THE RESPONSIBILITY TO:

Ensure sustainable exploitation, utilization, management conservation of the environment and natural resources

Ensure the equitable sharing of the accruing benefits and guarantee equitable benefit for all people from the use of natural resources

VISION 2030



VISION 2030 ASPIRES FOR THE MINING SECTOR'S CONTRIBUTION TO GDP TO INCREASE

MAIN OBJECTIVES OF VISION 2030

1. Provide a legal framework that conforms to current industry needs, trends and international best practices
2. Provide a strategy for transparent and accountable licensing procedures including access to land
3. Provide a framework for a well-structured mining fiscal regime
4. Enhance the acquisition, processing and dissemination of geological and mineral data
5. Provide a mineral value-addition strategy
6. Provide a sectoral resource mobilization and capacity building framework
7. Provide a framework for harmonizing mining and environmental legislations
8. Provide a framework for gender mainstreaming and eradication of child labour in the mining industry
9. Provide a framework for mainstreaming activities of ASM
10. Provide a framework for local participation in investment ventures
11. Provide a framework for equitable sharing of mineral benefits

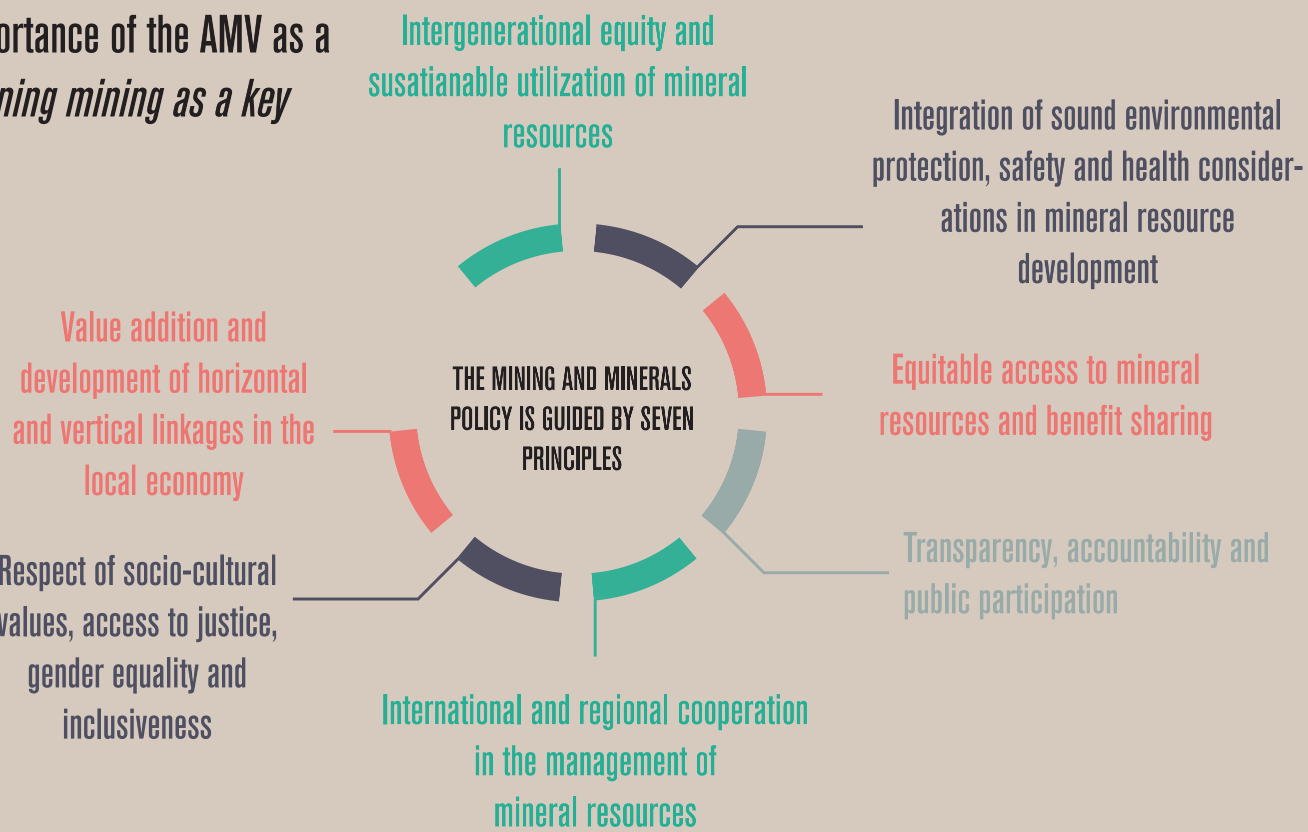
OVERARCHING POLICY AND LEGAL ENVIRONMENT CONT.

MINING AND MINERALS POLICY 2014

The Mining and Minerals Policy was created from the need of a policy framework to provide clear guidance for a sustainable mineral resource development. The policy will address gaps that have existed in the mining sector, with the overall goal to establish frameworks, principles, and strategies to provide for exploration and exploitation of mineral resources for socio-economic development.

The policy pays cognizance to the importance of the AMV as a *'continental blueprint aimed at positioning mining as a key driver…'*

The policy also pays strong homage to human rights and gender issues



The policy dovetails with AMV principles. It has 12 policy strategies revolving around

- Predictable, transparent, efficient & unified regulatory framework
- Transparent licensing system
- Enhancing collection and access to geological data
- Developing legislative mechanisms for accessing land for mineral development
- Achieving an acceptable balance between mining and the environment
- Developing and implementing a stable, transparent, predictable and competitive fiscal regime
- Developing and implementing mechanisms to ensure participation, ownership & decision-making by women, youth and disadvantaged groups
- Developing a framework for mainstreaming and formalizing ASM
- Developing and implementing mechanisms to enhance participation of all stakeholders in mining investments
- Designing mechanisms for sharing benefits accruing mineral exploitation between the various spheres of government
- Pursuing a responsive regulatory framework that ensures equitable benefits sharing and maximization
- Developing mining investment and value addition promotion mechanisms

OVERARCHING POLICY AND LEGAL ENVIRONMENT CONT.

MINING ACT 2016

The purpose of the Mining Act, 2016 is to give effect to Article 60, 62(1(f), 66(2) and 69 of the Constitution, to provide for prospecting, mining, processing and any dealings in minerals.

The Act was preceded by a Mining and Minerals Policy in 2014. The policy is cognizant and pays tribute to the AMV as a continental framework for extractives-based industrialization on the continent. Although the Act is generally progressive due to its requirements for public disclosure of information, its focus on public participation and the rights of communities, its recognition of the ASM sector and strong sustainable environment practices, amongst other things. Additionally, there was general agreement by stakeholders that the Act heavily borrows AMV principles such as a focus on community rights, job creation, accountability and disclosure if information, amongst other principles. This view was also supported by the fact that all stakeholders interviewed had a very good understanding of the AMV, the AMV therefore seems highly advocated around in Kenya.

That said, it is silent as regards strategy 12 of the Mining and Minerals policy which deals with gender issues. This is, and its lack of focus on human rights issues are arguably the Acts biggest weaknesses. Several stakeholders also still felt that the Act gave too much power to the cabinet secretary and the president. A particular concern around this was the effect it would have on the independence of, especially, the new institutions.

There was also a concern that the Act does not provide for sufficient upskilling of mining communities and was silent on human rights and gender issues. Stakeholders also felt that the absence of an access to information law was a potential hindrance to the implementation of the new regime.

Almost all stakeholders expressed satisfaction with the generally participatory and consultative approach that the government has taken so far as regards policy and decision making as regards the mining sector. There however still general angst as regards government's perceived ability and interest to implement regulations to the spirit of the Act especially on issues that mining companies might raise concerns on. The lack of legislation guaranteeing public access to information is also another weakness of the general governance environment in the country.

- Still too much power given to the CS and president
- Too much executive power in committees and organizational bodies
- Minerals in heavily marginalized areas – need to target and benefit
- Human resource capacities in ASM need to be improved
- Kenya has no access to information laws (colonial secrecy law)
- New initiatives in extractives may not meet poverty reduction expectations

INSTITUTIONAL SETTING

MINISTRY OF MINES

The Ministry was created in 2013 and is responsible for the implementation of Article 69 of the Constitution of Kenya (2010). The article enshrines the responsibility for ensuring the sustainable exploitation, utilization, management and conservation of the environment and natural resources and equitable sharing of the accruing benefits to the State

MINISTRY KEY ACHIEVEMENTS

- PUBLICATION OF A MINING HANDBOOK FOR INVESTORS
- ACQUISITION OF DATA THROUGH A COUNTRYWIDE AEROMAGNETIC GEOPHYSICAL SURVEY PROJECT
- FORMATION OF A MINING CERTIFICATION LABORATORY AND GEO-DATA BANK. NATIONAL GEO-DATA BANK WILL HOUSE THE NATIONAL GEOLOGICAL DATA
- THE MINISTRY HAS IMPLEMENTED AN ONLINE MINING CADASTRE PORTAL

KEY INSTITUTIONS

KEY INSTITUTIONS

ANCILLIARY ACTS

Ministry of Environment, Water and Natural Resources: Mandate is to develop policy and provide direction in the sustainable use of natural resources, water and environment to secure livelihoods of citizens

Kenya Investment Authority: Mandate to promote and facilitate investment in the country and its policies have an an impact on the investment environment in the extractives industry

NEMA: Implements environmental management and conducts all audit and monitoring activities.

- **The Environmental Management & Coordination Act**: Coordinates various sectoral laws dealing with the environment
- **The Water Act 2002**: Provides for the sustainable management of water resources

Kenya Revenue Authority: Mandate to assess and collect taxes. It remains a stakeholder in understanding and interpreting taxation law and its application in the extractives sector

National Treasury: Mandate to formulate finance and economic policy as well as other functions related to its role as custodian of national assets and financial resources. Its policies have an impact on the investment environment of the extractives

- **Public Finance Management Act**: Governs the principles of public finance in Kenya

KEY INSTITUTIONS CONT.

Ministry of Lands, Housing & Urban Dev.

Responsible for efficient administration and sustainable management of land resource in the country. Licensing process requires certifications from the Ministry on documentation

National Land Commission

Responsible for administering transactions related to public land & those involving exploitation of natural resources. It provides approvals of consents for public land use and resolves any other land matters

County Governments

Charged with the development of counties and administration of activities in local jurisdictions. Their consent is required before any prospecting or mining activity commences

Committee on Policy and Legal Framework for Geoloy, Mining and Minerals

Tasked with leading the implementation of policy and legal frameworks relating to the extractives sector

Judiciary

Tasked with handling any disputes that may emanate from the extractive sector. The role is limited to where agreements expressly limit dispute resolution to arbitration

Auditor General

Tasked with auditing and reporting accounts of national and county governments funds established and accounts of legislation that may require auditing

The Land Planning Act

Governs the principles of public finance in Kenya

Controller of Budget

Tasked with overseeing the implementation of the budgets of the national and county governments by authorising withdrawals from public funds

Legislature

Plays an oversight role in the management of natural resources. The National Assembly ratifies transactions involving the grant of a right or concession for exploitation

Attorney General

All laws and regulations developed for the sector have to pass the AGs office. Agreements on natural resources also go through the AGs office before they are ratified by the National Assembly

Public Health Act

Secures and maintains public health. Some of its provisions relevant to the extractive industry include prohibition of destructive activities such as oil spillage, dust and air pollution or any other condition deemed injurious or dangerous to human health

AMV PILLARS

Gap Analysis

I

MINING REVENUES AND MINERAL RENTS MANAGEMENT

Programme cluster goal: To create a mining sector that generates adequate income and rents to eradicate poverty and finance African growth and development

# AU TREATIES LINKED TO AMV PILLAR	NEITHER SIGNED NOR RATIFIED	ONLY SIGNED	RATIFIED AND DEPOSITED	average number of days between *signature* and *ratification* of AU treaties related to AMV pillar
0	0	0	0	--

SUMMARY OF GAP ANALYSIS

The policy and legal framework relating to Kenya's fiscal management of its mineral resources are guided by the mechanisms established under the Constitution of 2010 as well as the Public Finance Management Act (PFMA). This necessitates any analysis of the extractives fiscal regime to pay cognizance to the larger overall fiscal management regime that exists in the country. Kenya enacted its PFMA in 2012 and it lays the principles of public finance management placing emphasis on openness, accountability and public participation. In July 2016 the IMF published a fiscal transparency evaluation report for Kenya. Assessing the Kenyan fiscal management system against 3 principles (fiscal reporting, fiscal forecasting and budgeting and fiscal risks practices) and across 36 principles, the report rated 13 of the 26 principles as either "good" or "advanced" and 16 as "basic". Particularly, the production and dissemination of annual financial statistics was rated as advanced. However the report did express concerns some of which were that no government balance sheet is reported, concerns around the credibility pf forward spending estimates and the fact that around three quarters of the government's contingent liabilities which total an estimated 12% of the GDP are unreported. The report makes the necessary recommendations and reforms the country must implement. However, of importance to this study is the fact that Kenya's mineral fiscal regime can't be separated from the country's overall fiscal management regime. In fact, it is in all likelihood, bound to reflect it.

The AMV Action Plan identifies two broad expected outcomes of this pillar:

Enhanced share of mineral revenue accruing to the host country: The 2016 Mining Act does so by, amongst other things, requiring that a mineral agreement expressly includes the terms and conditions relating to the payment of royalties and taxes. It also requires that any mineral interests be registered only upon proof of compliance with relevant tax provisions. This includes the fact that Section 53 requires mineral rights holders to provide the Cabinet Secretary with annual financial statements within a specific time. It further establishes a national mining corporation to be the investment arm of the national government. Government also has a 10% free carrying share in operations. Although the Act is silent on the precise and exact amount or percentage to be paid by the holder of a mineral right, it mandates the Cabinet Secretary to determine, through a regulation published in the Gazette, the royalties to be paid on the various classes of minerals.

Certain stakeholders expressed concern with the fact that royalties had not been determined. The government responded by contracting an international firm to conduct a study to determine new royalty rates. In the meantime, the old rates will prevail. "We want to get it right so that people don't get excuses to smuggle minerals. We want something that is (also) attractive and competitive to investors ". Understandably though, stakeholders expressed concern that the Act does not, for example, state the principles or factors that will guide the determination of the royalties payable on the various classes of minerals. The fear is hence that the resultant rates may be unacceptable to the public at large, especially since mining companies have apparently already expressed unease with the new regime. Kenya is not a member of the EITI. Publish What You Pay has had members in Kenya since 2012, one of their main objectives has been to advocate for Kenya to join the EITI.

Improved management and use of mineral revenue: The Act provides for the division of mineral revenues to ensure that each sphere of government is responsible for their own portion. In this regard, it calls for the division of financial resources in the ratios of 70%, 20% and 10% for the National Government, County Government and the local communities respectively. This was the single most progressive aspect of the new Act that was identified and re-emphasised by all stakeholders interviewed as well as analytical pieces consulted.

SUMMARY OF GAP ANALYSIS CONT.

A Sovereign Wealth Bill establishing an extractives based natural resources Sovereign Wealth Fund is also currently undergoing the legislative authorization process. Its aim is to enhance intergenerational equity (Article 201 of Constitution). The idea of establishing a SWF so early in the life cycle has clearly proved contentious. Some stakeholders were of the opinion that it was too early and Kenya's development needs are great and the SWF will see funds locked in savings when they could be spent on bulk infrastructure and social services for example. Most were of the view that the SWF had to be established now with all the other agencies. "Is the national mining corporation not going to be making money and where will this money be going?" questioned one stakeholder. For purposes of this analysis, the immediate need to immediately start work on the establishment of an SWF was viewed as the good practice because of the following two reasons:

1. A SWF cannot be seen as necessarily and always solely a savings fund. Botswana is a good example of a country that managed to ring-fence mineral revenues and share them between a SWF and public infrastructure and human capital development; and
2. The AMV is unambiguous on the issue and as a study benchmarking against the AMV, this was not diverted from.

However, no stakeholder managed to give a convincing reason as to why the SWF has to be solely extractives based. In a country in which the extractives is the sector in its infancy, wouldn't adopting a more pragmatic approach that compels the more "mature" sectors of the economy to contribute to the SWF make more sense? To this end, the report was concerned with the pace at which the country seems to be "diversifying itself into a Dutch disease" by focusing on the extractives sector as the sole sector to anchor a SWF.

Additionally, concerns were expressed that the SWF Bill creates a parallel structure outside of the PFMA which is supposed to be the supreme law in public finance management. The PFMA establishes clear requirements for public finance management and several stakeholders expressed concern that the SWF Bill for example ignores the PFMA requirement for the preparation of a medium term fiscal strategy.

SWOT ANALYSIS

STRENGTHS

- New regime is clear about the percentages as regards benefits sharing amongst the different tiers of government and also provides local communities with larger share.
- The Act is clear on issues such as pre-emptive rights, mineral agreements, mineral rights, and matters revenue sharing among others.
- Fairly sound fiscal management regime that already exists

WEAKNESSES

- Discordance of the SWF Bill with the PFMA is a major weakness if it is implemented as it is
- Outstanding recommendations as regards strengthen the national fiscal management system's transparency as articulated by the Fiscal Transparency Evaluation report.

OPPORTUNITIES

- The current process of determining royalties provides an opportunity to entrench openness and public participation.
- An opportunity to build up on an existing public finance management system that is founded on openness and accountability

THREATS

- Natural resource poor counties may find themselves poor raising inequality in the country
- SWF structure ignores PFMA structures and processes

II

GEOLOGICAL AND MINING INFORMATION SYSTEMS

Programme cluster goal: To develop a comprehensive knowledge of Africa's mineral endowment

0	0	0	0	--
# AU TREATIES LINKED TO AMV PILLAR	NEITHER SIGNED NOR RATIFIED	ONLY SIGNED	RATIFIED AND DEPOSITED	average number of days between *signature* and *ratification* of AU treaties related to AMV pillar

SUMMARY OF GAP ANALYSIS

Emphasizing the need for a thorough knowledge of the mineral resource base as a fundamental starting point for mineral development interventions, the AMV Action Plan has the "improved geological and mineral information systems to underpin investment in exploration and mine development" as an expected outcome. The importance of a comprehensive mineral endowment database also lies in the fact that it improves the government's decision-making and ability to negotiate contracts with foreign investors.

In this regard, it is clear that this is still work in progress in Kenya. The operationalization of an online cadaster system however can be seen as a major step as this also will provide mineral information. The Act mandates the Director of Geological Survey responsible to the Cabinet Secretary for operation of the Directorate of Geological Survey; providing geoscience expertise and data to the government; undertaking geophysical, geochemical, seismological, and hydrogeological surveys and mapping; developing a national repository of geo-science information; promoting private sector interest and investment in mineral exploration by providing geological information and services to prospective investors.

The Ministry of Mines is currently engaged with development partners on developing a geological databank to determine the subsoil assets. This geological survey will form the basis of the 20-year strategic plan for the mineral sector.

SWOT ANALYSIS

STRENGTHS

- There is awareness and will to strengthen geological data information.
- Establishment of Geological Survey Department

WEAKNESSES

- Most of the country remains unexplored

OPPORTUNITIES

- Potential of geological maps to help increase investments

THREATS

- "The seemingly high costs (financial and technical) of conducting a comprehensive survey

III BUILDING HUMAN AND INSTITUTIONAL CAPACITIES

Programme cluster goal: To create a mining sector that is knowledge driven and is the engine of an internationally competitive African industrial economy

# AU TREATIES LINKED TO AMV PILLAR	NEITHER SIGNED NOR RATIFIED	ONLY SIGNED	RATIFIED AND DEPOSITED	average number of days between *signature* and *ratification* of AU treaties related to AMV pillar
1	1	0	0	--

SUMMARY OF GAP ANALYSIS

The necessity of having good institutions supporting the mineral development in order to make the development sustainable cannot be overemphasized. The report's opinion is that there is a general feeling that there exists weak links between the country's vision as regards the mineral sector and its education and training system, which needs significant overhaul if it is to yield significant offsets in skills shortages. These weaknesses also extend to government departments responsible for negotiating mineral development agreements and regulating the exploitation of mineral resources.

In order to remedy this, the Act expressly compels every mineral right holder to ensure skill transfer and capacity building among Kenyans by, amongst other things, detailing how they will recruit and train Kenyans. The Act however does not leave this solely to the mineral rights holder and also compels the Cabinet Secretary to come up with policy guidelines in this regard. The Act also obliges partnerships and links with universities. Additionally, there are plans of creating a national mining institute that will be offering technical training in disciplines related to the extractive industry, enhancing sectoral capacity building, and conducting research on the extractive industry.

SWOT ANALYSIS

STRENGTHS

- Possibility of human resource development growing along with the extractive sector.
- Legal texts are available online.

WEAKNESSES

- No mention of strategy on inclusion of private sector.
- No skills development strategy for the ASM sector
- No policy on education/ vocational training related to extractive industry

OPPORTUNITIES

- National Mining Institute will provide training opportunities and increased human resource development.
- Ministry of Mines will have the role of coordinating agency.

THREATS

- "Local employee" needs to be defined to avoid confusion on geographical limits.
- Lack of strategic link between national aspirations on the sector and the education and vocational training system.

IV

ARTISANAL AND SMALL SCALE MINING (ASM)

Programme cluster goal: To create a mining sector that harnesses the potential of artisanal and small scale mining to advance integrated and sustainable rural socio-economic development

1	1	0	0	– –
# AU TREATIES LINKED TO AMV PILLAR	NEITHER SIGNED NOR RATIFIED	ONLY SIGNED	RATIFIED AND DEPOSITED	average number of days between *signature* and *ratification* of AU treaties related to AMV pillar

SUMMARY OF GAP ANALYSIS

An often repeated positive of the new mineral regime is the recognition of artisanal mining, whereas the previous mining regime essentially outlawed artisanal mining. That said, the application and applicability of the legislation remains to be seen as there are significant ambiguities in the manner that artisanal miners are recognized. Section 4 of the Act defines artisanal mining as traditional and customary mining operations using traditional or customary ways and means. Section 96 (2) governing the duration of a permit, re-enforces the categorization of artisanal miners into their own category, and states that artisanal miners can apply to graduate from artisanal to small mining.

However, neither section 32 that spells out the categories of mineral rights nor section 123 that defines the categories of mineral rights relating to small scale operations, recognizes artisanal mining. This mismatch has led to confusion as to its practical implications. Reflecting this, some stakeholders told us that the Act does not recognize artisanal miners but has put them in the same category as small scale miners. Most were sure that the new Act recognizes artisanal miners but expressed ignorance on what the actual legislation says

SWOT ANALYSIS

STRENGTHS

- Artisanal mining has been made legal.
- Current efforts at developing a long term ASM strategy will facilitate the mainstreaming of the ASM sector into the broader national development plans.
- The law requires the geographical determination and designation of ASM areas.

WEAKNESSES

- Current regulations seem to turn a blind eye to child labour practices and were said to not take into consideration gender issues around artisanal mining
- Limited financial, technical and business management skills training and assistance threatens to trap the sector in a “subsistence living tailspin”, with low levels of graduation from artisanal to small mining.
- Lack of the sub-sector’s integration in current development plans.

OPPORTUNITIES

- The recognition of artisanal mining coupled with the ministry’s current initiative of developing an ASM strategy provides a real opportunity for the country to harness the transformative potential of the ASM sector especially as regards job creation, skills development and socio-economic development.
- The implementation of artisanal miners formalisation presents an opportunity for government to increase its tax base
- Establishment of an artisanal mining committee to advise the representative of the Director of Mines in the granting, renewal or revocation of artisanal mining permits.

THREATS

- The fact that mineral deposits do not respect political and administrative boundaries can create administrative and security complications and also incubate inter-community conflict if not well managed.
- Online mining cadaster can prove a challenge to artisanal miners with low literacy levels
- Ambiguities regarding the recognition and classification of artisanal miners in the Act.

V

MINERAL SECTOR GOVERNANCE

Programme cluster goal: To create a sustainable and well governed mining sector that is inclusive and appreciated by all stakeholders including surrounding communities

10	3	4	3	678
# AU TREATIES LINKED TO AMV PILLAR	NEITHER SIGNED NOR RATIFIED	ONLY SIGNED	RATIFIED AND DEPOSITED	average number of days between *signature* and *ratification* of AU treaties related to AMV pillar

SUMMARY OF GAP ANALYSIS

Kenya's mineral governance regime is undergoing an overhaul. It is hence new and still evolving. This means that any analysis will have to limit itself to what has been achieved so far and a "reasonably objective" forecast of how the implementation phase will evolve. Overall, the study found awareness of the AMV and its issues to be very high amongst all stakeholders in Kenya. Whilst the AMV might not have consciously been the guiding vision to the framing of the new regime; it was clear that the AMV principles are accepted as a guiding principles dovetailing with the country's principles around mineral governance. Consequently there is greater "awareness and reflection" by all stakeholders of the extent to which the national mineral governance regime neatly dovetails with the AMV and how any misalignment can be corrected.

All the stakeholders consulted expressed general satisfaction with the new mineral governance regime and the Act as well; especially as regards issues around the environment, technology transfer, local equity, the recognition of ASM, parliament's strengthened role and public participation. Clear apprehension however was expressed as regards government's ability and commitment during the implementation phase. It must however be said that this apprehension was due to past experience with the way the government managed the sector. However, most also highlighted their optimism due to the consultative and largely transparent nature that the current process has been handled. The establishment of an online mining cadastral was constantly and particularly noted by all stakeholders as proof of government's commitment to transparency and public participation.

SWOT ANALYSIS

STRENGTHS

The new mineral governance regime has generally been embraced by all the sections consulted during this study. The 2016 Mining act contains:

- Strengthened transparency, parliamentary oversight and public access to information (eg online cadastre system).
- Improved public participation requirements in policy and decision making and monitoring and evaluation of mining projects.
- Emphasises multi-stakeholder engagements in policy and decision making.

WEAKNESSES

- There was a recurring opinion that the new mineral governance regime still gave significant discretionary powers to the executive in general and the Cabinet Secretary in particular.
- Seemingly very low link/cooperation with security and health and emergency clusters to put in a place a risk/disaster management strategy especially given that mining activities are in remote areas where, even if security is not an immediate concern, natural disasters and other public health risks need management
- The pending community land bill greatly water's down the credibility of the mineral governance regime as lots of minerals are in communally owned land with no formal legal frameworks as regards ownership and hence who to negotiate with.
- Seemingly limited capacity building programs for CSOs and local communities.

OPPORTUNITIES

- Move from dualist to monist state hastens, simplifies and automates, the domestication of international conventions
- Regulations to operationalise the law yet to be published and there was uniform "apprehensive optimism" that the consultative decision making process that is taking root in the country will further strengthen the regulation implementation process.
- New institutions can provide a comprehensive approach to developing the mineral sector

THREATS

- Whilst the constitution guarantees human rights and access to information, sectoral laws regarding human rights in extractives are arguably weak and further weakened by the absence of legislation guaranteeing public access to information.
- The number of Bills still to be enacted that will support good mineral sector governance (such as the SWF Bill, Access to information Bill
- Regulations to operationalise the law yet to be published and there was uniform "apprehensive optimism" as to the extent that government will adhere to the spirit of the law largely due to the "strong" discretionary power given to the Cabinet Secretary
- Security concerns due to terrorist activities in certain parts of the country
- There was a consistently expressed concern regarding the heavy structures of the new bodies created by the Act. This must also be seen within the greater context of the country's current decentralisation process that has seen the creation of more structures that threaten to "burden" the national fiscus long before the mining sector itself matures and starts generating returns.

VII

ENVIRONMENT AND SOCIAL ISSUES

Programme cluster goal: To create a mining sector that is environmentally friendly, socially responsible and appreciated by all stakeholders and surrounding communities

9	0	4	5
# AU TREATIES LINKED TO AMV PILLAR	NEITHER SIGNED NOR RATIFIED	ONLY SIGNED	RATIFIED AND DEPOSITED

979

average number of days between *signature* and *ratification* of AU treaties related to AMV pillar

SUMMARY OF GAP ANALYSIS

The law was observed by almost all stakeholders to have a very strong social responsibility inclination. This is reflected by its insistence on programs aimed at transferring technology and skills to the community and Kenyans at large (Sections 46, 47, 49 and 50).

The Acts opinions as regards environmental issues were generally viewed as progressive. Especially Section 176 (1) which makes it clear that ownership of mineral rights do not exempt the owner from complying environmental protection laws and states that ancillary laws will prevail (such as Water Act). Additionally, mineral license granting will be conditional on completing an environmental impact assessment, social heritage assessment and the approval of an environmental management plan. The Act also requires the depositing of an environmental protection bond which will only be released upon the successful completion of all environmental and rehabilitation obligations upon shut down. There are however concerns around inter-ministerial coordination as environmental issues are largely the mandate of the environment ministry.

The Mining Act entrenches community participation in the decision making process be it on policy or mining operations, for example, it specifically requires that communities, owners and occupiers of land as well as other governing bodies to participate in and consent to the granting of a mineral license. Nonetheless, stakeholders expressed concern at the ambiguous definition of "community"'in the Act. Whilst the Act defines community as either a group of people living around exploration and mining operations area; or a group of people who may be displaced from land intended for exploration and mining operations; it does not define the terms "around" or "group". A major weakness of the act is that it is silent on gender issues.

SWOT ANALYSIS

STRENGTHS

- Completing environmental and social impact assessments are now prerequisites for acquiring mining licenses.
- An approved environmental management plan is also a pre-requisite to acquiring a mining license.
- The law requires the geographical determination and designation of ASM areas.
- License holders are obliged to offer adequate compensation for damages, obstructions, and other inconveniences, to owners and/or occupiers of the land.

WEAKNESSES

- The Act is not clear who approves the environmental management plan.
- Unclear hieracrchy between the Land Act and the Mining Act
- Ambiguous definition of the term "community" as well as other terms related to the word.
- The Act is rather silent on gender and human rights issues. In fact the terms "gender" and "human rights" do not appear in the Act at all.

OPPORTUNITIES

- New requirement of large-scale enterprises to form a development agreement with local communities describing value addition for the community.
- Community participation in the decision making process enhanced eg, communities need to give consent to mining operations etc.
- The Act has a section that outlines dispute resolution (Section 156)

THREATS

- Unclear definition of social heritage.
- There are concerns around inter-ministerial coordination as well as the usurping of certain functions away from the environment ministry. For example, Section 180(1) prohibits the Cabinet Secretary from granting a license to any applicant that whas not submitted site mitigation and rehabilitation or mine-closure plans for approval. Some stakeholders argued that this was misplaced and amounted to usurping some of the Environment department's core mandate.
- No clear interventions to enhance community understanding of the mining life cycle and its implications. This can undermine the ability to manage community expectations.

VI RESEARCH AND DEVELOPMENT

Programme cluster goal: To create a knowlege driven mining sector that is a key component of a diversified, vibrant and globally competitive industrialising African economy

# AU TREATIES LINKED TO AMV PILLAR	NEITHER SIGNED NOR RATIFIED	ONLY SIGNED	RATIFIED AND DEPOSITED	average number of days between *signature* and *ratification* of AU treaties related to AMV pillar
3	1	1	1	--

VIII LINKAGES AND DIVERSIFICATION

Programme cluster goal: To create a mining sector that catalyses and contributes to broad-based growth and development through upstream, downstream, sidestream and infrastructure linkages

# AU TREATIES LINKED TO AMV PILLAR	NEITHER SIGNED NOR RATIFIED	ONLY SIGNED	RATIFIED AND DEPOSITED	average number of days between *signature* and *ratification* of AU treaties related to AMV pillar
3	2	0	1	1108

SUMMARY OF GAP ANALYSIS

Most stakeholders pointed out that in addition to its "fairly strong" social responsibility provisions, the Mining Act is also particular about the need for fostering technological transfer and ensuring that the mining sector does not develop into an enclave economy. The Act therefore has provisions as regards the employment and training of Kenyans, preference in employment, government participation in mining licenses, local equity participation and preference for local products. In the case of the employment of expatriates for example, the Act has mandated the Cabinet Secretary with setting sunset terms as regards how long they can be employed and how they will be replaced by Kenyans. There was general agreement that the major test of these requirements will be the resultant regulations that will be enacted with concerns high that there will be a lot of "watering down" of the spirit of the Act when the regulations are enacted. The Act is also cognizant of the need to promote research and development and requires, for example, that expatriate staff partner and collaborate with "universities and research institutions to train Kenyans". There are also several plans to establish technical colleges and universities.

The government also sees infrastructure "as a facilitator that needs focus" and is therefore implementing a number of bulk infrastructure projects in the energy, ICT and transport and logistics. In this regard, it's particularly worth noting the extent to which the Kenya Nepad secretariat displayed extensive knowledge and awareness of the various projects that facilitate linkages with the extractives sector and particularly how these related with the various Nepad and AU continental infrastructure initiatives. Although government officials generally showed an understanding of the importance of linkages and diversification, the country currently doesn't have a clear strategy in this regard. This however is understandable given the raft of reforms that have been happening in the country.

The Ministry states that minerals must be processed before exportation. Section 50 of the Mining Act states that preference should be given to Kenyan goods, services and workers during processing, refinement and treatment of extracted minerals. The Ministry highlights the need of support in this matter, as "people may not know the use of certain minerals". The Ministry also expresses a wish to start polishing gemstones domestically, since they are now exported raw. There is a great need for capacity building if minerals should start to be processed locally.

SUMMARY OF GAP ANALYSIS cont.

The Ministry has set up a new Directorate of Mineral Promotion and Value Addition. Under this directorate, there is also a division for industry coordination, to improve the linkages to other that could benefit from the mining sector and vice versa. The Ministry wishes the downstream linkages to be symbiotic with the surrounding industries, and highlights that, as the mining sector still is in its infancy, it will depend on other industries in order to grow. Other stakeholders are worried about the lack of information on linkages and how the mining sector can benefit other industries in the new Mining Act.

One big infrastructure project is the Mombasa-Nairobi railway that will facilitate a better movement of goods. The railway is planned to be completed by June 2017, and there are also plans of an extension to Uganda. Another big project is the LAPSSET Corridor involving Lamu Port, and reaching on to South Sudan and Ethiopia. LAPSSET will bring development to the north-eastern region of Kenya. Both projects will improve Kenya's infrastructure and bring possibilities of linking extractive industries sites to transport arteries.

SWOT ANALYSIS

STRENGTHS

- Domestic value addition and local sourcing of goods and hiring of local employees requirements
- Sunset clause on the use of expatriates

WEAKNESSES

- There is almost no evidence showing cognisance of gender and development issues related to the extractives and its linkages with the rest of the economy, for example how women businesses can be integrated into teh value chain

OPPORTUNITIES

- New mineral fields and/or projects will create infrastructure opportunities
- On-going Infrastructure development projects that can entrench linkages between the mineral sector and the rest of the economy.

THREATS

- Slow development and enactment of value addition policies and strategies and/or legislation supporting them
- Infrastructure development plans that are not consciously linked to

CONCLUSION

Kenya's current mineral management regime is new. The Act was enacted a few months ago and it gives effect to the 2010 Kenyan constitution. The Act was preceded by a Mining and Minerals Policy in 2014 and this was preceded by the establishment of a Mining ministry in 2013. The policy is cognizant of, and pays tribute to the AMV as a continental framework for extractives-based industrialization on the continent. The constitutional requirements, mining policy and Act are generally progressive due their requirements for public disclosure of information, focus on public participation and the rights of communities, recognition of the ASM sector and strong sustainable environment practices, amongst other things. Additionally, it is clear that the Act heavily borrows AMV principles such as a focus on community rights, job creation, accountability and disclosure if information, amongst other principles. Additionally, knowledge and understanding of the AMV was found to be significant across all stakeholders in Kenya.

That said, the analysis still found areas of concern. One of these areas is gender. Whilst the mining policy is clear on gender issues (strategy 12 of the Mining and Minerals policy), the Act is silent on gender issues. The same is true as regards human rights issues. Additionally, there is clear concern amongst all stakeholders that the Act gives too much power to the cabinet secretary and the president. A particular concern around this was the effect it would have on the independence of, especially, the new institutions. There is also a concern that the Act does not provide for sufficient upskilling of mining communities. Stakeholders also felt that the absence of an access to information law was a potential hindrance to the implementation of the new regime.

Almost all stakeholders expressed satisfaction with the generally participatory and consultative approach that the government has taken so far as regards policy and decision making in the mining sector. There is however still general angst as regards government's perceived ability and interest to implement regulations to the spirit of the Act, especially on issues that mining companies might raise concerns on. The lack of legislation guaranteeing public access to information is also another weakness of the general governance environment in the country. The analysis also noted the country's intention to create a sovereign wealth fund. Whilst the nobility of this is unquestionable, the fact that the current Bill proposing the Fund circumvents the Public Finance Management Act is a cause of concern particular to the extent to which it has the potential to lead to a Fund that will carry out quasi-fiscal operations outside of the public finance management act.

The analysis was also unable to look at relevant regulations that the Act calls for as these are still being developed. Suffice it to say that these concerns were expressed in a rather 'measured' manner which appreciated and noted the Ministry's rather 'glowing' record of achievements within the short time that it has been established. Additionally, the context of continuing larger and continuing governance reforms in the country in general and the decentralization process in particular. The multiplicity of reforms requires careful coordination to avoid misalignment (as can be seen in the case of the misalignment between the sovereign wealth fund Bill and the public finance management act).