



Extractives Hub



## Public Participation in Africa's Mining Sector

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Research Insight

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# 1. INTRODUCTION

Africa's mining sector is a major part of the global extractives sector and is also a major source of revenue for African countries. According to the International Finance Corporation (IFC), Africa has over 30% of the world's global mineral reserves and produces a very wide array of minerals and metals, including aluminium; bauxite; coal; cobalt; diamonds; gold; iron; lead; manganese; nickel; titanium; platinum; zinc; and precious gemstones. More than half of the countries on the continent export some major mineral commodities, and for several countries, mining accounts for more than half of their export revenues.<sup>1</sup>

Major mining countries in Africa include Botswana, well known for diamonds; Democratic Republic of the Congo which has extensive cobalt and copper reserves; Mozambique, with extensive coal and iron ore deposits; Ghana, well known for gold; Guinea Conakry, with large iron ore deposits; South Africa, known for its diamonds; and Tanzania, which has large gold and diamond deposits and is sole global source of tanzanite, a gemstone. In recent years, new mining countries have emerged, including Kenya, that is mining significant deposits of titanium and has deposits of other rare earth elements, gold, coal, and gemstones.<sup>2</sup>

During the period 2001–14, the extractive industries accounted for nearly two-thirds of the total value of exports from Africa.<sup>3</sup> Whilst it is true that Africa has extensive mining operations and even more in reserves, this had in the past not made a significant contribution to national revenues and social development. Due to low bargaining power in post-colonial countries in the 1960s and '70s, post-war countries in the '80s and '90s, and further due to political risk reasons by mining companies, African governments often negotiated contracts that were heavily skewed towards investor interests. These contracts offered significant tax breaks, open repatriation of funds, and few to no regulations on environmental protection, health and safety, mine rehabilitation, and community development. Local communities in mining operations that were most affected had very little to see of the development. The communities also suffered the effects of displacement, pollution, and environmental degradation.<sup>4</sup>

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<sup>1</sup> IFC, 'Sustainable and Responsible Mining In Africa – A Getting Started Guide' (*ifc.org*, January 2014) <<https://www.ifc.org/wps/wcm/connect/14d1fb8c-8d63-47c9-acb7-35b20a488ff2/Sustainable+Mining+in+Africa.pdf?MOD=AJPERES&CID=knWL6R>> accessed 27 September 2020

<sup>2</sup> Republic of Kenya - Ministry of Mining, 'Kenya Mining and Minerals Policy, the Popular Version, 2016' (*idlo.int*, 2016) <<https://www.idlo.int/sites/default/files/pdfs/highlights/Kenya%20Mining%20Policy%20Popular%20Version-LowRes.pdf>> accessed 27 September 2020

<sup>3</sup> Punam Chuhan-Pole and others, 'Mining in Africa - Are Local Communities Better Off?' (*openknowledge.worldbank.org*, 2017) <<https://openknowledge.worldbank.org/bitstream/handle/10986/26110/9781464808197.pdf>> accessed 27 September 2020

<sup>4</sup> Mary Kimani, 'Mining To profit Africa's people' (*Africa Renewal*, April 2009) <<https://www.un.org/africarenewal/magazine/april-2009/mining-profit-africa%E2%80%99s-people>> accessed 27 September 2020

Over time, community development and public participation in mining projects have become a central issue for governments and mining companies to consider. This has followed on from pressure from community groups (and we will discuss examples of community initiatives that have paralysed large projects), international organisations (such as the UN), development financiers (such as the World Bank and the IFC), non-governmental organisations, international transparency initiatives (such as the Extractives Industries Transparency Initiative (EITI)) and mining sector organisations, such as the International Council on Mining and Metals (ICMM).

Public participation and community engagement in mining projects is important because it leads to the acceptance of the project by the community. This leads to a project obtaining and maintain a social license to operate (SLO). As a concept, public participation has been defined as the engagement of the public in decision making. Quick and Bryson define public participation as “*the direct involvement or indirect involvement through representatives of concerned stakeholders in decision-making about policies, plans or programs in which they have interest*”.<sup>5</sup> Done properly, public participation is not a single event but a process that should take place throughout the life of the project.<sup>6</sup> At its best, public participation can create a sense of ownership amongst local residents with respect to extractive industries projects in their midst.<sup>7</sup> However, and in practice, success is far from guaranteed.

The purpose of this Research Insight is to carry out an in-depth analysis of public participation in Africa's mining sector. Using case studies from key mining countries in Africa, the research will identify the development of public participation in mining so far, the positive examples, and the gaps. The research will aim to make suggestions on how public participation can be improved going forward.

Section 2 of this research will provide an overview of public participation, what the term means, what public participation involves, and what the drivers for success are. Mining projects have many stakeholders, including the mining company/ies, government, local community/ies, and non-governmental organisations. Section 3 provides a detailed look

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<sup>5</sup> Kathryn S. Quick and John M. Bryson, 'Public Participation' in Jacob Torbing and Christopher Ansell (eds.), *Handbook of Theories of Governance* (Edward Elgar 2016)

<sup>6</sup> World Bank, *Environmental and Social Framework* (worldbank.org, 2017) <<https://www.worldbank.org/en/projects-operations/environmental-and-social-framework>> accessed 28 September 2020

<sup>7</sup> Emma Wilson and Florian Stammer, *Beyond extractivism and alternative cosmologies: Arctic communities and extractive industries in uncertain times* [2016] 3(1) *The Extractive Industries and Society* 1-8

into who comprises the public participation stakeholders. The section also discusses the key rights of the local community as stakeholders in a mining project.

In section 4, this research highlights some of the benefits that arise from public participation, not just for the communities involved but also for the companies, governments, and the sector as a whole.

In section 5, this research critically examines examples of concerted efforts by the national governments of, *inter alia*, South Africa, Kenya, and Ghana to facilitate public participation in the mining industry; in each case, results have been very mixed.

Section 6 provides a conclusion on how far public participation has developed in the mining sector in Africa, and what else needs to be done in order to achieve maximum benefits for the full range of stakeholders in the mining sector in Africa.

## 2. OVERVIEW OF PUBLIC PARTICIPATION

The principle of public participation holds those who are affected by a decision have the right to involve themselves in the decision-making process.<sup>8</sup> Done properly, it is not a single event but a process that should take place throughout the life of the project.<sup>9</sup> It involves a continuous process that enables effective communication between the key players, capacity building, and public empowerment to participate in projects which directly affect the public.<sup>10</sup> This may consist of a series of events and actions by project investors over a project's entire lifetime to educate the public and get feedback from them. Ideally, public engagement offers the ability for stakeholders (those with an interest or stake in an issue) to influence decisions that impact their lives.<sup>11</sup>

At its best, public participation can create a sense of ownership amongst local residents with respect to extractive industries projects in their midst.<sup>12</sup> However, and in practice, success is far from guaranteed.

Key drivers of success include:

- **perceived sincerity:** whether public participation genuinely consists, and is perceived to consist, of a genuine two-way communication based on mutual trust, openness, and respect; or whether the public only really “participate” in the sense of being on the receiving end of a one-directional broadcast of information from the government. In short, is it perceived as sincere?; and
- **perceived cost/benefit:** will the likely affected community impacts be, overall, positive or negative? If they are correctly identified as negative, then regardless of the quality of communication engendered, uninhibited public participation is unlikely to be supportive of development, since such development would not be in those communities' best interests.

Public participation, therefore, calls for genuine and informed participation of stakeholders. In the next section, this research explains the concept of stakeholders further.

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<sup>8</sup> Ibid.

<sup>9</sup> World Bank, 'Environmental and Social Framework' (*worldbank.org*, 2017) <<https://www.worldbank.org/en/projects-operations/environmental-and-social-framework>> accessed 28 September 2020

<sup>10</sup> Yuanni Wang and others, *Empowerment through emotional connection and capacity building: Public participation through environmental non-governmental organizations* [2020] Environmental Impact Assessment Review 80

<sup>11</sup> Environmental Protection Agency, 'Public Participation Guide: Introduction to Public Participation' (*epa.gov*, 22 February 2018) <<https://www.epa.gov/international-cooperation/public-participation-guide-introduction-public-participation>> accessed 4 August 2020

<sup>12</sup> Emma Wilson and Florian Stammler, *Beyond extractivism and alternative cosmologies: Arctic communities and extractive industries in uncertain times* [2016] 3(1) *The Extractive Industries and Society* 1-8

### 3. WHO ARE THE MINING STAKEHOLDERS?

Public participation is a broad concept and members of the public are highly heterogeneous, not just with respect to individually held viewpoints but also regarding their time availability and willingness to engage constructively in conversation regarding the desirability, or otherwise, of extractive industries development. Managerial perceptions within the government may instinctively, even prejudicially, favour engagement of some groups within the general public over others. For instance, traditional gender-chauvinist perceptions may favour male views as more salient to the views of female community members. Additionally, the views of traditional authorities, such as tribal chiefs, may be incorrectly identified as the commonly held viewpoints of their respective communities. In addition, some focus on public engagement activities is invariably mandated by the fact that resources available to government officials are not limitless.

Stakeholder theory seeks to provide actionable answers to this prioritization quandary.

Stakeholders may be defined as people who may be affected positively or negatively by a development. This can be anyone who has or perceives that they have a stake in a decision, or who should otherwise be entitled to a say in a decision or the proposed project outcome. They may consist of either individuals ("grassroots" stakeholders) or organised groups of stakeholders, such as a trade union or a non-governmental organization.<sup>13</sup> Comprehensive stakeholder engagement should typically encompass both groups.<sup>14</sup>

The related concepts of stakeholder engagement and, indeed, public consultation and participation, are both highly contested. As indicated above, the quality and nature of public participation are highly heterogeneous. In an extreme case, broad questions posed to community members such as "what do you want?" are often used.<sup>15</sup> These merely take the *form* of community engagement rather than its genuine *substance*. Such broad questions are an accelerated route to a simple affirmation of decisions already made,<sup>16</sup> but that requires formal procedural completion to meet necessary legal requirements.<sup>17</sup>

<sup>13</sup> World Bank, 'Stakeholder Engagement Plan, Environmental Health and Pollution Management Project' (<http://documents1.worldbank.org/curated/en/910131581016525682/pdf/Stakeholder-Engagement-Plan-SEP-Africa-Environmental-Health-and-Pollution-Management-Program-P167788.pdf>) accessed 20 August 2020

<sup>14</sup> Nina Overton-de Klerk and Eriaan Oelofse, *Poor communities as corporate stakeholders: A bottom-up research approach* [2010] *Communicatio: South African Journal for Communication Theory and Research* 388

<sup>15</sup> Environmental Protection Agency, 'Public Participation Guide: Introduction to Public Participation' ([epa.gov](https://www.epa.gov/international-cooperation/public-participation-guide-introduction-public-participation), 22 February 2018) <<https://www.epa.gov/international-cooperation/public-participation-guide-introduction-public-participation>> accessed 4 August 2020

<sup>16</sup> Justice Nyigmah Bawole, *Public hearing or 'hearing public'? an evaluation of the participation of local stakeholders in environmental impact assessment of Ghana's Jubilee oil fields* [2013] *Environ Manage.* 52(2) 385-9

<sup>17</sup> *ibid.*

In contrast, the principle of Free, Prior, and Informed Consent (FPIC) is promoted by its advocates as an effective means to enhance the social justice of resource management by obtaining consent from local communities before conducting activities which have an impact on them, such as on their land and property rights.<sup>18</sup> However, the applicable extent of FPIC remains uncertain as does its actual efficacy. In particular: does it include a right of veto by affected communities that its title implies, since the concept of “consent” implies a right of refused consent?

In practice, and excepting exceptional circumstances,<sup>19</sup> the reverse is the case: extractive industry companies who have obtained the relevant legal mineral rights may be willing to constructively engage with local communities on the details of that extraction (such as corporate social responsibility payments), but are far less likely to cancel their projects simply because a local community is not supportive of their overall development plans. This is despite the FPIC stipulation that permission must be freely given by community members in order to proceed.<sup>20</sup>

A more pragmatic and balanced approach is to seek to answer the practical question “who and what really matters” in stakeholder engagement, including “moving salience beyond managerial perceptions”<sup>21</sup> in order to adjust for managerial blind spots and misconceptions. Importantly, this approach combines elevation of the importance of societal stakeholders whilst still maintaining a directional approach that accords with the reality that resource companies will wish to move ahead with extraction regardless of community opposition if they have the legal right and the commercial imperative to do so. The discussion is framed around the reduction of market “friction” due to firms’ poor conceptualisation of stakeholder salience.<sup>22</sup>

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<sup>18</sup> Sango Mahanty and Constance L. McDermott, *How does 'Free, Prior and Informed Consent' (FPIC) impact social equity? Lessons from mining and forestry and their implications for REDD+ fields* [2013] 35 Land Use Policy 406-416

<sup>19</sup> Specifically, in a contingent subset of cases where the United Nations definition of “Indigenous Peoples” has been met and where the subsoil extraction company also is compliant with the principle of FPIC, even in such circumstances. The relevant definition is as per: United Nations, ‘The United Nations Declaration on Rights of Indigenous People’ (*un.org*, 2007) <[https://www.un.org/development/desa/indigenouspeoples/wp-content/uploads/sites/19/2019/01/UNDRIP\\_E\\_web.pdf](https://www.un.org/development/desa/indigenouspeoples/wp-content/uploads/sites/19/2019/01/UNDRIP_E_web.pdf)> accessed August 21, 2020

<sup>20</sup> Sophia Carodenuo and Kalame Fobissie, *Operationalizing Free, Prior and Informed Consent (FPIC) for REDD+: Insights from the National FPIC Guidelines of Cameroon* [2015] 9 (2) Special Issue: The Legal Aspects of REDD+ Implementation: Translating the International Rules into Effective National Frameworks, *Carbon and Climate Review* 156

<sup>21</sup> Pete Tashman and Jonathan Raelin, *Who and What Really Matters to the Firm: Moving Stakeholder Salience beyond Managerial Perceptions* [2013] 23(4) *Business Ethics Quarterly* 591

<sup>22</sup> *Ibid.*



## 4. THE BENEFITS OF PUBLIC PARTICIPATION

Once the potential pitfalls of public participation and stakeholder engagement are acknowledged, an amelioration of public policy-making and implementation can be achieved through strategic planning that is informed by that understanding. By doing so, public policymakers may be able to unlock a range of benefits to the delivery of subsoil mineral extraction projects in their territories. The several benefits identified include the below:

- Wouters and others (2011) identify that effective public participation is associated with an improved affected community understanding of conservation issues and their responsibility in the rehabilitation process after projects have been completed.<sup>23</sup> This concept could be extended to community responsibility in the ongoing rehabilitation of former mining sites, post-mine closure;
- Pareja and others (2018) have provided detailed guidance on how to achieve water monitoring and restoration of the environment degraded as a result of mining through public participation.<sup>24</sup> In the text, where they echo the ideas of Science for Conservation, they state that it is essential to engage the community in decision making to create a sense of ownership. They explain that it is easier to engage the local community in the restoration process if they were part of the decision-making process from the very beginning;<sup>25</sup> and
- The United States Environmental Protection Agency (2018) advocates strongly for public participation processes in the mining industry, as generating a public good.<sup>26</sup> Notably, the agency showcases the degree to which public acceptance, when freely and genuinely granted, can foster productive cooperation between communities, government, and mining companies, resulting in beneficial outcomes, not least with respect to those firms' commercial activities.<sup>27</sup> Moreover, that cooperation and trust achieved through public participation tend to expedite the process of conflict resolution and community-held confidence that concerns raised will be fairly addressed.<sup>28</sup>

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<sup>23</sup> Mariska Wouters and others, *Evaluating public input in National Park Management Plan reviews, Facilitators and barriers to meaningful participation in statutory processes* [2011] 308 *Science for Conservation* 104

<sup>24</sup> Claudio Pareja and others, *What Participation? Distinguishing Water Monitoring Programs in Mining Regions Based on Community Participation* [2018] 10 (10) *Water* 1325

<sup>25</sup> *Ibid.*

<sup>26</sup> Environmental Protection Agency, 'Public Participation Guide: Process Planning' ([epa.gov](https://www.epa.gov/international-cooperation/public-participation-guide-introduction-process-planning), 22 February 2018)

<<https://www.epa.gov/international-cooperation/public-participation-guide-introduction-process-planning>> accessed 12 August 2020 "Public Participation Guide: Process Planning" (February 22, 2018)

<sup>27</sup> *Ibid.*

<sup>28</sup> *Ibid.*

Where and when it works well, active public participation improves public knowledge of a subsoil extraction operator's responsibilities and enhances the quality of public decision-making. It also enables greater compliance through a broader and more inclusive sense of ownership of issues and opportunities (such as for local employment).<sup>29</sup> Other benefits of genuine public participation include the ability to build community support for a project; enhanced understanding by companies of the detailed dynamics of affected communities (leading to better and more inclusive decision-making); and enhanced credibility of those firms within those affected communities.<sup>30</sup>

Pareja and others (2018) make the positive case that stakeholder engagement has become a central component for obtaining community approval of mining operations.<sup>31</sup> The counter-factual situation to the above is that community consent may still be lacking, perhaps due to:

- (a) the poor quality of perceived sincerity of community engagement by resource firms; and/or
- (b) a perceived predominance of negative community impacts (such as stress on water supply and/or its pollution) over positive impacts (such as jobs and infrastructure).

The case studies in the next section, drawn from Kenya, South Africa, and Ghana, contain a mixed bag of outcomes. They have several indications of successful public participation and contain examples where public participation has not achieved the foundational outcome of public consent.

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<sup>29</sup> Mariska Wouters and others, *Evaluating public input in National Park Management Plan reviews, Facilitators and barriers to meaningful participation in statutory processes* [2011] 308 *Science for Conservation* 104

<sup>30</sup> *Ibid.*

<sup>31</sup> Claudio Pareja and others, *What Participation? Distinguishing Water Monitoring Programs in Mining Regions Based on Community Participation* [2018] 10 (10) *Water* 1325

## 5. AFRICAN CASE STUDIES

### 5.1. Ghana

Ghanaians traditionally see the country's vast natural resources in their communities as a divine gift from God that must be enjoyed by them wholly.<sup>32</sup> The current Government of Ghana (GoG) can demonstrate at least some level of stakeholder engagement regarding the management of the nation's gold mining sector,<sup>33</sup> although that record is contested by opposing groups (see below).

In 2017, the GoG placed an indefinite ban on small-scale mining activities in the country in an attempt to stop illegal mining operations and to bring environmental degradation to a halt. Unsurprisingly, this was met with opposition from the legalized small-scale mining operators who complained of imbalanced treatment between them and large-scale miners.<sup>34</sup>

The authors of this Research Insight note that the expansion of the media landscape of Ghana has significantly increased the level of media participation in national affairs and hence steadily increased public involvement in domestic affairs. Even with the advancements in media, many local people continue to use the traditional ways of seeking redress for issues that affect their livelihood.<sup>35</sup>

Gold has been the primary international earning mineral resource in Ghana since 1999.<sup>36</sup> However, its actual developmental contribution remains minimal.<sup>37</sup> These contributions are extremely restricted as compared with common perceptions about the benefits that the mining sector can offer to the populations.

Given that the domestic supply sector is negligible and there has been no further creation of processing capacity in the region, the mining sector really has an enclave character in

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<sup>32</sup> Dickson Adom and Steve Kquofi, *The high impacts of Asante indigenous knowledge in biodiversity conservation issues in Ghana: The case of the Abono and Essumeja Townships in Ashanti Region* 4 *British Journal of Environmental Sciences* 63

<sup>33</sup> Francis Tuokuu, 'Environmental Policy Assessment in the Ghanaian Gold Mining Industry: Insights from Stakeholders' (*aura.antioch.edu*, 2019) <<https://aura.antioch.edu/cgi/viewcontent.cgi?article=1481&context=etds>> accessed 22 September 2020

<sup>34</sup> Kwesi Koomson, *Illegal Mining - Fighting an Ongoing Battle* [2019] 9 *Mining Review Africa* 8

<sup>35</sup> Daniel K Twerefou and others, 'Attitudes of local people to mining policies and interventions' (*theigc.org*, 2015) <<https://www.theigc.org/wp-content/uploads/2015/08/Twerefou-et-al-2015-Working-paper-1.pdf>> accessed 28 September 2020

<sup>36</sup> Wisdom Akpalu and Ametefee K. Normanyo, *Gold Mining Pollution and the Cost of Private Healthcare: The Case of Ghana* 142 *Ecological Economics* 104

<sup>37</sup> Joseph Ayee and others, 'Political Economy of the Mining Sector in Ghana' (*cmi.no*, 2011) <<https://www.cmi.no/publications/file/4091-political-economy-of-the-mining-sector-in-ghana.pdf>> accessed 28 September 2020

the economy.<sup>38</sup> Communities in the Ahafo mining enclave are actively being involved in the overall mining project. Newmont Ghana Gold Company Limited (NGGL) controls two sites, one at Ahafo in Asutifi District and Akyem, Birim North district.<sup>39</sup> The communities have been involved in numerous empowerment projects such as the Livelihood Enhancement and Community Empowerment Programme (LEEP), the objectives of which include a more effective level of community representation with NGGL.<sup>40</sup> Of crucial emphasis amongst these amplified community narratives is proper compensation of affected people for the loss of livelihood and property, resettlement, and access to jobs in both the mining and construction operations of NGGL.<sup>41</sup>

## 5.2 Kenya

The recognition of public participation in mining and other sectors is provided for in various statutes, including the 2010 Constitution of Kenya;<sup>42</sup> the Kenya Mining Act, 2016;<sup>43</sup> and the Environmental Management and Coordination Act (EMCA) 1999.<sup>44</sup> Kenya also has a Public Participation Bill 2019,<sup>45</sup> which is not yet enacted into law and has been in draft since 2015.<sup>46</sup>

Despite some Kenyan success in achieving public participation in mining projects, community protesting mining projects are common, especially in the context of emotive<sup>47</sup> and high salience land issues.

### 5.2.1 Extensive public participation, Kenyan example

An example of effective public participation in mining in Kenya is the Base Titanium mining project, a mineral sands project located in Kwale County in the coastal region of Kenya. Base Titanium is a subsidiary of Base Resources Limited, an Australian Securities Exchange-

<sup>38</sup> Ibid.

<sup>39</sup> Newmont, 'Ahafo – Ghana' (*newmont.com*, 2020) <<https://www.newmont.com/operations-and-projects/global-presence/africa/ahafo-ghana/default.aspx>> accessed 28 September 2020

<sup>40</sup> Ibid

<sup>41</sup> 'Public Participation in the Making of Ghana's Petroleum Revenue Management Law, draft' (*agora-parl.org*, 2011) <[https://agora-parl.org/sites/default/files/ghana\\_public\\_participation\\_in\\_law\\_2011.pdf](https://agora-parl.org/sites/default/files/ghana_public_participation_in_law_2011.pdf)> accessed 4 August 2020

<sup>42</sup> Republic of Kenya, 'Kenya Law: The Constitution Of Kenya' (*kenyalaw.org*, 2019) <<http://kenyalaw.org/kl/index.php?id=398>> accessed 28 September 2020

<sup>43</sup> Republic of Kenya, 'Kenya Law: Mining Act' (*kenyalaw.org*, 2016) <[http://kenyalaw.org:8181/exist/kenyalex/actview.xql?actid=No.%2012%20of%202016#part\\_1](http://kenyalaw.org:8181/exist/kenyalex/actview.xql?actid=No.%2012%20of%202016#part_1)> accessed 28 September 2020.

<sup>44</sup> Republic of Kenya, 'Environmental Management and Coordination Act 1999' (*kenyalaw.org*, 199) <<http://kenyalaw.org:8181/exist/kenyalex/actview.xql?actid=No.%208%20of%201999>> accessed 28 September 2020.

<sup>45</sup> Republic of Kenya, 'The Public Participation Bill, 2019' (*Kenyalaw.org*, 2019) <[http://kenyalaw.org/kl/fileadmin/pdfdownloads/bills/2019/PublicParticipation\\_No.\\_2\\_Bill\\_2019.PDF](http://kenyalaw.org/kl/fileadmin/pdfdownloads/bills/2019/PublicParticipation_No._2_Bill_2019.PDF)> accessed 28 September 2020.

<sup>46</sup> Patrick Mariru, 'What About Public Participation? Where Are We?' (*ilakenya.org*, 2015) <<https://ilakenya.org/what-about-public-participation-where-are-we/>> accessed 28 September 2020.

<sup>47</sup> Ernest Patrick Monte, *Representations of land in Kenyan song* 10 Critical African Studies 14

listed mining company,<sup>48</sup> and is an implementing company to the Extractives Industries Transparency Initiative (EITI).<sup>49</sup>

According to Base Titanium's Environmental and Social Impact Assessment Summary Report dated April 2012,<sup>50</sup> a Resettlement Action Plan was prepared for the Project in 2005 and between 2006 and 2008, 381 households were resettled from within the Special Mining Lease area. A post-resettlement monitoring and audit report was prepared in June 2011. A post-resettlement compliance audit was also undertaken in February 2012. Various programmes comprised within the project required resettlement, including the mining area, an 8 km long access road; a reservoir dam; a water pipeline; and a 14 km transmission line.

Base Titanium established a detailed Stakeholder Engagement Plan and adopted a public participation and stakeholder engagement strategy that included establishing a formalized committee structure, including for Mining Project Liaison (i.e. as a whole); Access Road and Water Pipeline Resettlement; Dam Resettlement; and for Transmission Line Resettlement. In its Environmental and Social Investment Assessment document, the firm also recognised and referred to international standards including:

- (a) the Equator Principles, adopted in 2010 by 101 financial institutions in 38 countries for determining, assessing, and managing environmental and social risk in projects being considered financing. The Equator Principles demand ethical considerations in investment, since they focus more on social and community standards, including impact standards for indigenous peoples;<sup>51</sup>
- (b) the World Bank Group's Environmental, Health, and Safety Guidelines (WB - EHS Guidelines) of 2007, which apply to all World Bank funded projects, and are technical reference documents with general and industry-specific examples of Good International Industry Practice. The WB-EHS Guidelines have detailed content on community health and safety;
- (c) the IFC Performance Standards 2012, which apply to all projects funded by the IFC.<sup>52</sup> These include standards for community health, safety, security, land re-settlement -

<sup>48</sup> Base Titanium, 'Base Titanium - Overview' (*basetitanium.com*, 2020) <<http://basetitanium.com/company-profile/company-overview>> accessed 28 September 2020

<sup>49</sup> Base Titanium, 'Base Titanium - Extractive Industries Transparency Initiative' (*basetitanium.com*, 2020) <<http://basetitanium.com/governance/extractive-industries-transparency-initiative>> accessed 28 September 2020

<sup>50</sup> Base Titanium, 'Base Titanium - Environmental Management' (*basetitanium.com*, 2020) <<http://basetitanium.com/environment/environmental-management>> accessed 28 September 2020.

<sup>51</sup> Equator Principles Association, 'The Equator Principles' (*equator-principles.com*, 2020) <<https://equator-principles.com/about/>> accessed 28 September 2020

<sup>52</sup> IFC, 'IFC Performance Standards' (*ifc.org*, 2012) <[https://www.ifc.org/wps/wcm/connect/Topics\\_Ext\\_Content/IFC\\_External\\_Corporate\\_Site/Sustainability-At-IFC/Policies-Standards/Performance-Standards](https://www.ifc.org/wps/wcm/connect/Topics_Ext_Content/IFC_External_Corporate_Site/Sustainability-At-IFC/Policies-Standards/Performance-Standards)> accessed 28 September 2020.

where that is unavoidable, and specific provisions for both indigenous peoples and cultural heritage; and

(d) International Labour Organisation (ILO) labour standards.

Even so, the Base Titanium project has not been without its challenges. From media reports, in November 2019, 24 households filed a petition with the Kenyan High Court, seeking re-location, due to health complications caused by the mining plant. It appears that the matter has not been concluded.<sup>53</sup>

### 5.2.2 Inadequate public participation, Kenyan example

A Kenyan example of inadequate public participation that led to the rejection of a project is the proposed coal mining in Mui Basin, Kitui County. Coal deposits in Mui Basin are estimated at 400 million metric tonnes and valued at an estimated USD \$3.4 billion. Fenxi company was awarded a concession in 2011 to mine coal in the county's Mui Basin, and the Government and investor entered into a Benefit Sharing Agreement in 2013. Mining operations were expected to last for 42 years. However, nine years on, extraction is yet to commence, in large part due to vociferous community objection. Among the complaints are the alleged secretive way the tender was awarded to the investor and alleged lack of public participation in the process.<sup>54</sup>

Community members sought legal redress in three different constitutional petitions, lodged in 2012, 2013, and 2014. The constitutional petitions were consolidated and in 2015, the Kenyan Constitutional Division of the High Court issued its judgment.<sup>55</sup> The court found that the public participation process had met the threshold, subject to continuing engagement of the community, since the Environmental Impact Assessment (EIA) process had not been completed at the time of tender and contracting. The court also affirmed that the right to public participation was a constitutional right of Kenyan citizens.

Following the 2015 Mui Basin Coal judgment, in May 2019, the Mui Basin residents made further attempts to resist the project, by writing a petition to the Kenyan Parliament's National Assembly Energy Committee, requesting Parliament to stop the project on the basis that if allowed to continue, then the project would have adverse effects on their lives.<sup>56</sup> This contestation continues at the time of writing this Research Insight.

<sup>53</sup> Joakim Bwana, 'Base Titanium in a Standoff with Kwale County Residents', *The Standard*, (Nairobi, 25 November 2019)

<sup>54</sup> Philip Muasya, 'Residents In New Push To Stop Kitui Coal Mining Plan', *The Standard*, (Nairobi, 27 May 2019)

<sup>55</sup> 'Mui Coal Basin Local Community & 15 Others v Permanent Secretary Ministry Of Energy & 17 Others [2015]eKLR' (kenyalaw.org, 2015) <<http://kenyalaw.org/caselaw/cases/view/117704>> accessed 28 September 2020.

<sup>56</sup> Philip Muasya, 'Residents In New Push To Stop Kitui Coal Mining Plan', *The Standard*, (Nairobi, 27 May 2019)

### 5.3 South Africa

In South Africa, Mining is regulated under the Mineral and Petroleum Resources Development Act.<sup>57</sup> Section 3 of the Act states that the state is the custodian of petroleum resources and therefore, should benefit all citizens of South Africa.<sup>58</sup>

The mining industry of South Africa over the last five years has been in the process of formulating a new legislative framework to transform the country's mining industry; the new draft framework aims to benefit those people who were disadvantaged during the colonial period and also during the Apartheid period.<sup>59</sup>

There still arises the question of how the mining industry can be recalibrated to become more of an inclusive and sustainable economic opportunity. Various local communities are negatively affected by mining activities and are often under-compensated.<sup>60</sup> This can happen as a result of at least two things: first, the community members are often excluded from official decision making and secondly, the underhand dealings that mining corporations strike with local leaders who might be duly elected or political appointees, which result in the disempowering of those that are opposed to mining on their land.<sup>61</sup>

The nation's courts have been on the frontline in holding that the South African communities must be consulted on every decision that directly affects them; the nations' courts remain the only accountability mechanism that affirms the right of mine-affected communities to meaningful engagement.<sup>62</sup> The Baleni judgment, locally known as the Xolobeni judgment,<sup>63</sup> echoes the ideas of shared values: consent from affected communities is needed from an early stage, as early as the mining approval stage, which questions the country as the custodian of mineral resources power to authorize mining rights and activities.

This judgement highlighted the level of consent required in order to obtain a mining right over the property held under the community land tenure system. The case set precedent aimed at protecting informal landowners against the harmful effects of mining operations.

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<sup>57</sup> 'Mineral and Petroleum Resources Development Act' (*info.gov.za*, 2002), <<http://www.info.gov.za/view/DownloadFileAction?id=68062>> accessed 28 September 2020

<sup>58</sup> *Ibid.*

<sup>59</sup> Matshidiso Dibakwane and Mashudu Masutha, 'Rebuilding Public Participation in the South African Mining Sector' (*transparency.org.au*, 2020) <<https://transparency.org.au/rebuilding-public-participation-in-the-south-african-mining-sector/>> accessed August 4, 2020

<sup>60</sup> Llewellyn Leonard, *State Governance, Participation and Mining Development: Lessons Learned from Dullstroom, Mpumalanga* [2017] 44 (2) *Politikon* 327-345

<sup>61</sup> Ben Turok, 'Problems in the Mining Industry in South Africa' (*ecdpm.org*, 2013) <<https://ecdpm.org/great-insights/growth-to-transformation-role-extractive-sector/problems-mining-industry-south-africa/>> accessed 4 August 2020

<sup>62</sup> 'Baleni v Minister of Mineral Resources' [2018] ZAGPPHC 829

<sup>63</sup> *Ibid.*

It established a higher threshold for obtaining mining rights within the designated land. This is an existential issue for South African mining. If affected communities are, in the future as in the past and present, systemically left out of crucial decision-making processes, it will exacerbate further social instability within, and continue to challenge the sustainability of, the country's mining sector.<sup>64</sup> The court held that consent from the applicants and the Umgungundlovu local community, the land rights owner, must be sought before granting mining rights to the Resources (SA) PTY Limited Company. The South African High Court upheld the concept of FPIC in pursuing and promoting the right to public participation in the extractive industry.<sup>65</sup>

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<sup>64</sup> Duma Gqubule, *Transformation in South Africa's Mining Industry: Sunset or Sunrise?* (African Books Collective, 2018) 121

<sup>65</sup> 'Baleni v Minister of Mineral Resources' [2018] ZAGPPHC 829



## 6. CONCLUSION

This Research Insight has provided an in-depth analysis of public participation in Africa's mining sector. Using case studies from key mining countries in Africa, the research has identified the development of public participation in mining so far, the positive examples, and the gaps.

As noted, public participation, if carried out properly, has several benefits for all stakeholders. The community has a sense of involvement and ownership of the project, and the resource companies obtain and maintain a social licence to operate. This in turn benefits the resource companies' bottom line. Governments are seen as understanding and protecting the rights of their citizens and achieve a continued governance mandate through their social contract with their citizenry. Further, affected communities understand the elements of a project, including the areas that they can be involved in (such as in providing local labour, goods, and services). Public participation is an important element in achieving economic prosperity for all stakeholders and generates a public good.

However, as has been shown in the case studies from Ghana, Kenya, and South Africa, in practice, the extent and the success of public participation are both far from guaranteed, and more needs to be done, especially in government legislation and policy making. It is positive to note that in the case study countries, local communities have become more aware and engaged in demanding their rights to public participation, community benefits, and safeguards for the environment, health, and safety. It is also positive to note that the national courts in the countries have acted to safeguard community concerns, as has been shown in the cases of the Mui Basin coal mining judgment in Kenya and the Baleni judgment in South Africa.

There is no doubt that public acceptance, when freely and genuinely granted, can, under the right circumstances, foster productive cooperation between communities, governments, and mining companies. It is therefore imperative for governments in Africa to do more to ensure that public participation of communities is guaranteed in mining projects, through fast-tracking the development of enabling legislation and policies. Mining companies are also best advised to include public participation and community engagement as key pillars in their project planning and budgeting.

## 7. FURTHER READING

Justice Nyigmah Bawole, *Public hearing, or 'hearing public'? an evaluation of the participation of local stakeholders in environmental impact assessment of Ghana's Jubilee oil fields* [2013] *Environ Manage.* 52(2)

Kathryn S. Quick and John M. Bryson, 'Public Participation' in Jacob Torbing and Christopher Ansell (eds.), *Handbook of Theories of Governance* (Edward Elgar 2016)

Claudio Pareja and others, *What Participation? Distinguishing Water Monitoring Programs in Mining Regions Based on Community Participation* [2018] 10 (10) *Water*

Pete Tashman and Jonathan Raelin, *Who and What Really Matters to the Firm: Moving Stakeholder Salience beyond Managerial Perceptions* [2013] 23(4) *Business Ethics Quarterly*

Yuanni Wang and others, *Empowerment through emotional connection and capacity building: Public participation through environmental non-governmental organizations* [2020] *Environmental Impact Assessment Review*