

Challenges in Setting up Legal Frameworks for Natural Resources Governance in the East African Countries

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Abstract

The paper posits that the trend in the East African countries whereby the governments have embarked upon developing policies and regulatory institutions for the governance of the recently discovered extractive resources is ill fated. The argument is that it is a quintessential to have in place an effective legal framework to secure democratic governance over natural resources. The paper proposes the underlying principles that can safeguard against patrimonial disenfranchisement of the people in their ownership and control of natural resources.

Introduction

The East African countries have in recent years discovered endowments in oil and gas. On 8 October 2006, President Museveni announced the discovery of commercial quantities of oil in the Albertine Graben formation¹ situated in Uganda's west. Subsequent drilling has uncovered over 2.5 billion barrels of oil in place, of which around 800 million – 1 billion barrels are estimated to be recoverable. In 2011 Tanzania discovered huge natural gas deposits offshore, followed by onshore discovery in the Ruvu Basin area near Dar es Salaam. In March 2012 the British energy group, Tullow Oil announced the discovery of oil in Kenya. The discovery of hydrocarbons has, on the one hand driven the respective governments into a flurry of policy and legislative activities. On the other hand, it has prompted public demands for responsible and accountable governance of natural wealth. The concerns by the people in these countries are exacerbated by the bad experiences suffered from mismanagement of the mineral resources, particularly in the United Republic of Tanzania. The examples that are most often cited include the apparently unconscionable mining concessions for diamonds, gold and tanzanite². This is also acknowledged by several reports³. Similar concerns have been raised in respect of Kenya⁴ and Uganda⁵.

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The underlying fear to the people in the East African Countries is that the respective governments embarked upon developing policies, establishing regulatory institutions and enacting laws without having in place acceptable and effective legal frameworks. The arguments raised were that the existing legal frameworks were not best suited to foster democratic natural resource governance and to secure the People's permanent sovereignty over the natural resources. These were also the concerns of the African Union⁶. This paper examines the state of the legal frameworks in the East African countries of Kenya, Tanzania and Uganda⁷ at the advent of the oil and gas discoveries and challenges faced by the governments in securing democratic governance over natural resources.

A Survey of the Legal Frameworks at the advent of the Oil and Gas Discoveries

The Pre-Discovery Legal Framework in Kenya

Kenya did not even have the Ministry of Mining before the discovery of oil. There was no comprehensive mining policy. A Sessional Paper No. 4 of 2004⁸ served as the policy document on energy. At the time oil was discovered, Kenya was still using the Mining Act of 1940⁹. The mining sector had not assumed a significant role in the Kenyan economy¹⁰. In respect of oil¹¹ there was the Petroleum Exploration and Production Act, 1986¹². Hurriedly the government promulgated the Petroleum Exploration and Production Regulations, 2012¹³, apparently to make provisions for the immediate handling of investor bids. As will be seen subsequently, new laws were in the offing. There were also a number of other laws that related to natural resource governance. These included the Income Tax Act 1974¹⁴; the Water Act, 2002¹⁵; the Forest Act, 2005¹⁶; the Environment Management and Coordination Act¹⁷, 1999; and the Land Management Laws. The different laws created different institutions concerned with natural resource governance and which were not coordinated. There was no authorizing environment to handle natural resource governance. Experience shows that where there are uncoordinated regulatory laws and institutions, governance issues and the attendant mandates tend to vest with discretionary ministerial powers. The people are disenfranchised. This is the outcome of the practice of vesting the ownership of natural resources unto the government¹⁸.

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Pre-Discovery Legal Framework in Uganda

The situation in Uganda was not very different from that in Kenya. At the time oil was discovered, there were no comprehensive policies over the governance of natural resources. The legislative front comprised of old laws that provided the regulatory framework for the governance of natural resources. These included the Petroleum Act, 1957¹⁹; the Petroleum (Exploration and Production) Act, 1985²⁰; the Petroleum (Exploration and Production) (Conduct of Exploration Operations) Regulations, 1985²¹; the National Environment Act²²; the Investment Code Act²³; the Wildlife Act²⁴; the National Forestry and Tree Planting Act, 2003²⁵; the Water Act²⁶; the Income Tax Act, 2002²⁷; the Petroleum Supply Act, 2003²⁸; the Land Act, 1998²⁹, to mention a few. Like the case of Kenya, ownership over petroleum was vested unto the government³⁰. Powers of governance over petroleum was vested unto the Minister³¹. The plethora of the piece of legislation created different institutions to regulate different types of the natural resources and which were always under the oversight of a Minister. Uganda also had no authorizing environment that was mandated with the overall coordination of governance over natural resources. The case of Uganda is more complex because despite having, comparatively better drafted laws than the other East African countries, especially Kenya and Tanzania, there seems to be less respect of the laws by the Government. There is a much stronger practice of Government fiat and patrimonialism.

Pre-Discovery Legal Framework in Tanzania

Tanzania had a comparatively more active natural resources sector, particularly the mining sector. A number of laws were in force to regulate mining activities. These include the Mining Act, 2010³²; the Mining (Mineral Rights) Regulations, 2010³³; the Mining (Environmental Protection for Small Scale Mining) Regulations, 2010; the Mining (Safe Working and Occupational Health) Regulations, 2010; the Mining (Mineral Trading) Regulations, 2010 □□ The Mining (Radioactive Minerals) Regulations, 2010; the Mining (Mineral Beneficiation) Regulations, 2010; the Mining Development Agreement Model 2010; the Mining (Salt production and Iodation) Regulations, 1999; the Merelani (Controlled Area) Regulations, 2002; the Mining (Diamond Trading) Regulations, 2003; and the Explosives Act of 1963. Others include the Energy and Water Resources Act³⁴; and the Land laws. The laws on extractives comprised of the Petroleum (Exploration and Production) Act, 1980³⁵; the Income Tax Act, 2004³⁶; the Environmental Management Act, 2004³⁷; the Petroleum Act, 2008³⁸; and the Energy and Water Utilities Regulatory Act, 2001³⁹. On the policy front there was the

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Mining Policy, 1997⁴⁰; and the Minerals Policy, 2009⁴¹. Like in the case of Kenya and Uganda the legal framework revolved around ministerial regulatory powers. There was no authorizing environment. The laws were obsolete and in need of review to address changing societal values and public concerns.

Salient Features of the Pre-Discovery Legal Frameworks

The pre-discovery legal frameworks left a lot to be desired and led to unacceptable consequences that have been a subject of public outcry. For example the Bomani Committee⁴² in Tanzania was a product of such public outcry. Despite being blessed with precious minerals, the mining sector for a long time had no significant contribution to the economy. The following salient features are common in the legal frameworks of each of the East African countries.

First, in all the three countries the legal frameworks were patterned to vest ownership over natural resources unto the respective governments. The citizens were disenfranchised in decision making in the governance of the natural resources. It was thus possible for the governments to enter into exploitative arrangements that were not beneficial to the country and without being held to accountability⁴³. Second, in establishing the legal frameworks, it became a common practice for the governments to avoid providing for and institutionalizing mechanisms for public oversight in the governance of natural resources⁴⁴. Third, the governance of natural resources was invariably placed under the discretion and powers of sector ministers. These were empowered to promulgate tertiary legislation to impose rules and regulations that insulated ministerial decisions against public scrutiny and probity. Fourth, there was no authorizing environment to coordinate the governance of natural resources. Decisions over the different resources were scattered across different ministries. Hence often ministerial conflicts were encountered in the exercise of regulatory powers over the resources. For example, it was not unusual for the Ministry responsible for Energy to make decisions and enter into arrangements that were resisted by the Ministry responsible for finance, or environmental protection, or land matters and the like. Fifth, policy processes were shrouded with secrecy and not open to public participation.

Sixth, there were no principles set down to guide policy and legislative processes in order to secure national interests. Hence at times laws that are inimical to the economy and the people could be enacted. For example, the

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principle of Permanent Sovereignty over Natural Resources (PSNR) was invariably disregarded. There were no principles aimed at safeguarding against the impairment of national benefits like tax revenue, securing the communities, contribution to the economy (local content requirements), environmental protection and rehabilitation of damage and the like. These could be compromised by executive choice. Seventh, regulatory institutions were cocooned against public accountability.

The foregoing salient features points to the existence of legal frameworks that are inimical to the necessity of institutionalizing democratic governance over natural resources. They pose the threat that natural resources, particularly the irreplaceable extractives may easily be plundered and the countries plunged into greater poverty.

Post-Discovery Processes in Setting up Legal Frameworks

The Legitimate Public Expectations

The objective of having in place ideal and effective legal frameworks is to ensure that the governance of natural resources secures the harnessing of these resources for the country's development for both the present and the future generations. The challenge is to set up legal frameworks that will institutionalize the following: One, to have in place legitimate policy processes. The aim is to ensure that policies guiding the governance of natural resources derive from transparent public consultations and which are reflective of the input from the full breath of stakeholders. It is imperative to curb and eliminate practice whereby policies are developed behind closed doors in government corridors. Two, to provide for legitimate legislative processes, whereby Bills are prepared for legislative purposes after effective public consultations. No proposal to enact a law should be laid in Parliament without receiving public endorsement through transparent and informed public hearings. Disenfranchisement of the people in all decisions over natural resources has to be curtailed. Three, to subject all institutions entrusted with regulatory functions over the management of natural resources, to transparent processes and accountability. Bureaucratic institutions with rule making powers that are capable to cocoon themselves against probity should not be permitted. Four, to provide for an informed public. All issues of governance of natural resources must be accurately, timely and fully reported to the public. The latter must have access to information in order to be able to make timely interventions where undesirable or harmful decisions are proposed to be made. An informed

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public is a quintessential to effective democratic governance over natural resources.

Have the Governments Met the Public Expectations?

This part reviews what the respective governments have been doing so far, in order to evaluate whether public expectations are being met, and identify the challenges in setting up the legal frameworks for the governance of natural resources in the East African countries. The preliminary assessment is that the governments have embarked upon reform processes through executive fiat and without having in place the requisite democratic mechanisms for such an exercise. The fear is the reenactment of past practices that have already proved harmful to the respective nations.

The Post-Discovery Government Actions in Kenya

The discovery of oil triggered a flurry of policy and legislative activities in Kenya. It is notable that while the guiding policy was being developed⁴⁵ several Bills were also being processed for enactment⁴⁶. These include the Mining Bill, 2014; the Sovereign Wealth Fund Bill, 2014; the Natural Resources (Benefit Sharing) Bill, 2014; the Energy Bill, 2015; and the Petroleum (Exploration, Development and Production) Bill, 2015.

Alongside, various institutions were being created and vested with regulatory mandates. The concern by the people was that the policy and legislative activities were not sufficiently involving the general public. It was left to Parliamentary activism to censure the government. Numerous community based organizations⁴⁷, the church⁴⁸ and other international organizations⁴⁹ conducted studies aimed at calling the government to attention over democratic governance issues in dealing with the newly discovered natural wealth⁵⁰. Apparently a legal framework for the governance of the natural resources wealth was being developed without democratically agreed principles. Oxfam-Kenya carried out significant studies through its Pan Africa Extractive Industries Program. The persistent concern is that the government has not effectively taken the people on board in ensuring the effective and transparent governance of the extractives sector⁵¹.

The Post-Discovery Government Actions in Uganda

Uganda had old laws governing the extractives sector. These included the Petroleum Act, 1957⁵² and the Petroleum (Exploration and Production) Act, 1985⁵³. According to Frank Tumusiime⁵⁴, in 2014 the government embarked

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upon the development of a legal framework for the extractive sector. The Minister responsible for energy and oil and gas had already published the National Oil and Gas Policy, 2008⁵⁵. Among the laws that were being processed for enactment included the Resource Management and Administration Bill, 2014; the Revenue Management Bill, 2014; the Environment Management Bill, 2014; and the Petroleum (Exploration, Development and Production) Bill, 2014. Concerns were raised that there was lack of transparency in the governance of the newly discovered wealth⁵⁶. Some authors raised worries that the government was not consulting the people⁵⁷. Others pointed out that the government was allocating exploration and production rights without transparency⁵⁸. Other studies caution that the legal framework for the governance of the extractives sector was fraught with pitfalls⁵⁹. Ongoing complaints point out that the government is exercising great discretion and secrecy in dealing with the extractives⁶⁰. It means that the legal framework for the governance of the extractives sector is not yet transparent and democratic.

The Post-Discovery Government Actions in Tanzania

In 2012 after the discovery of natural gas the government initiated a process of evaluating the state of the legal framework for the governance of extractives. It formed an Experts Panel to evaluate the appropriateness of the legal framework by benchmarking it against the standards suggested by the Natural Resource Charter⁶¹. The government also wanted to draw experiences from other countries in designing the legal framework for Tanzania. The Experts Panel was given a year to produce their findings and submit a report with appropriate recommendations. During the year the government called upon the Panel to submit an interim report on all the areas which they could provide guidance based on ascertained findings. The intention was to capture the findings in developing the attendant policies, namely, the National Petroleum Policy of Tanzania, 2015; the Natural Gas Policy, 2013; the National Energy Policy, 2015; and the Local Content Policy of Tanzania for Oil and Gas Industry, 2014.

The government used the input from the Experts Panel in preparing the laws, which comprise the Tanzanian legal framework for the extractives sector. These are the Petroleum Act, 2015⁶²; the Oil and Gas Revenues Management Act, 2015⁶³; and the Tanzania Extractive Industries (Transparency and Accountability) Act, 2015⁶⁴. The Experts Panel was tasked to conduct extensive research and widely consult with stakeholders. This was done through a support team of researchers. Tanzania had the

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advantage of the wisdom that came from the bad experience with the mining sector⁶⁵. Experiences from other African countries, for example Zambia⁶⁶, Nigeria⁶⁷, Cameroon⁶⁸, Gambia, Congo DRC, Angola and others⁶⁹ were carefully examined and lessons drawn.

An Assessment of Whether Public Expectations Have Been Met

The post-discovery approaches in designing and implementing appropriate legal frameworks for the governance of the extractives sector by the respective governments disclose deficiencies in meeting public expectations, particularly in securing effective public control and accountability. While the approach pursued by the government of Tanzania is commendable, still the following common shortcomings can be observed in respect of all the three East African countries. As observed earlier, there were four legitimate public expectations and they remain unfulfilled.

First, the legal frameworks in all the three states have not secured the right of the public to participate in policy processes. None provide for the requirement that policies guiding the governance of natural resources shall derive from transparent public consultations and which are reflective of the input from the full breath of stakeholders. There is an apparent reluctance by governments to institutionalize public consultations in policy making. The favoured practice is to call a select list of stakeholders, often under short notices to legitimize draft policies. It is the continuation of paternalist attitudes.

Second, in all the three states the recently enacted laws on extractives do not require the publication of Bills for purposes of enabling informed public hearings. The laws on extractives were not tabled in the Parliaments after receiving public endorsement through transparent and informed public hearings.

Third, the regulatory institutions created under the laws enjoy a wide margin of discretion in decision making and are not subject to transparent processes and accountability. Invariably they are placed under the directions of the Minister who is also vested with wide rule making powers that may easily be abused.

Forth, the laws do not make it mandatory for the governments to publish reports to the general public. As pointed out earlier, all issues of governance of natural resources must be accurately, timely and fully reported to the

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public. There must be guaranteed access to information by the members of the public.

It can be fairly surmised that the legal frameworks that emerged after the discoveries of extractives in East Africa are not yet well suited to secure effective and democratic governance over natural resources. This is attested by the continued existence of the following concerns:

- Governments have continued to negotiate contracts for the extractives in secret and without accountability.
- Harmful ministerial competitions continue to make the terrain for aspiring investors uncertain and costly. This is because there is no authorizing environment whereby decisions regarding extractives are made conclusively by the governments at high levels and bind all the ministers.
- There are no clear rules aimed at stamping out asymmetry in information and ensuring that all geological information is brought under the ownership of the governments.
- With the exception of Tanzania, the other two countries (Kenya and Uganda) do not have clear rules to secure the use of revenues from the extractives for unlocking the economies and creating wealth for the future generations.

The list of concerns are high when the laws on extractives are subjected to close analysis to establish their full implications and impact as far as governance of natural resources is concerned.

Conclusion

The enactment of the laws on extractives is not an impediment to reviews and amendments that will ensure that the governance of natural resources is secured. The fact that some production contracts have been concluded should not prevent the initiation of public debates that will culminate to the creation of desirable legal frameworks and correct the deficiencies observed. This will avert greater harm that is imminent and before it is too late.

Notes

1. The Lake Albert basin
2. Mkombozi Mhina, "Transnational Investment, Human Rights and the Environment: A Cross-National Case Study Based On Mineral And Petroleum Industries In Selected Developing Countries" (University of Dar es Salaam, 2013).
3. "Report of the Presidential Mining Review Committee to Advise the Government on Oversight of the Mining Sector" (Government of Tanzania, April 2008).
4. Christabel Nyamwaya, "Benefits Sharing on Extractive Natural Resources with Society in Kenya" (Friedrich Ebert Stiftung, November 2013).
5. Arthur Bainomugisha, Hope Kivengyere, and Benson Tumasirwe, "Escaping the Resource Curse and Making Poverty History: A Review of the Oil and Gas Policy and Legislative Framework for Uganda", ACODE Policy Research Series, 2006.
6. African Union, "Africa Mining Vision," February 2009.
7. The other East African countries of Rwanda and Burundi are not included because at the moment they are not amongst the new frontier countries in oil and gas. South Sudan expects to join the East African Community but is yet to have stable political governance system and thus is not ready for this kind of analysis.
8. "Kenya Sessional Paper No. 4 on Energy" (Government of the Republic of Kenya, 2004).
9. "Kenya Mining Act 1940," Cap. 309 § (1940).
10. "Kenya Mining Investment Handbook" (Government of the Republic of Kenya, 2015).
11. Kenya Mining Act 1940. Under section 3 mineral oil is not covered by the Act
12. "Kenya Petroleum (Exploration and Production) Act 1986," Cap. 308 § (2012).
13. "Kenya Petroleum Exploration and Production Regulations 1986," Rev 2012 § (n.d.).
14. "Kenya Income Tax Act 1974," Cap. 470 § (n.d.).
15. "Kenya Water Act 2002," Pub. L. No. No. 8 of 2002 (2002).
16. "Kenya Forest Act 2005," Pub. L. No. No. 7 of 2005 (2005).
17. "Kenya Environmental Conservation and Coordination Act 1999," Cap 387 § (1999).

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18. See section 4 of the Kenyan Mining Act, 1940. Apparently this practice impelled the drafting of Article 71 in the Constitution of Kenya, 2010 that require that any agreement seeking to grant rights over the exploitation of natural resources must be ratified by the Parliament.
19. "Uganda Petroleum Act 1957," Cap. 149 § (n.d.).
20. "Uganda Petroleum (Exploration and Production) Act 1985," Cap. 150 § (n.d.).
21. "Uganda Petroleum (Exploration and Production) (Conduct of Exploration Operations) Regulations," Statutory Instrument No. 150-1 § (n.d.).
22. "Uganda National Environment Act 1995," Cap. 153 § (n.d.).
23. "Uganda Investment Code Act 1991," Cap. 92 § (n.d.).
24. "Uganda Wildlife Act 1996," Cap. 200 § (n.d.).
25. "Uganda National Forestry and Tree Planting Act 2003," Act No. 8 § (2003).
26. "Uganda Water Act 1997," Cap. 152 § (n.d.).
27. "Uganda Income Tax Act," Cap. 340 § (n.d.).
28. "Uganda Petroleum Supply Act 2003," Act No. 13 § (2003).
29. "Uganda Land Act 1998," Act No. 16 § (1998).
30. Section 2 of Cap. 150 as well as Article 244 of the Constitution of Uganda, 1995 (as amended up to 2015)
31. See the breadth of section 3.
32. "Tanzania Mining Act 2010," Act No. 14 § (2010).
33. "Tanzania Mining (Mineral Rights) Regulations 2010" (n.d.).
34. Cap. 414 R. E. 2002
35. "Tanzania Petroleum (Exploration and Production) Act 1980," Pub. L. No. Act No. 27, Cap. 328 (1980).
36. Tanzania Parliament, "Tanzania Income Tax Act," Pub. L. No. Act No. 11, 332 Cap. 332 (2004).
37. "Tanzania Environmental Management Act 2004," Act No. 20 § (2004).
38. "Tanzania Petroleum Act 2008," Act No. 4 § (2008).
39. "Energy and Water Utilities Regulatory Authority Act 2001," Act No. 11 § (2001).
40. "Tanzania Mining Policy 1997" (Government of Tanzania, 1997).
41. "The Mineral Policy of Tanzania" (Government of Tanzania, 2009).
42. See footnote 3 above.

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43. Taimour Lay and Mika Minio-Paluello, "Contracts Curse: Uganda's Oil Agreements Place Profit Before People" (Kampala: PLATFORM & CSCO, February 2010).
44. Katindi Sivi-Njonjo, ed., *Local Communities in Kenya's Extractive Sector: From Paternalism to Partnership* (Norwegian Church Aid, 2015).
45. "Kenya National Energy and Petroleum Policy" (Government of the Republic of Kenya, 2015).
46. Brian Mutie, "Policy Gaps in Mining and Minerals Sector in Kenya" (Oliver Leaf Foundation, 2012).
47. Kenyan Civil Society Platform on Oil and Gas (KCSPOG) as early as 2012 became active to mobilize public interventions. They issued a Report on "Setting the Agenda for the Development of Kenya's Oil and Gas Resources" and subsequently they convened a dialogue sponsored by Oxfam on "Kenya's Emerging Oil and Gas Sector: Fostering Policy Frameworks for Effective Governance".
48. Sivi-Njonjo, *Local Communities in Kenya's Extractive Sector: From Paternalism to Partnership*.
49. Nyamwaya Christabel, "Benefits Sharing on Extractive Natural Resources with Society in Kenya" (Friedrich Ebert Stiftung, November 2013).
50. Edgar Odari, Davis Osoro, and Miriam Omolo, eds., *A Primer to the Emerging Extractive Sector in Kenya: Resource Bliss, Dilemma or Curse* (Nairobi, Kenya: Institute of Economic Affairs, 2014).
51. "Security and Human Rights in Kenya's Extractives Sector" (Nairobi Process Initiative, February 2015).
52. Uganda Petroleum Act 1957.
53. Uganda Petroleum (Exploration and Production) Act 1985.
54. Frank Tumusiime, "Oil and Gas Laws in Uganda: A Legislators' Guide," *International Alert, Uganda* (Kampala: International Alert, Uganda, n.d.).
55. "National Oil and Gas Policy for Uganda" (Government of Uganda, February 2008).
56. Bainomugisha, Kivengyere, and Tusasirwe, "Escaping the Resource Curse and Making Poverty History: A Review of the Oil and Gas Policy and Legislative Framework for Uganda".
57. Joel D Barkan et al., *Uganda: Assessing Risks to Stability: A Report of the CSIS Africa Program* (Washington, DC: Center for Strategic and International Studies, 2011), http://csis.org/files/publication/110623_Barkan_Uganda_Web.pdf.

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58. Lay and Minio-Paluello, "Contracts Curse: Uganda's Oil Agreements Place Profit Before People."
59. Ben Shepherd and Royal Institute of International Affairs, *Oil in Uganda: International Lessons for Success*, 2013.
60. "Briefing: Why Should Uganda Publish Extractive Contracts?" (Global Witness, August 2014).
61. Natural Resource Governance Institute, "Natural Resource Charter" (NRGI, n.d.).
62. Tanzania Parliament, "Tanzania Petroleum Act, 2015," Pub. L. No. Act No. 21 (2015).
63. "Tanzania Oil and Gas Revenues Management Act," Act No. 22 § (2015).
64. "Tanzania Extractive Industries (Transparency and Accountability) Act," Act No. 23 § (2015).
65. "Bomani Report."
66. Christopher Adam and Anthony M. Simpasa, "Copper Mining in Zambia: From Collapse to Recovery," in *Plundered Nations? Successes and Failures in Natural Resource Extraction* (UK: Palgrave Macmillan, 2011).
67. Olu Ajakaiya, Paul Collier, and Akpan H. Ekpo, "Management of Resource Revenue: Nigeria," in *Plundered Nations? Successes and Failures in Natural Resource Extraction* (UK: Palgrave Macmillan, 2011).
68. Bernard Gauthier and Albert Zeufack, "Governance and Oil Revenues in Cameroon," in *Plundered Nations? Successes and Failures in Natural Resource Extraction* (UK: Palgrave Macmillan, 2011), 27-78.
69. Paul Collier and Anthony Venables, eds., *Plundered Nations?: Successes and Failures in Natural Resource Extraction* (Houndmills, Basingstoke, Hampshire ; New York: Palgrave Macmillan, 2011).

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