A "New" Developmental State in Africa? Evaluating Recent State Interventions vis-à-vis Resource Extraction in Kenya, Tanzania, and Rwanda

Article · December 2017

2 authors:

Chilenye Nwapi
The University of Calgary

Nathan Andrews
University of Northern British Columbia

A "New" Developmental State in Africa? Evaluating Recent State Interventions vis-à-vis Resource Extraction in Kenya, Tanzania, and Rwanda

Chilenye Nwapi & Nathan Andrews*

This article considers development interventions in the extractive resource sector undertaken by three African countries (Kenya, Tanzania and Rwanda) to understand how they fit into the "developmental state" framework originally used to explain the miraculous economic development East Asia experienced after World War II. We focus on interventions aimed primarily at enhancing the capacity of a state's nationals to participate in extractive resource development.

Our understanding of a development state is based fundamentally on Mkandawire's definition: a state "whose ideological underpinnings are developmental and one that seriously attempts to deploy its administrative and political resources to the task of economic development." However, we also propose that the existence of opportunities for citizen participation in the development process is an essential ingredient of a developmental state. While the state itself sets the policy agenda and coordinates the developmental efforts, it is the citizens themselves who are to generate that development. This view aligns with the idea of a "democratic developmental state" but is apparently inconsistent with Johnson's original formulation of the developmental state concept. However, we postulate that the developmental state need not be conceptualized exactly according to its original formulation since development itself is not static.

That said, the most important thing is the seriousness of the attempts a state makes to develop. After evaluating the seriousness of the attempts Kenya, Tanzania and Rwanda have made to promote development through the adoption of policies and laws intended to enhance local participation in the extractive sector, we argue that there is a significant gap between policy declarations and the actionable steps and/or laws initiated to translate those policies into reality. We conclude, however, that Tanzania and Rwanda fit more properly into the developmental state framework, whereas there are serious doubts as to whether Kenya qualifies as a developmental state.

* Chilenye Nwapi is a Research Fellow in the Canadian Institute of Resources Law as well as an independent consultant in extractive sector governance, policy and regulation. He is also affiliated with the Southern African Institute for Policy and Research, where he conducts research on comparative extractive resource governance in Africa. His research has been published widely in such journals as *Canadian Yearbook of International Law*, L*aw & Development Review*, *Resources Policy*, and *Extractive Industries & Society*.

Nathan Andrews is an Assistant Professor in Global and International Studies at the University of Northern British Columbia, having recently completed his tenure as a Banting postdoctoral fellow at Queen's University, where he was adjudged a 2017 SSHRC Talent Award finalist. His current research on the international political economy resource extraction is published in journals such as *World Development*, *Resources Policy*, *Business & Society Review*, *Africa Today* and *Journal of International Relations & Development.*

Cet article traite des interventions de développement entreprises par trois pays africains (Kenya, Tanzanie et Rwanda) dans le secteur extractif, afin de comprendre leur qualification au cadre de « l'État développementaliste », lequel fut d'abord employé pour expliquer le développement économique miraculeux dans l'Asie orientale après la Seconde Guerre mondiale. Nous étudions les interventions visant primairement à améliorer la capacité des citoyens et citoyennes d'un État à participer au développement extractif.

Notre compréhension de l'État développementaliste est fondée principalement sur la définition de Mkandawire : un État « dont les fondements idéologiques sont développementalistes et qui tente sérieusement de consacrer ses ressources administratives et politiques aux fins du développement économique » [notre traduction]. Pourtant, nous proposons aussi que l'existence d'opportunités de participation citoyenne au processus de développement est essentielle à l'État développementaliste. Quoique c'est l'État qui détermine le programme politique et qui coordonne les efforts de développement, ce sont les citoyens et citoyennes qui doivent générer ce développement. Cette perspective s'inscrit à l'idée de « l'État développementaliste démocratique », mais elle paraît inconsistante avec la formulation originale de Johnson du concept d'État développementaliste. Toutefois, nous postulons que l'État développementaliste ne nécessite pas d'être conceptualisé exactement selon cette formulation, car le développement n'est pas statique.

Ceci dit, la plus importante considération est le sérieux des tentatives d'un État de développer. Notre étude des tentatives du Kenya, de la Tanzanie et du Rwanda de favoriser le développement dans le secteur extractif par l'adoption de politiques et de lois visant à améliorer la participation locale, nous permet d'avancer que les déclarations de principe ne se concrétisent pas précisément en lois. Nous concluons, tout de même, que la Tanzanie et le Rwanda s'inscrivent dans le cadre de l'État développementaliste, alors que de sérieux doutes planent sur la qualification du Kenya.

1. INTRODUCTION

The efforts of many African states to regain control over the exploitation of their resources and take charge of their development have generated significant scholarly interest globally.[1] Drawing on the growing law and development scholarship, this article considers development interventions within the extractive resource sector in Africa to understand how they fit into the "developmental state" framework originally used to understand the economic development of East Asia after World War II. Simply put, a developmental state is a state that has demonstrated a commitment to pursuing national development with a clearly defined ideological and institutional commitment. In order to achieve developmentalism, it is not enough to have a developmental ideology; it is equally essential that the state demonstrate, in unmistakable terms, that it is serious about pursuing development. The concept of "development" itself is such a buzzword that it cannot be taken for granted. In this paper, our reference to development refers to initiatives and mechanisms

[1] For more recent writings, see Jesse Salah Ovadia, *The Petro-Developmental State in Africa: Making Oil Work in Angola, Nigeria and the Gulf of Guinea* (London, Ont : Hurst, 2016); Laura Mann & Marie Berry, "Understanding the Political Motivations that Shape Rwanda's Emergent Developmental State" (2016) 21:1 New Political Econ 119; Sara Ghebremusse, "New Directions in African Developmentalism: The Emerging Developmental State in Resource-Rich Africa" (2016) 7:2 JSDLP 1 [Ghebremusse, "New Directions in African Developmentalism"]; Sara Ghebremusse, "Conceptualizing the Developmental State in Resource-Rich Sub-Saharan Africa" (2015) 8:2 L & Dev Rev 467 [Ghebremusse, "Conceptualizing the Developmental State"].

that are often pro-poor and broad-based in nature.[2] In essence, development underscores the "discourses and sets of practices that guide and structure social change processes geared towards improving the living conditions of people in a particular geopolitical locale."[3] Also, our usage of "the state" has a dual meaning, referring to the government in some instances and the nation or national economy in others.

Within the extractive resource sector, African states' interventions have typically taken two forms: (1) the adoption of local content policies (LCPs) and laws to increase the participation of nationals in the state's extractive industry, and (2) the enactment of new laws to increase state interests in extractive projects and demands for the renegotiation of previously concluded contracts with foreign investors.[4] These interventions represent the assertion of resource nationalism, which we describe as a relatively "new" approach to developmentalism. This paper primarily focuses on interventions aimed at building local capacity to promote local participation in the extractive sector—i.e., the first of the two forms mentioned above—with an emphasis on the quality of the interventions in three African states: Kenya, Tanzania, and Rwanda. As Mbabazi and Taylor have argued, "how and in what ways states plot a course in constructing a 'developmental state' within the globalizing confines of the contemporary period is absolutely vital and is perhaps one of the foremost tasks before Africa's leadership."[5] Our central argument is that there is a significant gap between policy declarations and the actionable steps and/or laws that are actually initiated to translate those policies into reality. This gap has significant implications for the characterization of these states as developmental states. We recognize that we cannot fully assess whether a state qualifies as a developmental state based solely on the type of LCP it adopts or based solely on one sector of its economy. Our point, however, is that given that the LCP has become one of the most prominent tools used by African and other developing states to pursue development,[6] it ought to be included in an assessment of whether or not a state adopting LCPs can be considered a developmental state.

There is a large body of emerging scholarship on the issue of the developmental state in Africa. One of the most recent writings in this area argues that while recent African states' extractive sector-related policy interventions are reflective of the developmental state and the "'new' developmental state,"[7] "neither the developmental state, nor the 'new' developmental

2 Nathan Andrews & Sylvia Bawa, "A Post-development Hoax? (Re)-examining the Past, Present and Future of Development Studies" (2014) 35:6 Third World Q 922.

3 *Ibid* at 923.

4 See Ghebremusse, "New Directions in African Developmentalism", *supra* note 1.

5 Pamela Mbabazi & Ian Taylor, "Developmental States and Africa in the Twenty-first Century" in Pamela Mbabazi & Ian Taylor, eds, *The Potentiality of "Developmental States" in Africa: Botswana and Uganda Compared* (Dakar: CODESRIA, 2005) 147 at 148.

6 Virtually every oil-producing developing state has LCP requirements in one form or the other—either in primary legislation or in secondary legislation. See Silvana Tordo et al, *Local Content Policies in the Oil and Gas Sector: A World Bank Study* (Washington, DC: The World Bank, 2013), online: <documents.worldbank.org/curated/en/549241468326687019/pdf/789940REVISED000Box377371B00PUBLIC0.pdf>.

7 The usage "new" basically implies a return to the developmental state ideology but, according to Trubek, it is new because of a rejection of a one-size-fits-all approach to development for every country. See David M Trubek, "Developmental States and the Legal Order: Towards a New Political Economy of Development and Law" (Paper delivered at the Conference on Social Science in the Age of Globalization, National Institute for Advanced Study on Social Science, Fudan University, Shanghai, December 2008) at 9, online: University of Wisconsin Law School <law.wisc.edu/gls/documents/developmental_states_legal_order_2010_trubek.pdf>. Current approaches may be considered new also because state intervention tends to target a specific sector of the economy instead of broad-based approaches.

state, have fully taken shape in resource-rich Africa" as there remain concerns about "good governance."[8] Our approach is unique in that rather than making a broad reference to the policy interventions and then reverting to the literature—which in our respectful view is what most of the existing literature on Africa does—we engage in detail with the actual provisions of the new laws and policies formulated to promote development. We believe this methodology better allows us to assess the extent to which those interventions are characteristic of a developmental state. Our primary contribution to existing literature on the developmental state is the assessment of the extent to which LCPs offer sufficient grounds to suggest that states such as Kenya, Rwanda, and Tanzania fit the developmental state model. We focus on these three East African states primarily because of their individual efforts to advance national development via LCPs that relate to the extractive sector[9]—capturing what Ghebremusse conceptualized as new directions in developmentalism on the continent of Africa. Generally speaking, these three states have some of the most recent policy and legal interventions aimed at increasing the capacity of their nationals to take charge of their national development in Africa.

Our analysis is divided into six parts, including this introduction. Part 2 reviews the literature on the concept of the developmental state in order to understand exactly what it means to say that a state is a developmental state. Part 3 analyzes the emergence and evolution of the developmental state in Africa. In Part 4, we discuss the types of interventionist strategies deployed by Kenya, Rwanda, and Tanzania in the context of extractive resource development. This discussion involves examining both the socio-legal context within which the interventions were conceived in each of the three states, as well as the specific instruments utilized by the states to promote local participation in the extractive sector. Based on the conclusions we draw in Parts 2 and 3, in Part 5 we assess the quality of the state interventions identified in our selected states and illustrate that there is a significant gap between avowed declarations and the actual steps undertaken to translate those declarations into action. Part 5 will also underscore how this gap has significant implications for the qualification of these states as developmental. As part of the conclusion, Part 6 focuses on broader reflections on the implications of our findings for both the concept of the developmental state and resource-engendered development in Africa.

2. THE DEVELOPMENTAL STATE

The "developmental state" is one of the most influential concepts put forward to explain the unbelievable economic transformations experienced by East Asian states—particularly Japan, South Korea, Taiwan, Hong Kong, and Singapore—after World War II.[10] Chalmers

8 Ghebremusse, "New Directions in African Developmentalism", *supra* note 1 at 2–3.

9 We do not suggest, however, that these are the only African states making individual efforts to advance national development through legal provisions for local content.

10 Yin-wah Chu, "The Asian Developmental State: Ideas and Debates" in Yin-wah Chu, ed, *The Asian Developmental State: Re-examinations and New Departures* (New York: Palgrave Macmillan, 2016) 1 at 1.

Johnson's 1982 publication, *MITI and the Japanese Miracle: The Growth of Industrial Policy, 1925–1975*,[11] laid the groundwork for the analysis of the developmental state. Johnson summoned the concept to explain the role of the Japanese state in Japan's seemingly inexplicable economic growth after the calamities it suffered during World War II. According to him "[a] state attempting to match the economic achievements of Japan must adopt the same priorities as Japan. It must first of all be a developmental state—and only then a regulatory state, a welfare state, an equality state, or whatever other kind of functional state a society may wish to adopt."[12] Johnson describes the developmental state, in this Japanese example, as one that "[gives] its first priority to economic development."[13] He explains that the state was not "*solely* responsible for Japan's economic achievements," but that it played a major and critical role in leading Japan to those achievements, not merely in setting the rules of economic activity (the regulatory state) but also, and perhaps mainly, in setting the agenda and actively participating in the substantive aspects of economic activity and development.[14] He describes Japan's developmental success as "state-guided."[15]

Put simply, the developmental state is the idea of state-led development; it is closely related to the concept of "industrial policy"—state-intervention in economic activity.[16] Ghebremusse argues that while industrial policy was practiced in several states following World War II, the concept of the developmental state was used to define a state that did not practice state intervention merely for its own sake, but rather used it as a tool to achieve economic growth.[17] There is an intense debate as to whether governments should lead economic development or allow it to be led by the "invisible hand" of market forces.[18] This age-old debate was re-ignited by the Asian financial crisis of the late 1990s, which called into question the value

11 Chalmers Johnson, *MITI and the Japanese Miracle, 1925–1975* (Stanford: Stanford University Press, 1982) [Johnson, *MITI and the Japanese Miracle*].

12 *Ibid* at 306.

13 *Ibid* at 305. See also, Chalmers Johnson, "The Developmental State: Odyssey of a Concept" in Meredith Woo-Cumings, ed, *The Developmental State* (Cornell: Cornell University Press, 1999) 32 at 37 [Johnson, "The Developmental State"].

14 Johnson, "The Developmental State", *supra* note 13 at 34, 37; Johnson, *MITI and the Japanese Miracle*, *supra* note 11 at 19.

15 Johnson, *MITI and the Japanese Miracle*, *supra* note 11 at 309.

16 Joseph E Stiglitz, Justin Yifu Lin & Celestin Monga, "Introduction: The Rejuvenation of Industrial Policy" in Joseph E Stiglitz & Justin Yifu Lin, eds, *The Industrial Policy Revolution I: The Role of Government Beyond Ideology* (New York: Palgrave Macmillan, 2013) 1 at 1 (defining industrial policy as "government policies directed at affecting the economic structure of the economy").

17 Ghebremusse, "New Directions in African Developmentalism", *supra* note 1 at 10.

18 For arguments in favor of state-intervention, see Ha-Joon Chang, *Kicking Away the Ladder: Development Strategy in Historical Perspective* (London, UK: Anthem Press, 2002) at 13–68; Dani Rodrik, "The Return of Industrial Policy", *Project Syndicate* (12 April 2010), online: <www.project-syndicate.org/commentary/the-return-of-industrial-policy> [Rodrik, "The Return of Industrial Policy"]; Dani Rodrik, "Industrial Policy for the Twenty-First Century" (September 2004) Harvard University John F. Kennedy School of Government, Faculty Research Working Paper No. RWP04–047, online: <https://www.sss.ias.edu/files/pdfs/Rodrik/Research/industrial-policy-twenty-first-century.pdf>. For arguments against state-intervention, see Michael Hart & Bill Dymond, "Special and Differential Treatment and the Doha 'Development' Round" (2003) 37 J World Trade 395.

of government intervention in economic activity.[19] Particular to the African context, the failure of "good governance" austerity mechanisms such as structural adjustment programs (SAPs) in the 1990s brought back debates on the role of the state in economic development.[20] Following the 2008 global financial crisis, the use of industrial policy resurfaced both as an economic tool to promote growth through the transformation of economic structures and as an analytical tool to shed light on the experiences of many states, both developed and developing.[21] Industrial policy includes state efforts to promote infant industries through such means as: export facilitation, subsidies to local industries, trade protection, and preferential treatment in favor of local businesses, e.g., by enacting local content requirements. Explaining the re-acceptance of industrial policy, Rodrik argues that "developing new industries often requires a nudge from government" and that "government assistance" often lies behind the success of any new industry anywhere in the world.[22] Another advocate of industrial policy, Lee, argues that developing states should be allowed space within the international trading system to adopt effective development policies, including industrial policy, to meet their development needs.[23] Lee believes that the idea of a "level playing field" does not necessarily reject the application of dissimilar rules to all states, but rather is compatible with the concept of "reasonable accommodation."[24]—i.e., any change or adjustment made in a system that allows persons, based on need, to participate in and enjoy the benefits of membership of that system.[25]

Johnson identifies four defining elements of a developmental state: the existence of (1) a small, inexpensive, elite bureaucracy consisting of the best managerial talents, whose duties would be to identify the industries to be developed and the best means of developing them, (2) a political system conducive for the bureaucracy to take initiatives without interference from vested interests, (3) "market-conforming methods of state intervention in the economy", such as the avoidance of overly detailed laws that constrain administrative creativity and the utilization

19 See Bhumika Muchhala, ed, *Ten Years After: Revisiting the Asian Financial Crisis* (Washington, DC: Woodrow Wilson International Centre for Scholars, 2007), online: <cepr.net/documents/publications/tenyearsafter_2007_11.pdf>.

20 See Franz Heidhues & Gideon Obare, "Lessons from Structural Adjustment Programmes and their Effects in Africa" (2011) 50:1 Q J Intl Agriculture 55; Olumide Victor Ekanade, "The Dynamics of Forced Neoliberalism in Nigeria Since the 1980s" (2014) 1:1 J Retracing Afr 1.

21 Zsuzsánna Biedermann, "Rwanda: Developmental Success Story in a Unique Setting" (July 2015) Hungarian Academy of Sciences Institute of World Economics, Centre for Economic and Regional Studies, Working Paper No. 213, online: <real.mtak.hu/25192/1/WP_213_Biedermann.pdf>; Juan He, *The WTO and Infant Industry Promotion in Developing Countries: Perspectives on the Chinese Large Civil Aircraft Industry* (Oxford: Routledge, 2015) at 4; Claire Dhéret and Martina Morosi, "Towards a New Industrial Policy for Europe", European Policy Centre Issue Paper No 78, November 2014, 1, online: <www.epc.eu/documents/uploads/pub_4995_towards_a_new_industrial_policy_for_europe.pdf>.

22 Rodrik, "The Return of Industrial Policy", *supra* note 18 at para 9. See also Chang, *supra* note 18 (arguing that developed states should not "kick away the ladder" they had used to climb to the top of economic development).

23 YS Lee, *Reclaiming Development in the World Trading System*, 2nd ed (Cambridge: Cambridge University Press, 2016) at 412–413.

24 *Ibid*.

25 *Convention on the Rights of Persons with Disabilities*, 13 December 2006, UN GAOR, 61st Sess, Annex I, UN Doc. A/RES/61/106 (2006), art 2.

of public corporations, especially the mixed public-private type, to implement policies in high-risk sectors, and (4) a pilot agency within the bureaucracy, such as Japan's Ministry of International Trade and Industry, that is characterized by internal democracy, functions like a think tank, and has a duty to coordinate industrial policy formulation and implementation.[26] He found these elements well-pronounced in the Japanese economic model, which had no exact replica anywhere else in the world, including among the industrialized states. Ghebremusse consolidates these elements with those found in the contributions of other scholars into four "features of the 'successful' developmental state": development-oriented political leadership, an autonomous and effective bureaucracy, performance-oriented governance, and production coordination and conflict management.[27]

Mkandawire identifies two components of the developmental state: the "ideological" and the "structural." The ideological component sees a developmental state as a state that is "developmentalist" in its orientation: "it conceives its 'mission' as that of ensuring economic development, usually interpreted to mean high rates of accumulation and industrialization."[28] The structural component speaks to a state's "capacity [—institutional, technical, administrative and political—] to implement policies sagaciously and effectively."[29] Economic nationalism is seen as the "ideational" foundation of the developmental state, as it serves as the mobilizing force for the commitment to develop,[30] i.e., it mobilizes nationalist sentiment to secure the state's economic autonomy.[31] In this sense, the developmental state agenda has links with efforts to resist Western imperialism.[32]

Mkandawire, however, believes that "the definition of the 'developmental state' runs the risk of being tautological, since evidence that the state is developmental is often drawn deductively from the performance of the economy."[33] That is to say, if a state is not developing, it cannot qualify as a developmental state regardless of its commitment to development. But if it is developing, then it qualifies automatically without any consideration of its commitment to development. To avoid this reasoning, Mkandawire offers a definition of a developmental state as "one whose ideological underpinnings are developmental and one that seriously *attempts* to deploy its administrative and political resources to the task of economic development."[34] Thus, it is the fact that a state is making efforts towards development that is decisive, even if such efforts have not yet yielded any developmental outcome, because the absence of outcome may be due to extraneous or unforeseeable factors beyond that state's control or due to sheer ill-luck.[35]

26 Johnson, *MITI and the Japanese Miracle*, *supra* note 11 at 315, 317, 319.

27 Ghebremusse, "Conceptualizing the Developmental State", *supra* note 1 at 477–480.

28 Thandika Mkandawire, "Thinking about Developmental States in Africa" (2001) 25 Cambridge J Econ 289 at 290.

29 *Ibid*.

30 Chu, *supra* note 10 at 6; Mkandawire, *supra* note 28 at 291.

31 David Szakonyi, "The Rise of Economic Nationalism under Globalization and the Case of Post-Communist Russia," (2007) 6 Vestnik, The Journal of Russian and Asian Studies, online: <www.sras.org/economic_nationalism_under_globalization>.

32 Woo-Cumings argues that the developmental state originated in East Asia as "the region's idiosyncratic response" to Western domination. See Meredith Woo-Cumings, "Introduction: Chalmers Johnson and the Politics of Nationalism and Development" in Woo-Cumings, ed, *The Developmental State* (Cornell: Cornell University Press, 1999) at 1.

33 Mkandawire, *supra* note 28 at 290.

34 *Ibid* at 291.

We agree with Mkandawire's definition of a developmental state, but feel it is in need of further exposition. At the most basic level, we view a developmental state as one that takes a more active role in its national economy, rather than surrendering the developmental project to the private sector, international financial institutions (IFIs), or foreign aid agencies. A developmental commitment by the political leadership, though crucial, is not enough for developmentalism. The leadership's vision of development is as important as its commitment. The political leadership must champion a vision of development that is citizen-participatory: it must connect the state with its citizens. Therefore, the active role in development is not undertaken by the state, in the sense of the national government, alone. The existence of opportunities for citizen participation in the development process is an essential component of a developmental state. We agree with Bhattacharyya that the fundamental goal of development should be to improve "the capacity of people to order their world" and to give people "the powers to define themselves as opposed to being defined by others."[36] A developmental state not only allows, but also facilitates, the active participation of its citizens in the development process—in the design and implementation of national policies affecting their livelihoods. While the state itself sets the policy agenda and coordinates the developmental efforts throughout the country, it is the citizens themselves who are to generate that development. Scholars have called this the "democratic developmental state."[37] White also coins the term "inclusive embeddedness," which means that "the social basis and range of accountability of democratic politicians goes beyond a narrow band of elites to embrace broader sections of society."[38] The role of the state, therefore, is to create an enabling environment for its citizens to take charge of their own development. In the context of extractive resources with large negative externalities, those who bear the burden of those externalities—typically local communities—must be actively involved in the development of the resources and in the sharing of the benefits therefrom.

35 *Ibid* (arguing that "the definition [of a developmental state] must include situations in which exogenous structural dynamic and unforeseen factors can torpedo genuine developmental commitments and efforts by the state").

36 Jnanabrata Bhattacharyya, "Theorizing Community Development" (2004) 34:2 J Community Dev Society 5 at 12.

37 See Omano Edigheji, "A Democratic Developmental State in Africa? A Concept Paper", Centre for Policy Studies, Johannesburg, Research Report 105, 2005, 9, online: http://www.rrojasdatabank.info/devstate/edigheji.pdf (noting that "citizens' active participation [is] a necessary requirement in the development and governance process"); Omano Edigheji, "Introduction" in Omano Edigheji, ed, *Constructing a Democratic Developmental State in South Africa: Potentials and Challenges* (Cape Town: HSRC Press, 2010) 1 at 14 [Edigheji, "Introduction"] (arguing that citizen participation "in democracy is not limited to the choice of decision-makers. Development, by its very nature, is a political process, and therefore cannot be treated in a technocratic fashion"); see also Mark Robinson & Gordon White, "Introduction" in Mark Robinson & Gordon White, eds, *The Democratic Developmental State: Political and Institutional Design* (Oxford: Oxford University Press, 1998) 1 at 4–6.

38 Gordon White, "Constructing a Democratic Developmental State" in Mark Robinson & Gordon White, eds, *The Democratic Developmental State: Political and Institutional Design* (Oxford: Oxford University Press, 1998) 17 at 31.

We recognize that the idea of the citizen-participatory (or people-driven) developmental state may not have been on Johnson's mind when he made his declarations about Japan; we postulate, however, that a developmental state need not be conceptualized exactly according to its original formulation since development itself is not static. The East Asian states were models for their time. We also recognize that our view is not necessarily supported by the classic developmental state literature, for some regimes that have been described in association with the developmental state were autocratic regimes that restricted democratic citizen participation.[39] However, what is unique about such regimes—and this is what earns them the developmental state description—is that while they were characterized by centralized planning and decision-making, they had a deliberate policy of reinvesting accumulated wealth in public welfare. The East Asian states aptly fit this narrative. As explained by Ohno, when faced with the fierce need to "cope with the life-or-death problem posed by external military threat or internal social fragmentation," a number of East Asian states established a political regime later called "authoritarian developmentalism" to preserve "national unity and military readiness" and to pursue economic growth at all costs.[40] Even though the citizens were not embedded in the development process, they participated in the enjoyment of the economic growth that resulted from authoritarian developmentalism. While the classic East Asian approach may be opposed to the form of participatory development we advocate, the authoritarian approach was, arguably, suited to the reality of the situation at the time.[41] Thus, that the East Asian states achieved development under authoritarian leadership "does not mean that all developmental states must be autocratic."[42] The developmental success achieved by Scandinavian states under undisputed democratic leadership counters any notion that authoritarianism is necessary for the achievement of a developmental state.[43]

We therefore do not assume that a state is necessarily "non-developmental" simply because development decision-making is centralized in the hands of a small elite. Context matters and we doubt that modern-day states can achieve *sustained* (and/or sustainable) development without broad citizen participation in the development process itself. History in fact shows that authoritarian developmentalism is a "transitional … short-term regime of convenience"

39 See Lawrence Sáez & Julia Gallagher, "Authoritarianism and Development in the Third World" (2009) 15:2 Brown J World Affairs 87 at 92 (comparing the developmental success of China with South Korea and North Korea, which were authoritarian regimes from the 1950s to the mid-1980s).

40 Kenichi Ohno, "The East Asian Growth Regime and Political Development" in Kenichi Ohno & Izumi Ohno, eds, *Eastern and Western Ideas for African Growth: Diversity and Complementarity in Development Aid* (Oxford: Routledge, 2013) 30 at 30–31 [Ohno] (noting, at 38, that all successful East Asian economies, with the exception only of Hong Kong, adopted authoritarian developmentalism in the past).

41 *Ibid* at 38. For instance, shattered by the Korean war and under extreme poverty, South Korea, faced serious military threats from North Korea. See Chilenye Nwapi & Yong-Shik Lee, "Trade and Development in Africa" in Yong-Shik Lee, *Reclaiming Development in the World Trading System*, 2nd ed (Cambridge: Cambridge University Press, 2016) 334 at 360. This condition, arguably, called for immediate and dramatic transformational actions to engineer the affairs of state to protect the country and forge a development path without the constraints posed by the highly bureaucratic nature of democratic decision-making processes.

42 Edigheji, "Introduction", *supra* note 37 at 8.

43 Ha-Joon Chang, "How to 'do' a Developmental State: Political, Organisational and Human Resource Requirements for a Developmental State" in Omano Edigheji, ed, *Constructing a Democratic Developmental State in South Africa: Potentials and Challenges* (Cape Town: HSRC Press, 2010) 82 at 86.

that is useful at a critical juncture in a state's history, but which becomes a danger to further development if not abandoned after the threat it was introduced to confront is cleared.[44] The East Asian states faced extraordinary threats, but as those threats subsided and the states attained a significant level of development, authoritarian developmentalism was gradually replaced with more temperate and inclusive political regimes with an equally developmental mindset.[45] Political regime studies show that economic development breeds democracy and that authoritarian developmentalism often dies a natural death with advancing development and in fact plants the seeds of its own death by producing a well-educated middle class that rises to challenge its continued existence.[46] To remain in power, such autocracies need to sustain economic growth, which is difficult where autocratic leadership changes occur often because such changes usher in policy transformations that potentially shake "investor confidence".[47] To avoid this from happening, such autocracies often seek some level of democratic legitimacy, which they achieve by embedding themselves "in a wider leadership group," through, for instance, joining a political party with clear leadership succession rules.[48]

We acknowledge, however, that an intense debate is ongoing regarding whether developmental states are "inherently autocratic" and whether a democratic developmental state is even possible.[49] While this paper is not the venue to resolve that debate, it is our view that both democratic developmental states and authoritarian developmental states are possible. However, as argued in the above paragraph, authoritarian developmentalism almost

44 See Ohno, supra note 40 at 40, 48–50.

45 *Ibid*; Dali Y Yang, "China's Developmental Authoritarianism Dynamics and Pitfalls" (2016) 12:1 Taiwan J Democracy 1. However, Singapore is the only state that has not abandoned authoritarian developmentalism even after attaining "a very high income level"; Ohno, *supra* note 40 at 38.

46 Ohno, *supra* note 40 at 43–44. After diagnosing the South Korean developmental state, Kim writes that, "an important lesson from the South Korean experience is that authoritarian developmental states are unsustainable and that even where they are successful, they will face tremendous challenges from society to relinquish [their] heavy-handed interventions in the economy." Eun Mee Kim, "Limits of the Authoritarian Developmental State of South Korea" in Omano Edigheji, ed, *Constructing a Democratic Developmental State in South Africa: Potentials and Challenges* (Cape Town: HSRC Press, 2010) 97 at 116. See also Carles Boix & Susan C. Stokes, "Endogenous Democratization" (2003) 55:4 World Politics 517; Daniel Goh, "The Rise of Neo-Authoritarianism: Political Economy and Culture in the Trajectory of Singaporean Capitalism" (April 2002) Center for Research on Social Organization Working Paper No 591, 2, online: <deepblue.lib.umich.edu/bitstream/handle/2027.42/51355/591.pdf?sequence=1>.

47 See Kim Kelsall, "Authoritarianism, Democracy, and Development" Development Leadership Program State of the Art Series No 3, November 2014, 12, online: <publications.dlprog.org/SOTA3.pdf>.

48 *Ibid*. See also Eyob Balcha Gebremariam, "Can 'Authoritarian Developmentalism' Be Tested at the Ballot Box?" *Pambazuka News* (3 June 2015), 2, online: <www.pambazuka.org/printpdf/92117> (highlighting how the authoritarian regime in Ethiopia has disguised itself in "democratic developmentalism" through the conduct of democratic elections). We recognize however that China still practices authoritarian developmentalism, but the developmental results have been described as "mixed"; see Sáez & Gallagher, *supra* note 39 at 92.

49 See e.g. Duncan Green, "The Democratic Developmental State: Wishful Thinking or Direction of Travel?" [2011/12] Commonwealth Good Governance 40; Omano Edigheji, *A Democratic Developmental State in Africa? A Concept Paper* (Johannesburg: Centre for Policy Studies, 2005), online: <www.rrojasdatabank.info/devstate/edigheji.pdf>; Richard Sandbrook, "Origins of the Democratic Developmental State: Interrogating Mauritius" (2005) 39:3 Can J African Studies 549; Michael T. Rock, "Southeast Asia's Democratic Developmental States and Economic Growth" (2015) 7:1 Institutions & Economics 23.

inevitably dies with advancing development. Our main test for developmentalism is thus based on Mkandawire's definition of a developmental state: a state "whose ideological underpinnings are developmental and one that seriously *attempts* to deploy its administrative and political resources to the task of economic development."[50]

3. THE DEVELOPMENTAL STATE AND AFRICA

Is the East Asian economic development model replicable in other states? In 1999 Johnson declared that the Japanese development model "would be hard to emulate."[51] This is not to say, however, that Japanese history is not "generalizable"; it simply requires a state with a similar commitment "to the mobilization of industry."[52] He recognized successful emulations of the Japanese development model in other countries, such as South Korea, Taiwan, Singapore, Hong Kong, and (much later) China.[53] Johnson "had no doubt that other Asian, African and Latin American countries would try to emulate Japan."[54]

Scholars have expressed pessimism about Africa's economic development prospects and have debated whether the East Asian economic model is duplicable in the African context.[55] The pessimism, which is expressed in the impossibility-of-a-developmental-state-in-Africa theory,[56] is informed mainly by the internal conditions of many African states: unending civil wars, pervasive corruption, dependence syndrome, lack of autonomy, rent-seeking behavior, neo-patrimonialism, lack of democratic institutions, unaccountable governments, and lack of adequate educational opportunities for the continent's teeming youth population, among others.[57] Only four African states—Botswana, Mauritius, South Africa, and Uganda—are regarded in the scholarship as "potential developmental states," based on the "'activist' role" they play in their economic development.[58] The word "potential" is very telling and contrasts with the impossibility theory because it implies the presence of the capacity to develop, whereas the

50 Mkandawire, *supra* note 28 at 291.

51 Johnson, "The Developmental State", *supra* note 13 at 40.

52 *Ibid* at 41.

53 *Ibid* at 40.

54 *Ibid* at 41.

55 See Nwapi & Lee, supra note 41 at 359–360; Peter Meyns & Charity Musamba, eds, *The Developmental State in Africa: Problems and Prospects* (Duisburg: Institute for Development and Peace, 2010), online: <duepublico.uni-duisburg-essen.de/servlets/DerivateServlet/Derivate-29167/report101.pdf>; Francis B Nyamnjoh & Ignasio M Jimu, "Success or Failure of Developmental States in Africa: Exploration of the Development Experiences in a Global Context" in Mbabazi & Taylor, *supra* note 5 at 17; Mkandawire, *supra* note 28 at 293.

56 See Mkandawire, *supra* note 28 for a critique of the different versions of the "impossibility" theory.

57 Nwapi & Lee, *supra* note 41 at 359–360; Mkandawire, *supra* note 28 at 298.

58 Ghebremusse, "Conceptualizing the Development State", *supra* note 1 at 480. See also Mbabazi & Taylor, *supra* note 5; Jeffrey A. Frankel, "Mauritius: African Success Story" (2010) Harvard University John F. Kennedy School of Government, Faculty Research Working Paper No 16569, online: <dash.harvard.edu/bitstream/handle/1/4450110/Frankel_MauritiusAfrican.pdf?sequence=1>; William Gumede, "Delivering the Democratic Developmental State in South Africa" (2009) Development Bank of Southern Africa, Development Planning Division Working Paper No 9, online: <www.dbsa.org/EN/About-Us/Publications/Documents/DPD%20No%209.%20Delivering%20the%20democratic%20developmental%20state%20in%20South%20Africa.pdf>.

impossibility theory implies the absence of such capacity. The impossibility theory has, however, been deconstructed by some scholars as a misinterpretation of Africa's economic history,[59] and for failing to consider the continent's economic growth in the past decade.[60] Also, the idea that the lack of democratic institutions in Africa makes the developmental state impossible flies in the face of the East Asian experience noted in Part 2. However, the impossibility theory has already done significant damage to Africa's development. It has influenced the actions of many African states, leading to policy measures that have so seriously undermined their "economic and political capacity" that the states appear compelled to exhibit proof of the impossibility of becoming developmental states.[61]

Nonetheless optimism for a better economic future for Africa can be observed; it is stimulated by the success of East Asian states, most of which found themselves in conditions much worse than those faced by most African states today.[62] For instance, South Korea started with a lower per capita GDP than that of most African states currently, it lacked natural resources essential for growing the manufacturing sector, it had no prior successful industrialization experience, and it faced a constant military threat from North Korea.[63] Yet it was able to achieve economic development and it successfully lifted itself out of life-threatening poverty to become an industrialized state with a high per capita GDP.[64] The silver bullet was an aggressive pursuit of state-led export promotion policies which, as the economy advanced, loosened up to increase the role of the private sector.[65]

A growing number of scholars now acknowledge that African states are not only capable of becoming developmental, but have in fact already exhibited evidence thereof, despite leadership failures in many parts of the continent.[66] While some scholars believe that African leaders' propensity for power consolidation using state power overwhelmed their declared

59 Mkandawire, *supra* note 28 at 299, 303. Mkandawire argues that features like rent-seeking and neo-patrimonialism do not always correlate with low economic development, but could have a positive impact on it. He warns against the idealization of the impact of these features on development. Botchway and Moudud also point to how East Asian developmental states succeeded while having authoritarian regimes rather than democratic institutions. See Karl Botchway & James Moudud, "Neo-liberalism and the Developmental State: Consideration for the New Partnership for Africa's Development" in Benjamin F Bobo & Herman Sintim-Aboagye, eds, *Neo-liberalism, Interventionism and the Developmental State: Implementing the New Partnership for Africa's Development* (Trenton, NJ: Africa World Press Inc, 2012) 13 at 34. See also Mkandawire, *supra* note 28 at 310 (arguing that "[t]he first few examples of developmental states were authoritarian").

60 Nwapi & Lee, *supra* note 41 at 359–360.

61 Mkandawire, *supra* note 28 at 306.

62 Nwapi & Lee, *supra* note 41 at 359–360.

63 *Ibid* at 360.

64 *Ibid*.

65 Lee, *supra* note 23 at 303.

66 Ghebremusse has, for instance, articulated how post-colonial African states' leaders made development a priority in their political careers. See Ghebremusse, "New Directions in African Developmentalism", *supra* note 1 at 13. See also Verena Fritz and Alina Rocha Menocal, "Developmental States in the New Millennium: Concepts and Challenges for a New Aid Agenda" (2007) 25:5 Development Policy Rev 531.

developmentalist agenda,[67] others believe that African states remained "active participants in development" under postcolonial leaders, even as neoliberalism gained ground in the 1980s.[68] Applying Mkandawire's definition of the developmental state, however, it is not enough that the "ideological underpinning" of the leaders was developmental; they must also be shown to have "seriously *attempt[ed]*" to utilize their state's resources for the purpose of development, even if they failed to achieve it.[69] In the section that follows, we examine the extent of manifestation of the developmental state within the extractive resource sector in Africa, focusing specifically on Kenya, Rwanda, and Tanzania. Do these states exhibit *serious attempts* to utilize their resources for the purpose of development?

4. EXTRACTIVE RESOURCE DEVELOPMENT AND AFRICAN STATE INTERVENTIONS

While a developmental state could have implications for a number of different sectors of a country's socio-political economy, in the African context developmentalism is manifesting most conspicuously in the natural resource sector. We postulate three reasons for this emerging focus on what, particularly in the context of oil and gas development, Ovadia calls the "petro-developmental state".[70] First, some African states possess abundant natural resources—such as diamond, gold, copper, oil, and gas—making them well-positioned to participate in international commodity markets.[71] These states are beginning to recognize the potential of these resources, if utilized properly, to benefit their national economies. Despite the rise and fall of global commodity prices, several multinational corporations and foreign states are looking to the continent for minerals and fossil fuels.[72] Some scholars have conceptualized this phenomenon as a new "scramble" for Africa.[73] Thus, African governments are making attempts to harness their competitive advantage through certain state interventions. Second, years of economic liberalization have taken a toll on several African economies that were subject to SAPs and many generations of mining codes[74] that were influenced immensely by

67 See e.g. Claude Ake, *Democracy and Development in Africa* (Washington, DC: Brookings Institution, 1996) at 6.

68 Ghebremusse, "New Directions in African Developmentalism", *supra* note 1 at 14; Nyamnjoh & Jimu, *supra* note 52 at 27.

69 See Mkandawire, *supra* note 28 at 291.

70 Jesse Salah Ovadia, "Local Content Policies and Petro-development in Sub-Saharan Africa: A Comparative Analysis" (2016) 49 Resources Policy 20 [Ovadia, "Local Content Policies"].

71 See e.g. "Have the BRICS Hit a Wall? The Next Emerging Markets" (January 2016) University of Pennsylvania, *Knowledge@Wharton*, online: <knowledge.wharton.upenn.edu/article/the-next-emerging-markets/>.

72 See Zeddy Sambu, "Oil and Gas Discoveries Make East Africa a Rich Hunting Ground for Global Explorers", *Business Daily* (31 December 2012), online: <www.businessdailyafrica.com/Oil-and-gas-discoveries-in-East-Africa-/-/539552/1654946/-/ vvmvcs/-/index.html>.

73 See Pádraig Carmody, *The New Scramble for Africa* (Cambridge: Polity Press, 2011); Roger Southall & Henning Melber, eds, *A New Scramble for Africa? Imperialism, Investment and Development* (Scottsville: University of KwaZulu-Natal Press, 2009); Jedrzej George Frynas & Manuel Paulo, "A New Scramble for African Oil? Historical, Political, and Business Perspectives" (2007) 106:423 African Affairs 229 at 230.

74 See Hany Besada & Philip Martin, "Mining Codes in Africa: Emergence of a 'Fourth' Generation?" (2015) 28:2 Cambridge Rev Intl Affairs 263.

the neoliberal ideologies of IFIs such as the IMF and the World Bank.[75] These externally-driven reform processes eroded state legitimacy and limited the ability of concerned states to determine the conditions under which extractive activities would take place in their own territories.[76] African states therefore see this "new" trend (internally-driven reforms) as a viable way to take ownership of their development instead of subscribing entirely to the dictates of external forces, as has been the trend since gaining independence in the 1950s and 1960s.

The third reason for the apparent shift towards ensuring that resource extraction serves a broad-based development agenda is the launching of the *Africa Mining Vision* (AMV) in 2009[77] and its subsequent action plan agreed upon in December 2011.[78] The adoption of the AMV is traced to a rise in mineral prices in the years prior to the 2008 global financial crisis and the ever-widening gap between the profits accruing to mineral corporations and the revenues accruing to African governments.[79] The vision broadly articulates the steps that African governments need to take to capture a greater share of the benefits of mineral development.[80] It stresses the importance of African states having "more fiscal space" to capture the benefits of mineral development and highlights the gains derivable from it through "employment generation, local procurement of goods and services, entrepreneurial development, skills and knowledge creation, [and] technology transfer."[81] Being a developmental pathway established by African leaders themselves, this endeavor has given policymakers the boldness and agency to center all policy related to mineral extraction around broader development objectives. Despite being a high-level endeavor that may neglect grassroots concerns about resource extraction, particularly the effects of mining development on African women,[82] the AMV is believed to be a paradigm shift from the previous model of extraction-based resource development to a model that focuses on harnessing resources to accelerate development and build resilient,

75 Bonnie Campbell, "Factoring in Governance is Not Enough: Mining Codes in Africa, Policy Reform and Corporate Responsibility" (2003) 18:3 Minerals & Energy 2.

76 Bonnie Campbell, "Revisiting the Reform Process of African Mining Regimes" (2010) 30:1–2 Can J Development Studies 197.

77 African Union, *Africa Mining Vision*, [2009], online: <www.africaminingvision.org/amv_resources/AMV/Africa_Mining_Vision_English.pdf>.

78 See United Nations Economic Development for Africa & African Union, *Minerals and Africa's Development: The International Study Group Report on Africa's Mineral Regimes*, (Addis Ababa: Economic Commission for Africa, 2011), online: <www.uneca.org/sites/default/files/PublicationFiles/mineral_africa_development_report_eng.pdf>.

79 Third World Network Africa, *Africa Mining Vision and ECOWAS Minerals Development Policy* (Accra: Third World Network Africa, 2014), online: <www.daghammarskjold.se/wp-content/uploads/2014/12/Conceptual-Framework5.pdf>.

80 Chilenye Nwapi, "Realising the Africa Mining Vision: The Role of Government-Initiated International Development Think-Tanks" (2016) 7:1 MJSDL 158 at 160–161 [Nwapi, "Realising the Africa Mining Vision"].

81 Antonio MA Pedro, "The Africa Mining Vision: Towards Shared Benefits and Economic Transformation", GREAT Insights 1:5 (July 2012) at 2, online: European Center for Development Policy Management <ecdpm.org/great-insights/extractive-sector-for-development/the-africa-mining-vision-towards-shared-benefits-and-economic-transformation/>.

82 Salimah Valiani, *The Africa Mining Vision: A Long Overdue Ecofeminist Critique* (16 October 2015), online: WoMin <womin.org.za/images/docs/analytical-paper.pdf>.

diversified, and competitive national economies.[83] As part of what some scholars consider to be a "fourth generation" of mining codes in Africa, the AMV seeks to entrench principles of transparency and accountability under the premise that good resource governance overall leads to economic development.[84] In short, the shift towards developmentalism allows for "greater national participation, facilitation of mining activities, increase of fiscal revenue and local community development."[85]

In light of the above three points, we now turn to the interventions pursued by Kenya, Tanzania, and Rwanda. As noted in the introduction, our focus on these states is based on the fact that, out of all the African states, they have some of the most recent policy and legal interventions aimed at increasing domestic capacity to take charge of their national development. Our primary focus is on the adoption of laws and LCPs—a type of "productive development polic[y]" whose main goal is to "strengthen the productive structure of a particular national economy."[86] We recognize that the sole focus on LCPs is only one way of discussing the developmental state model; however, focusing only on LCPs enables us to have a deeper discussion than if we also incorporated other mechanisms employed by developmental states. Moreover, LCPs are becoming increasingly popular within the extractive resource sector as a mechanism to achieve economic development,[87] thus making it a natural focal point for a discussion of the developmental state.

LCPs seek to increase the participation of a state's nationals in their national economic activity and, in so doing, contribute to economic empowerment and development at both national and sub-national levels. By way of definition, LCPs are a form of "content protection" that require that "a given percentage of domestic value added or domestic components be embodied in a specified final product."[88] Typically, LCPs mandate investors to give preference to the use of local raw materials in production, the use of local firms and experts in goods and services procurement, and the recruitment of local professionals in matters of employment.[89] They can assist a state to enhance the competitiveness of domestic firms in relation to foreign firms, improve national technological development, create jobs, and support economic diversification.[90] By requiring international companies to ensure a certain degree of local

83 Antonio MA Pedro, "The Country Mining Vision: Towards a New Deal" (2016) 29:1 Miner Econ 15; Nwapi, "Realising the Africa Mining Vision", *supra* note 80 at 160–162.

84 Besada & Martin, *supra* note 74.

85 Steven De Backer, "Mining Investment and Financing in Africa: Recent Trends and Key Challenges" (Paper delivered at *Africa's Mining Industry: The Perceptions and Reality*, Canada-Southern Africa Chamber of Business 13th Annual Mining Breakfast and MineAfrica's 10th Annual Investing in African Mining seminar, Toronto, March 2012) at 10, online: <www.mineafrica.com/documents/2%20-%20Steve%20 De%20Backer.pdf>.

86 Albero Melo & Andrés Rodríguez-Clare, "Productive Development Policies and Supporting Institutions in Latin America and the Caribbean" (2006) Inter-American Development Bank Working Paper C-106 at 5, online: <core.ac.uk/download/pdf/22860801.pdf> [Melo & Rodríguez-Clare].

87 See Tordo et al, *supra* note 6.

88 Gene M. Grossman, "The Theory of Domestic Content Protection and Content Preference" (1981) 96:4 Q J Econ. 583 at 583.

89 Chilenye Nwapi, "Defining the 'Local' in Local Content Requirements in the Oil and Gas and Mining Sectors in Developing Countries" (2015) 8:1 L & Development Rev 187 [Nwapi, "Defining the 'Local'"].

90 *Ibid* at 191.

participation, one can expect that domestic expertise could be built for long-term development purposes. In this way, LCPs have the potential to address the fundamental market failure of skill development by focusing on building the domestic capacity to meet the skill demands of the economy.[91] The concept also tests the idea of shared value creation that many corporations have advanced as part of their objective to contribute to the development of the society in which they operate.[92]

LCP requirements have been criticized for their potential conflict with international trade rules, such as those under the World Trade Organization's *Trade-Related Investment Measures* and the *Agreement on Subsidies and Countervailing Measures*, which uphold the "national treatment" principle.[93] However, while the rarity of enforcement does not affect the validity of the rules,[94] it does undermine the rules' continued utility. It has also been suggested that given the socioeconomic necessities of most oil-producing developing states and those states' historical failure to maximize the gains accruable from resources, "the lack of willingness among countries to enforce [WTO] rules particularly in the context of the oil and gas industry … likely signifies moral shyness on the part of the home countries of multinational oil companies regarding the implications of challenging [LCPs]."[95] Companies have also seemed willing to comply with LCP measures except where the measures impose stringent local content targets that, given the human and technical capacity of the state, are impossible to meet without grinding business to a halt.[96]Some scholars have justified the use of LCPs by developing states by invoking the principle of "reasonable accommodation."[97]Reasonable accommodation means that the international trading system should allow developing states the policy space to adopt measures like LCPs in order to meet their development challenges and that this is not necessarily "unfair" to developed states because they also utilized industrial policy measures akin to present-day LCPs.[98] The existence of resource-rich developing states, despite potential conflict with international trade rules, likely represents an indirect demand from developing

91 Chilenye Nwapi, "A Survey of the Literature on Local Content Policies in the Oil and Gas Industry in East Africa", (April 2016) University of Calgary, School of Public Policy Technical Paper 9:16 at 4, online: <www.policyschool.ca/wp-content/uploads/2016/05/local-content-east-africa-nwapi.pdf> [Nwapi, "A Survey of the Literature"]

92 John D Sullivan, *The Moral Compass of Companies: Business Ethics and Corporate Governance as Anti-Corruption Tools* (Washington, DC: International Finance Corporation, 2009) at 1–3, online: <documents.worldbank.org/curated/en/494361468333857366/pdf/477910NWP0Focu10Box338866 B01PUBLIC1.pdf>; Dilşah Ertop, "Business Ethics, Corporate Social Responsibility and Importance of Implementation of CSR at Corporations" (2015) 2:12 Intl J Contemporary Applied Science 37 at 38, 44.

93 The "national treatment" principle mandates WTO member states to treat one another as they would their own nationals. See Nwapi, "Defining the 'Local'", *supra* note 89 at 193–194.

94 Cathleen Cimino, Gary Clyde Hufbauer & Jeffrey J Schott, *A Proposed Code to Discipline Local Content Requirements* (Washington, DC: Peterson Institute for International Economics, 2014) at 1, online: <piie.com/publications/pb/pb14-6.pdf>. These scholars note that challenges against LCPs have occurred only in three WTO cases, all of which are in the field of renewable energy.

95 Nwapi, "Defining the 'Local,'" *supra* note 89 at 196.

96 *Ibid*.

97 Lee, *supra* note 23 at 413.

98 *Ibid*; Lindsay Whitfield et al, *The Politics of African Industrial Policy: A Comparative Perspective* (Cambridge: Cambridge University Press, 2015) at 43, 48–49; Dani Rodrik, *One Economics, Many*

states for trade reforms that not only give all states the opportunity to develop, but give each state opportunities that correspond to its development needs.

Lastly, it has also been pointed out that LCPs can be subject to capture by national and local elites in several states.[99] Studies have in fact found this to be so in several states, including African states, and have suggested ways of dealing with the capture problem, which include mainstreaming transparency into LCPs.[100]

4.1. Kenya

Kenya has had a chequered history be it in political, social, or economic terms. Economically, it was considered to be an underdeveloped country for much of the mid-1960s through to the 1990s.[101] Politically, present-day Kenya has been shaped by issues surrounding the consolidation of the 1962 constitution, the shift from a one-party to a multi-party state, and the 2007–2008 political crisis over the manipulation of the 2007 presidential election.[102] It must be noted that there is a charged background to Kenya's political atmosphere. Efforts to win autonomy over a narrow strip of the Indian Ocean coastline in the early 1960s resulted in separatist politics that invigorated divergent visions of the postcolonial nation and a divisive language of citizenship along the lines of race, ethnicity, religion, and physical space.[103] In

Recipes: Globalization, Institutions, and Economic Growth (Princeton, NJ: Princeton University Press, 2007) at 215, 225–226; Chang, *supra* note 18 at 13–68.

99 Nwapi, "Defining the 'Local'", *supra* note 89 at 215.

100 See Chilenye Nwapi, "Corruption Vulnerabilities in Local Content Policies in the Extractive Sector: An Examination of the Nigerian Oil and Gas Industry Content Development Act, 2010" (2015) 46 Resources Policy 92 [Nwapi, "Corruption Vulnerabilities"]; Global Witness, *Rigged? The Scramble for Africa's Oil, Gas and Minerals* (London: Global Witness, 2012), online: <www.globalwitness.org/sites/default/files/library/RIGGED%20The%20Scramble%20for%20Africa's%20oil,%20gas%20and%20minerals%20.pdf> [Global Witness]; Christina Katsouris & Aaron Sayne, *Nigeria's Criminal Crude: International Options to Combat the Export of Stolen Oil* (London: The Royal Institute of International Affairs, 2013), online: <www.chathamhouse.org/sites/files/chathamhouse/public/Research/Africa/0913pr_nigeriaoil.pdf>; Maíra Martini, *Local Content Policies and Corruption in the Oil and Gas Industry* (Bergen: U4 Anti-Corruption Resource Centre, 2014), online: <www.u4.no/publications/local-content-policies-and-corruption-in-the-oil-and-gas-industry/>; Ana Maria Esteves & Mary-Anne Barclay, "Enhancing the Benefits of Local Content: Integrating Social and Economic Impact Assessment into Procurement Strategies" (2011) 29:3 Impact Assessment & Project Appraisal 205 [Esteves & Barclay, "Enhancing the Benefits of Local Content"]; Mark Henstridge et al, Enhancing the Integrity of the Oil for Development Programme: Assessing Vulnerabilities to Corruption and Identifying Prevention Measures, Case Studies of Bolivia, Mozambique and Uganda (Oslo: Norwegian Agency for Development Cooperation, 2012), online: <www.norad.no/globalassets/import-2162015-80434-am/www.norad.no-ny/filarkiv/vedlegg-til-publikasjoner/enhancing-the-integrity-of-the-oil-for-development-programme.pdf>.

101 WR Ochieng & RM Maxon, eds, *An Economic History of Kenya* (Nairobi: East African Publishers, 1992) at xii–xiii.

102 See Karuti Kanyinga, *Kenya: Democracy and Political Participation* (Johannesburg: Open Society Initiatives for Eastern Africa, 2014), online: <www.opensocietyfoundations.org/sites/default/files/kenya-democracy-political-participation-20140514.pdf>; Joel D Barkan, *Kenya: Assessing Risks to Stability* (Washington, DC: Center for Strategic and International Studies, 2006), online: <csis-prod.s3.amazonaws.com/s3fs-public/legacy_files/files/publication/110706_Barkan_Kenya_Web.pdf>.

103 Jeremy Prestholdt, "Politics of the Soil: Separatism, Autochthony, and Decolonization at the Kenyan Coast" (2014) 55:2 J African History 249.

line with this background, the term "political tribalism" characterizes the current context of Kenya, where observers have witnessed an "unprincipled and divisive competition for state power by members of the political class who claim to speak for unified ethnic communities."[104] This syndrome is referred to in political science literature as "prebendalist", "patrimonial", "neo-patrimonial", or "clientelistic"; it reflects the current political crisis in which Kenya finds itself—particularly the weakening of credible state institutions, which has allowed the ruling elites to abuse power and misuse resources for their own benefit and that of their close affiliates.[105]

In addition to the existing political tension, there remain conflicts over the distribution of natural resources, including intense contestations over land rights.[106] Access to land has been at the roots of anti-colonial struggles in Kenya[107] and it continues to remain an issue. This issue led to the establishment of a Commission of Inquiry into the Illegal/Irregular Allocation of Public Land, chaired by Paul Ndungu, whose report was presented to President Kibaki in December 2004.[108] The report disclosed how illegal land allocations in Kenya increased during the period of democratic elections under former President Arap Moi. Commentators acknowledge that the Commission recorded "one partial victory"—its revelations of illegal land allocations by politicians to their friends, family members, judges, civil servants, and military personnel have led to the return of several swaths of land to the government.[109] However, local

104 Jacqueline M. Klopp, "Can Moral Ethnicity Trump Political Tribalism? The Struggle for Land and Nation in Kenya" (2002) 61:2 African Studies 269 at 269.

105 Susanne D. Mueller, "The Political Economy of Kenya's Crisis" (2008) 2:2 J East African Studies 201. Prebendalism, patrimonialism, neo-patrimonialism and clientelism all speak to the idea of identity politics—a political system whereby officeholders use their offices to generate material benefits for themselves and their constituents, thereby blurring the divide between the public and the private. Prebendalism refers to a political system in which public officeholders utilize their official positions for personal gains, including to benefit their support groups. Patrimonialism and neopatrimonialism refer to political regimes in which what is public is treated as though it were private, for the benefit of the officeholder and their friends. Bureaucrats owe allegiance to the supreme ruler or to their superiors, who reward them for their loyalty. Clientelism is more associated with capitalism (crony capitalism)—rulers create opportunities for certain preferred persons, usually campaign donors. See Richard A Joseph, *Democracy and Prebendal Politics in Nigeria: The Rise and Fall of the Second Republic* (Cambridge: Cambridge University Press, 1987) at 8; Derick W Brinkerhoff & Arthur A Goldsmith, *Clientalism, Patrimonialism and Democratic Governance: An Overview and Framework for Assessment and Programming* (Cambridge, MA: Abt Associates Inc, 2002), online: <www.abtassociates.com/reports/2002601089183_30950.pdf>.

106 See David J. Campbell et al, "Land Use Conflict in Kajiado District, Kenya" (2000) 17:4 Land Use Policy 337; Adrien Detges, "Close-up on Renewable Resources and Armed Conflict: The Spatial Logic of Pastoralist Violence in Northern Kenya" (2014) 42 Political Geography 57; Jennifer Bond, "A Holistic Approach to Natural Resource Conflict: The Case of Laikipia County, Kenya" (2014) 34 J Rural Studies 117.

107 See Parselelo Kantai, "In the Grip of the Vampire State: Maasai Land Struggles in Kenyan Politics" (2007) 1:1 J East African Studies 107.

108 Paul Ndiritu Ndungu, *Report of the Commission of Inquiry into the Illegal/Irregular Allocation of Public Land* (Nairobi: Republic of Kenya, 2004); see Ambreena Manji, "The Grabbed State: Lawyers, Politics and Public Land in Kenya" (2012) 50:3 J Modern African Studies 467 at 468.

109 See Roger Southall, "The Ndungu Report: Land & Graft in Kenya" (2005) 32:103 Rev African Political Economy 142 at 142.

land grabbing remains an issue in Kenya, even to the extent that the 2012 *Land Act*,[110] which seeks to provide for the sustainable administration of Kenya's land and land-based resources, is described as "a deeply disappointing outcome of a decade's struggle over land policy."[111] All the issues highlighted so far have influenced the extent to which the country has been able to harness the development potential of its mineral resources.[112] In 2016, Kenya adopted a new mining law[113] to replace the 76-year-old colonial-era *Mining Act* of 1940. As Ayisi has observed, the 76-year period between the two statutes means that Kenya's mining policy and law has not kept pace with the wave of reviews of mining codes across Africa in the last three decades.[114]

Despite several decades of unsuccessful oil and gas exploration, Kenya received attention when Tullow Oil discovered commercially viable reserves near Lake Turkana in 2012.[115] Kenyan oil revenue is predicted to skyrocket in the 2020s, generating between $650 million and $2.7 billion annually for the Kenyan government, depending on the stability of global oil prices and how the resources are managed. The implication is that over the next decade, resource extraction will grow from contributing to approximately one percent of Kenya's GDP to approximately ten percent.[116] Investors are also interested in Kenya's hydrocarbons because of the country's close proximity to emerging economic giants China and India.[117] We postulate that the apparent shift towards some form of resource nationalism—to be discussed shortly—has been fueled by these promising statistics and the expected outcomes of resource extraction. However, there has also been speculation about the likely detrimental impacts of potential conflicts in the politically and economically marginalized county of Turkana.[118]

110 *Land Act, 2012* (Kenya), No 6 of 2012.

111 Ambreena Manji, "The Politics of Land Reform in Kenya 2012" (2014) 57:1 African Studies Rev 115 at 115.

112 See e.g., Nassim Salim Hadi, "Financing Options for Effects of Political Risk in Mining Industry in Kenya" (2016) 6:2 International Journal of Scientific and Research Publications 395 at 400 (stating that given that in Kenya, the consent of landowners is required before reconnaissance and prospecting licenses are issued, it is very difficult to obtain the consent of a large number of persons who may qualify as landowners in relation to a large swath of land that may be the subject of a reconnaissance or prospecting license application).

113 *The Mining Act, 2016* (Kenya, Gazette Supplement No 71) No 12 of 2016.

114 Martin Kwaku Ayisi, "The Legal Character of Mineral Rights under the New Mining Law of Kenya" (2017) 35:1 J Energy & Natural Resources L 25 at 28.

115 See Africa Centre for Open Governance, *Mixed Blessing? Promoting Good Governance in Kenya's Extractive Industries* (Nairobi: Africa Centre for Open Governance, 2014), online: <africog.org/wp-content/uploads/2015/10/Mixed-Blessing-Promoting-Good-Governance-in-Kenya%E2%80%99s-Extractive-Industries.pdf>.

116 See Kenya Civil Society Platform on Oil and Gas, Press Release, "Potential Government Revenues from Turkana Oil" (12 April 2016) at 17–18, online: <kcspog.org/wp-content/uploads/2016/04/Revenues-from-Turkana-Oil-April-2016.pdf> [Kenya Civil Society Platform].

117 Patricia I Vasquez, "Kenya at a Crossroads: Hopes and Fears Concerning the Development of Oil and Gas Reserves", online: (2013) 4:3 International Development Policy at 4, online: <https://poldev.revues.org/1646#text>.

118 See e.g. Kennedy Mkutu Agade, "'Ungoverned Space' and the Oil Find in Turkana, Kenya" (2014) 103:5 Commonwealth J Intl Affairs 497; Eliza M Johannes, Leo C Zulu & Ezekiel Kalipeni, "Oil Discovery in Turkana County, Kenya: A Source of Conflict or Development?" (2015) 34:2 African Geographical Rev 142; Charis Enns & Brock Bersaglio, "Enclave Oil Development and the Rearticulation of Citizenship in Turkana, Kenya: Exploring 'Crude Citizenship'" (2015) 67 Geoforum 78.

Kenya historically has had a liberal political economy in which the state is prominent in economic affairs while the private sector maintains a privilege.[119] This characteristic has allowed for "crony capitalism" whereby the political elite own large private companies and benefit from inside deals (including land deals) not known to the average citizen.[120] This "mixed economy" continues to underscore much of the discussions around development engendered by natural resource extraction. Kenya's local content and participation legislation is found in the *Petroleum (Exploration, Development and Production) Bill, 2015* [*Petroleum Bill*],[121] which was passed by Kenya's National Assembly in May 2016, but which the President declined to sign due to disagreements over certain provisions within it. When finally signed, the *Petroleum Bill* will repeal the *Petroleum (Exploration and Production) Act* of 1984 (revised in 2012), which has few local content provisions.[122] Part IV of the *Petroleum Bill* is devoted to local content arrangements and has provisions for the employment and training of Kenyans, preference for Kenyan goods and services, and a technology transfer program that seeks to build and develop country-based specialized technical, management, and professional skills relevant to upstream petroleum operations, as well as any additional facilities required for the advancement of technical skills in upstream petroleum operations. Also, specific attention is paid to local content in the draft *Petroleum Exploration, Development and Production (Local Content) Regulations, 2014* [*Local Content Regulations* or *Regulations*][123]—consisting of 49 regulations—which was prepared pursuant to the *Petroleum Bill*.[124] According to these *Regulations* (which are meant to flesh out the local content provisions of the enabling *Petroleum Bill*), local content means "the quantum or percentage of locally produced materials, personnel, financing, goods and services rendered in the petroleum industry value chain and which can be measured in monetary terms."[125] The *Petroleum Bill* also establishes the Upstream Petroleum Regulatory Authority, which is expected to establish the Local Content Development and Monitoring Unit responsible for the monitoring, coordination, and implementation of the provisions set out in the *Local Content Regulations*.[126] This is to ensure that indigenous Kenyan companies have a relatively equal playing field in bidding for contracts within the hydrocarbon sector.

119 Ochieng & Maxon, *supra* note 101 at xii.

120 John Harrington & Ambreena Manji, "Satire and the Politics of Corruption in Kenya" (2013) 22:1 Soc & Leg Stud 13.

121 *Petroleum (Exploration, Development and Production) Bill, 2015* (Kenya), a text of the bill is available online: <www.erc.go.ke/images/docs/Petroleum_Bill_3rd_Aug_2015.pdf> [*Kenya Petroleum Bill*].

122 *Petroleum (Exploration and Production) Act* (Kenya), c 308 2012, online: <faolex.fao.org/docs/pdf/ken64182.pdf> (section 9(1)(g) and (h) imposes an implied obligation on every petroleum contractor to "give preference to the employment of and training of Kenyan nationals in petroleum operations" and "to the use of products, equipment and services locally available").

123 *Petroleum Exploration, Development and Production (Local Content) Regulations, 2014* (Kenya), 2014, online: <www.erc.go.ke/images/docs/Petroleum_Local_Content_Regulations-PB-111014.pdf> [*Kenya Local Content Regulations*].

124 An earlier version of the *Petroleum Bill, 2015* had been prepared in 2014. It was under that bill that the *Local Content Regulations, 2014* were drafted. It is likely that the *Local Content Regulations, 2014* will be revised before the *Petroleum Bill, 2015* is signed into law.

125 *Kenya Local Content Regulations*, *supra* note 123, reg 2.

126 *Kenya Petroleum Bill*, *supra* note 121, ss 14–15.

As defined in the *Local Content Regulations*, an indigenous Kenyan company is a company incorporated under the *Kenyan Companies Act* with at least 51 percent of its equity owned by a Kenyan citizen, with Kenyan citizens holding at least 80 percent of executive and senior management positions and 100 percent of non-managerial and other positions.[127] Kenyan citizens are to be given priority consideration for employment and training opportunities in any project undertaken by a contractor, sub-contractor, or any other entity that holds a licence to operate in the upstream petroleum industry.[128] The plan for implementing this and the many other provisions in the *Regulations* are supposed to be clearly laid out during the permit bidding process and prior to the commencement of a project, as part of a contractor's Local Content Plan, subject to review by the Local Content Development and Monitoring Unit.[129]

According to *Regulation 35*, an annual Local Content Performance Report shall be submitted to the Upstream Petroleum Regulatory Authority that contains the following information:

> (a) specif[ies] by category of expenditure the local content on both a current and cumulative cost basis; (b) show[s] the employment achievement in terms of hours worked by Kenyans and foreigners, as well as their job positions and remuneration; (c) show[s] the training, industrial and technology transfer achievement availed to Kenyans and foreigners; [and] (d) show[s] the actual procurement of goods, works, and services executed.[130]

The penalty for noncompliance or submission of false information, as noted in *Regulation 47*, ranges from five hundred thousand to one million shillings (approximately between US$5,000 and US$10,000), depending on whether it is as a result of collusion between an indigenous Kenyan and a foreigner or the fault of an individual contractor or company. The penalty could also include the Authority withholding the approvals and permits required by the contractor to engage in petroleum activities until the breach is resolved.[131] Such offenders could be convicted to serve a prison term of three years or more.[132] The *Regulations* also indicate that a contractor who contravenes the provisions could face a fine of up to five million shillings (approximately US$10,000) or the cancellation of the existing contract.[133]

Overall, Kenya's local content mechanisms follow an incremental approach towards local equity participation. For instance, a petroleum agreement or license will only be granted to a company where at least one of its shareholders is an indigenous company with at least five percent equity participation in the company.[134] There is also a requirement for contractors to incorporate a joint venture company or arrange to have one of the shareholders hold ten percent equity participation or ten percent of the contract value.[135] The prescribed minimum levels of

127 *Kenya Local Content Regulations*, *supra* note 123, reg 2.

128 *Ibid*, reg 6(1).

129 *Ibid*, reg 6(6).

130 *Ibid*, reg 35.

131 *Ibid*, reg 47(5)(k).

132 *Ibid*, reg 47(3).

133 *Ibid*, reg 47(7)(d).

134 *Ibid*, reg 6(3).

135 *Ibid*, reg 6(5).

local content at the outset are set between ten and 30 percent for local goods, services, and for the recruitment and training of locals in management and "technical core" staff positions; however, other lower-level staff positions are to be held by Kenyans at a minimum starting level of 80 percent.[136] Within ten years of the implementation of these *Regulations* (from the date of their adoption) and the signing of a petroleum agreement, participation at all levels is expected to rise to between 60 and 100 percent whether that be in the area of goods and services or technical and managerial support.[137] It should be noted that the *Local Content Bill, 2016* was also recently developed, which seeks to expand all these local ownership and participation arrangements to the non-hydrocarbon mineral resource sectors.[138]

In sum, Kenya now faces the burden of managing the multiple stakeholders and diverse range of political and socio-economic issues associated with the extractive sector, as well as the challenge of utilizing the resources in a sustainable manner to avoid the ignoble path that leads to the so-called "resource curse". For instance, issues of environmental protection (the oil and gas regions fall within the arid and semi-arid parts of Kenya)[139] and oil community stakeholder engagement (most parts of the oil regions have faced historical marginalization by successive governments)[140] are staring Kenya in the face. Also, the current political atmosphere in Kenya cannot be taken for granted to ensure that the "local" is properly defined to address broader issues rather than a narrow focus on job creation and goods and services procurement. Ultimately, the way in which Kenya addresses these issues will determine whether it can be described as making *serious attempts* to establish a developmental state.

4.2. Tanzania

For three decades—from 1967 to 1997—Tanzania's development policy was guided by the *Arusha Declaration* of 1967, which jettisoned the colonial, World Bank-inspired development model and replaced it with a socialist model that ostensibly integrated the people of Tanzania into formal development planning in an effort to tailor development objectives to local needs.[141] During this period, Tanzania's policy was to avoid reliance on World Bank-like assistance packages as well as other forms of foreign gifts and loans, convinced that accepting them would endanger its self-reliance and independence.[142] However, in terms of socio-economic development, this policy was a failure, as the structures it erected did not sufficiently respond to "changing market and technological conditions" in the domestic and

136 *Ibid* at 21.

137 *Ibid*.

138 See *Local Content Bill, 2016* (Kenya), No 149 of 2016, online: <www.parliament.go.ke/the-senate/house-business/senate-bills/item/download/2966_e471bef494c21bbc22149969a52b834d>.

139 Chrispine Oduor et al, "The Political Economy of the Extractive Sector" in Miriam W Oiro Omolo & Germano Mwabu, eds, *A Primer to the Emerging Extractive Sector in Kenya: Resource Bliss, Dilemma or Curse* (Nairobi: Institute of Economic Affairs, 2014) 177 at 181.

140 *Ibid*.

141 See Michael Jennings, "'We Must Run While Others Walk': Popular Participation and Development Crisis in Tanzania, 1961–9" (2003) 41:2 J Modern African Studies 163.

142 Julius Nyerere, *The Arusha Declaration and TANU's Policy on Socialism and Self-Reliance* (Tanzania: Tanganyika African National Union, 1967), online: <www.marxists.org/subject/africa/nyerere/1967/arusha-declaration.htm>.

global economy, which required the involvement of all partners in development.[143] It also failed because it "failed to effectively mobilize domestic resources and capabilities to meet the emerging challenges of market-oriented and private sector-led development."[144] In 1999, Tanzania adopted the *Tanzania Development Vision 2025* [Vision], calling for a "developmental mindset"[145] focused on "private sector-led" economic growth.[146] The Vision redefined the role of the Tanzanian state as that of facilitating "strategic investments and selective industrial support."[147] The Vision states:

> The government will have to put in place affirmative action programmes which provide special support for promoting the participation of all the indigenous population in the wealth creation and ownership process. These programmes will need to be effectively supported to ensure that the place of the indigenous Tanzanians in the ownership and control of the economy is enhanced.[148]

However, the effective implementation of the Vision has been impeded by the state's political leadership. While many believe that President John Magufuli has shown a leadership style positively different from that of his predecessor, Tanzania's developmental mindset has been called into question by some observers who see "a wide authoritarian streak" in Magufuli's "populism."[149] President Magufuli is said to have "shut down newspapers," stopped the live broadcasting of parliamentary debates, and banned political rallies until 2020.[150] These actions have negative implications for the implementation of the Vision's statement that indigenous participation in wealth creation should be promoted.

One area of opportunity for the implementation of the Vision is the extractive sector. Tanzania is endowed with large deposits of gold, diamond, tanzanite, tin, copper, nickel, iron, phosphate, gypsum, coal, and uranium.[151] Although oil and gas exploration has been going

143 Planning Commission, *The Tanzania Development Vision 2025*, (1999) at 1, online: <www.tzonline.org/pdf/theTanzaniadevelopmentvision.pdf> [*Tanzania Vision 2025*]; see Nyerere, *supra* note 142 at 11; Ernest T Mallya, "A Critical Look at Tanzania's Development Vision 2025" (January 2000) at 1, online: <unpan1.un.org/intradoc/groups/public/documents/idep/unpan002404.pdf>.

144 *Tanzania Vision 2025, supra* note 143 at 11.

145 *Ibid* at 17.

146 *Ibid* at 11.

147 *Ibid* at 24.

148 *Ibid*.

149 Agence-France Presse, "Democracy v Development in Magufuli's Tanzania" *Mail Online* (14 October 2016), online: <www.dailymail.co.uk/wires/afp/article-3837895/Democracy-v-development-Magufulis-Tanzania.html>.

150 *Ibid*; see also "Magufuli's 'Bulldozing' Leadership Questioned", *Deutsche Welle* (1 July 2016), online: <www.dw.com/en/magufulis-bulldozing-leadership-questioned/a-19371737>; Fumbuka Ng'wanakilala, "Tanzania Police Uses Teargas at Opposition Rally, Bans Protests" *Reuters* (7 June 2016), online: <www.reuters.com/article/us-tanzania-politics-idUSKCN0YT2G7>; Oxfam America, *The Weak Link: The Role of Local Institutions in Accountable Natural Resource Management in Peru, Ghana, Senegal, and Tanzania*, (2016) at 57, online: <www.oxfam.org/sites/www.oxfam.org/files/file_attachments/rr-the-weak-link-synthesis-150416-en.pdf>.

151 See Ministry of Energy and Minerals, *Tanzania Mining Industry Investors Guide*, (June 2015) at 11, online: <mem.go.tz/wp-content/uploads/2015/11/04.11.15TANZANIA_Mining-Industry-Investor-Guide-June-2015_v10b.pdf>.

on in the country since the 1950s and sizeable reserves of natural gas have since been found, production only began in 2005.[152] Renewed exploration activities in 2010 suggested the existence of oil deposits as well, drawing several oil and gas companies to Tanzania.[153] While these finds together with the existing mineral deposits put Tanzania on the path to economic prosperity, several challenges weaken the state's ability to make optimal use of its resources. With regard to the mining sector, challenges include "weak linkages between the sector and local supply chains; low domestic value addition; limited multiplier effects and employment creation; environmental-related conflicts; and technical and institutional capacities for effective management of the sector."[154] For the oil and gas sector, disputes between black Africans and Asian and Arab Tanzanians,[155] as well as between the Tanzanian mainland and Zanzibar[156]—such as those "over hypothetical royalties" for the yet-to-be-discovered oil around the islands—have been identified as threats to the sector.[157] However, a new draft land policy is under consideration to clarify some of the controversial issues that may affect extractive resource development.[158]

The Tanzanian government believes that the enactment of local content laws is a key vehicle for operationalizing the developmental mindset through the affirmative promotion of domestic participation in economic activity within the extractive sector.[159] In relation particularly to the mining sector, however, studies show that weak and uncoordinated legislation, informed by a liberal approach to foreign direct investment, has resulted in very limited participation of Tanzanians in the mining sector and minimal inter-sectoral linkages and multiplier effects.[160]

152 David M Anderson & Adrian J Browne, "The Politics of Oil in Eastern Africa" (2011) 5:2 J East African Studies 369 at 379.

153 *Ibid* at 381.

154 Tanzania, Ministry of Finance and Economic Affairs, *National Strategy for Growth and Reduction of Poverty II*, (July 2010) at 8, online: <www.international.gc.ca/development-developpement/assets/pdfs/countries-pays/NATIONAL-STRATEGY-FOR-GROWTH-AND-REDUCTION-OF-POVERTY-TANZANIA.PDF>.

155 David Booth et al, *East African prospects: an update on the political economy of Kenya, Rwanda, Tanzania and Uganda* (London: Overseas Development Institute, 2014) at 35, online: <www.odi.org/sites/odi.org.uk/files/odi-assets/publications-opinion-files/8945.pdf>.

156 *Ibid*.

157 Nwapi, "A Survey of the Literature," *supra* note 91 at 1.

158 See Tanzania, Ministry of Lands and Physical Planning, *National Land Use Policy*, draft (May 2016), online: <www.ardhi.go.ke/wp-content/uploads/2016/06/Draft-National-Land-Use-Policy-May-2016.pdf>.

159 Ministry of Energy and Minerals, *The National Petroleum Policy of Tanzania*, Draft (2 April 2014) at 24, online: <www.tpdc-tz.com/wp-content/uploads/2015/04/National-Petroleum-Policy.pdf>; Ministry of Energy and Minerals, *Local Content Policy of Tanzania for the Oil and Gas Industry*, Draft One (Dar es Salaam: April 2014) at 13, online: <mem.go.tz/wp-content/uploads/2014/05/07.05.2014local-content-policy-of-tanzania-for-oil-gas-industry.pdf> [*Tanzania Draft Local Content Policy*].

160 See Michael W Hansen, "Reaping the Rewards of Foreign Direct Investment: Linkages between Extractive MNCs and Local Firms in Tanzania" (2013) Danish Institute for International Studies, Working Paper No 22 at 15, online: <www.diis.dk/files/media/publications/import/extra/wp2013-22_extractive-mncs-tanzania_michael-w-hansen_web_0.pdf>; Michael W Hansen et al, "The Political Economy of Local Content in African Extractives: Lessons from Three African Countries" (Paper presented at the 46th Annual Meeting of the Danish Society for Political Science, Vejle, Denmark, 23–24 October 2014) at 13,

The main reason for these problems may be the absence of targeted local content legislation in Tanzania's mining sector.[161] However, Tanzania's *Mining Act, 2010* [*Mining Act*][162] contains provisions prohibiting the grant of "a primary mining licence for any minerals" to individuals, partnerships, or corporations unless the individual is a Tanzanian national; the partnership is composed exclusively of Tanzanian nationals; or in the case of a corporation, the members and directors are all Tanzanians, and control over the company is exclusively exercised by Tanzanians from within Tanzania.[163] Licences for gemstone mining are exclusively reserved for Tanzanians unless it is determined that "specialised skills, technology or high level of investment" is most likely to be required.[164] Also, subsection 49(2) of the *Mining Act* requires applicants for a mining license to submit an employment and training plan for Tanzanians, a succession plan on expatriate employees, and a procurement plan for made-in-Tanzania goods and services.[165] Licence holders are required to keep record of and report on the employment and training of Tanzanians.[166]

With regard to the petroleum sector, in 2014 Tanzania published a *Draft Local Content Policy* [Draft LCP],[167] and in 2015 it adopted a new petroleum statute with explicit LCP provisions—*The Petroleum Act, 2015* [*Petroleum Act*].[168] This was a notable development as the preceding statute of 1980 had no such provisions. While the adoption of local content reflects international trends, it was also an attempt by Tanzania to avoid in the petroleum sector the mistake it made in the mining sector by allowing the operation of foreign mining companies in the country, who were in no way subject to LCPs. Subsection 3(1) of the *Petroleum Act* defines local content as:

> the quantum of composite value added to, or created in, the economy of Tanzania through deliberate utilization of Tanzanian human and material resources and services in the petroleum operations in order to stimulate the development of capabilities indigenous of Tanzania and to encourage local investment and participation.[169]

online: <openarchive.cbs.dk/bitstream/handle/10398/9014/Wendelboe%20Hansen.pdf?sequence=1> ; Vuyo Mjimba, "The Nature and Determinants of Linkages in Emerging Minerals Commodity Sectors: A Case Study of Gold Mining in Tanzania" (2011) The Open University, Making the Most of Commodities Programme, Discussion Paper No 7, online: <www.commodities.open.ac.uk/discussionpapers>; Mike Morris, Raphael Kaplinsky & David Kaplan, "Commodities and Linkages: Industrialisation in Sub Saharan Africa" (2011) The Open University, Making the Most of Commodities Programme, Discussion Paper No 13, online: <www.commodities.open.ac.uk/discussionpapers>.

161 Other reasons include corruption and the political economy of policy-making in Tanzania.

162 *The Mining Act, 2010* (Tanzania), No 14 of 2010, online: <mem.go.tz/wp-content/uploads/2014/02/0013_11032013_Mining_Act_2010.pdf>.

163 *Ibid*, s 8(2).

164 *Ibid*, ss 8(3)–(4).

165 *Ibid*, ss 49(2)(f), (h), 52(e)–(f).

166 *Ibid*, Second Schedule, s 2(a)(iii).

167 *Tanzania Draft Local Content Policy*, *supra* note 159.

168 *The Petroleum Act, 2015* (Tanzania), No 8 of 2015, online: <mem.go.tz/wp-content/uploads/2014/02/17.06.15A-BILL-PETROLEUM-ACT-2015-Updated-version-15.6.15.pdf> [*Tanzania Petroleum Act*].

169 *Ibid*, s 3.

Both the National Oil Company and the Petroleum Upstream Regulatory Authority (PURA) are required to promote local content and the participation of Tanzanians in the petroleum sector.[170] Project proponents are required to submit local content plans to the regulatory authority and to adhere to any approved plans.[171] The *Petroleum Act* mandates that preference be given to goods "produced or available in Tanzania" and to services rendered by Tanzanians or local companies; where the required goods and services are not available in Tanzania, they are to be provided by a company which has a joint venture with a local company with no less than a 25 percent participating share.[172] The *Act* defines "local company" mainly in terms of local registration and ownership: a Tanzania-incorporated company that is 100 percent owned by Tanzanians, "or a company that is in a joint venture partnership with a Tanzanian citizen or citizens whose participating share is not less than fifteen percent."[173] This second arm of the definition provides a lower threshold than the threshold required for a procurement company where goods and services are not available in Tanzania, since in the latter case, the goods and services are to be provided by a company that is in joint venture partnership with a local company which has at least a 25 percent participating share. The definition of "local company" under subsection 220(9) of the *Petroleum Act* does not apply to local companies for the purposes of subsection 220(2). This is because subsection 220(3) proclaims that the 25 percent threshold applies specifically to "[t]he local company referred to in subsection (2)." It is thus not legally possible for a company that qualifies as a "local company" under the second arm of the definition under subsection 220(9) to bypass the 25 percent threshold requirement for the procurement of goods and services.

The *Petroleum Act* also makes provisions for employment and training of Tanzanians with a view to facilitating technology transfer to Tanzanians. For instance, a licence-holder or contractor is obliged to submit a detailed program to PURA for the recruitment and training of Tanzanians in all phases of petroleum operations.[174] The program, which cannot be varied without PURA's approval, must take into account gender and equity issues, as well as the situation of persons with disabilities and host communities, in accordance with Tanzania's *Employment and Labour Relation Act*.[175] To ensure compliance with the provisions, the licence-holder or contractor is required to submit an annual report to PURA detailing its provision of the program, including any progress made by Tanzanians in the training program and the "steps taken … to close any identified learning gaps."[176] Section 240 of the *Petroleum Act* creates "general offences" for any person who "knowingly or recklessly" provides "false or misleading" information in any material particular in respect of any requirement under the *Act*. It establishes a penalty of not less than 100 million Tanzanian shillings (approximately US$44,700) in fines or a term of imprisonment of not less than ten years or both in the case

170 *Ibid*, ss 10(2)(l), 13(2)(e).

171 *Ibid*, ss 52(2)(a)(v), 161(i), 220(5)(c), 221(1).

172 *Ibid*, ss 220(1)–(3).

173 *Ibid*, s 220(9).

174 *Ibid*, s 221(1).

175 *Ibid*, ss 221(2)–(3), (5). "Host communities" is defined as the "inhabitants of the local area in which petroleum operations or gas activities take place" (*ibid*, s 221(5)).

176 *Ibid*, s 222.

of individuals, and in the case of corporations, a fine of not less than one billion Tanzanian shillings (US$447,000) or a term of imprisonment of not less than five years or both.

It is noteworthy that, unlike the *Petroleum Act, 2015*, the original *Draft LCP* contains an explicit definition of "local": "[t]he Tanzania Mainland and its people."[177] Its definition of local content also differs slightly from that of the *Petroleum Act*: "[t]he added value brought to the country in the activities of the oil and gas industry in the United Republic of Tanzania through the participation and development of local Tanzanians and local businesses through national labour, technology, goods, services, capital and research capability."[178] The *Petroleum Act*'s reference to "deliberate utilization of Tanzanian human and material resources and services"[179] suggests recognition that value addition should not be expected to occur by accident or in the ordinary course of events, but is to be pursued deliberately. Elsewhere, however, the *Draft LCP* defines local content as "the added value brought to a host nation (and regional and local areas in that country) through the activities of the oil and gas industry."[180] The reference to "regional and local areas" under the *Draft LCP* departs from the position in other states and represents explicit recognition that the localities or regions where oil and gas development activities take place deserve special recognition in local content design and implementation.[181] Furthermore, the *Draft LCP* recognizes the need to develop "Local local content"[182]—what Warner terms "community content"[183]—with the objective of enhancing the contribution of petroleum resources to the development of local communities and assisting companies to obtain the "social licence to operate."[184] While the *Petroleum Act* discards the idea of "Local local content," it requires licence-holders and contractors to take into account host communities in their recruitment and training programs. The *Draft LCP* explicitly encourages licence-holders to, "as far as possible," seek their workforce, materials, and services from the communities in which they operate.[185] However, neither the *Petroleum Act* nor the *Draft LCP* call for special preference to be given to host communities over other Tanzanians.

In sum, Tanzania has made significant progress in establishing a legal framework for local content implementation in the petroleum sector, though the mining sector lags behind. As we argue in Part 5, it may serve Tanzania well to revisit the idea of "Local local content" contained in the *Draft LCP*, which the *Petroleum Act* abandoned. Lastly, although Tanzania is relatively peaceful, it faces some of the same challenges to sustainable extractive resource development faced by Kenya.

177 *Tanzania Draft Local Content Policy*, *supra* note 159 at iii.

178 *Ibid*. Compare with the definition provided in the *Tanzania Petroleum Act*, *supra* note 168, ss 3(1).

179 *Tanzania Petroleum Act*, *supra* note 168, s 3.

180 *Tanzania Draft Local Content Policy*, *supra* note 159 at 7.

181 Nwapi, "A Survey of the Literature," *supra* note 91 at 9.

182 *Tanzania Draft Local Content Policy*, *supra* note 159 at 24.

183 Michael Warner, *Community Content: The Interface of Community Investment Programmes with Local Content Practices in the Oil and Gas Development Sector* (2007), Overseas Development Institute, Briefing Note 9 at 5, online: <www.odi.org/sites/odi.org.uk/files/odi-assets/publications-opinion-files/2087.pdf>.

184 *Tanzania Draft Local Content Policy*, *supra* note 159 at 24.

185 *Ibid* at 24–25.

4.3. Rwanda

Rwanda is perhaps most known for its 1994 genocide in which between 500,000 and 800,000 people were murdered, mostly members of the ethnic Tutsi.[186] The genocide highlighted the tension in Rwanda between the dominant ethnic groups in the country (the Hutu and the Tutsi) and it left the country in utter ruin, "with very little economic revenue and a lack of incentive for the two social groups to work together to rebuild."[187] Perhaps the genocide's deadliest blow to the country's prospects for economic growth was the near extinction of Rwanda's professional class.[188] This was well pronounced in the mining sector. In 2009, the number of locally available mining scientists in Rwanda was just 40, out of which only four were below the age of 40.[189] A 2012 skills survey revealed that the Rwandan mining sector alone had a total skills scarcity of 2,721 labour units in the short term, of which 89.9 percent were skilled mining artisans, 4.1 percent were managers, 2.8 percent were technicians, 1.4 percent liberals, and 1.8 percent scientists.[190] The survey also reported the absence of training institutions in Rwanda offering programs for mining professionals and technicians.[191] This has resulted in Rwanda relying on expatriate professionals and technicians for its economic survival. Since the expatriates generally do not have long-term economic goals in Rwanda and eventually repatriate their funds to their home countries, the economic benefits of mining do not trickle down to ordinary Rwandans.[192] Further, the extensive reliance upon expatriate workers prevents Rwanda from developing local capacity to harness its mining resources. Given the importance of mining to economic development in Rwanda,[193] there is a compelling need for Rwanda to establish a comprehensive strategy to develop local capacity.

186 John Eriksson, *The International Response to Conflict and Genocide: Lessons from the Rwanda Experience*, OECD Joint Evaluation of Emergency Assistance to Rwanda, Synthesis Report, (March 1996), online: <www.oecd.org/derec/50189495.pdf>.

187 Laura H Wicks, *Rwanda's Miracle: From Genocide and Poverty to Peace and Economic Prosperity* (MA Thesis, Florida International University, 2014), FIU Electronic Theses and Dissertations, Paper 1526 at 21, online: <digitalcommons.fiu.edu/cgi/viewcontent.cgi?article=2614&context=etd>.

188 See Rwanda Development Board, *Mining Sector Report: Rwanda Skills Survey 2012*, at 12–21, online: <www.lmis.gov.rw/scripts/publication/reports/Mining.pdf> [*Rwanda Development Board*]; Jasper van Teeffelen, *The EU Raw Material Policy and Mining in Rwanda: Policy Coherence for Development in Practice* (February 2012) at 25, online: Fair Politics <www.fairpolitics.nl/doc/Impact%20Study%20FINAL.pdf>; African Union, *Rwanda: The Preventable Genocide*, July 2000 at paras 14.6, 17.5 and 17.7, online <www.refworld.org/pdfid/4d1da8752.pdf>.

189 Ministry of Natural Resources (MINIRENA), "A Revised Rwandan Mining Policy: Transforming Rwanda's Mining Industry", October 2009, at 13, online: <rnra.rw/uploads/media/Mining_policy_draft-sent_to_the_minister-30-10-09.pdf> [*Revised Rwandan Mining Policy*].

190 Rwanda Development Board, *supra* note 188 at vii.

191 *Ibid*.

192 See Chilenye Nwapi, "Addressing the Capacity Building Challenge in the Mining Sector in Rwanda: The Implications of Rwanda's 2014 Mining and Quarry Law" 61:2 J Afr L [forthcoming in 2017] [Nwapi, "Addressing the Capacity Building Challenge in Rwanda"].

193 In 2010 the mining sector accounted for over 40% of Rwanda's foreign exchange earnings and in 2011 was rated the "most prosperous" in Rwanda, falling behind only the tourism industry. See *Rwanda Development Board*, *supra* note 188 at 1. The country is best known for the 3T minerals: tin (cassiterite), tungsten (wolframite) and tantalum (coltan)—minerals that have been designated as "critical" because of their "particularly high risk of supply shortage" and which are "particularly important for the value

In view of the 1994 Rwandan genocide and the progress the country has made since, Rwanda is said to represent a "developmental miracle"[194] and an economic model for the developing world.[195] Biedermann writes that the genocide "set the scene for a dramatic change of performance,"[196] a transformation from aid-dependency to self-reliance. Rwanda's president Paul Kagame is described as "[t]he 'entrepreneur' behind Rwanda's development strategy."[197] One major difference between Kagame's government and those preceding it is that in the current government political parties are not defined along ethnic lines. Further, every party is represented in Parliament, which provides each party an opportunity to contribute to public policy-making and implementation.[198] Notwithstanding this positive narrative, Rwanda's political climate is one of authoritarianism; Kagame's intolerance of criticism has manifested in extrajudicial killings, widespread arrests of opposition members, and repressive laws that restrict free speech, leading some observers to wonder whether Rwanda's rapid economic growth justifies Kagame's political repression.[199] Much of the criticism of Rwanda's developmental model focuses on this apparent political repression;[200] but as discussed in Part 2, there is debate about whether developmental states are inevitably autocratic. In fact, Rwanda's success has been linked with "developmental patrimonialism"—centralized planning and management of resource rents[201]—aligning it closely to the East Asian model. However, as noted previously,

chain." See EC, *Tackling the Challenges in Commodity Markets and on Raw Materials*, [2011] OJ, C 318/12 at 12.

194 Laura Mann & Marie Berry, "Understanding the Political Motivations that Shape Rwanda's Emergent Developmental State" (2016) 21:1 New Political Economy 119 [Mann & Berry].

195 Patricia Crisafulli & Andrea Redmond, *Rwanda, Inc: How a Devastated Nation Became an Economic Model for the Developing World* (New York: Palgrave Macmillan, 2012) at 110.

196 Biedermann, *supra* note 21 at 4.

197 Sabrina Kimberly Brandt, *An Asian Miracle in Africa? On the Institutional Context of Developmentalism as a Determinant Factor for a Successful Development Strategy: A Case Study of Rwanda* (MA Thesis, Graduate School of Development Studies, Institute of Social Studies, 2009) at 35, online: <https://thesis.eur.nl/pub/6627/BrandtAnAsianMiracle.pdf> [Brandt].

198 Wicks, *supra* note 187 at 22.

199 See Joann Weiner, "Does Rwanda's Economic Prosperity Justify President Kagame's Political Repression?", *Washington Post* (13 August 2014), online: <www.washingtonpost.com/blogs/she-the-people/wp/2014/08/13/does-rwandas-economic-prosperity-justify-president-kagames-political-repression/?utm_term=.5a56a85f3955>; Human Rights Watch, "Rwanda: Repression Across Borders" (28 January 2014), online: <www.hrw.org/news/2014/01/28/rwanda-repression-across-borders>.

200 See e.g., George BN Ayittey, "The Non-Sustainability of Rwanda's Economic Miracle" (2017) 7:2 Journal of Management and Sustainability 88–104; Andrew Friedman, "Kagame's Rwanda: Can an Authoritarian Development Model be Squared with Democracy and Human Rights" (2012) 14 Oregon Rev of Int'l Law 253; Filip Reyntjens, "Rwanda: Progress or Power Keg?" (2015) 26:3 Journal of Democracy 19; Shawn Russel, "The Benevolent Dictatorship in Rwanda: Negative Government, Positive Outcomes?" (2012) 32:1 The Applied Anthropologist 12.

201 See David Booth & Frederick Golooba-Mutebi, "Developmental Patrimonialism? The Case of Rwanda" (2011) Overseas Development Institute, Africa Power and Politics Programme, Working Paper No 16, online: <www.institutions-africa.org/filestream/20110321-appp-working-paper-16-developmental-patrimonialism-the-case-of-rwanda-by-david-booth-and-frederick-golooba-mutebi-march-2011>.

it is our contention that patrimonialism must gradually give way to popular participation if development is to be sustained over the long term.[202]

Kagame's development strategy is described as "apolitical" in that it conceives of "markets as apolitical spaces where 'economics' can work."[203] In contrast to the neoliberal theory which abhors government involvement in economic activity, Kagame's approach allows for government involvement but in an apolitical manner, pushing politics into the shade "to get serious about development."[204] A central component of Rwanda's overall development strategy is its *Domestic Market Recapturing Strategy* released in March 2015, which prioritizes "the development of Rwanda's existing and potential production capacity"[205] and is supported by a "Made in Rwanda" campaign to encourage consumption of Rwanda-produced goods and boost the domestic market.[206]

Other reasons for Rwanda's success include: (1) the establishment of an effective public service that provides essential benefits to ordinary citizens rather than only the elite;[207] (2) a clear developmental vision that is shared by almost the entire Rwandan population;[208] (3) government-initiated private investment to finance politics and avoid dependence on foreign donors;[209] (4) low corruption in the civil service;[210] (5) "developmental patrimonialism";[211] and (6) home-grown initiatives that cause ethnic identity to recede to the background and give citizens a sense of national identity.[212] This last factor advances national "reconciliation and unification" due to its domestic nature.[213] Developmental patrimonialism reduces the "party's need for more overt forms of corruption that might divert resources away from developmental needs."[214]

With respect to the mining sector, the economic exigencies of the time have dictated Rwanda's policy focus. Following the genocide in the 1990s and in order to address the

202 For further discussion of the contrast between authoritarian and democratic developmentalism, see the text accompanying notes 42–45.

203 Mann & Berry, *supra* note 194 at 120–122.

204 *Ibid* at 122.

205 Rwanda, Ministry of Trade and Industry, *Domestic Market Recapturing Strategy*, (March 2015) at 5, online: <www.minicom.gov.rw/fileadmin/minicom_publications/Planning_documents/Domestic_Market_Recapturing_Strategy.pdf>.

206 Rwanda, Ministry of Trade and Industry, News Detail, "Rwanda Embarks on Made in Rwanda Brand" (23 December 2014), online: <www.minicom.gov.rw/index.php?id=24&tx_ttnews%5Btt_news%5D=912&cHash=fc72f3dc09ab3c0c08a81faa2aee8b21>.

207 Biedermann, *supra* note 21 at 13 (stating that "nearly the entire society genuinely shares the common vision to rebuild the country").

208 *Ibid* at 9–10.

209 *Ibid* at 12–13.

210 Brandt, *supra* note 197 at 39.

211 Developmental patrimonialism manifests itself in the use of "party-statals to centralise investment in priority areas and crowd in private sector participation". Mann & Berry, *supra* note 194 at 124.

212 Biedermann, *supra* note 21 at 14.

213 *Ibid*.

214 Mann & Berry, *supra* note 194 at 124.

problem of poor investments in the mining sector, Rwanda moved from a state-based to a market-based economy, characterized by privatizations of state-owned mines, including its state-owned mining company, *Régie d'Exploitation et de Développement des Mines*.[215] However, following the genocide, the rebuilding of the mining sector was a slow development. It took ten years for Rwanda to formulate a mining policy,[216] and 14 years to enact a mining law.[217] Yet the government recognized that "[o]ne of the key means of ensuring that the mining industry has a positive impact on rural communities and the country as a whole is through the development of local skills."[218] To promote local skill development, the government enacted a set of policy and legislative reforms, which included the establishment, in 2009, of the Public Sector Capacity Building Secretariat as one of the country's strategies for rebuilding the capacity of its public institutions.[219] In 2010, the Rwanda Geology and Mining Authority (established in 2008) published a four-year strategic plan covering the 2010 to 2013 period, with the objective of reviving and sustaining the geology and mining subsector.[220] The implementation programs included initiatives targeted at "add[ing] value to mineral and quarry resources in Rwanda."[221] In 2011, the government adopted the Strategic Capacity Building Initiative to address its capacity building challenges in a more targeted manner.[222] An important step towards realizing the Strategic Capacity Building Initiative was the provision of a legal framework for integrating local capacity building into mining development and which would result in increased government revenue. Greater recognition, formalization, and promotion of artisanal and small-scale mining were viewed as important means of integrating local capacity building into mining policy reform.[223] These strategic initiatives led to the enactment of *Law No 13/2014 of 20/05/2014 on Mining and Quarry Operations* [*Law No 13/2014*],[224] which came into force on June 30, 2014.[225]

215 Rachel Perks, "Re-framing the Nature and Success of the 'Post-Conflict' Mineral Reform Agenda in Rwanda" (2016) 3 Extractive Industries & Society 329 at 335–336.

216 Rwanda Geology and Mining Authority, *Strategic Plan 2010–2013*, final draft (April 2010) at 14, online: <rnra.rw/uploads/media/Stragetegic_Plan-OGMR-April_2010_1_validated.pdf> (pointing out that the 2010 mining policy replaced a 2004 mining policy, which, apparently, was formulated 10 years after the genocide).

217 *Law No 37/2008 of 11/08/2008 on Mining and Quarry Exploitation* (Rwanda).

218 *Revised Rwandan Mining Policy*, *supra* note 189 at 13.

219 Republic of Rwanda, 5 Years Capacity Building Strategy for Local Governments (2011–2015), December 2010 at 10, online: <www.minecofin.gov.rw/fileadmin/templates/documents/LG_DIstricts/Fiscal_Decentralisation_document/Local%20Government%20Capacity%20Building%20Strategy-%20 2011-2015.pdf> [Capacity Building Strategy]; Omar Munyaneza, Economics of Adaptation, Water Security and Climate Resilient Development in Africa: Detailed Assessment of the Learning Needs in Rwanda, WACDEP / GWP Capacity Development in Africa 2013-2015, Final Report, November 2013 at 9, online: <http://www.gwp.org/globalassets/global/wcdp-images/wacdep-staff-portraits/cdreports/rwanda-wacdep-capacity-development-needs-assessment-report.pdf>.

220 Capacity Building Strategy, *supra* note 219.

221 *Ibid* at 6.

222 Joel Beasca, *Project to Support the Strategic Capacity Building Initiative (SCBI) – Central Government Component Implemented by the Government of Rwanda and UNDP (2012-2013)*, Summative Evaluation Report, Final Version, October 2014 at 2.

223 Nwapi, "Addressing the Capacity Building Challenge in Rwanda", *supra* note 192.

Article 48 of *Law No 13/2014* requires mineral licence-holders and their subcontractors to comply with applicable labour laws in Rwanda. It also requires a mineral licence to "include conditions requiring its holder to provide training to employees to enable them to perform well their duties."[226] There is a requirement under Article 49 for preferential treatment to be given to "Rwandan contractors" in the procurement of services, subject to a proviso that "the rates, quality and time schedule for delivery [of the services] are competitive to what is submitted by [non-resident] contractors."[227] Article 49 also provides for priority to be given to made-in-Rwanda "materials and goods," provided they are "comparable in quality, quantity, price, and delivery to materials and goods produced outside of Rwanda." With a view to enhancing the domestic value addition of the mining sector, Article 50 proclaims that "a mineral licence may include provisions requiring a holder" to consider the "feasibility" of processing and refining their mineral products in Rwanda.[228]

Law No 13/2014 remains the key vehicle to add value to the mining sector through local content requirements in the country. A fuller developmental state critique of the provisions of this law is offered in Part 5. It is appropriate, however, to stress here that the LCPs of the *Law No 13/2014* are meagre, both quantitatively and qualitatively. In addition, they are contained in Chapter IX of the law titled, "Miscellaneous, Transitional and Final Provisions," which raises questions as to Rwanda's commitment in deploying its legal resources to addressing its debilitating problem of local capacity deficit in the mining sector.

5. THE GAP BETWEEN DECLARATIONS AND ACTIONABLE STEPS

We now turn to the question of whether the legislative interventions of Kenya, Tanzania, and Rwanda qualify the states, respectively, as "developmental states." All three states have demonstrated varying degrees of agency by drafting and enacting policies and laws to enable their respective governments to take advantage of the current and projected resource booms they are experiencing. However, the sentiments expressed in these policy documents and draft or enacted legislation have not yielded effective outcomes in practice. In part, this is due to the relatively early stage of implementation of the policies and laws; however, there could be a lack of political will to put forward the steps necessary to truly achieve developmental goals. Based on the contents of these documents, we can offer some projections as to each state's qualifications as a developmental state.

224 *Law No 13/2014 of 20/05/2014 on Mining and Quarry Operations* (Rwanda), online: <www.minirena.gov.rw/fileadmin/Mining_Subsector/Laws__Policies_and_Programmes/Laws/1.Law_on_Mining_and_Quarry_Operations.pdf> [*Law No 13/2014*].

225 *Ibid.* As we present this positive narrative about Rwanda it is important to note Rwanda's ignoble role as a transit route for conflict minerals in the Great Lakes Region, a factor that fuelled the crisis in Democratic Republic of the Congo. See *Final report of the Group of Experts on the Democratic Republic of the Congo*, UNSC, 2014, Supp No 42, UN Doc S/2014/42.

226 *Law No 13/2014*, *supra* note 224, art 48.

227 *Ibid*, art 49.

228 *Ibid*, art 50.

5.1. Kenya

Kenya has yet to officially enact any LCPs into law. The currently in force *Petroleum (Exploration and Production) Act* of 1984 (revised in 2012), has no local content provisions. Both the *Petroleum Bill* and the draft *Local Content Regulations*, discussed in Part 4, are still in draft form. Absent legislative enactments, it is unclear how companies and contractors are incentivized to incorporate the minimum levels of local content required in these draft policies when they begin operations in the country. This underscores the need for Kenya to accelerate the enactment of these draft bills to avoid the Ghanaian experience, in which significant opportunities were lost during the development phase of its Jubilee project due to delays in adopting local content legislation.[229]

In its current form, the draft *Local Content Regulations* has some significant shortcomings. For instance, it is not clear whether it applies only to the oil and gas sector, or also to the mining sector. The drafters seemingly failed to recognize that the extractive sector is not homogeneous, but is made up of two subsectors that operate under different laws, regulations, and institutional arrangements. A look at the LPC provisions in the draft *Local Content Regulations* illustrates that it is heavily focused on oil and gas, compared to mining.[230] Each of these subsectors has distinct needs and challenges and therefore, they should be approached accordingly.[231] For instance, since the oil and gas subsector is only just emerging in Kenya, it can be expected that there will be a greater skills shortage in this subsector than in the mining subsector. Given that one of the challenges to the success of LCPs is the unavailability of local skills to meet the needs of companies—and given that this unavailability varies depending on subsector—a distinct local content strategy for each subsector is advised rather than a one-size-fits-all approach. It is also unclear in the *Petroleum Bill* how technology transfer and local investments are to be measured. Further, other that stating that county governments are to be consulted by the Local Content Committee in implementing the *Petroleum Bill*, the specific role of these governments is not clearly stated in the *Bill*;[232] given the ongoing disagreements between counties and conflicting visions of decentralization,[233] this could be a major hurdle for advancing the kind of resource nationalism that would benefit Kenya as a whole.

Ovadia argues that "it seems completely impossible that the [local content] targets in Kenya's draft law could be met in the short to medium term."[234] This statement is supported by two main reasons. Firstly, while Kenya appears to have firmly worded legislation to govern its oil production with respect to local content provisions, the fine for contravening the legislation is quite modest—"not less than" five million shillings (approximately US$10,000).[235] This

229 Nwapi & Lee, *supra* note 41 at 350 (the Jubilee project was one of the first major oil fields developed by Ghana after its oil discovery).

230 Institute for Law and Environmental Governance et al, *Third Extractive Sector Forum: Local Content in Kenya's Extractive Sector* Workshop Report (Nairobi: 2016) at 4, online: <ices.or.ke/wp-content/uploads/2016/10/ESF-III-Report.pdf> [Institute for Law and Environmental Governance et al].

231 See *ibid* at 8.

232 *Ibid*.

233 See Nic Cheeseman, Gabrielle Lynch, & Justin Willis, "Decentralisation in Kenya: The Governance of Governors" (2016) 54:1 J Modern African Studies 1.

234 Ovadia, "Local Content Policies", *supra* note 70 at 28.

235 *Kenya Petroleum Bill*, *supra* note 121 s 116.

is a small penalty relative to the size and value of oil companies who may be operating under such regulations, and is therefore unlikely to act as a sufficient deterrent. Secondly, he proposed penalty of cancelling contracts and potentially imprisoning defaulters may never be implemented, as politicians do not want to set a tone of criminalization and litigation, which may impair the promising prospects of oil development in the country.[236] Further, the prevalence of corruption and patrimonial politics at the highest level of government gives reason to believe that defaulters may not be properly penalized for their actions or inactions. However, recent research suggests that there is a growing middle class interested in democratic ideals, which may help to reverse the established political trajectory.[237]

A "Memorandum of Objects and Reasons" attached to a senate report on Kenya's draft *Local Content Regulations* explicitly recognizes the expectations of local communities in territories where extractive resources are found, and the need for the government to ensure that resource development delivers benefits to those communities.[238] In fact, this is mandated under Article 66(2) of the Kenyan Constitution, which requires Parliament to "enact legislation ensuring that investments in property benefit local communities and their economies."[239] The Memorandum acknowledges that benefits have not reached local communities due to "a) [l]ack of capacity by the local communities to participate in the extractive or connected activities owing to lack of capacity or involvement in the said processes; b) [l]ack of technology and technical know-how; c) [l]ack of public participation; and d) [l]ack of a legal framework for the exploitation of natural resources in a manner that ensures that the benefits accruing from such exploitation find their way to the communities and the country as a whole."[240]

Kenya's *Draft Local Content Regulations* were therefore intended to establish a framework to ensure the "[i]nvolvement of local communities in the extractive industry value chain" and "facilitate the development of local economies through the creation of employment opportunities and by ensuring the procurement of goods and services that are produced locally" in order to promote capacity building and enhance local capability.[241] However, a look at the actual provisions of the *Draft Local Content Regulations* reveals a complete departure from this policy declaration. There is no mention of "local communities" anywhere in the *Local Content Regulations*. While the term "local" is extensively used (e.g., "local content", "local experts", "local persons", "local ownership", "local assets", "local participation", and "local labor force"), it is not defined anywhere in the *Regulations*. In the *Petroleum Bill* "local

236 See United States, Department of State, *Kenya: Investment Climate Statement 2015*, (May 2015) at 23, online: <https://www.state.gov/documents/organization/241827.pdf> (noting the lack of political will to implement laws in Kenya).

237 See Nic Cheeseman, "'No Bourgeoisie, No Democracy'? The Political Attitudes of the Kenyan Middle Class" (2015) 27:5 J Intl Development 647.

238 The Senate of the Republic of Kenya, Senate Standing Committee on Energy, *The Local Content Bill, 2016* at 5, online: <www.oilnewskenya.com/wp-content/uploads/2015/01/Local-Content-Bill.pdf> [Senate of the Republic of Kenya].

239 *Constitution of Kenya, 2010*, s 66(2), online: <www.kenyaembassy.com/pdfs/the%20constitution%20of%20kenya.pdf>.

240 Senate of the Republic of Kenya, *supra* note 238 at 5–6.

241 *Ibid* at 6.

community" is explicitly defined under section 2 as "a sub-county or sub-counties in which an upstream petroleum resource is exploited."[242]

Some commentators have argued that while a definition of "local" is important, focusing too much on the definition may distract attention from the important goal to be achieved through local content.[243] According to this view, defining "local" to legally mean the "communities" or "counties" where resource extraction takes place may breed conflict among citizens from different regions of the country.[244] Attention should therefore be focused on "creating [an] enabling environment for local people to benefit from resource extraction."[245] In our view, however, integrating rather than excluding a community content strategy into the broader local content strategy would more effectively create an enabling environment for local people to benefit from resource extraction. A definition of "local" would therefore be strategically useful. This does not mean defining "local" to exclude other nationals from participation in local content programs. Instead, it may only require defining "local" in a manner that gives first priority to communities in the resource-bearing region over other nationals, or the creation of a quota system that requires a company to allocate a certain percentage of its local employment and procurement opportunities to local communities.[246] This vision of development would more effectively ensure that local communities that have historically been at the margins of development—despite living in resource-rich territories—are given opportunities that correspond to their development needs.

As Warner has explained, community content is "the strategic deployment of local participation and local capability development opportunities arising from an oil or gas project, specifically directed to strengthen the sustainability, relevance and political visibility of community investment programmes."[247] Community content recognizes the extraordinary circumstances of host communities in the extractive sector, and seeks to compensate them for the impacts of extractive activities through the imposition of community content requirements on extractive companies' operations.[248] It has several advantages for a state. One advantage is that it can serve as a mechanism to address the fragile relationship between extractive companies and their host communities—a fragility that results from the lack of positive impacts of extractive resource development on host communities—enabling companies to obtain the "social licence to operate."[249] Also, a community content strategy would give local residents an incentive to protect the industries located on their territory because they stand to benefit from their continued growth, whether through employment or other livelihood opportunities that

242 *Kenya Petroleum Bill*, *supra* note 121, s 2.

243 Institute for Law and Environmental Governance et al, *supra* note 230 at 4.

244 *Ibid*.

245 *Ibid*.

246 See Nwapi, "Defining the 'Local'", *supra* note 89 at 215.

247 Warner, *supra* note 183 at 5.

248 See Nwapi, "Defining the 'Local'", *supra* note 89 at 204–205.

249 Nwapi, "A Survey of the Literature", *supra* note 91 at 10–11; Nwapi, "Defining the 'Local'", *supra* note 100 at 200; World Bank, *Human Capital for the Oil, Gas and Minerals Industries* (WB, 2014) at 4, online: WB <documents.worldbank.org/curated/en/406101468202451878/pdf/857140BRI0WB0H00Box382147B00PUBLIC0.pdf>; Esteves & Barclay, "Enhancing the Benefits of Local Content", *supra* note 100 at 205.

come with these industries.[250] Warner suggests that a community content strategy should be pursued as a freestanding policy from local content due to the unique challenges community content presents.[251] Those challenges have to do mainly with the unavailability of requisite skills at the community level. We believe, however, that a community content policy can be embedded into a local content policy by requiring first consideration to be given to a host community before other nationals in matters of procurement, employment, and training.

Furthermore, transparency and proper accountability would be required to effectively advance the requirements set out in the local content and participation provisions of Kenya's *Petroleum Bill* and *Local Content Regulations*. On the 2016 *Corruption Perception Index* (CPI), which measures how corrupt a country's public sector is perceived to be, from 0 (highly corrupt) to 100 (no corruption), Kenya scored 26, translating to a ranking of 145 out of 176 countries and territories.[252] This poor ranking is not surprising given that Kenya is not a subscribing state to the Extractive Industries Transparency Initiative (EITI).[253] Despite its shortcomings as a global governance endeavor,[254] the EITI continually establishes itself as a viable framework that promotes the active engagement of multiple stakeholders in ensuring that both governments and extractive companies are transparent in their reporting of resource revenues.[255] While we are certainly not endorsing the EITI as a cure-all for corruption, given that its initial spearheads Liberia and Azerbaijan are currently not operating at the expected "good governance" level,[256] our argument is that without proper accountability measures in place, Kenya's local content legislation risks being sacrificed for short-term gains that primarily benefit the central government and/or a small fraction of political elites.[257]

250 Nwapi, "Defining the 'Local,'" *supra* note 89 at 211–212.

251 Warner, *supra* note 183 at 5.

252 Transparency International, *Corruption Perceptions Index 2016* (Berlin: Transparency International, 2017), online: <issuu.com/transparencyinternational/docs/2016_cpireport_en?e=2496456/43483458> [Transparency International].

253 EITI African countries (current at the time of this writing) are: Burkina Faso, Cameroon, Chad, Cote d'Ivoire, Democratic Republic of Congo, Ethiopia, Ghana, Guinea, Liberia, Madagascar, Malawi, Mali, Mauritania, Mozambique, Niger, Nigeria. Republic of the Congo, Sao Tome and Principe, Senegal, Seychelles, Sierra Leone, Tanzania, Togo, and Zambia. See Extractive Industries Transparency Initiative, *Overview*, online: <https://eiti.org/countries>.

254 For some recent works, see Nathan Andrews, "A Swiss-Army Knife? A Critical Assessment of the Extractive Industries Transparency Initiative (EITI) in Ghana" (2016) 121:1 Business & Society Rev 59; Benjamin K Sovacool et al, "Energy Governance, Transnational Rules, and the Resource Curse: Exploring the Effectiveness of the Extractive Industries Transparency Initiative (EITI)" (2016) 83 World Development 179.

255 See James Van Alstine & Nathan Andrews, "Corporations, Civil Society, and Disclosure: A Case Study of the Extractive Industries Transparency Initiative" in Thijs Van de Graaf et al, eds, *The Palgrave Handbook of the International Political Economy of Energy* (London, UK: Palgrave Macmillan, 2016) 95 at 106–109.

256 Benjamin K Sovacool & Nathan Andrews, "Does Transparency Matter? Evaluating the Governance Impacts of the Extractive Industries Transparency Initiative (EITI) in Azerbaijan and Liberia" (2015) 45 Resources Policy 183 at 184.

257 Studies have highlighted how the LCP has become a victim of political elite capture in many countries due to an absence of adequate transparency and accountability measures. See e.g. Nwapi, "Corruption Vulnerabilities", *supra* note 100; Global Witness, *supra* note 100.

Based on the foregoing analysis, we conclude that it is doubtful Kenya can be categorized as a developmental state. Its failure to accelerate the enactment of local content legislation for the extractive sector while extractive companies are rapidly carrying out development activities does not represent a *serious attempt* to pursue development. Despite being passed by Kenya's National Assembly in May 2016, the *Petroleum Bill*, has yet to be enacted into law while the *Local Content Regulations* have remained in draft form since 2014. Moreover, the *Local Content Regulations*' departure from its own policy declaration regarding the importance of involving resource-bearing local communities in the extractive industry value chain may reflect a lack of appreciation of the ways in which community content may promote development, not least by addressing the fragile relationship between companies and local communities. While it is acknowledged that these bills are currently in draft form, and it is possible that certain provisions will be amended prior to their final enactment, their draft versions cast a bleak outlook on Kenya's commitment. Kenya's corruption profile only casts further doubt, and without appropriate transparency measures in place, the benefits expected from its local content strategy will likely remain elusive.

5.2. Tanzania

Even though the *Tanzania Development Vision 2025* calls for a "developmental mindset" that focuses on "private sector-led" economic growth in which the state serves to facilitate "strategic investments," it is doubtful that this is being implemented.[258] This observation is confirmed by other research, which finds that Tanzania's main public policy problems are the government's failure to align sectoral policy with macro policy, and its failure to implement already formulated policy.[259] These failures are evident in the lack of mandatory provisions for the creation of backward and forward linkages[260] in the *Mining Act*, which leaves linkage formation "largely … to market forces."[261] A recent study finds that although there has been a significant rise in local goods and services procurement by large-scale miners in recent years,

258 See *What Will It Take for Tanzania to Become a Developmental State* (25 February 2013), Policy Forum, online: <www.policyforum-tz.org/what-it-will-take-tanzania-become-developmental-state>.

259 Vuyo Mjimba, "The Nature and Determinants of Linkages in Emerging Minerals Commodity Sectors: A Case Study of Gold Mining in Tanzania" (2011) The Open University, Making the Most of Commodities Programme, Discussion Paper No 7 at 4, 43, online: <www.commodities.open.ac.uk/discussionpapers>; International Monetary Fund, *United Republic of Tanzania: Poverty Reduction Strategy Paper*, IMF Country Report No. 06/142, April 2006, 21, online: <https://www.imf.org/external/pubs/ft/scr/2006/cr06142.pdf>.

260 The term "linkages" speaks to the links that one economic sector or sub-sector or one firm has with other sectors or sub-sectors or other firms in the economy. Backward linkages refer to the "demand-side" links while forward linkages refer to the "supply-side" links. For instance, a firm's need to purchase equipment to build its facilities constitutes a backward linkage, whereas what the firm supplies to the industry constitutes a forward linkage. See Oliver Morrissey, "FDI in Sub-Saharan Africa: Few Linkages, Fewer Spillovers" (2012) 24:1 European J Development Research 26; Frank L Hefner & Paulo P Guimaraes, "Backward and Forward Linkages in Manufacturing Location Decisions Reconsidered" (1994) Rev Regional Studies 229.

261 Michael W Hansen et al, *supra* note 160 at 13.

linkage development is still "limited to low value goods and services due to shortage of human capital and poor infrastructure."[262]

The idea of community content, discussed at length in our earlier analysis of Kenya's policies, is captured in the idea of "Local local content" introduced under Tanzania's *Draft LCP*, but was later abandoned in the *Petroleum Act*. The *Draft LCP* required oil and gas companies to consider host community interests in their employment and training programs, and encouraged companies to "as far as possible" seek their workforce, materials, and services from the community.[263] While it did not call for special preference to be given to host communities before other Tanzanians—which would have been our preferred approach—even this policy direction was discarded by the Tanzanian Parliament. However, Parliament included in section 223 of the *Petroleum Act* a provision requiring licence-holders and contractors to prepare "a credible corporate social responsibility [(CSR)] plan jointly agreed by the relevant local government authority" which shall consider the socio-environmental, economic, and cultural needs of their host communities. However, the *Act* does not state the relationship between this plan and the company's development plan that is required to be submitted to PURA before development can commence, and whether the CSR plan is to be submitted before or after the submission of the development plan. Nor does it state how the CSR plan can be enforced, and what would happen if a company fails to submit it.

It is not clear why Tanzania decided to abandon the community content strategy originally set out in the draft *Local Content Regulations* when it adopted the *Petroleum Act*. By initially explicitly considering making it a requirement for companies to consider host community interests in the implementation of local content in the draft policy, and then later relegating it to the realm of CSR (essentially a voluntary initiative) the *Petroleum Act* indirectly authorizes companies to ignore such interests. This is a serious regression on the rights of resource-bearing communities to participate in the enjoyment of the benefits of resource development and it denies Tanzania the broader benefits of the LCP. On a more promising note however, the minimum penalties for giving false or misleading information about the fulfilment of a requirement of the *Petroleum Act*—US$44,700 imposed on individuals and US$447,000 imposed on corporations—seem to high enough to have a deterring impact, especially when compared to an equivalent provision in Kenya, as noted earlier.

On the 2016 CPI, Tanzania scored 32 and ranked 116 out of 176 states.[264] Though a better ranking than Kenya, it is evident that Tanzania is perceived as a highly corrupt state. However, Tanzania has subscribed to the EITI, which perhaps puts it in a more promising position to make some efforts to uphold EITI transparency standards.

From this analysis, it is fair to say that Tanzania is making *serious attempts* to pursue development, which could allow it to qualify as a developmental state. Though much more can still be done, the passage of the *Petroleum Act* with explicit local content provisions and substantive penalties for non-compliance is an important step in the right direction. Tanzania's

262 Thabit Jacob, Rasmus Hundsbæk Pedersen, Faustin Maganga & Opportuna Kweka, "Rights to Land and Extractive Resources in Tanzania (2/2): The Return of the State" (2016) Danish Institute for International Studies, Working Paper No 12 at 17, online: <pure.diis.dk/ws/files/706392/DIIS_WP_2016_12.pdf>.

263 *Tanzania Draft Local Content Policy*, *supra* note 159 at 19.

264 Transparency International, *supra* note 252.

subscription to the EITI is equally emblematic of its desire to promote transparency. One critical issue Tanzania needs to address is the elaboration of the local content provisions of the *Mining Act*, which, compared to the *Petroleum Act*, lags behind. Further, the enhancement of inter-sectoral linkages in both sub-sectors is critically important for the state to optimize the benefits of the LCPs.

5.3. Rwanda

As noted earlier, a driving factor behind Rwanda's mining policy reform was the need to rebuild the capacity of Rwandans to take charge of mining sector development following the genocide. The 2012 Skills Survey recommended launching and implementing knowledge and skills development training programs for artisanal and small-scale miners in Rwanda, and enhancing qualitative skills among mining employees in private establishments.[265] A key instrument for achieving this is *Law No 13/2014,* which represents the legal culmination of those reforms. However, the legislative provisions regarding value addition to Rwanda's economy are too weakly and meagerly expressed to produce effective outcomes. The use of the discretionary term "may" in Article 50 of *Law No 13/2014*, for the provisions regarding the processing and refining of mineral products in Rwanda, reflects a lack of political will on the part of the Rwandan government to enact adequate mandatory provisions to promote local content.[266] Given the discretionary wording of the provision, it is not surprising that *Law No 13/2014* does not provide any penalty for non-compliance with Article 50. In fact, the only penalty provision for non-compliance in the *Law* is found in Article 25, which provides that "[t]he Minister may suspend or cancel a mineral licence" under specified circumstances.[267] Those circumstances are when a licence-holder (1) fails to make a required payment in due time; (2) fails to start the work for which licence has been issued, without satisfactory explanation; (3) fails to meet its minimum obligations under a licence; (4) violates health and safety and environmental regulations; (5) fails to submit required reports; (6) violates any conditions of a mining licence; or (7) "for any other reason becomes ineligible for a mining licence". (6) covers situations where a mining licence contains a provision requiring mineral processing and refining to be carried out in Rwanda and the licence holder carries these out in outside Rwanda. But this is only where the licence contains such a provision. The non-mandatory requirement that mineral processing and refining shall be carried out in Rwanda (perhaps subject to some exceptions, such as where it is not feasible to process and refine in Rwanda) means that such a provision may not even be included in the mining licence. Moreover, the use of the discretionary word "may" under Article 25 means that the Minister is not under obligation to exercise the suspension or cancellation power even where a violation has occurred.

By contrast, Article 49 of *Law No 13/2014*, which deals with the procurement of goods and services in Rwanda, is couched in mandatory language Given the seriousness of suspension or cancellation of a licence, however, it is unlikely that the Minister will exercise his/her Article 25 power where the violation is not to an extreme degree. A better approach would be to impose some less stringent fine to serve as a deterrent, and reserve suspension and cancellation for extreme or habitual violations. Lastly, while Article 49 requires license-holders

265 *Rwanda Development Board*, *supra* note 188 at viii.

266 *Law No 13/2014*, *supra* note 224, art 50.

267 *Ibid*, art 25.

to give preference to Rwandans in goods and services procurement, there is no companion requirement in matters of employment and training.[268] Although a stringent local employment policy may not be feasible for Rwanda given the severe unavailability of local skills at this time, an incremental approach that takes stock of available skills maybe a more effective option for Rwanda.

On the 2016 CPI, Rwanda's score of 54 places Rwanda as the third (together with Mauritius) least corrupt state in Africa, and 50th of 176 states in total.[269] Under this index, it can be argued that Rwanda appears more likely to be transparent in the implementation of its established provisions compared to Kenya and Tanzania. Moreover, the Rwandan government heartily welcomed the 2016 CPI when it was announced in January 2017, and promised to increase its efforts in fighting corruption.[270] If this mentality is maintained, there is no doubt that Rwanda will overcome one of the most significant obstacles to development in Africa. Over all, despite the weak provisions of *Law No 13/2014* on local capacity building, we think that *serious attempts* to pursue development can be observed in Rwanda. However, the country needs to demonstrate greater political will, especially in matters involving imposing obligations on multinational corporations to contribute to local capacity building, before it can truly be considered a developmental state.

6. CONCLUSION

To conclude, we will now consider a few reflective questions. Firstly, is there a new developmental state in Africa? —the question posed in the title of this paper. One can argue that some form of developmental mentality existed in all the three states we examined, especially shortly after gaining independence. However, due to political issues that resulted in violent conflicts (particularly in the case of Rwanda) and the destabilization of effective government machinery (in Kenya for instance), in addition to pressure to adopt SAPs and other externally-driven neoliberal policies, developmentalism was not pursued actively in the past. Thus, to a great extent, the developmental state as expressed through features like local content requirements is a new phenomenon in these three states.

Concluding that the state interventions being pursued reflect a shift towards a developmental state, a second question to consider is: development for whom? —i.e. who are the actual or expected beneficiaries of this shift? As we argued in Parts 2 and 3, the political leadership of a developmental state ought to expound a vision of development that is participatory. Though autocratic developmental states are possible, we reiterate that over time such states become less autocratic and give way to more participatory forms of development. The purpose of participation is to allow those who are to be affected by a project, policy, or program to contribute in determining how that project, policy, or program is designed and implemented. It follows that those to be most affected by a project, policy, or program ought to be given priority in the participation process and in distributing the benefits of the outcome, given that they have legitimate interests connected to the outcome of development. Within the extractive

268 See Nwapi, "Addressing the Capacity Building Challenge in Rwanda", *supra* note 192.

269 Botswana ranked No 1 with a score of 60 and an overall ranking of 35, while Cape Verde scored 59 and ranked 38th overall, see Transparency International, *supra* note 252.

270 Rodrigue Rwirahira, "Rwanda is Africa's 3rd Least Corrupt Country", *The New Times* (26 January 2017), online: <www.newtimes.co.rw/section/article/2017-01-26/207449/>.

resource sector, a participatory (or democratic) developmental state would recognize that the local communities which bear the negative burden of extractive resource development ought to be actively engaged in resource development and in the sharing of the benefits therefrom. LCPs could be utilized to achieve this purpose by ensuring that these local communities are given priority in the distribution of the benefits from the resources.

Given the lack of capacity which exists in the states we have discussed in this paper (particularly in Rwanda), it is unclear how the setting up of stringent equity participation requirements can immediately translate into benefits for locals who may be engaged in the sector. Even the best thought-out laws and policies are fruitless if they are not followed through with implementation. Thus, effective governance mechanisms need to be established to ensure implementation of the laws and policies that have been established and to ensure that the potential for resource-engendered development is optimally realized.

In addition, in the face of dwindling oil prices and volatile commodity prices, another question should be considered: what incentives are there to keep companies and respective African governments committed to LCPs in whatever form they may be enacted? There seems to be support from international organizations such as the World Bank for LCPs.[271] However, there is anecdotal evidence that American and British governments—typical home states of multinational extractive companies operating in Africa—are not entirely supportive of such mechanisms being used by the host states of their corporations,[272] although they themselves used such policies in the past and still use them in some form in several economic sectors.[273] However, the broader issue is that the massive layoffs usually triggered by commodity price downturns could have direct implications on the extent to which domestic enforcers of LCPs would demand such requirements to be met.

Therefore, while some African states have intentions to utilize their natural resources for broad-based development goals, this endeavor is inevitably complex given the intrinsic and extrinsic factors at play in the socio-political economy of these countries. The intention to develop displayed by our three case study states, the attempts they are making to actualize that intention, and the progress they have made so far reveal that these states have the potential

271 In the case of Kenya, for instance, there is World Bank funding under the Kenya Petroleum Technical Assistance Project that seeks to support reforms in the petroleum sector between 2014 and 2021, including the building of local capacity to serve the needs of the sector. See World Bank, *Implementation Status & Results Report: Kenya Petroleum Technical Assistance Project (KEPTAP),* (WB, 2015) at 1, online: <documents.worldbank.org/curated/pt/754111468047975445/text/ISR-Disclosable-P145234-12-23-2015-1450903201897.txt>. See also, World Bank Group, The World Bank Group in Extractive Industries, 2016 Annual Review, online: <https://www.ifc.org/wps/wcm/connect/9703eec3-927a-49b6-ba33-9d8f4fd2ac63/WBG-in-Extractive-Industries-2016-Annual-Review.pdf?MOD=AJPERES> (summarizing World Bank Group's activities in the extractive resource sector in several states, including Tanzania).

272 Ovadia, "Local Content Policies", *supra* note 70 at 29.

273 See Rodrik, "The Return of Industrial Policy", *supra* note 18 at para 6; Chang, *supra* note 18; *Canada—Certain Measures Affecting the Renewable Energy Generation Sector and Canada—Measures Relating to the Feed-In Tariff Program (Complaints by the European Union and Japan)* (2013), WTO Doc WT/DS412, 426/AB/R (Appellate Body Report), online: <www.wto.org/english/tratop_e/dispu_e/412_426abr_e.pdf>. In this case, Japan challenged Canada (Ontario)'s LCP program relating to renewable energy generation.

to become developmental states, which debunks the impossibility theory applied to Africa. However, having the potential to become a developmental state is not identical with being a developmental state. It only means that the possibility exists to become a developmental state. Whether a state actually becomes a developmental state depends on the seriousness of its attempts. We doubt the seriousness of Kenya's attempts.

Lastly, several lessons can be drawn from the analysis, which if applied in the three states analyzed here, could enhance their capacity to become developmental states. States must recognize that the mining and oil and gas subsectors in a given country may have different local content needs and should therefore develop strategies accordingly. In drafting legislation, states should avoid weak language as it will ultimately have little force in the imposition of obligations on companies, thereby reducing the effectiveness of the policies themselves. It is also imperative to impose penalties that are substantial enough to encourage compliance within the legislation. Most importantly, draft policies and laws must be enacted with full force and effect without excessive delay to ensure that they have the necessary legislative backing for enforcement, which will allow the state and its people to truly benefit from extractive-resource development.