

# **Battling for Corporate Accountability: Experiences from Titanium Mining Campaign in Kwale, Kenya**

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Rights and Participation: Sharing Experiences and  
Opportunities

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First they ignore you.  
Then they laugh at you.  
Then they fight you.  
Then you win.

– M. K. Gandhi

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## List of Abbreviations

AGA	Action for Endangered Species
EIA	Environmental Impact Assessment
EMCA	Environmental Management and Coordination Act
EPZ	Export Processing Zones
ESAF	Enhanced Structural Adjustment Facility
CBO	Community Based Organisation
CES	Coastal and Environmental Services
CMRF/CRF	Coast Mining Rights Forum/Coast Rights Forum
FDI	Foreign Direct Investment
GDP	Gross Domestic Product
IGAD	Intergovernmental Authority on Development
ILO	International Labour Organisation
IMF	International Monetary Fund
INGO	International Non Governmental Organisations
IPC	Investment Promotion Centre
ISO	International Standardisation Organisation
KCA	Kenya Community Abroad
Kshs	Kenyan Shillings
KU	Kenyatta University
MENR	Ministry of the Environment and Natural Resources
NEMA	National Environmental Management Authority
NGO	Non Governmental Organisation
NIC	Newly Industrialised Country
OECD	Organisation for Economic Co-operation and Development
PRA	Participatory Rural Appraisal
TNC	Transnational Corporation
UN	United Nations
UNCTAD	United Nations Conference on Trade and Development
US	United States (of America)
VAT	Value Added Tax
WWFE	World Wide Film Expedition

## Introduction

The debate around the conduct of transnational corporations (TNCs) globally has been lively. Attention has focussed on the growing role of non-governmental organisations (NGOs) in ensuring that the TNCs become more accountable. NGOs influence the activities of TNCs in three crucial ways. First, through lobbying and encouraging others to lobby, they have brought pressure to bear on TNCs. Second, they have helped set and enforce regulations and standards to which, at the risk of financial loss, TNCs are keen to aspire. Third, NGOs have helped generate consumer concern to the extent that it is now a company's long term competitive interest to act responsibly (Mulligan 1999:51).

TNCs are also now (or appear to be) keen to present themselves as socially and environmentally responsible to a variety of actors at the international level. This change in perception, according to Mulligan (1999), has four important links. One is that there are actual and potential investors including shareholders, shareholding institutions and multilateral and bilateral donor agencies expressing concern about these issues. The second is that NGOs with their ever-growing power within the global political arena are targeted for their support. Thirdly is that TNCs are finding it valuable to have the support for a project of inter-governmental bureaucratic structures such as the UN agencies. Fourth, it is important for TNCs to present themselves and their products favourably to consumers.

Historically, the battle between TNCs and NGOs has been more prominent in the global North. The approach has been that TNCs have on a several occasions sought to gain acceptance of states. NGOs and affected communities have historically been kept out of this equation. Whereas most states are keen to demand high environmental and social standards within their borders, at least rhetorically, the reality of escalating debts can make the imperative of attracting investment greater than that of stipulating (or enforcing) social and environmental regulations.

Faced with the pattern of worldwide economic governance, governments only reluctantly regulate and enforce standards, as they fear hindering companies' economic competitiveness. The shifting of authority from national governments to TNCs – where the private sector is seen as the engine for growth – and thus beyond the state and public democratic control, is at the heart of the mounting public discontent with the political process (Korten 1995; Strange 1996). This phenomenon provides opportunities for NGO actors to redress this perceived democratic deficit in both national and global arenas. Disempowered people engage increasingly in

'politics without the politicians' (Rose 1996:31), especially via NGOs and direct action.

With time, thanks to negative publicity, the key area for TNCs now is to engage with, involve and gain the consent of the local people affected by their activities. Previously it was possible for TNCs to focus more on gaining state agreements and attracting international finance than on working with local people. Now however, the climate is changing and TNCs are finding it ever more important to work with local communities where they operate. They can no longer ignore local values and impose changes upon communities (Willettts 1998: 225).

As the power of TNCs over the nation state has increased, NGOs have frequently identified them (especially those who are brand based and vulnerable to customer boycotts) as prime targets to effect change. The battle between the Ogoni people and Shell in Nigeria is such a case.

In order to perfect their art as defenders of citizen rights, NGOs have diversified their strategies, initiated new alliances amongst themselves, created new integrated NGOs and engaged with TNCs to effect the changes they desire. With this three-tier response NGOs have driven the corporate responsibility agenda.

This paper draws on my own personal experience of having worked on a campaign for three years. It borrows from a forthcoming book, *Sands of Conflict* (Ojiambo, forthcoming), in which I narrate the whole story of a campaign against a proposal to strip-mine titanium along the Kenyan coast. The paper presents an array of strategies that a coalition of NGO actors in Kenya have used in a campaign aimed at demanding corporate accountability from a TNC. The focus of the paper is on strategies and lessons learnt from this battle. I would wish to note that mainstreaming accountability should start at the early stages of the project. This does not imply that corporate accountability is a one-off thing. It is a process, which must be nurtured over time. The strategies shared in this paper are interrelated, as will be demonstrated later on.

This paper comes at a time when, increasingly, we are seeing an influx of mining companies in countries such as Kenya. In such countries with limited experience on demanding for corporate accountability, it is eminent that civil society actors be prepared to rise to the occasion for the betterment of the citizenry. This paper is not about anti-mining campaign. It is about creating spaces for engagement with diverse stakeholders. It is about the need for responsive mining ventures that do not degrade the environment and violate the human rights of the people. And as countries

develop new legal frameworks to check the conduct of these mining companies, NGOs must come forward to ensure that these laws are implemented.

In order to develop a clear understanding of the issues and to enable you decide for yourselves why we made the decisions we made, the paper is divided into three main parts. The first part starts by giving a brief description of the Kenyan economy highlighting the fact that it is in the doldrums. For a long period, the Kenyan economy has been on a declining path with the year 2000 marking the lowest GDP growth ever recorded. In light of this, the paper delves into the role of mining in the Kenyan economy with emphasis on what the titanium deal meant for the economy and the people of Kenya. Given this context, one might question why one would conduct a campaign at this time. Kenya desperately requires investment, more now than ever before. But the point I am putting across is that, much as the country is desperate for investment, we should not allow our desperation to overshadow our values and the rights of the citizens of Kenya. We would appreciate investment so long as it is responsible and takes into account the rights of citizens.

Information about the company – Tiomin Resources Inc., who they are and their perspectives on the titanium deal – is also shared. Included also is the story of the commissioning of their environmental impact assessment (EIA) and how this process, coupled with the conduct of Tiomin in the community soured their relationship. The genesis of the anti-mining campaign and the main faults of the Tiomin deal are also discussed.

Staging a successful campaign is dependent on clear strategies. The strategies are the wheels upon which the campaign runs. As will be demonstrated, they are not 'stand alone'; they have to be well co-ordinated in order to enable the campaign vehicle to move. Similar to a vehicle, one should never believe that the available strategies are fool-proof and thus efficient. One must at all times carry a spare wheel – a 'plan B'.

In the second part of the paper, I discuss the various strategies that we used during the campaign; how they were employed; where necessary, their limitations; and some of the available options that the Coast Rights Forum could explore if the project is allowed to go ahead in its current form. The strategies are interrelated as one either reinforces or builds on the other. Running through all these strategies is the issue of information – both gathering and dissemination. It is the pillar upon which the strategies are built.

These strategies range from understanding the legal framework in Kenya, networking and building alliances, research, media advocacy and the use of the Internet. It is these strategies that has enabled the issue of titanium mining along the Kenyan coast to be known and thus to bring Kenya and the people of Kwale into international focus. They are the ones the have stirred the current controversy in regard to the titanium project and the losses that Tiomin continues to incur.

It is worth noting that the success of these strategies has been dependent on a number of changes in Kenya. Firstly, the democratisation process has opened up more space for dissenting views. Secondly, civil society in Kenya, especially the NGO sector, has also grown and shown its prowess in fighting for the rights of the poor and marginalised. Thirdly, the vibrancy of the media in Kenya has enabled diverse discourses to be shared and heard more widely than ever before. Fourthly, Kenya is part of the global community and therefore the globalisation process has meant that events happening there are interrelated or affect what is happening elsewhere in the world. Fifthly, Kenya is undertaking legal reforms, a process that has created more spaces to hold both the government and companies to account. The impact of these strategies in other contexts will vary, depending on the opportunities that are available for engagement and participation. In the third and final part, I present some of the key lessons emerging from the campaign and draw some conclusion in regard to advocacy.

## **Part I – Background**

### **The Kenyan economy**

Kenya's economy is primarily driven by the agricultural sector, the single largest sector accounting for about one quarter of GDP and 70 percent of employment. Agriculture also makes an indirect contribution of another 30 percent of GDP through the manufacturing and service sectors while two-thirds of the industrial output in the country are agro-based. Historically, the performance of the agricultural sector in Kenya has been robust, with growth rates of 6.2 per cent in 1965 through 1973; 4.6 per cent in 1974–80 and declining to 2.5 per cent in the period between 1981 and 1987. The situation has worsened since 1988. The agricultural growth rate was 1.6 per cent in the period 1988–92, and negative in 1992 and 1993 largely due to poor climatic regimes and instability in the coffee, tea, sugar, dairy and other sub-sectors. Similarly, other sectors experienced reduced growth with the tourism sector yet to recover from shocks associated with insecurity and negative publicity abroad, which acted in tandem to injure Kenya's reputation as a tourist destination. An exodus of investors who prefer investing in other countries where security standards and costs of doing business are acceptable has hit the commerce and manufacturing sector.

The Kenyan economy has thus experienced turns and twists resonating with events in agricultural and other sectors. The country experienced a crunch in power supply, which occasioned a biting cycle of power rationing during the better part of the year 2000. This critically impacted on the manufacturing sector, which had to halve its capacity, forcing most players to effect job cuts while others unsuccessfully attempted to switch to petroleum-based power supplies. In essence, Kenya's economy is no longer capable of absorbing the more than half a million people who enter the labour market every year, as most sectors are cutting jobs. Unemployment is soaring while incomes accruing to the agriculture-dependent population, who comprise majority of Kenya's population, has gone down. Over 52 per cent of the national population is reported to subsist below the poverty line (Government of Kenya 2000c).

Essentially, Kenya's economy has undergone a deep recession in recent years, culminating in an all time low growth rate of minus 0.3 per cent in the year 2000 (Government of Kenya, 2001). The economy is thus in dire need of resuscitation through injection of capital and new investments to reverse declining growth. The physical challenges to increasing economic growth in an agricultural dependent

country are formidable. Arid and semi-arid land areas constitute about 85 per cent of the country's total land and the arable land; other resources such as rangelands have been over-exploited, triggering environmental degradation previously not witnessed in the country.

On the political front, the country is polarised into political parties mainly based on ethnic groupings in a system where the majority of productive time is wasted on politics at the expense of economic production. Likewise, government policies seem fixed to serve political expediency as opposed to underpinning economic recovery and this is largely responsible for the current stand-off between the government and the Bretton Woods institutions (the International Monetary Fund (IMF) and the World Bank). The stand-off saw the latter withdraw some US\$218 million (Kshs3 billion) of Enhanced Structural Adjustment Facility (ESAF)<sup>2</sup> loans previously earmarked to support economic recovery. Such a stalemate also serves to send signals of a lack of confidence to donor members of the Paris Club, who adopt a 'wait and see' attitude to doing business with Kenya.

### **Titanium mining and Kenya's ailing economy**

The national mineral wealth is vested with the government by law. This clearly cuts out Kenyans on whose land minerals are discovered from staking any claims on the said minerals. It is said that this law was enacted by the colonial government, which sought to bequeath all national wealth to the Crown for ease of exploitation and repatriation to the parent country. Why the law has been retained, 35 years into Kenya's independence is not clear. The law is possibly retained in the spirit of enabling everybody to benefit from national mineral resources as per government policy. In theory, it is in this spirit that the government conducts explorations and provides information on all discovered mineral deposits with a view to promoting investment in the sector.

The mining sector in Kenya, however, currently plays a fairly insignificant role in the national economy as it employs only slightly more than 5,000 people and contributes less than 1 per cent of gross domestic product (GDP). Compared to sectors such as agriculture, manufacturing and services which contribute the lion's share of GDP earnings, mining is yet to make an impact in the national economy and has traditionally received peripheral treatment in past and current National Development Plans. In 2000, close to 0.7 million tonnes of minerals valued at slightly over GBP£36 million (Kshs 3.6 billion) were produced by the mining sector in Kenya.

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<sup>2</sup> Since renamed the Poverty Reduction and Growth Facility (PRGF).

The scenario with regard to foreign direct investment (FDI) flows to Kenya is very discouraging. According to a 2001 report by the United Nations Conference on Trade and Development (UNCTAD), Kenya's FDI flows were a paltry US\$40 million in 1997 and increased only marginally to stand at US\$60 million in 2000. This is a very precarious situation which makes Kenya unable to compete favourably with her East African neighbours, Uganda and Tanzania.

A letter by Tiomin's President Jean-Charles Potvin to Gene Bernofsky had this to say about the FDI situation:

It is obvious to any objective observer that Kenya is in desperate need of foreign investment. The World Bank reported that Kenya had a total foreign investment in 1998 of \$20 million. The estimated capital cost for the Kwale project is \$137 million. Here is the opportunity for the creation of a new industry, and the emergence of Kenya as a significant supplier of titanium and zircon mineral concentrates to the global market. The development of Kwale is bound to bring substantial benefits to both the local communities and the people of Kenya as a whole (WWFE 2000).

According to the Investment Promotion Centre (IPC),<sup>3</sup> the Government of Kenya welcomes the flow of private foreign investment into the country. Currently, the government is seeking to diversify its export base by encouraging non-traditional exports. As an incentive to foreign investors, in 1990 the government enacted a bill to create free trade zones known as export processing zones (EPZs). Companies operating within an EPZ receive concessions on customs duties, tariffs and taxes, amongst other incentives. To encourage industrial development the government allows an investment allowance of 85 per cent (35 per cent in Nairobi and Mombasa) on plant, machinery, buildings and equipment in the first year of business. This is also applicable to the hotel industry. The allowances are given as tax deductions in the year of expenditure. Depending on the earnings of the business, the investment allowance can produce a tax free holiday lasting several years.

Generous tax and other incentives are to be given to companies carrying on business in an EPZ. These include: a corporation tax holiday for ten years; a reduced rate of corporation tax of 25 per cent for the next ten years; zero rating for VAT purposes; exemption from withholding tax on certain payments to non-residents; and certain reliefs from exchange controls.

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<sup>3</sup> See <http://www.ipckkenya.org/>

Under the IPC capital repatriation rules, remittance of dividends and interest are guaranteed to foreign investors under the Foreign Investment Protection Act (FIPA) (Cap 518). Investors can repatriate:

- After tax profits, including retained profits which have not been capitalised.
- The proceeds of the investment after payment of the relevant taxes.
- The principal and interest associated with any loan.

Against a background of a poor development status of the mining sector in Kenya and an overall poorly performing national economy, the discovery of titanium along the Kenyan coast was clearly viewed as God's chosen way of rescuing Kenyans out of the current economic misery. Titanium is a mineral valued for making a range of products including pigments, watches, and golf clubs to the light metals used in aircraft engineering. Hopes for an economic turn around triggered by exploitation of titanium minerals were therefore quite high among Kenyans highly motivated by a stated government policy designed 'to ensure that, the nation derives maximum benefits from its mineral resources through rational exploitation while occasioning minimum damage to the environment' (Ojiambo 2002). Anybody saying no to such a deal would then be easily labelled anti-development.

According to data available, an estimated US\$42 million is projected to be earned annually from the export of titanium minerals from Kwale. Thus, value wise, titanium mining could increase the value of minerals produced in Kenya by over 80 per cent. This would seem to address the government's policy goal of promoting investment in this sector with a view to providing raw materials for local processing and export and creating employment opportunities. And though not a significant one, mineral development is also considered a strategic sector in facilitating the transformation of Kenya to 'newly industrialised country' (NIC) status by the year 2020. Is titanium mining likely to rise to meet these expectations?

## **Mineral presence in Kenya**

Prospecting work has established the presence of titanium ore deposits estimated at 3.1 billion tonnes along Kenya's coastline, which are reputed to account for close to 10 per cent of the world's known titanium reserves. A breakdown of deposits by location, quantity and grade are given in Table 1.

**Table 1: Breakdown of mineral sand deposits along Kenya's coastline**

Location	Mombasa		Kwale		Mamburui		Kilifi North		Kilifi South	
Ore (Mt)	500		200		700		1700 (combined total)			
Mineral value	Q'tity (Mt)	Grade (%)	Q'tity (Mt)	Grade (%)	Q'tity (Mt)	Grade (%)	Q'tity (Mt)	Grade (%)	Q'tity (Mt)	Grade (%)
Ilmenite			4.3		6.2	2.3	7.0	1.5	3.6	1.4
Rutile			1.1		0.3	0.1	0.62	0.14	0.33	0.13
Zircon			0.6		0.3	0.12	0.62	0.14	0.36	0.14
Total coastal deposits: 3.1 billion tonnes										

Key: Mt = million tonnes; Shaded cells = data unavailable

Source: based on information from Tiomin's web site, [www.tiomin.com](http://www.tiomin.com)

Although the Kwale deposit is the smallest, logistical considerations demanded that it be exploited first, with the others targeted for sequential exploitation in due course. Thus, where appropriately handled, the titanium resource base provides a strategic springboard for industrial and economic transformation for a country where direct foreign investment has been dwindling in recent years. Despite the Kwale deposit being the smallest of the four, exploitation of this resource as per the Tiomin proposal was promising to inject some US\$137 million in capital costs in a project worth US\$700 million, with a recurrent costs base of US\$420 million in 14 years. However, it may be noted that many of these capital costs would be incurred outside Kenya, as much of the equipment would have to be bought abroad. There would be the dislocation of 450 households of local Digo and settler Kamba peoples (a resident population of about 4,000 people).

Expectations that the titanium deposits could help Kenya's economy take a quantum leap forward were rife among Kenyans. Kenyans community further expected that some of the recurrent expenditure would end up with the exchequer in form of tax revenue, employee income taxes and levies paid from other multiplier activities, while citizens would benefit from direct employment as well as supply contracts with the firm, investment in share holdings, and so on. Thus, commercial exploitation of the coastal titanium wealth has the potential to create a totally different socio-economic order in Kenya. For Kenya, Kwale and the other titanium deposits amount to the

legendary goose that lays golden eggs. It has to be harnessed for all its worth to the country.

For this dream to materialise however, arrangements needed to be put in place to expand indigenous participation through sale of equity to Kenyans, contracting some services to local firms and so on, all of which would facilitate greater ploughing back of accruing profits into the local economic system. But under the current set-up, Tiomin Kenya Ltd., the company set to undertake strip mining, and Kenya Titanium Minerals (EPZ) Ltd., the firm set up to process and export the processed minerals, are wholly owned by the Toronto, Canada-based Tiomin Resources Inc. As part of the investment incentives provided by the Government of Kenya, Tiomin Kenya would be free to repatriate any after-tax profits accruing from titanium mining to Toronto, for onward distribution to Tiomin's shareholders. This point was clearly brought home in a statement by the Kenyan Minister in charge of mineral exploration:

[T]he project is expected to generate a number of direct and indirect benefits as here under: Employment of 200 people; upgrading of a 50 km road; Foreign exchange earnings estimated at US Dollars 42 million annually; Tax revenue which may add up to 25% of the company's profit; and Income tax revenue from employees (Government of Kenya 2000b).

Direct earning from equity shareholdings or from trade contacts with the company are certainly not among the openings available to Kenyans in which case, locals will have to content with the few low cadre jobs created and the annual tax revenue of US\$2.4 million potentially payable by the project. And contrary to the Minister's statement, it is not clear how Tiomin will earn Kenya badly needed foreign exchange without Kenyan participation in the project. Also not clear is the breakdown of the operating costs amounting to a staggering US\$ 30million annually. It is apparent that the titanium-mining project as currently designed does not offer much for Kenya's ailing economy. And this, for a country projected to become a world leader in titanium production. However, all is not lost. Mining licences are yet to be granted. Before this happens, there is need to rethink the entire titanium exploitation strategy with a view to incorporating the Kenyan agenda into the equation.

## **Tiomin – the project proponent**

Information on Tiomin, the prime mover of the Kwale Heavy Mineral Sands Project, is difficult to find. Save for the often-repeated statement that Tiomin Resources Inc. is a Toronto based mineral explorations company which is listed on the Toronto and Montreal stock exchanges, little other information about the firm is available. In particular, information on past operations and track record, which would facilitate evaluation of the firm's capacity in commercial scale mineral exploitation, is hard to come by. Also hard to get is information on the firm's previous relationship with governments and host communities and experience in rehabilitation of mine sites. This renders it impossible to assess the firm's capacity to live up to the challenges posed by the proposed titanium mining venture.

Some bits of history on Tiomin can be deduced from the firm's timeline. In a news release of December 1999, Mr. Jean Charles Potvin is said to have been the President, CEO and a co-founder Director of Tiomin since inception and prior to this, was a Director and Vice-President of Burns Fry Limited (now Nesbitt Burns) until 1994. Tiomin Resources Inc. may thus have been formed sometime in 1994/95. A statement in the same news item intimated that

Tiomin Resources Inc. is a rapidly growing mining exploration company committed to establishing resource development through ownership of several large titanium-bearing mineral sands deposits in Kenya and Canada, and of the 24 billion pound Cerro Colorado copper deposit in Panama, as well as exploring for Nickel in a joint venture with SOQUEM in Quebec. Tiomin has no long-term debt and approximately 36 million shares issued. Tiomin trades on the Toronto Stock Exchange and Montreal Stock Exchange under the symbol TIO (Tiomin Resources Inc. 2001).

Given the timeline and mission statement above, it can be concluded that Tiomin is still in its infancy. Tiomin is a relatively young company, rapidly developing capacity in mineral exploration but yet to undertake any economic-scale mining venture. The firm's capacity is therefore primarily in the field of mineral explorations and there is no evidence to suggest past engagement in economic-scale mineral exploitation. Indeed, it has since been disclosed that Tiomin does not have a smelter anywhere in the world, a fact which alludes to the possibility of Tiomin selling titanium in the open market from the high seas.

Associated with Tiomin's corporate capacity is the question of assets controlled by the firm. In numerous marketing releases, Tiomin claims to own several mineral ore deposits in Kenya. Two statements issued at diverse dates attest to this:

Kwale is one of the four Kenyan mineral sands projects owned by Tiomin and its development will be the first step for Tiomin and Kenya to emerge as a significant supplier of titanium and zircon minerals to the global market... Tiomin's long term operating plan proposes the sequential development of its other Kenyan deposits... Tiomin also holds two other large Titanium bearing sands deposits in Kenya (Tiomin Resources Inc., 1997).

Admittedly, Tiomin has undertaken comprehensive mineral prospecting and has acquired close to 20 per cent of surface rights for the Kwale deposit but the firm is yet to be granted requisite mining and environmental licences. It is however important to clarify that Tiomin does not own any titanium deposits in Kwale, Mamburi or Kilifi (formerly Sokoke). The firm's own statement of 28 November 2001 confirms the fact: 'Tiomin does not have land title to proposed mining area. Until Tiomin can demonstrate access to title – the fourth criteria has not been met<sup>4</sup>' (Tiomin Resources, 2001).

It would further appear that the titanium ores located on the Kenyan Coast are strategic to the evolution of Tiomin from a junior exploration company to a producer in the international titanium industry. However, the fact that the Kwale Titanium mining project would be the first one ever to be mounted by Tiomin has grave implications to the host government, the Kenyan taxpayer and other stakeholders. Indeed, the viability of joint ventures with a firm that has never handled economic scale mining development is not clear. Further, the credibility of Tiomin's pledges to rehabilitate mined land when the firm has no experience in mining, let alone mine rehabilitation is not apparent.

In preparation for ownership and development of the Kwale titanium deposits, Tiomin has registered two Kenyan based companies, Tiomin Kenya Limited and Kenya Titanium Minerals Limited both of which are wholly owned by the parent company. It is anticipated that Tiomin Kenya Limited will handle the mineral processing and subsequently pass them on to Kenya Titanium Minerals Ltd for export and marketing. The latter company has allegedly applied for EPZ status in readiness for mineral

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exports. The fact that three different corporate entities will be responsible for titanium mining has important implications with regard to handling of responsibilities especially on environmental rehabilitation and the resolution of the question of resettlement for displaced people, and the ensuing liabilities.

### **Commissioning the environmental impact assessment**

Tiomin completed prospecting for heavy mineral sands in Kwale in 1999 and promptly applied for licenses to mine, process and export titanium. However, the law required that Tiomin undertake a full feasibility study and environmental impact assessment (EIA) followed by tabling of findings with the government. The titanium deposits in Kwale are only up to 40 metres deep and the preferred mining method is strip mining, which would involve clearing and stockpiling all vegetation topsoil so as to expose the mineral bearing sands. Concern has been expressed that such a development will cause irreparable damage to human settlements, and local resource systems such as the coastal ecosystems, habitats for fauna and flora, water resources, infrastructure etc. To allay such fears, and in conformity with local and international project development requirements, Tiomin commissioned an EIA for the proposed mineral sands project. The study was undertaken by a consortium of companies, led by the South African firm Coastal and Environmental Services (CES), which included local groups such as Groundwater Survey (Kenya) Ltd and the National Museums of Kenya, among others.

### **The problems of the Tiomin deal**

There has been extensive debate on the role and conduct of transnational corporations, particularly in developing countries. Waters (1995) notes that TNCs are frequently more powerful than the states in which they operate. Luard (1990:151) remarks: 'Given the increasing economic power of these corporations and their ability to slip between the network of the sovereignty of individual states, there will continue to be concerns about their activities.'

Increasingly, businesses are starting to recognise the need to respond to (or at least be seen to respond to) the 'triple bottom line' (Elkington 1998) of not only meeting existing profit margins but also environmental and social concerns. One key aspect of this ethical approach to business is the need to increasingly involve and engage

with indigenous people when a company's activities change the local environment (Mulligan 1999:51).

To a significant extent, Tiomin's proposal in Kenya mirrors that of Rio Tinto in Madagascar, as explained in Mulligan's work *Green Wash or Blue Print? Rio Tinto in Madagascar* (1999). Whereas Tiomin tried to improve on the Rio Tinto approach, they failed on a number of counts and thus sparked the controversy that they find themselves in.

Similar to the Rio Tinto proposal, Tiomin set aside the finite nature of mineral extraction, which makes it an inherently unsustainable activity. There are questions as to which existing local economic activities will be undermined and whether the economic multiplier of the project would be as great as these threatened activities (particularly tourism and sugar cane growing). That there will be significant changes in land use in and around the project area cannot be denied. This would be significant for the resident villagers who currently utilise many natural resources in the vicinity. In addition, sacred lands (*Kayas*), including graves (which are of great significance with the context of Digo cultural veneration) are likely to be affected by the venture, as is the region's rich biodiversity, elements of which are endemic.

Two important areas that demonstrate elements of corporate accountability is the manner in which companies relate with local communities (especially in regard to land rights) and the independence, exhaustiveness and sincerity of the EIA process. How these two processes are managed would reflect a lot on the company's relationship with the stakeholders and NGOs. As explained earlier on, it is the failure to properly manage this process that sparked off the controversy. Technically, Tiomin's proposal to strip mine titanium failed first through poor community consultation. As local Councillor Mohammed Budzo aptly put it during one community meeting, 'Whenever Tiomin comes here, they only see minerals. They do not see the people staying on the surface. It is only when they will appreciate the people that we will allow them to mine.'

One major problem that Tiomin has to contend with is the land issue. The land question is both tricky and complicated. Whereas some of the landowners have title deeds – the majority of whom have signed agreements with Tiomin – there is a large majority of the residents who believe in customary land ownership. Tiomin did not go into any contractual agreement with those without title deeds as they were considered to be squatters.

Customary land ownership can be a complicated issue, often resulting in the emergence of difficult conflict situations. In our context the relationship between a man and his land is sacred and intimate, and goes beyond the mere ownership and the normal processes of reason and rationalisation. Physical occupancy by an individual or group may not be the conclusive evidence of ownership of that piece of land.

Understanding this complex land tenure in Kwale therefore required an effective mechanism that would integrate both the titleholders and those without legal title. This requires an all encompassing strategy and active participation by the affected farmers. This was not the case as Tiomin sought to clinch a deal with the titled thus dividing the once united community into two opposing camps.

Some of the key faults of the Tiomin proposal included the following:

### **Importance of environmental impact assessment**

The EIA process is an important economic development tool that helps people to understand environmental issues. The current situation in regard to the Kwale mining project highlights the need for countries to conduct credible EIAs that are participatory and independent. In the Kwale case, the EIA carried out by the CES-led consortium was not independent, as it was carried out by the same consulting firm that developed the terms of reference, and two volumes of the EIA were prepared by Tiomin staff. Tiomin employees managed the public participation process in a way that interpreted 'participation' to mean 'consultation'. Their reports did not mention any of the decisions that were arrived at or explain what had changed as a result of the public participation process. Of particular importance is the need to evaluate a no-go scenario, an aspect which was not captured by the Kwale EIA.

### **Adequate and just compensation**

The current rates of compensation, which are GBP£90 (Kshs 9,000) per acre for resettlement costs and an annual lease of GBP£20 (Kshs2,000) per acre, plus individual amounts according to improvements on the land, are inadequate, taking into consideration the land prices in adjacent areas and the family structure and size. There is a need for a proper valuation that takes into consideration not just the land but also the trees and the various economic activities that the people engage in. The valuation to be done would be based on the category of assets, with a suitable

methodology in place for the valuation of *kayas*. Local and national experiences in regard to the compensation of affected persons should have been considered.

## **Environmental Management Plan and Resettlement Action Plan**

Volume 7, page 27 of the EIA Report reads:

The resettlement of the people in the proposed mining area has the potential to result in three negative impacts of high significance, namely the loss of households, loss of community infrastructure and disruption of the community network. The negotiated compensation can actively mitigate these impacts, reducing their significance to low... (Tiomin Kenya Ltd 2000)

Accordingly, an Environmental Rehabilitation Plan with relevant costs, a Resettlement Action Plan and an Environment Monitoring Plan must be in place. These items are part and parcel of the EIA process and must be done up front. Tiomin ought also to conduct an EIA that takes into account the new resettlement site. The development of a Resettlement Action Plan should address the compensation issue. Tiomin should create an Environmental Fund to cater for the rehabilitation process. All these items were absent in the CES EIA.

## **Absence of an Economic Analysis**

The EIA report lacked a cost benefit analysis of both the social, economic and environmental impact of the project. For example, the proposal to develop a ship loading facility at Shimoni did not look at the costs and benefits of this against those of tourism. Through such an analysis, the benefits of the project to the nation would be stated in clear terms, well defined and articulated. Further, since the proposed mining area is adjacent to a sugarcane growing area, the opportunity cost of each of these ventures must be looked at. The mining option should not have any adverse effect on sugar cultivation in the area.

## **Impacts on underground water resources**

The proposal by Tiomin to exploit underground water resources in the Kilindini aquifer was the best option but should be approached with caution. Excessive pressure on the aquifer is bound to lead to severe draw down with possibilities of

salt-water intrusion. Since the boreholes are located near the Gongoni Forest, an eventuality of salt-water intrusion would have a significant impact on the forest.

### **Possible radioactivity**

An independent study by Kenyatta University indicates that Zircon – one of the minerals to be mined in the area – contains impurities of uranium and thorium at appreciable levels of up to 309 parts per million (ppm) and 143ppm respectively. The Hot Acid Leach process to be used in removing the impurities – thorium, uranium and iron oxide coating – involving a 170<sup>0</sup>C heating after mixing with sulphuric acid, would lead to the release of these radioactive elements into the atmosphere with a possible significant impact. There is need to develop adequate technology to contain the resulting situation.

### **Development of a ship loading facility at Shimoni**

The proposal to develop a ship loading facility at Shimoni should be rejected. The EIA report was found to be unconvincing with regard to the environmental soundness and cost effectiveness of this. It downplays the significant impacts on marine life arising from the dredging of the Wasini Channel, the risk of ship accidents and the issue of trans-boundary border conflicts. Further, the Kenya Ports Authority had not been approached in this regard. Furthermore, impacts on the adjacent terrestrial areas such as the Shimba Hills National Reserve, Buda and Gongoni forests and the Kisite/Mpunguti Marine Park and Reserve were not exhaustively examined.

Whereas Tiomin has publicly accepted some of the environmental and social problems that mining in the area might cause, it has been difficult to have them openly accept that the responsibility for dealing with these problems lies, to a large extent, with them. They have put themselves in a state of constant defence and denial even when faced with facts such as the issue of radioactivity.

### **Genesis of the anti-titanium campaign**

Two formerly obscure villages situated on Kenya's South Coast have suddenly become household names in Kenya. Within international conservation circles, Nguluku and Maumba villages in Kenya's Kwale District require no further introduction. They have dominated news in the recent past, thanks to their being the stage for a bitter struggle pitting lowly subsistence villagers on one hand, and Tiomin

Resources Inc. – backed by a cash-strapped host government – on the other. The cause of the conflict is a struggle for access to and control of two coastal sand dunes whose mineralised sands are known to hold titanium.

These two villages have a rich history as they are made up of about two dominant tribes, the Digos and the Kambas. Appendix 1 gives the time line of the two communities. The residents of these areas are farmers growing various crops both for subsistence and commercial purposes.

The battle dates back to 1996 when Tiomin started exploring for titanium in this area. Events on the ground indicate that, despite numerous meetings, the manner of Tiomin's entry into Nguluku village left a bitter taste with the villagers. The mood on the ground is captured by the experience of Mama Esther Peter Mwanyangima:-

*“Tuliona trakta zikivamia mashamaba yetu. Hatukujulishwa mapema nia ya wenye trakta. Mimea yetu iliharibiwa. Miti ya Mzee Balozi ilikanyagwa. Tulipouliza kinachofanyika, hao watu wakawa wajeuri. Chifu akaja na baadaye ikasemekana Mzee Balozi alipwe. Lakini mpaka sasa hajalipwa. Hata tukilipwa pesa hizo hazitufai.”*

*[“We saw tractors invade our plots. We had no prior information on the motive of the tractors. Mzee Balozi's trees were trampled. When we inquired what was happening, they became evasive. The chief intervened and it was agreed that Mzee Balozi be compensated. But up to now, he has not been compensated. Even if they pay, the compensation will be not be worthy of us” (Quoted in Wamicha et al, 2000)].*

Strip mining and human settlement are mutually exclusive. Thus alongside detailed mineral exploration, Tiomin initiated a campaign to acquire surface rights to the land corresponding the mine area in preparation for granting of mining licenses. And since people would have to relocate to give way to mining, acquisition of ground rights simply entailed convincing local landowners to vacate their lands under a compensation and lease programme. Negotiation for voluntary relocation proceeded throughout 1997/98 with agents of Tiomin rapidly acquiring land titles from easy-to-convince villagers, while relying on ready help from the provincial administration to secure the co-operation of hesitant locals. To those who stood their ground, particularly the squatters at Nguluku, threats of compulsory land acquisition followed by eviction without any compensation were issued.

A newspaper article in mid-1999 reported the seeming discontent amongst the farmers with the Tiomin deal. Their main concern at this time was the paltry compensation of GBP£110 per acre. This was the beginning of a protracted Civil Society Organisation campaign on titanium mining in Kenya. A chronology of events surrounding the titanium campaign is shown in Box 1, below. For more than three

**Box 1:** *A chronology of events surrounding the titanium campaign*

- 1996 Tiomin begins mineral exploration
- 1997 Huge titanium deposits discovered along the Kenyan coast
- 1998 Tiomin begins negotiation on land ownership with farmers
- 1999 Farmers register dissatisfaction with the compensation; media reports
  - Tiomin/CES EIA study
  - NGO intervention / visits to affected area
  - Barclays Capital appointed financial advisors to the mining project
  - Coalition building at local, national and international levels
  - Second meeting of farmers' representatives and Tiomin achieves some level of compromise on compensation (an extra GBP£2 (Kshs 200) added to the initial offer)
  - NGO coalition begins preliminary discussions with Kenyatta University team
- 2000 Parallel EIA study
  - Dongo Kundu filming
  - Community dissemination of the CES EIA
  - First Conference on Titanium Mining (June)
  - Meeting with Government of Kenya
  - Meeting with Tiomin Vice-President
  - First Roundtable discussion
  - International letter-writing campaign
  - Submission of comments on the CES EIA
  - Government statement on the status of the mining project
  - Second Roundtable discussion
  - Trip to Canada
  - Project put on hold by government
  - CoastWatch court case
- 2001 Coastal Rights Forum institutionalised
  - Farmers take Tiomin to court, win 14-day injunction (February)
  - Farmers win a permanent injunction (September 2001)
  - Tiomin threatens to pull out
- 2002 Tiomin appeals against the court ruling
  - Farmers accept an out-of-court settlement

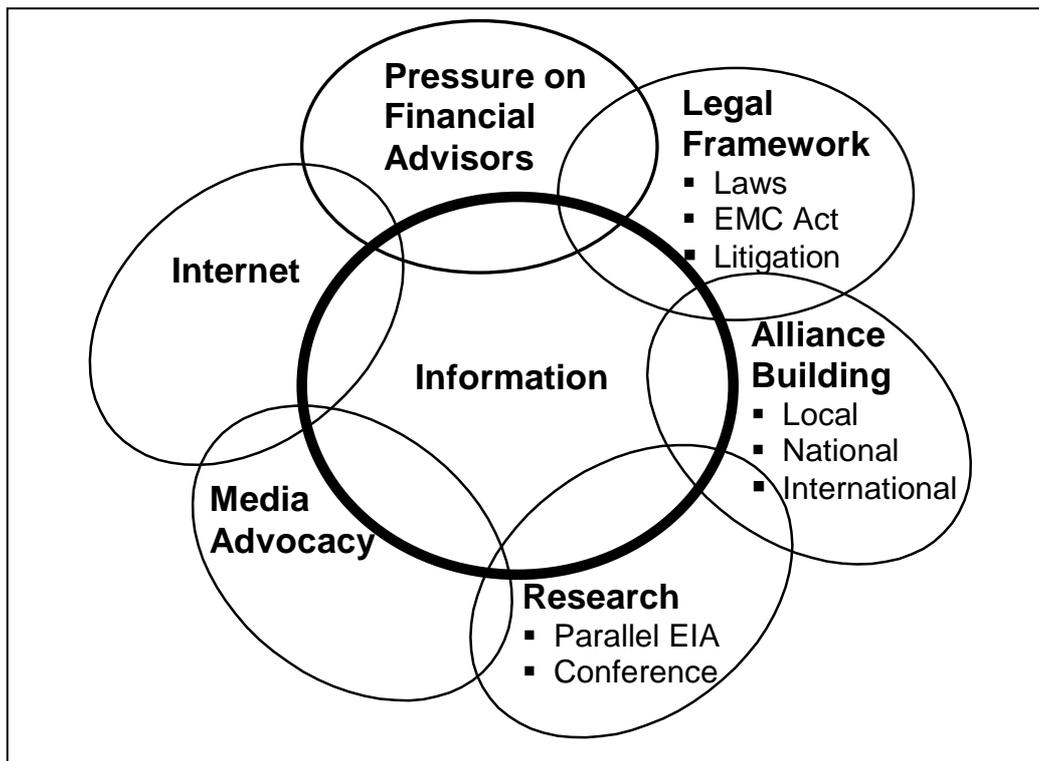
years, campaigners have pushed for accountability before Tiomin starts mining titanium. They sought to push forward a diverse agenda whose main goal was to ensure responsible investment that does not lead to environmental degradation and that upholds community rights. The campaign catapulted the two previously unknown villages of Maumba and Nguluku in Kwale district into international fame. A discussion of the diverse strategies that were employed by this team – the core of this paper – is shared in the next part.

## Part II – A concoction of strategies

In order to press the demand for corporate accountability, we adopted a number of strategies. These strategies were not used in isolation but a combination of one or two were utilised at a single time during the campaign. The work was incremental and one strategy either reinforced or depended on the other. It is these strategies that were key to the success of the campaign.

This section therefore seeks to share some of the important strategies that we used. As shown in Figure 1 below, the strategies are inter-linked and dependent on each other. The core of the strategies is information and how it is used strategically in each case, in pushing forward the accountability agenda. These strategies can be divided into two broad areas: information gathering and solidarity building. Information is essential in pressing for accountability and is vital when applying any of these strategies, as will be demonstrated below.

**Figure 1:** Campaign Strategies



Looking at each of the strategies, one realises that at least one or two strategies are employed at any one time. A single strategy would not be able to do the trick unless

supported by the others. And, as stated above, they are incremental in nature in that they build upon the successes and failures of the other strategies.

Time and the progress of the project also govern the use of a combination of these strategies. Other important variables that would be of importance in selecting the strategies include the general political climate, the counter-strategies developed by the company, resource availability, accessibility of information technology and the location of the campaign (whether rural or urban). In the case of the titanium campaign, the fact that it was staged from Mombasa made it easier in terms of most of the variables indicated above.

## **Strategy one – Understanding the legal framework**

One of the strongest mechanisms for ensuring accountability is through the enforceability of the laws in the country. To most of those in the advocacy field, knowledge of the legal framework is essential. It enables one to know the current opportunities and the risks of adopting a legalistic approach in challenging the corporations concerned. It also allows one to know under which sections of the law particular conduct could be challenged in the courts. In the context of the campaign, this formed the beginning of information gathering and, as will be demonstrated later on, is still an important strategy that runs throughout the campaign.

### **The problem of outdated laws**

An analysis of the Kenyan legal framework shows that there are a number of laws relating to investment in the mining sector. According to Mobbs (2000:1), the Customs and Excise Act (Cap. 472), the Foreign Protection Investment Act (Cap. 518), the Income Tax Act (Cap. 470) and the Value Added Act (Cap. 476) cover the mining industry in Kenya. Other very important Acts that regulate the conduct of mining companies include the Mining Act 1940 (Cap. 306), the Land Adjudication Act 1908 (Cap.284), the Trust Land Act 1939 (Cap. 288), the Government Lands Act 1915 (Cap. 280), the colonial Land Titles Act 1908 (Cap. 282) and the Registration of Titles Act 1920 (Cap. 281) (references are to the Laws of Kenya). The list is long. The reality is that the above-mentioned Acts are outdated and have been blamed for the current legal predicament in which the citizens of Kenya, especially those living in possible mining areas like Maumba and Nguluku, find themselves.

Repeatedly, these Acts have led over time to the local people losing their rights to land, and have been a major source of the current ugly situation that the coastal people find themselves in with regard to their land rights. They have proved not to protect the interests of the poor, while those who have power have used them to their advantage and thus acquired large chunks of land. They represent the ethos and ideals of the colonial government which formulated them and used them for their own benefit.

The situation is further complicated by the fact that the Kenyan Constitution echoes the same colonial ideals and does not make the situation any better. The constitution has by and large been used to maintain the status quo.

The Mining Act vests all national mineral wealth with the government. Citizens who legally own land in areas where minerals are found are entitled to 'Ground Rights' equivalent to the rooting depth of most crops. The Mining Act also allows for compulsory acquisition of land targeted for mining if their owners are reluctant to relocate the land in favour of mining, but however provides for such farmers to be paid a relocation fee as compensation for loss of investments on the land. These legal documents have bestowed mineral rights to the state! Any economic wealth found on the sub-surface is the property of the state and therefore a citizen cannot claim rights of ownership to that important resource. What the individual has to do is to relocate and be compensated for the land – not valued at resource value – but based on the developments on the surface. This is an aspect of compulsory acquisition that the state employs in order to take over such land all in the guise of public interest. Its effect is to exacerbate poverty through deprivation and displacement.

For example, Section 115 (1) of the Kenyan Constitution states that:

All Trust land shall vest in the county council within whose area of jurisdiction it is situated:

Provided that there shall not vest in any county council by virtue of this subsection:

- (i) any body of water that immediately before 12th December, 1964 was vested in any person or authority in right of the Government of Kenya; or
- (ii) any minerals or mineral oils... (Government of Kenya 1998)

This is a clear demonstration that even the county councils do not have rights in regard to mineral wealth found within their own jurisdiction. It belongs to the state – that is, the central government in Nairobi.

The constitution also provides for the right to own property. Though this may sound a noble idea, it has been misused in regard to the property rights of poor people. Land, which is an important property is always taken away from them. Upholding this constitutional right in the face of a mining company is important. The situation is further complicated where the community believes in customary land ownership, a mechanism that is not recognised within the current legal framework. The ‘squatters’ in Maumba and Nguluku saw the available land as their own property and each of them could pinpoint the beginning and end of their land. Just because they did not hold a land title deed – a legal requirement – meant that they could not benefit from the compensation on the land lease.

As demonstrated above, the Kenyan legal framework is one full of outdated laws. These laws are either contradicting each other – therefore require harmonisation – or are not in tandem with the current socio-economic situation. They therefore become a big stumbling block on the part of the poor in pursuit for justice. The current legal reforms – including the constitutional review – present an excellent opportunity to improve on them and whenever possible amalgamate or even do away with those sections that seem not beneficial to the citizenry, particularly the poor.

Understanding this legal framework was an essential element of the advocacy work in the titanium campaign. It enabled us to weigh which options to adopt and thus agree on when to resort to a legalistic approach, as shall be shown later on. It also afforded us an opportunity to know what action to take and constantly reminded us to ensure that we behaved at all times within the legal provisions.

### **The Environmental Management and Coordination Act, 1999**

It is through this process that we were able to learn about a new law relating to environmental regulation that had just been debated in Parliament. The Environmental Management and Coordination Act, 1999, which received Presidential assent in January 2000, became the ‘Bible’ of the campaign. This is so because of the principles that it sought to espouse, which are shown in Box 2. It clearly stated that ‘Every person in Kenya is entitled to a clean and healthy environment and has the duty to safeguard and enhance the environment’ (Government of Kenya

2000a:63). This statement did not just talk about the entitlement, it gave the responsibility to the people to ensure that their environment is safeguarded.

**Box 2. Key provisions of the Environmental Management and Coordination Act, 1999**

**PART II – THE GENERAL PRINCIPLES**

3. (1) Every person in Kenya is entitled to a clean and healthy environment and has the duty to safeguard and enhance the environment.
- (2) The entitlement to a clean and healthy environment under subsection (1) includes the access by any person in Kenya to the various public elements or segments of the environment for recreational, educational, health, spiritual and cultural purposes.
- (3) If a person alleges that the entitlement conferred under subsection (1) has been, is being or is likely to be contravened in relation to him, then without prejudice to any other action with respect to the same matter which is lawfully available, that person may apply to the High Court for redress and the High Court may make such orders, issue such writs or give such directions as it may deem appropriate to:
  - (a) prevent, stop or discontinue any act or omission deleterious to the environment;
  - (b) compel any public officer to take measures to prevent or discontinue any act or omission deleterious to the environment;
  - (c) require that any on-going activity be subjected to an environment audit in accordance with the provisions of this Act;
  - (d) compel the persons responsible for the environmental degradation to restore the degraded environment as far as practicable to its immediate condition prior to the damage; and
  - (e) provide compensation for any victim of pollution and the cost of beneficial uses lost as a result of an act of pollution and other losses that are connected with or incidental to the foregoing.
- (4) A person proceeding under subsection (3) of this section shall have the capacity to bring an action notwithstanding that such a person cannot show that the defendant's act or omission has caused or is likely to cause him any personal loss or injury provided that such action:-
  - (a) is not frivolous or vexatious; or
  - (b) is not an abuse of the court process.
- (5) In exercising the jurisdiction conferred upon it under subsection (3), the High Court shall be guided by the following principles of sustainable development:
  - (a) the principle of public participation in the development of policies, plans and processes for the management of the environment.
  - (b) The cultural and social principles traditionally applied by any community in Kenya for the management of environment or natural resources in so far as the same are relevant and are not repugnant to justice and morality or inconsistent to any written law:
  - (c) The principle of international co-operation in the management of environmental resources shared by two or more states;
  - (d) The principles of intergenerational and intragenerational equity;
  - (e) The polluter-pays principle; and
  - (f) The pre-cautionary principle.

Source: Environmental Management and Coordination Act, 1999

The Act therefore provided an important opportunity to challenge the conduct of Tiomin. It enabled us to assess to what extent the company's activities could lead to environmental degradation.

In light of the fact that Tiomin had already conducted its EIA by the time this Act came into force, it was essential to check whether they had behaved within the legal requirements. In particular, there were in existence draft EIA regulations that were developed by the National Environment Action Plan under the National Environmental Secretariat (NES) of the Ministry of the Environment and Natural Resources (MENR). These guidelines were supposed to inform thinking in regard to the development of the new Act.

The provisions for an EIA under this new Act are very clear. Section 58 (1) states:

Notwithstanding any approval, permit or licence granted under this Act or any other law in force in Kenya, any person, being a proponent of a project shall, before *financing, commencing, proceeding with, carrying out, executing or conducting or causing to be financed, commenced, proceeded with, carried out, executed or conducted by another person any undertaking* specified in the Second Schedule of this Act, submit a project report to the Authority, in the prescribed form, giving the prescribed information and which shall be accompanied by the prescribed fee [emphasis added].

This section clearly established the requirement for EIAs and determined that the project proponents must conduct these at their own expense. It also emphasised the need to have the EIAs done by independent bodies, a stipulation which was abused by Tiomin, as seen above. It noted that EIAs shall be conducted in accordance with the EIA regulations, guidelines and procedures issued under the Act.

What was of great use also to us, and was abused by both the company and the government, was the legal requirement in Section 59(1) that:

Upon receipt of an environmental impact assessment study report from any proponent under section 58(2), the Authority shall cause to be published in each of two successive weeks in the Gazette and newspaper circulating in the area or proposed area of the project once at least in each of two successive weeks in some one and the same a notice which shall state:

- (a) a summary description of the project;
- (b) the place where the project is to be carried out;
- (c) the place where the environmental impact assessment study, evaluation or review report may be inspected; and

- (d) a time limit of not *exceeding ninety days* for the submission of *oral or written comments by any member of the public on the environmental impact assessment study, evaluation or review report* [emphasis added].

Clear as these requirements are, it took Tiomin almost two months to advertise its EIA in the local print media. In fact, during one of the community level disseminations of the Tiomin EIA, I did quote the relevant sections of this Act and the fact that this requirement had not been met, to the embarrassment of Tiomin and the government representatives. They little expected that we would carry along the Act and read it verbatim in front of the community. This spectacle tilted the power balance as the community got the courage to ask more pertinent questions, some of which the company could not respond to.

The requirements in Section 59 (1) (d) became handy when it became important that we develop our position on this issue and submit it to the Permanent Secretary of the MENR – once the Act had not been fully observed. It became essential that, whereas we were putting a lot of emphasis on Tiomin, there was also a need to put pressure on the government to operationalise the Act. Otherwise, Tiomin's relationship with the Inter-Ministerial Technical Committee (which is not a legal entity) could be considered null and void. At the same time, effort was put into advocating for the need to review the Mining Act in order to be in the same spirit as this new Environmental Act.

At the moment, the Act has now been operationalised and the National Environment Management Authority (NEMA) constituted. Other organs that have been created include the National Environment Council, which is responsible, among other things, for policy formulation; the Environmental Complaints Committee; Provincial and District Environmental Committees and Environmental Tribunals.

The titanium case therefore provided a litmus test to this new Act and gave the impetus towards pushing for policy implementation. Our work around this Act therefore was two-pronged – targeting both the company and government for legal compliance.

## **Litigation**

The above scenario does not suggest positive grounds the successful use of litigation. As a campaign Forum, we left this option open but, as will be explained below, it was put into practice by the affected farmers themselves. Litigation as a

strategy is dependent on the availability of information or evidence that would enable one to put forward a credible case. This strategy will depend on all the other strategies and how much information has been gathered. Although it is one of the strongest strategies, it also has several limitations, as will be discussed later. It became our 'Plan B' that we could use at an opportune time.

### *Litigation in Kenya*

Given the above limitations with the legal framework in Kenya, taking Tiomin and the government to court was one option that we have continued to leave open up to the present time. However, some time in December 2000, CoastWatch, a Nairobi-based organisation with links in the Coast region, went to the High Court to restrain the government from licensing Tiomin before the issues in question had been sorted out. This was the first suit that brought Tiomin into a Kenyan court. The suit did not proceed because the plaintiff lacked the necessary *locus standi* [legal standing to bring the case].

On 27 February 2001, 203 farmers – mainly those who had no title deed – led by Frank Mutua, took Tiomin to court for the second time. Their grounds for legal redress were that the compensation offered, a total of GBP£110 (Kshs11,000) per acre per year, was inadequate; they objected to moving out of Maumba and Nguluku on the grounds that Tiomin Kenya Limited had not produced a proper relocation plan. They also took issue with the EIA prepared by the company, saying it downplayed key issues.

Though this team had consulted us, we agreed that we would give them only 50 per cent backing. The reason behind this decision was that it was their own initiative and if we intervened it would not remain their activity. The farmers are the ones who are directly affected by this process and therefore better placed to take Tiomin through running court battles.

The first legal success was when the High Court in Mombasa granted a fourteen-day temporary injunction, preventing Tiomin from pursuing its exploration and development programme in the project area and prohibiting the company from having any contact with the local residents until the court case was heard and decided. This was a big success on the part of the farmers, especially those who had no title deeds. However, the legal battle split the entire community right down the middle, with some criticising Mr. Mutua for including their names in the suit without consulting

them. This became a thorny issue which gave Tiomin an opportunity to capitalise on it by working with those who were dissatisfied with the legal approach.

According to a press release just after the court ruling, Tiomin challenged the judge 'to lift the work injunction on the grounds that it is wrongly based in fact and in law and furthermore to dismiss the lawsuit on the basis that it is not a class action suit by 203 farmers but solely initiated by three individuals, two of whom are not farmers. The third one is a farmer who signed a lease agreement with Tiomin Kenya some four years ago and has collected land rent' (Tiomin Resources Inc. 2001).

On 21 September 2001, the High Court refused to lift the injunction on Tiomin, thus preventing them from operating in the project area. This ruling was historic in that it found in favour of the farmers, but the grounds on which the ruling was based were very weak and could be challenged in any appellate court. One of the grounds was that Tiomin had not submitted its EIA to the government, while it was clear to all that they had done this. The ruling therefore showed that there was something very wrong.

Tiomin criticised the ruling which 'gave as primary reason that Tiomin had not submitted its Environmental Impact Assessment ... to the Government of Kenya. This issue never arose in court proceedings and Judge Hayanga never asked counsel to clarify this point, which could easily have been done. Tiomin confirms it has submitted the EIA to the Government of Kenya. The company has applied for a review of the judgement made by Justice Hayanga and lodged appeal documents in the Kenya Court of Appeals' (Tiomin 2002).

As expected, Tiomin lodged their appeal. This time round, the company adopted delaying tactics that wore the farmers out. They also concentrated on technical issues relating to things that the plaintiff's lawyer had failed to do during the previous hearings. One of these was the fact that, despite the suit being a representative one, it had not been advertised in the local media. This approach seemed to work for them and before long, sensing danger, the farmers decided to go for an out-of-court settlement. They consented that the Order of Injunction of 21 September 2001 be discharged, the suit be dismissed; and that there be no order as to costs.

After the dismissal of this suit Mr. Jean-Charles Potvin, President and CEO of Tiomin Resources Inc., stated 'this is a very important step in the future development of this important project for Kenya. We are pleased with this result and we now look forward to continued success in developing Kwale' (ibid.).

Although the farmers effectively lost their suit, it brought out fundamental points. As Newell (2001:85) aptly puts it, 'the process of bringing a suit serves to highlight and expose existing inequalities in the law, providing a focus for future mobilisation'. Thus process achievements become of great importance, as they are likely to change Tiomin's behaviour.

Jezić and Jochnick (2000:16) rightly argue that 'legal victories must be viewed as pieces of larger campaigns and evaluated in terms of their benefits to local organising and activism which represent the best long term hope for these communities'. Forcing defendants to respond to a case in a court and therefore creating an official record of violations confers recognition of crimes, which otherwise would not be acknowledged (Newell 2001). Civil Case No. 97 of 2001 will remain a reminder to Tiomin of the battles that they had to go through, and that a strong community resolve to fight for its rights can be a bitter pill to swallow. No wonder for the three months to 30 September 2001, the corporation had a net loss of US\$741,000<sup>5</sup> (\$0.02 per share) compared to a net loss of \$370,000 (\$0.01 per share) for the same period in 2000 (Tiomin 2001). The increased loss was primarily due to increased salary expenses as a result of hiring additional employees in early 2001 in anticipation of the development of the project, and increased costs due to the court injunction placed upon the corporation in Kenya.

### *Limitations of this approach*

From the experience of legal battles in Kenya and based on the previous analysis of the legal framework, it is evident that using the courts as a strategy is a necessary but not sufficient condition. This is because:

- Legal strategies often reduce complex social problems to questions of monetary compensation especially in class action suits like the one against Tiomin Kenya.
- Lack of legal literacy and unfamiliarity with technical legal vocabulary and concepts alienates not just the community but even the educated. The show is left to the lawyer who is trusted that she/he will be able to deliver the facts as expected.
- Costs become very high. This is both in terms of time and money that goes into this process. It takes hours to commute between Maumba and Nguluku and the High Court in Mombasa. Several court hearings therefore tires the communities

who with the scarce financial resources they have find it difficult to continue supporting an initiative whose result is not forthcoming. Unless they are very lucky to get an excellent lawyer who is willing to take up their case *pro bono* [on a no-fee basis], they cannot afford the legal fees, not just of the lawyer but also of registering the case in court. Justice in such situations is very expensive for the poor to afford.

- Legal technicalities often become an excellent way out for the companies. In the Tiomin case, the fact that the farmers had not advertised the suit in the print media became an issue. They also have to contend with issue of *locus standi*. For example, during the Coast Watch suit in Nairobi, it was argued that the plaintiff did not come from the proposed mining area and therefore would not be affected by the activities of the mining company.
- Intimidation and threats by the provincial administration is a significant deterrent. The Chiefs Act (Cap.128) has been used by the local Chiefs to intimidate the farmers in the proposed mining areas. Close to this are allegations of corruption. Frynas's (1998) work on Shell's investment in Nigeria suggests that part of the attraction of investing in countries where corruption is rife and organised opposition is openly repressed, is that businesses with the right contacts and financial resources can proceed with controversial projects with few obstacles. The Kwale experience was no better.

### *International company-specific legal instruments*

Newell (2001) notes that advocacy work against TNCs enables us to understand the role of litigation in creating checks and balances on the activities of global corporations where globalisation creates opportunities for exploiting the lack of protection of the poor and their environment. It is within this frame of thinking that taking the struggle to the international level still remains another option that the Forum could adopt.

Currently, there are a number of company-specific international instruments that would be applicable to the Tiomin case. Key among these are the guidelines and standards promoted by the International Labour Organisation (ILO) and the Organisation for Economic Cooperation and Development (OECD). However, these instruments are far from being widely known and therefore are rarely used. They are entirely voluntary and without sanction and are outdated, even when compared with companies' own codes of conduct (McLaren 2000). The nine principles of the United

Nations' Global Compact are another example. Other certification standards such as those of the International Standards Organisation (ISO) remain voluntary, and therefore would be of little relevance to the fight at this initial level. These however remain options that could be adopted in instituting legal action in Canada, where Tiomin is domiciled, in case the project is allowed to proceed.

Other options include the use of the law of torts, class actions and transnational litigation. These provisions are able to defend and promote the interests of poorer communities whose livelihoods are most threatened by destructive investments. Newell (2001) observes that transnational litigation seeks to use the law of the company's home state to hold the company accountable for activities undertaken overseas. The basis in this case would be that the parent company – Tiomin Resources Inc. – exercises sufficient control over the operations of its subsidiary, Tiomin Kenya, Limited to be legally responsible for the impacts of the subsidiary's operation. Examples exist where such litigation has been used to the benefit of the plaintiff. The mass tort case brought against Texaco in Ecuador (*Aguinda v. Texaco*; Newell 2001:85) and the *Thor* case in South Africa are vivid examples.<sup>6</sup>

The levels of radioactive elements (thorium and uranium) in the proposed area cannot be extracted unless proper disposal mechanisms are developed. Suits akin to *Connolly v. RTZ* would emerge in a venture like this due to its relationship with uranium. In the *Connolly v. RTZ* case, the United Kingdom House of Lords concluded a judgement in 1997 that allowed Edward Connolly, a worker exposed to uranium dust whilst working at the company's plant in Namibia, to bring his GBP£400,000 compensation claim to the UK High Court. The grounds upon which the decision was made were that support in the form of funding for a legal action like this was not available to the plaintiff in Namibia. If such a strategy were adopted in the Tiomin case, the Canadian government could then be at loggerheads with Tiomin.

### *International Conventions – putting pressure on the government*

Since Kenya is a signatory to, and has ratified a number of international conventions and other agreements which bind her to protect the environment, a critical requirement for any local development would be its contribution to helping the country fulfil her undertakings in such conventions and agreements. Will the titanium mining project assist Kenya in fulfilling her undertakings, or will it act against the spirit

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<sup>6</sup> In the *Thor* case, twenty workers who suffered potentially lethal mercury poisoning in a factory in South Africa won substantial damages (GBP£1.3 million) from the United Kingdom parent company. The parent company was held liable because of negligent design, transfer and supervision of an intrinsically hazardous process (Newell 2001:85).

and requirements of prescribed joint global action for the environment? If the project will help the country to fulfil its undertakings while complying to local legislation, then it merits further consideration. But should it turn out that the proposed activities make the fulfilment of undertakings difficult, the project should be reviewed.

Appendix 2 gives a brief description of the most important international conventions and agreements on the environment that Kenya is a party to and that would be infringed by the titanium deal.

These international conventions presented an opportunity to shame the government at the international level with regard to the manner in which it treated the titanium issue. Any activity that would go contra to the ethos of these conventions would therefore be an important weapon upon which to put the government to task. It is in this spirit that the international nature protection organisation AGA (Action for Endangered Species) withdrew its 2001 award for excellence in environmental stewardship, which was supposed to be handed over to Kenya at the International Tourism Convention in Berlin, Germany. The reason cited for this last-minute withdrawal was the manner in which the Government of Kenya handled the issue of timber extraction and the controversial mining of titanium sands in the coastlands, the violation of human rights of indigenous peoples and the dramatic decline of wildlife populations in the country.

## **Strategy two – Alliance building and networking**

The growth of international communication technology has facilitated international networking and alliances, which increasingly transcend geographical boundaries, broadening the power and influence of NGOs (Watts 1998:24). Advocacy campaigns on a large scale have been won through collective effort. Further, the cordial relationship between TNCs and states imply that no single organisation would be able to challenge TNCs on their own at the risk of de-registration. It is cardinal therefore that NGOs develop effective alliances right from the beginning in order to push forward the accountability agenda. Alliance building enables the team to draw on the diverse skills and resources of the member organisations. In this process, we formed a local level alliance, which lead to national and international alliances. The linkages therefore are developed not all at once but depending on the issues at stage of the campaign.

## **Local level alliances**

The support accorded to Tiomin by the government against its own citizenry found a more than equal match in the NGO world. What the NGO movement lacked in terms of capacity to stop the government was more than compensated by their excellent network and capacity for advocacy, which was effectively used to rally local and international support for the Kwale villagers in their war against Tiomin. The starting point was the decision by ActionAid Kenya to mobilise like minded NGOs and community-based organisations (CBOs) into an umbrella body, the Coast Mining Rights Forum (CMRF; since renamed the Coast Rights Forum, CRF), under whose auspices the campaign against Tiomin was mounted.

The membership of the CMRF included the following organizations: the Maumba and Nguluku communities; ActionAid Kenya (Coast Regional Office); Kituo Cha Sheria; the Kwale Rural Support Programme; the Kenya Human Rights Commission; Muslims for Human Rights; the Ilishe Trust; the Tsunza Conservation and Development Programme; Africa Ncha ya Uvumbuzi; the Supreme Council of Kenya Muslims (SUPKEM) – Coast Branch; Pwani Community Development Organization; Tiwi Community-Based Organization; and Kwale Professionals Forum.

These organisations provide valuable services to local populations in the absence/inadequacy of government services. Some of these organisations have several years of experience working to assist the social and economic development of people in all districts in Kenya - the very districts in which mining companies are now increasingly showing interest of operating. Some currently support grass-roots self-help development projects in some of these areas. The organisations do not provide these services to the local people out of a sense of charity but from a belief that people have basic rights. Their fundamental tenet is that assisting people to acquire enough to eat, a livelihood, a home, clean water, a safe environment etc. is not an act of charity but an obligation on our part to ensure that people have what is theirs by right as human beings.

Under this coalition, a parallel EIA study was commissioned and undertaken by Kenyatta University, which not only cross-checked the findings by the CES study, but also presented a balanced evaluation of impacts and their likely consequences. The coalition also embarked on awareness raising which was not only limited to the proposed mining area but to the other parts of the Coast Province, particularly Mombasa. Inputs from the local elite coming from the affected area was also sought and important links established with them.

One strategy aimed at forging solidarities between workers in Mexico and in the Appalachian south, has been the organisation of study tours so that women who had lost their jobs in the Appalachian region could visit their counterparts who had gained similar jobs in the Maquiladora region of Mexico (Gaventa 1999). Shared experiences can be communicated through community exchanges and the making of videos which allow people to see how companies have exploited other communities.

Given that the affected farmers had become apathetic to the system, most of them had given up hope. This culture of apathy still exists in this area to date. Raising the consciousness of the people therefore had only to be done during the period when the EIA was being done and due to financial constraints and lack of proper organisation, the Forum could not carry out an adequate follow-up. We organised two exposure tours for the leadership of Maumba–Nguluku Executive Committee (a farmers' representative body) to visit communities that were dislocated by Ndakaini Dam and Sondu Miriu Hydroelectric Power plant. This helped to overcome the mood of apathy.

One major problem that faced this alliance was the fact that the campaign came to be identified more with ActionAid Kenya who were the main financiers. This challenge therefore points to the whole question of how to position campaigns that are spearheaded by alliances. It also implies the need to share responsibilities with each organisation taking the lead in areas where it has a comparative advantage. As will be shown later on for example, INGOs such as ActionAid Kenya have a comparative advantage in creating spaces for engagement. It is this strength that has to be built upon for the benefit of other members of the alliance.

### **National level alliances**

At the national level, the Forum developed an excellent working relationship with the National umbrella body of NGOs in Kenya, the NGO Council. The Council's responsibility, in collaboration with the Forum, was to push forward this important policy agenda at the national level. This would be through initiating discussions with the government and parliamentarians. Links were also developed with the International Union for Conservation of Nature (IUCN) whose inputs in developing a critique of CES EIA became handy. Strategic alliances were also developed by quasi-governmental organisations that were opposed to certain aspects of the project. The Kenya Wildlife Services was one such organisation.

## International alliances

The third and final layer of the alliance building was at the international level. Gene Bernofsky's WorldWide Film Expedition (WWFE) of Montana, USA were the first partners to collaborate with. Their reputation for producing educational and environmental videos in the USA encouraged us to work with them. Their work includes videos on the Noranda mining at Yellowstone, the Asarco mines in the Cabinet Mountains Wilderness, the Phelps/Dodge mines at Lincoln, Montana, the Cominco mining in The Big Snowy Mountains, The Pegasus mines at the Fort Belknap Indian Reservation and the DuPont mines on the Okefenokee National Wildlife Refuge.

Linking up with WWFE was a boost to the campaign. Their two weeks stay in Kenya while shooting the documentary was supported by grants from the Turner Foundation, Mary Stranahan of Pablo, Montana and a host of Kenyans who volunteered either to provide accommodation or transport for the period they were in Kenya. The result of this process was an award-winning film, *Dongo Kundu*,<sup>7</sup> a 20-minute documentary that highlighted the views of diverse people in regarding the project. The film was shared widely in Kenya, Canada and USA. In Kenya we sent the video to key Members of Parliament and urged them to view it and to raise the issues it highlighted for debate in Parliament.

Links with the USA-based organisation Global Response resulted in the launching of petition to prominent people in Britain and Kenya. Key targets of these letters were the Chief Executive of Barclays Capital, Tiomin's financial advisors; the Permanent Secretary at the Kenyan Ministry of the Environment and Natural Resources; and the Head of the Civil Service and Secretary to the Cabinet of Kenya. These petitions urged them not to licence the project until it addressed the contentious issues.

Through an alliance with Mining Watch Canada, the InterChurch Coalition on Africa and the organisation Rights and Democracy, the Forum was also able to bring its issues to the fore in Canada – Tiomin's country of origin. Constant contacts through e-mails were maintained between the Forum and these partners. As a result of this partnership two members of the Forum were able to travel to Canada to engage the government, media, members of the public and the company. This was the first time for the Forum members to engage in this process. It is through this trip that a number of issues came out more clearly in regard to Tiomin and titanium. In one of the

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<sup>7</sup> *Dongo Kundu* is Swahili for 'red earth', from which titanium is mined. *Dongo Kundu* was recently awarded Merit Awards for Investigative Journalism and Cultural Impact at the International Wildlife Film Festival.

meetings with the government's Mines and Geology Department they said that 'Tiomin and titanium does not exist in our radar', pointing to the fact that Tiomin was not a giant, as we had been made to believe (Ndubi, 2000 and pers. comm.). The team also met with Tiomin's President.

Further meetings were held in Washington DC in order to drum up support for CMRF issues. Support from the Kenya Community Abroad was essential in making the international campaign reach far and wide.

Flowing through these three levels of alliance was information including regular updates on what was happening on the ground. This was made easier by the good relationship that had been nurtured between the Forum and the farmers. The media was also constantly updated on progress.

In a nutshell, the NGO community is largely credited with all gains made in the road to securing fair play for Kwale villagers and environmentally oriented stakeholders in the entire campaign. It was largely the activities of the CRF that propelled the formerly village-level debate on titanium to international attention and helped build the capacity of the local people to fight for their rights, firstly by challenging the biased CES EIA report. The CRF also received substantial support from like-minded, locally-based NGOs such as the International Fund for Animal Welfare (IFAW).

### **Strategy three – Research: gathering and dissemination**

It is now clear that 'deeper societal changes reflecting the emergence of a late-modern risk society imply that business can no longer rely on government approval and scientific expertise as primary sources of corporate legitimacy' (Grolin 1998:213). Instead, companies must seek approval from an ever-widening body of stakeholders who have disparate interests and various degrees of power to affect the company.

Increasingly, 'facts' derived from a Western rationalistic perspective are elusive and cannot be sufficiently corroborated to hold sway. In their place, expressions of values are becoming significant. What people believe and what they care about need to be factored into the assessment of what is important (Osborn 1997:131). Whereas this position is true, in most developing countries credibility is still earned through scientific facts.

Fighting without facts is like going to the war without ammunition. Research is an essential thing in this kind of advocacy work. It enables the concerned to be credible and also to be seen as serious people. One of the frequent problems that a number

of advocacy campaigns have confronted is the labelling problem. By 'labelling problem', I mean the fact that the government would easily brand those on the opposing sides as noisemakers or 'anti-development' forces, who do not have the interests of the country at heart. This was a clear label that our campaign would have been given. The company would also not listen to any engagement that was not informed by 'facts'. Experience has shown that advocacy work in Kenya must be backed by well-conducted research. Research provides valuable information that helps drive and define other strategies that can be applied. It provides food for thought upon which engagement can be made.

### **The parallel EIA**

The Forum commissioned a parallel EIA, whose objective was to provide an independent evaluation of the project and thus provide facts that could form a foundation for engaging with both the government and the company. The study was conducted at the request of the affected farmers, who felt that they had not participated in the Tiomin study and were not aware of the dangers and or benefits of the project. The study was intended to identify the possible impacts of the proposed project and provide alternative methods for mitigating these impacts. The study was funded by ActionAid Kenya.

Because of the controversies surrounding the issue it became essential that we get accurate facts as a foundation for the campaign. Analysis of the situation on the ground showed that it would have been difficult for a private independent consultant to undertake a rapid EIA. The universities therefore became our only alternative since their charter allows them to conduct research in any part of the country. We therefore developed strategic linkage with Kenyatta University's Faculty of Environmental Studies, who agreed to conduct a rapid EIA.

Diverse PRA methodologies, such as focus group discussions, key informant sessions, child mapping, *Barazas*<sup>8</sup> etc., were applied in the Kenyatta University (KU) study so as to solicit the views of the Nguluku and Maumba community. Further, through participation in public review sessions organised by Tiomin, during which CES presented their report to the local community, the KU team was able to familiarise itself with the design, scope and proposed implementation strategy for the Heavy Sand Minerals Project. The KU team took advantage of such sessions to seek clarifications on all the issues of concern encountered during their study.

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<sup>8</sup> Swahili: public gathering or meeting.

The methodology used to do the study, particularly social assessment, enabled the farmers to link their environment with the mining project. Women and children were also interviewed with children giving critical input through child mapping. For example, according to Wamicha *et al.* (2000), the destruction of schools might mean an early end of formal schooling for children, which for some affected children might imply early or forced marriage, employment as child labourers and possible juvenile delinquency. Such perceptions of the children towards the proposed mining of titanium and the possibility of being relocated were brought out during child mapping sessions conducted on children from Maumba and Duncan Ndegwa Primary Schools. The children expressed concern that the relocation will affect their lives through possible loss of playmates, interruption of their schooling, fear of settling in a new place where water, firewood and other basic needs would be far away. The children also worried about the fact that their parents were poor and might not be able to afford to buy new land; the possibility of sickness and insecurity in the new places; the possible loss of their neighbours and friends they had known since childhood; and the possible loss of their churches or mosques and their *Madrasa*<sup>9</sup> teacher.

Focus group discussions with women revealed that a great majority, comprising women and children who do not own land but currently subsist on the family land holdings, would otherwise be wholly dependent on the generosity of household heads if relocated (*ibid.*). This is the group which unfortunately has no control or authority over the family resources and is therefore likely to bear the brunt of the difficulties associated with relocation if the household head decides to withhold lease incomes or even start a second home.

The research process built the farmers understanding of what would happen to them and their environment should the mining project be allowed to go ahead; this increased their resolve to resist it.

### **Creating spaces around the study**

One of the main problems facing research is the failure to package and disseminate the findings in a well-structured manner or in an appropriate forum. Studies have ended up on shelves with little or no action being done on the resolutions or recommendations made by the researcher. In advocacy, it is of essence that several

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<sup>9</sup> Muslim school.

spaces be created on which to engage diverse audiences with different packages arising from the study. Six diverse arenas for engagement were created.

### *Community-level engagement*

The first serious engagement relating to the study was when Tiomin was disseminating their EIA at the community level. Although we were not invited in these meetings we thought that they would provide an ideal arena to compare the two studies' findings and enable the community to understand what is wrong with the Tiomin proposal. The Kenyatta University team attended two of these meetings and engaged Tiomin at this level. Efforts were made by the team through translations, to ensure that the issues that were being talked about were clearly understood by the community. The challenge at this level was not to hijack the community's meeting. We had to give them ample time to ask their questions and only engage the company when the number of questions started to diminish. This opened up space for more questions from the community. Community level engagement enabled the farmers understand that Tiomin was not sincere with what it was telling them.

### *National Seminar on Titanium Mining*

With the parallel study complete, we organised the first conference on titanium mining. This drew participants from the affected farmers, the business community, NGOs and the media. However, the government and Tiomin snubbed the conference, arguing that they had not been given sufficient time to prepare, even though the invitations were sent two weeks in advance. The conference would have been an excellent opportunity for Tiomin to clear its name and also to see how their study compared with the Kenyatta University one. It would have narrowed the seeming divergence in the study findings in these two studies. The position taken by both the government and Tiomin was a blessing in disguise. The participants were able to deliberate extensively on the implications of titanium mining in Kenya. A trip was also organised to the proposed mining area in order to enable the participants (most of whom had never been to the area) to get a feel of what the campaign was talking about.

At the end of the conference, a statement was arrived at which defined a number of issues that would be negotiable and what would not be negotiable. Three clear areas of concern to the conference were the dangers of environmental degradation and destruction of bio-diversity; just and acceptable resettlement and compensation for

affected people; and conformity with Kenyan law and policy as well as international standards. Each of these three broad areas included a list of demands that Tiomin and the government should meet. The specific demands are as shown in Appendix 3.

### *Meeting with the government*

A meeting between ActionAid Kenya and the Permanent Secretary at the MENR demonstrated the prowess of INGOs in creating spaces. This was the first meeting following the failure of the government to attend the Forum's conference on titanium, in spite of the earlier confirmation from the Permanent Secretary that he would send a representative to officiate during the conference. At this meeting, we were able to clarify the emerging view that ActionAid was fighting Tiomin and noted that there were a number of organisations – ActionAid Kenya being one of them – which were opposed to the manner in which the project was being handled. We were able to share with the government our position in regard to the project and emphasised the need to have a project that creates a win-win situation. We used the meeting to present to the government copies of the parallel EIA. We further pushed for the need to have around table discussion bringing together the various actors in regard to the titanium deal.

Emerging out of this meeting was the feeling of disquiet and suspicion between the government and the NGOs in regard to the manner in which each had handled the titanium issue. The government's position, that we ought to have contacted them first prior to engaging in any work around the issues, brings into question the role of policy advocacy and whether one needs to get clearance from the government before engaging in any advocacy work. It overlooked the fact that engagement is but one aspect in the advocacy equation and that one cannot engage without having facts. These facts can in most cases be obtained through research. It was through our research that the government was willing to engage with us. Although we left the meeting without a final word on whether we would go ahead and organise a roundtable discussion, we were convinced that we had left a mark on the government.

One of the government institutions that could have been extensively targeted is the parliament. Although a few MPs were approached regarding this campaign and copies of *Dongo Kundu* sent to them, the campaign left relations wide open and failed to seriously engage the parliamentarians. Roundtable discussions with them would have been key to informing them about what Kenya stands to lose by signing

the titanium deal. The efforts that went towards this strategy were, to say the least, uncoordinated and failed to give it a good chance of success.

### *Roundtables*

A meeting between Tiomin's Vice President and ActionAid Kenya came at an opportune time. Through this meeting we were able to push for a roundtable debate, which Tiomin accepted after a lengthy discussion. Organised under the auspices of the NGO Council, the roundtable brought together diverse experts drawn from Kenya Wildlife Services, the Coast Development Authority, the Kenya Marine and Fisheries Research Institute, Kenyatta University, the University of Nairobi and Moi University. Others came from the National Museum of Kenya, the World Bank, IUCN, the East African Wildlife Society, the Environmental Liaison Centre International, the Kenya National Chamber of Commerce and Industry (Mombasa branch) and members of the CMRF. In attendance were Tiomin Resources Incorporated Vice-President, Mr. Mathew Edler and senior government officers from the MENR. This closed-door meeting brought out all the problems with regard to the conduct of Tiomin in Kenya and the shortcomings of their EIA.

The second roundtable discussion, organised one month later, enabled the government to absolve itself from what, it was emerging, that they had licensed under the Tiomin deal. This came soon after we had submitted our comments on the CES EIA to the government. It therefore provided us with an opportunity to understand the process that Tiomin had to follow prior to obtaining an environmental licence and then a mining lease.

Due to logistical problems, it was not possible to have the farmers attend all these meetings. This did not mean that they were completely cut out of the whole process or that NGOs had hijacked their process. Since the meetings were organised in Nairobi, and at a short notice, we did not have time to visit the farmers. We had to ensure that we updated them on the progress of the discussions once we were back in Mombasa.

### *Submitting comments*

Section 59 (1) (d) of the Environmental Management and Coordination Act (EMCA) 1999 gives a time limit of ninety days for the submission of oral or written comments by any member of the public on the environmental impact assessment study, evaluation or review report. This was an important space that we could not miss.

Working in close collaboration with the NGO Council, we developed 21 pages of comments which essentially represented the NGO stand and which were later presented to the Permanent Secretary of the MENR. The process of developing the comments entailed going through the seven volumes of the CES EIA and the parallel EIA with something akin to a microscopic lens. It entailed putting in extra hours and working as late as 3:00 am for four consecutive days.

The end product of the commitment and time that went through this process was the final position that was presented to the government. The challenge here was that should we fail to take advantage the legal requirements, then our initiative would be regarded as not being serious. We had to do our best despite the odds. The quality of what we presented to the government as the NGO position was excellent. The chairman of the inter-ministerial technical committee that was handling this issue credited us for the job well done. It was a masterpiece.

The role of INGOs in creating spaces for participation was noticeable in this process. This is where their niche lies in advocacy. The creation and use of the available spaces was essential, especially now that the facts were clear.

## **Strategy four – Media advocacy**

Global and electronic media have helped place environmental and social issues firmly on the international political agenda. TNCs are increasingly operating in a 'global goldfish bowl' (Watts 1998:24) in which their operations in specific localities are being judged by a worldwide audience.

The esteemed position of the media as the watchdog in public affairs and the moral conscience of the nation truly came out during the campaign against titanium mining in Kenya. It was the media who first highlighted the presence of titanium deposits in Kwale in 1996 and thereby introduced Tiomin to Kenya. Indeed, the media is the unacclaimed agent which consistently supported the campaign by highlighting the activities of diverse actors and presenting analysis and commentaries on the campaign, thus helping to shape local and international public opinion.

By publicising the conflict, the media effectively elevated the issue to a national debate, which went on to acquire international dimensions. If the media succeeded in one thing, it was to galvanise all Kenyans both at home and abroad to speak out for their country and heritage. It was in the ensuing media debate that key issues were defined and articulated thereby assisting stakeholders come to grips with what was at

stake. The media also mobilised the international constituency to take a stand on the debate and thus effectively stopped the mighty Tiomin – otherwise known as ‘a junior exploration company that trades on the Toronto Stock Exchange’, dead in its tracks.

On 10 August 2000, the media carried a government statement counselling Kenyans on the benevolence of the titanium mining project, and appealing for calm as the government exhausted all necessary machinery before granting a mining lease and license. This, notwithstanding the fact that farmers had long been coerced into granting Tiomin access to their properties through signing lopsided deals. It was the same media that carried a government statement (this time from a straight talking, no nonsense minister with military background) announcing the shelving of the titanium mining project to give stakeholders time to consult. By regularly highlighting inconsistencies in government action, the media indirectly built up the capacity of the local citizenry to provide leadership and direction where government had failed them.

Further, by highlighting the twists and turns of the debate, the media provided a monitoring and evaluation programme, which kept the strategists permanently on the drawing board. The campaigners also succeeded in transforming the media into a whip often delivering painful blows with incredible precision. Consequently most of statements by Tiomin were issued in self-defence and in response to reports and allegations in the media. The mass media turned to be a true medium, which faithfully delivered the campaign agenda to all consumers. The campaign against titanium was essentially a media campaign.

Drawing in both local and international media, the titanium campaign was catapulted from a local issue to an international one. We developed a cordial working relationship with the media and invited them on all our community visits. This helped to keep the wider public on the developments on ground. The titanium issue therefore was one that drew consistent local and international media interest.

The electronic media brought in various angles on the campaign. Local talk shows like the Nation TV’s Up Close and Candid, Kenya Television Network (KTN)’s Breakfast Show and the state-owned Kenya Broadcasting Corporation’s The Debate all had features on the titanium deal. The Dongo Kundu documentary became the in-thing in the KTN and Nation TV stations. This helped to spread the message to a number of audiences.

Some of the international media houses that covered the titanium deal included the Reuters news agency, The Guardian (UK) and the Canadian National Post to mention but a few.

This negative publicity did not augur well for Tiomin given that it was a company that depended on people's shares and shareholders would easily withdraw once they knew the implications of this investment. Even Tiomin's head office was exasperated: 'We're a bit paranoid', Jean-Charles Potvin, Tiomin's Chief Executive, is quoted to have stated in a phone interview with Corinna Schuler of Canada's National Post. 'It's war out here... Our stock price has dropped \$20million in the last three weeks' (quoted in Schuler 2001).

The media campaign caused a lot of unease to Tiomin. In one incident, Tiomin sent a 20-page rebuttal to the Canadian National Post even before a planned article on the company was published. It showed a company desperate and jittery about what was written about it in the media. In response to this state of affairs, Tiomin sought to clarify its position by buying space in the local newspapers – the same papers that had talked about the problems with the Tiomin deal. They only used the space to deny rather than address the issues at hand however. They wanted to present a position that they were good investors and had conducted themselves well, and that those fighting them were anti-development. They even created a special site on their website containing newspaper articles that they had published in order to clear their name.

Caught up in such a situation, threats to pull out was one of the counter-strategies that they adopted. They threatened to pack up and go, forfeiting an alleged up-front investment of £3.75 million (Kshs375 million).

Drawing and sustaining media interest in the titanium issue depended on highlighting various angles. Issues of radioactivity and the closeness of the titanium project to the beaches – important for tourism – were interesting angles for the international media. Other interesting angles included neo-colonialism, environmental degradation and community rights. Both Tiomin and the Kenyan government were attacked through commentaries and articles that depicted them as not being interested in getting a deal that would benefit the national interest.

The vibrant media, both in Kenya and internationally, pushed the campaign from an issue of the community vs. the company to one of the citizens of Kenya against the collaboration of their government with Tiomin. It was one strategy that we extensively used in the campaign.

## Strategy five – The internet

If there is a weapon that has emerged as a result of globalisation and that has been extensively used to push for accountability, it is the internet. With this new way of doing things, most NGO activists have staged successful battles against TNCs and even governments.

The titanium mining campaign utilised this tool, not just in getting information about Tiomin but also as a campaign tool. Regular visits were made to the Tiomin website <[www.tiomin.com](http://www.tiomin.com)> in order to understand more about the company and also to check on any updates posted on their site. It was also important to get their official reaction on developments in Kenya. Through the net, it was easy to know what their plans are and how far the progress had gone. The advantage was that being a company listed in Toronto Stock Exchange, information disclosure to their shareholders was compulsory. We benefited from this process. We also surfed the net in order to get information in regard to the conduct of mining companies world-wide, and Tiomin in particular. It provided us with a medium through which we learned more about Tiomin – its directors and history. In other words, it enabled us to know more about our enemy and therefore to strategise on the most effective approach to use. It is through this medium that a member of staff from a reputable organisation in the USA reviewed the terms of reference for the Kenyatta University EIA study.

Further, we maintained constant regular contact with our other partners in Canada and USA through e-mails. This was the easiest way to up date them on the developments in Kwale.

As a campaign tool, we were able to organise petitions and letters in collaboration with Global Response. Through a letter-writing campaign that targeted the Permanent Secretary at the MENR, the Head of Civil Service and Secretary to the Cabinet and Tiomin's financial advisors, Barclays Capital, the Global Response initiative managed to generate over 1,000 petition letters. These petitions would also be downloaded from Global Response's website <[www.globalresponse.com](http://www.globalresponse.com)> and other sites such as <[www.manitese.it/boycott/campagne/26\\_00eng.htm](http://www.manitese.it/boycott/campagne/26_00eng.htm)>. The petitions urged the concerned people not to approve the Tiomin project until the issues raised by the CMRF had been addressed.

The Wild Wide Film expedition also initiated an electronic direct action urging people who were concerned with the titanium issue to send protest letters to Tiomin's President. This was more evident on the cover of their *Dongo Kundu* film on which

they requested those who had watched it to send the mails. They also had regular updates on the titanium campaign on their website <[www.montana.com/wwfe](http://www.montana.com/wwfe)>. Adverts for the film were also posted on this site.

The main problem with the Tiomin issue also centred on information dissemination. It was not easy to get copies of the EIA, even through their website. The Kenya Community Abroad (KCA) site <[www.kenyansabroad.org](http://www.kenyansabroad.org)> became handy in hosting the CMRF-funded parallel study. This made it possible for people to access information about the titanium deal. Online magazines such *g21.net*<sup>10</sup> and *africawire* maintained regular updates on the issue, as did the various media houses in Kenya. The idea was to have the information spread as much as possible. KCA also maintained a lively debate on their *kca-environ* e-group, which ensured that every member was updated and shared their views on what needed to be done in relation to this project.

In Canada, alliance partners Mining Watch Canada and Rights and Democracy also maintained regular updates on their sites <[www.miningwatch.ca](http://www.miningwatch.ca)> and <[www.ichrdd.ca](http://www.ichrdd.ca)> respectively.

### **Tiomin's response**

Tiomin had not expected all this negative publicity. As Bray (2000:53) has rightly put it, 'rather than taking the initiative to put forward their points of view, companies have either ignored controversial issues on their websites or reacted defensively'.

Tiomin's initial reaction was to ignore the issues. Their news updates never talked about the problems they were encountering in Kenya. The first news release that showed some inkling that all was not well was very subtle: 'Tiomin Resources Corrects Misleading Reuters Headline' on Thursday 10 August 2000. Their first release that talked about the Kwale project was on 11 June 1997. In between these two dates several issues were raised, especially as from 1999, which the company either thought were not important enough to update their shareholders on or ignored them altogether. The only other issue that has been widely reported on their site is the court case, with news spun towards the argument that they will win and that their conduct in Kenya has been excellent.

A review of their site shows that the information provided was specifically meant for their shareholders and would-be shareholders. There was nothing that would be of

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<sup>10</sup> <[www.g21.net](http://www.g21.net)>

interest to the communities, a sign that they are more interested in money and not building relations with the local people. Also posted on the site were newspaper articles written by the company denying the issues that had been raised. Instead of trying to address the issues raised or showing some concern that they will be addressed, they adopted the strategy of denial.

Thus, new communications technology has made it possible for like-minded groups of activists to co-ordinate their activities internationally in a way, which previously would never have been possible. Greater public access to information via the Internet has helped change the balance of power between companies, NGOs and consumers. In an Internet-connected world, companies such as Tiomin are coming to realise that there is no hiding place for poor performance on environment and social issues (see Bray, 2000:63).

Ojiambo's comments on the Global Response site sums up the feeling of fighting through the Internet:

By working closely with Global Response, we have developed the courage to fight on, knowing quite well that we are not alone, and that we have reliable partners who are, though far away, standing by our side (Global Response 2002).

## **Strategy six – Putting pressure on Tiomin's financial advisors**

One of the pillars of the successful campaign by Professor Wangare Maathai in 1980 to protest against a 60-storey building that was to be built in Nairobi's Uhuru Park was the fact that she was able to identify the financiers of the said project and put a lot of pressure on them.

On 17 June 1999, a press release from Tiomin Resources' indicated that they had appointed Barclays Capital, the investment banking division of Barclays Bank plc, to provide financial advisory services in relation to the financing and development of its Kwale titanium minerals project in Kenya (Tiomin 1999). This provided a good chance to be able to put pressure on them and also to inform them about the nature of the project that they would be supporting. The fact that local people were becoming increasingly dissatisfied by the conduct of Tiomin had not reached their ears.

Barclays Capital's Chief Executive was therefore included on the list of those who were to receive petitions from Global Response members. In response to a request about their position in regard to the CES EIA, they noted that they had commissioned

an independent review, which identified some areas in the CES EIA report where World Bank Standards and Kenyan regulations would not be met. These included; finalisation of the water supply for project; the resettlement programme for people who may be displaced; design of the ship-loading facility at Shimoni; and the rehabilitation programme for the mine at closure. In a way, by identifying weaknesses of the CES report that had previously been highlighted locally, the highly respected Barclays Capital served to prove the objectivity of comments raised locally against the CES EIA. It is also instructive that Tiomin has always rushed to dismiss locally raised comments as unfounded but, none the less, revelation of concerns by Barclays Capital comprise the only ray of hope that Tiomin would address the issues outstanding to the Kwale project's design.

Barclays should have been wary not to fall into another campaign against them following a protracted one in South Africa that had started in the 1970s and lasted until 1986 when they sold their interest in Barclays National (RSA). International pressure combined with large-scale consumer boycotts made Barclays' continuing involvement in South Africa during the Apartheid regime untenable as it began to impede expansion into US and European markets. Going into ventures that would put them once again in the spotlight in this 'CNN World' would be highly risky.

Banks and financial services in general should exercise corporate citizenship in a manner that reflects the improved understanding of their social and environmental responsibilities (Lachowicz 2000:112). This seemed to be the ethos resonating from their response.

## **Part III - Lessons learnt**

A number of lessons were taken from the campaign against titanium mining, including the following.

The campaign brought together diverse players who had constantly to surmount major obstacles erected in their path by Tiomin and its able allies. It is, however, the story of a people whose sheer will-power and resilience in fighting for justice and fair play took over the role of government and mounted the biggest rejection ever issued to a foreign investor. In essence, the campaign against Tiomin was also a learning process, not only for the Nguluku and Maumba communities but for all those caught in the struggle.

For Tiomin and its supporters, one only hopes that the days when people would sell their birthright to anyone who flashed a few dollars in his hand have finally gone. Also gone are the days when the world would stand by as peoples' rights were trampled by multinationals and their supporters.

Though the government is currently implementing a multifaceted strategy to eradicate poverty in Kenya, existing policies seem to contradict and undermine achievement of this goal. The Mining Act (Cap. 306) which vests all mineral wealth with the government, and thereby provides for official grabbing of God-given wealth from communities is clearly out of tune with national aspirations towards poverty eradication. The land acquisition Act, that convenient tool used to facilitate official grabbing of resources from their rightful owners also merits review. Ultimately, poverty eradication will require that government policies be reviewed and harmonised to facilitate equity of access and control of productive resources by the immediate owners.

The newly enacted Environmental Management and Co-ordination Act of 1999 needs review to mop-up observed inconsistencies and loopholes. Key among these is the clause in Section 58 of the Act, which requires project proponents to undertake EIAs for proposed developments. By placing the responsibility of undertaking EIAs (recruiting, supervision and payments to EIA teams) in the hands of project proponents, the law subjects the EIA process to potential manipulation in favour of proponents. Review of the law to remove the duty of supervision of EIA processes from project proponents is an urgent necessity.

Adopting a legalistic approach when demanding accountability from the corporate sector is expensive. Justice on the part of the poor becomes a pipe dream unless

they join hands with strong partners who will be willing to withstand and bank-roll the costs of the legal suit. Otherwise, the poor alone cannot afford this process.

The story of the struggle against titanium mining has another side too: that of a strong-willed foreign investor ready to apply any trick in the clamour to access the rare earths of Kwale. Stories have been told of how Tiomin equipped local chiefs with motor cycles to enable them reach and serve the people better, a fact which Tiomin agrees 'was a mistake in retrospect'. How government officers above the Chief cadre were facilitated by Tiomin is not yet clear. It is not apparent that Tiomin overlooked this factor in the equation to garner all surface rights in the concession area. Tiomin is also said to have recruited and employed a former member of the Nguluku–Maumba Mining Joint Executive Committee, a fact which no doubt made the firm privy to all the committees' secrets and strategies.

Corporations in some cases are not willing to engage. The best that they could do was to deny the ills they had committed or were about to commit. In all sessions and fora convened to thrash out contentious issues in the CES EIA report, Tiomin maintained a safe distance between the EIA team and the local pressure groups, including specialists. Attempts to get the Tiomin specialists to attend the National Seminar on Titanium Mining organised by the CMRF, or the Round Table Meeting on Titanium Mining organised by the National Council for NGOs, did not bear fruit. The Tiomin Vice President for Corporate Development has always preferred to address even the most technical of questions and in one occasion actually promised to apply 'liquid calcium oxide' to neutralise acid fumes as mitigation against acid rain generation.

Advocacy is most effective when backed up by a solid information base. The process thus goes beyond empty sloganeering and requires a firm foundation based on capacity to generate and make use of information.

The people affected by the mining venture must at all times be part of the process. Hijacking their process is bound to lead to mistrust and the eventual collapse of the initiative. Given that they are mostly poor, the company can exploit their condition to its own advantage.

The role of INGOs in regard to the advocacy work in the south has come into question. As INGOs continue to demand for accountability, it is essential that they do not take lead in the struggle but develop local capacities for engagement. Their role should be that of creating spaces for engagement.

The old public relations tactics of deny, delay, divert and dismiss (the 'four Ds') are not effective. Statements defending corporation's legitimacy and reputation such as 'we obey the law' or 'that is the government's responsibility, not ours' are not sufficient in the 21st Century.

## **Conclusion**

The titanium campaign shows the application of diverse advocacy strategies in the fight against exploitation of the lowly by the mighty, degradation of a natural heritage, advocacy against scientific diplomacy, and more so, advocacy against laws which are relics of the colonial era. The highly successful campaign against the titanium-mining project, as currently designed, has proven the unchallenged role of advocacy as a tool for empowering communities to defend their birth right. Thus, when other systems -political, legal, economic, diplomacy, even sheer logic fail to make sense out of emerging situations, advocacy offers the most promise.

Advocacy is never an end in itself. Rather, it is a means towards attaining a community felt need or goal. Further, though the process initially targets only a single goal, advocacy is notorious for unearthing many otherwise silent obstacles, which consequently become goals to be confronted alongside the original concern. In the context of the campaign against titanium mining, the advocacy process would be an effort in futility if it became an end in itself. Rather, having identified weak points previously exploited to defend and push forward the titanium mining proposal, the process should subsequently be refocused towards addressing these and other loopholes which investors can exploit to dispossess communities of their birthrights. That way, the campaign against Tiomin would contribute towards securing the property rights for Kenyans both today and in generations to come.

Siting back and sifting through the files upon files of information assembled during the campaign against titanium mining, one is overwhelmed by the sheer effort and quantity of resources that were marshalled to generate the information needed to back up the cause against titanium mining in Kwale. Indeed, aware that information is power and that he who wields information wields power, the Forum embarked on a fierce campaign to generate information for cross checking the reports being churned out by Tiomin.

Diverse strategies, which included commissioning of a parallel EIA study, research on the internet to access relevant databases, networking with advocacy groups to share experiences, and so on were all successfully applied in the data search. In

particular, the collation of case studies featuring activities similar to the proposed titanium mining, which detailed the experiences of affected communities, impacts on target communities, the reaction of the culprit multinationals, etc., only served to deepen the mistrust for multinationals in general and Tiomin in particular, thus strengthening the resolve to fight titanium mining at Kwale.

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# APPENDIX 1

## Community time line

According to the community time line available, the Digo and Kamba communities systematically migrated and acquired land in the area at diverse dates within the last century:

- **About the beginning of the twentieth century**, it is believed that six pioneer Digo families first settled in the mining concession area. Four of the original Digo families were identified as Hussein Ali, Ali Hassan, Juman Ali, and Juma Swale who are said to have cleared the forest area and settled, each family creating a *Fingo* in the process. Later on in 1963, other people of Digo origin from Msambweni moved into the area as part of the countrywide million-acre settlement scheme.
- **In 1965**, people of Kamba origin arrived in the area and 'bought' land from the indigenous Digo families. The buying act was a symbolic process whereby the Digo seller would show the Mkamba buyer where he should cultivate. As a friendly gesture, the Mkamba buyer would, in return, give the Digo seller Ksh. 150.00, a process that was referred to as *Kutoa Kilemba* for being shown where to cultivate. The two communities have ever since lived in harmony.
- **In 1966**, the two communities came to learn that the Madhivan Group which owns a now defunct Sugar Mill in the neighbourhood, also owned part of their land, a fact which rendered them technically squatters on their own land. It later transpired the said land, now called Ramisi Estate had previously been allocated to the Madhivan group by the colonial government for a sugar cane growing project in 1911. The said allocation was effected through an agreement signed between the Madhivan Group and the Colonial Government without reference to the indigenous Digo, in spite of the latter having already taken occupancy of the land.
- **By 1974**, the squatters' plight was officially confirmed in when the area failed to be covered by an ongoing land adjudication exercise on account of the dual ownership claim. The squatter community is concentrated within the Nguluku village (Southern Dune) and consists of the Digo, Duruma, and the Kamba people. At the time these communities settled on the affected land, they had no idea that Madhivan Group owned the said land, since it had not been adjudicated to indicate the true owners. In this case the Digo who first settled in this area thought that they were the original

owners of the land and hence they gave ownership rights to the Kamba settlers to establish residence.

## APPENDIX 2

### International Conventions

Kenya is a signatory to **Agenda 21**, the action programme adopted at the United Nations Conference on the Environment and Development (UNCED) in 1992. Agenda 21 contains concrete proposals for the work on sustainable development in all areas of society and though not legally binding, it has strong political support internationally. The UN Commission on Sustainable Development (CSD) is responsible for the supervision of the implementation of Agenda 21 and holds meetings once a year. Related to Agenda 21 is **Rio's forest principles**, a non-binding inter-governmental document which aims at fostering sustainable forest management in all countries. It is supervised by the Intergovernmental Forum on Forests (IFF).

The objective of the **UN's Framework Convention on Climate Change** (1992) of which Kenya is a signatory, is a stabilisation of the level of greenhouse gases in the atmosphere at a level which limits global climate change. An important consideration in evaluating the compliance of Titanium mining is the sulphur dioxide and carbon dioxide gases to be produced from burning 30, 000 tons of Heavy Fuel Oils every year. Though these gases will not accumulate locally, they however will contribute to build-up of greenhouse gases in the atmosphere.

At the regional level, since 1990 Kenya has been a party to the **Convention for the Protection and Development of the Marine and Coastal Environment at the East African Region** together with its Protocol thereof. The Convention has reference to management of oil spills to the Indian Ocean countries of Eastern Africa and islands thereof – particularly pollution from ships.

The **Convention on Biological Diversity** concerns the conservation and sustainable use of biological diversity (the world's ecosystems, all species of plants, animals, fungi and a fair and equitable sharing of the benefits arising from the sustainable use of genetic resources. By signing this convention, Kenya is bound to take action that protects genetic resources of local and international significance. In pursuit of this convention, Kenya should take action to investigate claims that titanium mining will generate radioactive uranium which is likely to end up in the marine ecosystems of South Coast and adjoining open sea ecosystems. Such impact is likely to affect the Kisite Marine National Park just next to Shimoni which is home to the humpback and spotted dolphins and hence a major tourist attraction. Kisite is

reputed to be the most earning of the Marine parks and thus is of major significance to the Kenyan economy. In 1998, the park generated £70,000 (Kshs 7 million) and the entire worth of tourism in the area is estimated at GBP£1.36 million (Kshs 136) million annually (IUCN, 2000).

Similarly, the **Convention on Wetlands of International Importance (the Ramsar Convention)** has the goal of preserving wetlands of international importance. No Ramsar site is situated within the proposed titanium mining area. However, in pursuit of the spirit of the convention, the government should take action to prevent any action that endangers the functioning of mangrove formations and other wetland ecosystems adjacent to the titanium mining project.

**CITES** (the Convention on International Trade in Endangered Species of Wild Fauna and Flora) prohibits (and in certain cases regulates) international trade in endangered species. The CES EIA identified some reptiles occurring within the concession area and which are protected by CITES. This treaty would further be contravened indirectly if titanium mining destroys the habitat of certain wildlife species such as elephants in the Shimba Hills National Reserve.

At the regional level, Kenya is party to the **African Convention on the Conservation of Nature and Natural Resources, 1968** as well as the Phytosanitary Convention for Africa, 1967 which protects plants from diseases. Of significance too is the **1986 IGAD<sup>11</sup> Charter** which among other things calls for proper environmental management of natural resources.

The aim of the **Convention on the Conservation of Migratory Species of Wild Animals (the Bonn Convention)** is the conservation and management of migratory species (including waterfowl and other wetland species) and the promotion of measures for their conservation including habitat conservation. This again brings potential damage of mangrove formations into sharp focus.

Kenya is a signatory to the **UN Convention to Combat Desertification (CCD)** whose objective is a reduction in the degradation of land in arid areas of the world. The convention emphasises the need of local work for sustainable development and encourages participatory methods. Against this background, the potential of the Titanium mining project to generate acid rain within the vicinity of the dry coastal forests and adjacent savannah country should be given thorough scrutiny so as to institute preventive action. Kenya is party to the **Vienna Convention of 1985 on**

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<sup>11</sup> IGAD: Intergovernmental Authority on Development.

**Protection of the Ozone Layer** together with its three Protocols of 1990, 1992 and 1994.

The objective of the **Basel Convention on the Control of Trans-boundary Movements of Hazardous Wastes and their Disposal** is the control and reduction of transports of environmentally hazardous waste between countries, the secure disposal of environmentally hazardous waste and support to developing countries for the environmentally effective management of waste. The issue of the disposal of radioactive monazite and uranium in an area only 20 kilometres away from international waters and close to an international boundary is therefore squarely covered by this convention. And much as the government claims that the Radiation Protection and Control Board is handling this issue, no information on the progress of their investigations has been released to the public, a trend similar to the previous failure by Tiomin to acknowledge the presence of the radioactive polluters. Given the proximity of the project area in the hinterland of the tourist capital of Kenya, any poor handling of this issue is likely to reverberate badly within local and international consumer groups.

Similar repercussions are likely to accrue from contravention of the **London Convention** which aims at preventing the dumping of environmentally hazardous waste and other matter at sea.

The **WHO's Global Strategy for Health and Environment** takes up the relationship between health and environmentally sustainable development. The strategy stipulates among other things the establishment of mechanisms to guarantee co-operation between authorities and organisations in all sectors, which are responsible for health and the environment.

The **UN Convention on the Rights of Child** lays down the fundamental rights of children to survival, development and protection and their right to participation in decisions, which concern them. The convention came into force in 1990 and is the convention which most countries in the world, among them Kenya, have signed and approved. Yet, by planning to displace children without alternative settlement, the government and Tiomin will be acting contrary to the requirements of this convention. Further, by undermining the economic base of families, Tiomin will render many children destitute. In their own words the children fear the prospect of being forced into *chokora* ('street life', short for *chokora mapipa* which is a local name for street children which literally means 'living off garbage dumps'). Related to the convention on rights of children is the **Beijing Declaration** from the 4<sup>th</sup> World Conference on

Women, Beijing, China, 1995 which contains an universal commitment to gender equality and empowerment.

Kenya is also a signatory to the **Convention on Protection of World Cultural and Natural Heritage 1972**, which also protects threatened plants. The said convention has important reference to the Titanium mining project owing to the anticipated erosion of the cultural heritage at Shimoni as a consequence of building of the proposed ship loading facility.

The **Habitat Agenda** has the aim of sustainable development in urban areas. The Agenda contains principles, undertakings and a global action plan for the sustainable development of cities and emphasises broad participation in development work.

## **APPENDIX 3**

### **Specific demands placed by the community on the government and Tiomin, arising from the Conference on titanium**

(see Part II, Strategy three: Research – gathering and dissemination)

#### **(A) Dangers of environmental degradation and destruction of bio-diversity**

1. The proposed Titanium extraction process be reviewed, with the view to eliminating construction of a 2km long and wide dam in the area as a tail dam.
2. Extraction process rely less on water-based technologies, to reduce radioactive material being discharged into the river and shallow springs aquifers systems.
3. The proposal to store water in tailing dams should not be accepted unless the following are established:
  - ✓ clear safety measures for the dams;
  - ✓ an emergency plan to respond to leakage; and
  - ✓ what happens to the dams at project end.
4. The release of sulphuric acid-laden vapour into the air only be accepted if the magnitude is consistent with WHO guidelines of 100–150mg/m<sup>3</sup>.
5. Put in place adequate measures to prevent the release of silica into the air during the process of extracting the minerals.
6. Develop appropriate standards and effective monitoring and enforcement systems such as the command-and-control approach to environmental management in the project area.
7. A commitment that all people living within 5km of the project area be resettled and adequately compensated.
8. More detailed analysis of the effect on the gene pools and proposed mitigation measures.
9. To have in place an environmental management plan to go hand in hand with the EIA.
10. Adequate measures in regard to containing the radioactive elements: an issue downplayed in their EIA.
11. An alternative site be identified for the development of a jetty rather than Shimoni – popularly known for its tourism. Tiomin should look for means of accessing Kilindini Harbour (currently under-used).

**(B) Just and acceptable resettlement and compensation for affected people**

1. All affected communities be eligible to title deeds.
2. Compensation must be made for graves that will be disturbed taking into consideration the various religions of the local people.
3. Compensation for access to biodiversity resources, medicine, public facilities, etc. must be calculated and negotiated.
4. Relocation which is bound to affect the social fabric and livelihoods of the affected communities be as painless as is possible
5. Neighbouring *Kayas* and *fangos* (sacred places) must not be disturbed.
6. A proper land valuation be carried out.
7. All previous agreements signed between the farmers and Tiomin be declared void since the farmers were not aware what they entailed. Proper negotiations be started anew.
8. Resettlement site and infrastructure be acceptable to the community.
9. A restoration bond of Ksh1 million per acre mined be put in place by Tiomin so that the money can be used to rehabilitate the area should they fail to do so. This should be paid before mining commences.

**(C) Conformity with Kenyan law and policy and international standards**

1. All negotiations between farmers and the government on one side and Tiomin Kenya Limited to be suspended.
2. Government must ensure that the Environmental Management and Co-ordination Act 1999 is followed to the letter.
3. The reported high investment of Tiomin Inc. must go hand in hand with more cost-effective technologies for environmental protection.

Source: Ojiambo (2000).