

COUNTRY REPORT: KENYA
Reforming the Legal Framework for Sustainable Governance of the
Extractive Industry in Kenya

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Context for Kenya's Extractive Discoveries

While the extractive industry has been part of the Kenyan resource base for years, recent events have emphasised not just the importance thereof but also the legislative and policy focus on the extractive industry sector. Kenya has been exploring for oil since 1937.¹ These efforts have however been unsuccessful for over seventy years. The turning point was the announcement in March 2012 by the country's political leadership that Kenya had, for the first time, discovered oil. In March 2012, Kenya officially announced that oil had been found for the first time in the country by the British company Tullow Oil. The discovery of oil by the British Tullow company in Ngamia 1² block in Turkana County in the Northern part of Kenya was received with trepidation and enthusiasm by the Kenyan public. The significance of that milestone was aptly acknowledged and publicly captured by the country's top leadership. While assuring the citizenry of the potential of the oil discovery, both the then President and the Prime Minister cautioned on the need to ensure that all Kenyans can benefit from the resources and that the discovery does not turn to the proverbial resource curse.³ The resource curse refers to a trend where countries with abundant non-renewable resources perform worse off economically after the resource discoveries than before and in comparison to countries without natural resource deposits. The oil discoveries in Turkana

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¹ Hunton and Williams & Challenge Energy, *Kenya Oil and Gas Sector Development: Review and Update of the Legal, Regulatory and Fiscal Framework*, 3rd July, 2013 available at <http://ices.ihubconsulting.org/wp-content/uploads/2014/03/Legal-and-Regulatory-Guidance-3-July-2013-Report.pdf> at page 23.

² This refers to the name of the oil block where the exploration took place. Under Kenyan law, potential oil sites are divided into block and allocated to prospectors. The current one was given the name *Ngamia*, which stands for Carmel and being the first, was called *Ngamia 1*.

³ For discussions on oil as a resource curse, See generally Rose, M., *The Oil Curse: How Petroleum Wealth Shapes the Development of Nations*, Princeton University Press, Princeton University, 2012.

County in Kenyan have since been accompanied by those of other extractive resources, including niobium, titanium and coal.

In efforts to ensure that the resources help address the country's developmental needs so as to avoid a resource curse, the country has enhanced its efforts at putting in place adequate legal and policy frameworks. Kenya's efforts and discoveries need to be seen in the wider picture. Although globally, Africa is not a major player in the extractive sector, especially the oil industry, with no African country being in the top ten producing countries,⁴ Africa's oil discoveries are significant. Amongst the African countries Nigeria, Algeria, Libya and Angola are still significant producers. In addition in 2013, East Africa represented the largest discoveries of oil than anywhere in the world.⁵ Despite these positive trends and its contribution to growth, extractives also result in negative consequences to the environment, society and economy, hence the need for responsive and robust policies, laws and institutions.⁶

Against the above background, this article reviews the legislative developments in 2014 to regulate the extractive industry and assesses the extent to which they promote sustainability of the sector.

Constitutional Underpinnings

The Constitution, as the fundamental law of the land, provides the broad architecture for the governance of the country and its diverse resources. The organizing principle for the management of the natural resource is the concept of sustainability,⁷ requiring a balance

⁴ The Top Ten oil producing countries in 2014 were Russia, Saudi Arabia, USA, Iran, China, Canada, Iraq, United Arab Emirates, Mexico and Kuwait. See <http://www.whichcountry.co/top-10-largest-oil-producing-countries-in-the-world/>.

⁵ See <http://www.deloitte.com/assets/Dcom-Kenya/Local%20Assets/Documents/The%20Deloitte%20Guide%20to%20oil%20and%20gas%20in%20East%20Africa.pdf>.

⁶ For a discussion on the Extractive industry in Africa, and its possible effects, See, Africa Progress Panel, *Equity in Extractives: Stewarding Africa's Natural Resources for All: Africa Progress Report 2013*. Available at http://www.africaprogresspanel.org/wp-content/uploads/2013/08/2013_APR_Equity_in_Extractives_25062013_ENG_HR.pdf.

⁷ For a discussion of the Concept of Sustainable development see, World Commission on Environment and Development, *Our Common Future* (Oxford University Press, Oxford, 1987);

between the exploitation of those resources and their conservation. Maintaining the threshold of sustainability is a complex task one which requires well-crafted legislative provisions. Kenya's previous constitutional order did not capture and promote sustainability in the management of natural resources. On the other hand, the current Constitution, as adopted in August 2010, makes sustainable development its organising ideology in the management of the country's resources. The Constitution captures national values and principles of governance in Article 10 and directs that these should guide any entity that applies or interprets the Constitution; enacts, applies or interprets law; or makes or implements any policy.⁸ Sustainable development⁹ is included in the list of these overarching principles that also includes human rights, good governance and accountability.

The Constitution provides the broad basis for sustainable management of the extractive industry in Kenya. First extractives that comprise of oil, gas and mineral are categorized as part of public land. In Kenya, by virtue of the Constitution, land is a public resource,¹⁰ with all land belonging to the people of Kenya.¹¹ While all land belongs to Kenyans, in terms of tenure categories, the Constitution recognizes public land as land collectively owned, private land and community land. Extractives are classified as public land by the Constitution.¹² The outcome of this classification is that irrespective of whether the oil or mineral resource is found on private, public or community land, it will be a public resource whose ownership and control is vested as a consequence of sovereignty in the people of Kenya to be exercised on their behalf by the state. The traditional doctrine of *Cujus*, is consequently limited in the context of oil and mineral resources. Thus how it relates to the rights of the owner of the land on which the resource is found whether it is either private or community land must be clarified through legislation.

The other provisions of the Constitution relevant to the governance of the extractive sector are those that address environmental management, those dealing with human rights, those on natural resource contracts and those focusing on benefit sharing. The right to a clean and

Preston, B.J., "The Role of the Judiciary in Promoting Sustainable Development: The Experience of Asia and the Pacific" 9(2&3) *Asia Pacific Journal of Environmental Law* (2005) 109-212.

⁸ Article 10(1), Constitution of Kenya (Republic of Kenya, 2010).

⁹ See Article 10(20), Constitution of Kenya (Republic of Kenya, 2010).

¹⁰ See Article 61 of the Constitution of Kenya.

¹¹ *Ibid.*

¹² Article 62(1)(f), Constitution of Kenya.

healthy environment is now given constitutional recognition.¹³ Environmental management is a key issue in the exploitation of extractives be it due to pollution concerns, land degradation or water linkages arising due to the water needs of the extractive industry. As a consequence, the implementation of the constitutional right of a clean and healthy environment is an important benchmark for judging the extractive industry in Kenya.

In areas where oil and minerals are discovered, there are disputes that arise between the local communities, the state and the investors. At the heart of these disputes is the sharing of benefits that derive from the extraction of the resources. The Constitution provides that investment in natural resources must benefit local communities.¹⁴ In practice though adhering to this basic constitutional requirement has largely remained elusive. In public discourse, both the national government and investors will laud the positive outcomes and dividends expected from natural resource extraction. However, if one takes the experience of the local communities in Kenya, all they see and talk about are the problems they face as a result of the discoveries of oil, the expectations that have either not been met or only partially met, their lifestyles that have been disrupted, the sudden increase in cost of living and other problems. To address these concerns, the Constitution has set the basic requirement for benefit sharing by providing that “(t)he State shall ensure sustainable exploitation, utilisation, management and conservation of the environment and natural resources, and ensure the equitable sharing of the accruing benefits.”¹⁵

While the Constitution has robust provisions for the extractive industry, their implementation requires a supportive legal framework. In one instant, there is a requirement for developing of legislation. This is for contracts that govern the exploitation of natural resources, including oil and mineral resources.¹⁶

Legal Regime Governing Extractives

Despite the existence of the above Constitutional provisions, the legal regime for the extractive industry regime at the time of the discoveries from 2012 were still outdated and

¹³ See Article 42 of the Constitution of Kenya. See also Collins Odote, “Country Report: Kenya Constitutional Provisions on the Environment”, Issue 1(2012) IUCN Academy of Environmental Law E-Journal 136-145.

¹⁴ Article 66(2), Constitution of Kenya, 2010.

¹⁵ Article 69(1)(a), Constitution of Kenya, 2010.

¹⁶ Article 71 and 72 of the Constitution of Kenya, 2010.

out of tune with modern requirements. Although 2014 witnessed tremendous developments in the efforts to update and reform the legislations governing the sector, as the year ends, the main laws still remain *the Mining Act of 1940*¹⁷ and *the Petroleum (Exploration and Production) Act of 1986*.¹⁸

The Mining Act vests rights over all un-extracted minerals (except common minerals), under or on any land on the government, subject only to any rights that have been granted by the government.¹⁹ The Act creates the office of a Commissioner for Mines and Geology²⁰ to regulate the sector, including having powers to register and license dealers,²¹ power to issue prospecting rights which entitle the holders to prospect for minerals on any land in Kenya.²²

The law is outdated and out of tune with the modern demands of the extractive sector. Its licensing regimes and procedures have been criticized, even by the Government itself for imbuing opaqueness resulting in the Government cancelling in 2013 all licenses issued to all mining companies in Kenya and appointing a Task Force to review their legality and make appropriate recommendations. Other shortcomings of the law include, lack of provisions on transparency and no reference to environmental management in mining operations.²³ A critical component of modern mining is the different interests of large-scale miners from those of artisanal miners, an issue that *the Mining Act* does not address. The end result is that with renewed interest in the mining sector the Mining Act required urgent overhaul, an issue that became a core focus of legislative developments in Kenya in 2013.

The second aspect of the extractive industry is oil and gas, whose exploitation, production and marketing is currently governed by *the Petroleum by (Exploration and Production) Act*.²⁴ The title to the Act clearly demonstrates its limited focus on regulating contracting in the oil industry only. It provides that it is a law to “to regulate the negotiation and conclusion by the

¹⁷ Chapter 304, Laws of Kenya.

¹⁸ Chapter 308, Laws of Kenya.

¹⁹ Supra note 17, Section 4.

²⁰ Ibid, Section 9.

²¹ Ibid, Section 12.

²² Ibid, Section 13.

²³ Kibugi, Robert, “Mineral Resources and the Mining Industry in Kenya,” in C.O Okidi, *et al*, *Environmental Governance in Kenya: Implementing the Framework Law*, (East African Educational Publishers, Nairobi, 2008)355-371 at 364.

²⁴ Chapter 308, Laws of Kenya.

*Government of petroleum agreements relating to the exploration for, development, production and transportation of, petroleum and for connected purposes.*²⁵ The Act has only thirteen sections. The main issues that the Act deals with include: vesting rights over petroleum to the government subject to any rights recognized by law; regulatory powers of the Minister over petroleum operations in Kenya; provisions that the Government may conduct petroleum operations either through an oil company established for that purpose, currently the National Oil Corporation of Kenya, or through independent contractors. The powers of the Minister under the Act include negotiating and entering into petroleum agreements on the basis of model petroleum agreements; granting non-exclusive petroleum exploration permits and supervising petroleum operations. The Act also has minimum obligations for every contractor²⁶ and conditions for accessing private land²⁷ requiring that contractor who intends to enter into any private land for purposes of conducting petroleum operations to give only forty eight hours notice to the occupier of the land. The notice to the actual owner is only to be given if it is practicable to do so. This has the implications of disregarding the property rights of the land owner on which the exploration is proposed to be undertaken and has been a source of unrest.

The Act, like its counterpart for the mining sector, is inadequate to regulate the oil and gas sector in light of the discoveries – discoveries which could potentially convert Kenya from an oil importing country to a producing and exporting country. A consultancy report prepared in 2013 for the Kenyan Government with support from the World Bank, assessed Kenya's legal framework for oil and gas: "In countries that have not previously had any petroleum discoveries, the typical approach is very similar to Kenya's existing regime. The Cabinet Secretary provides notice that blocks are open for applications from contractors who desire to enter into petroleum agreement negotiations. Contractors then submit applications containing prescribed information."²⁸

The petroleum sector is typically divided into upstream, midstream and downstream, with the upstream focused on exploration and production, midstream dealing with storage, processing and transportation, while downstream deals with distribution to end users. The current regulatory framework does not adequately address all these stages in the petroleum operations chain, hence the need for its reform following the discoveries of commercial

²⁵ Ibid.

²⁶ Ibid, Section 9.

²⁷ Ibid, Section 10.

²⁸ Supra, note 1.

deposits of oil in Turkana and subsequent discoveries of other oil and natural gas in the country.

Recent Legal and Policy Developments

Between 2013 and 2014, following the general elections in March 2013, the government prioritized legislative reforms in the extractive sector. These included the amending and updating of *the Energy Act and Policy* and the development of new legislation *including The Petroleum (Exploration and Production) Bill*, and *The Sovereign Wealth Fund Bill*. These reform measures were spearheaded by the two Ministries established by the Jubilee administration following its election, the Ministry for Mining and that of Energy and Petroleum. In addition the Senate has produced a Bill to focus exclusively on benefit sharing, namely the Natural Resources (Benefit Sharing) Bill that is awaiting debate and finalisation by the Senate.

The year 2014 thus saw the development of several laws. However, the main focus of this report is on the one law that was discussed conclusively by the National Assembly, being the Mining Bill, 2014.

Overview of the Mining Bill, 2014

The Mining Bill was presented to the National Assembly in early 2014 and following lengthy debates and consultations passed in November 2014. Its short title is a demonstration that it is more robust than its predecessor, *the Mining Act, of 1940*. The Short title provides that it seeks to incorporate the key constitutional provisions governing extractives which have been discussed in this report and also constitutional principles on national land management. In addition the law seeks to “provide for prospecting, mining, processing, refining, treatment, transport and any dealings in minerals.”²⁹

The Bill clarifies the ownership of minerals in Kenya by stating that all mineral resources are the property of the Republic of Kenya.³⁰ This is a departure from the previous position where the law categorised them as belonging to the government hence justifying the government treating them as private property. In the new law, the resources are national and are only vested in the national government as trustee.

²⁹ Mining Bill, 2014.

³⁰ Ibid, Section 6.

Another vexing issue in the governance of mineral resources is the relationship between mineral rights and land rights. The law seeks to deal with this by, first clarifying that mineral resources belong to the republic, irrespective of “any right or ownership of or by any person in relation to any land in, on or under which any minerals are found.”³¹ The law grants the Cabinet Secretary the rights to issue a mineral right authorising prospecting or mineral operations. Out of the appreciation of the linkages with land, it is a requirement that before issuing such a license, that consent must be obtained from the relevant persons and agencies, including land owners. Thus the consent is required of the National Land Commission for public land and the community or private owner for community and private³² land respectively. Should the consent be unreasonably withheld then the law grants the Cabinet Secretary the power to acquire the land without consent.³³

The law also recognises that there is a lack of requisite skills to be able to work in the mining sector. As a consequence, the sector invariably employs a lot of foreigners in the skilled jobs with Kenyans being relegated to providing menial and unskilled labour. To redress this, the law requires skills transfer and capacity building for Kenyan citizens in the extractive industry.³⁴ To ensure this happens the law requires every applicant for a mineral right to submit to the Cabinet Secretary a detailed programme for the recruitment and training of Kenyan citizens,³⁵ which is a condition to the granting of a mineral right. The Cabinet Secretary will also develop regulations “to provide for the replacement of expatriates, the number of years such expatriates shall serve, number of expatriates per capital investment and provide for collaboration and linkage with universities and research institutions to train citizens.”³⁶ In addition the holder of a mineral right is required to give preference to Kenyans in employment.³⁷

The other key issue in the extractive industry is local content, defined as the extent to which the industry supports local economy. A lot of times when people think about benefits from oil, minerals and other extractives only tax revenues and employment are considered. While

³¹ Ibid, Section 6(2).

³² Ibid, Section 34(2).

³³ Ibid, Section 38.

³⁴ Ibid, Section 44.

³⁵ Ibid. Section 44.

³⁶ Ibid, Section 44(3).

³⁷ Ibid, Section 45.

these are important, the discourse around local content argues for innovation in leveraging the extractive industry not only to benefit the local economy but also to build local capacity in the process. It is therefore a broad term. It can encompass job creation, enterprise development and transfer of skills and technologies. The aim is to ensure that the developments in the extractive industry have a more long-term and sustainable positive effect on the country's economy. The law has addressed the issue of local content, by requiring the participation of local equity in the mining sector,³⁸ and the preference for materials and products made in Kenya, services offered by Kenyan citizens and companies and businesses owned by Kenyan citizens in the conduct of any mining dealings or operations in Kenya.³⁹

The law also includes the need to conserve the environment in all mining operations, providing that the holder of a prospecting permit should "take all necessary measures to protect the environment."⁴⁰ Similar obligations exist in respect to holders of mining rights.⁴¹ In addition Part IX of the law deals with environmental, health and safety issues, indicating explicitly that the granting of a mineral right does not exempt the holder from complying with the laws relating to the environment.⁴² Currently the main law on environmental issues is the Environmental Management and Coordination Act, which has provisions on environmental impact assessment, monitoring and audit all of which are very critical processes for the mining industry.

The law also addresses benefit sharing and provides that seventy percent of the royalties that accrue to the country from mining operations shall be retained by the national government, provincial government shall retain twenty percent and local communities ten percent. The law also recognises artisanal miners and contains detailed provisions to regulate their operations, including establishing a provisional office of the Director of Mines, whose functions will be to:

- grant, renew and revoke artisanal mining permits;
- compile a register of the artisanal miners
- supervise and monitor the operation and activities of artisanal miners;

³⁸ Section 47, Mining Bill, 2014.

³⁹ Section 48, Mining Bill, 2014.

⁴⁰ Section 107(b), Mining Bill.

⁴¹ *Ibid*, Section 114.

⁴² *Ibid*, Section 149.

- advise and provide training facilities and assistance necessary for effective and efficient artisanal mining operations;
- submit to the Director of Mines, reports or other documents and information on artisanal mining activities within the county, facilitate the formation of artisanal association groups or cooperatives; and
- promote fair trade of artisanal miners.

Conclusion and Emerging Issues

This report demonstrates the efforts that Kenya has embarked on in order to update and modernise its laws to govern the extractive industry. The Mining Bill, 2014 despite its shortcomings in several areas represents the greatest progress in this process. The Bill, however still faces challenges due to the jurisdictional disputes between the National Assembly and the Senate. In Kenya's constitutional framework, laws that touch on devolution have to go to both the Senate and the National Assembly. Defining what it is that relates to devolution has, however, been a vexed question in Kenya despite the Supreme Court having pronounced on the issue. The Mining Bill is caught in this dispute, having originated from the national assembly and containing provisions touching on counties, the Senate has argued that it should pass before going to President for assent, an argument that has merits.

The second challenges relate to the multiple laws that the country has proposed to govern the sectors. From a background of outdated legislation, the country in its modernisation and reform efforts risk the danger of over-legislation. A fact that is exacerbated by legislation being developed by the two Ministries of Energy Petroleum and that of mining without clarity on the linkages within the extractive industry.

In the end, 2014 ended with a progressive mining law, which awaits resolution of the dispute over the role and input of the Senate and Presidential assent. The President will be required to give assent to the law for it to become an Act and thus part of Kenya's legislative framework. This will also require a final determination on whether the Bill will be debated in Senate or not. Hopefully the Petroleum law can also be finalised and adopted. More importantly the development of modern and progressive laws are only a part of the governing process of the extractive sector in Kenya. The other part relates to implementation which is a critical challenge that needs to be addressed urgently.