

Legal and Policy Framework Governing the Oil and Gas Sector in Kenya

ILEG Paper Discussion

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Comments

- The scope of the paper is quite expansive, it leaves little room for in-depth analysis of the local legal framework. (UNCLOS; UNCED; International Convention on Oil Pollution Preparedness, Response and Cooperation , ESPOO Convention and Kiev Protocol; Basel Convention.
- Link between the foregoing and key issues from international regulation and best practices (3.2) is unclear. (sector roles and responsibilities, allocation and sharing of revenues, environmental compliance standards, land rights, transparency and accountability (EITI),
- Need to use benchmarks to address the foregoing challenge of clarity. Use of initiatives to delineate issues such as governance (EIR/NRC), performance standards (IFC/Equator Banks), supply chain due diligence (OECD,ITRI/KPCS), codes of practice certification (IRMA/RJC/ARM), information/reporting (GOXI/Resource Book/GRI), Policy Frameworks (IGFMMSD/AMV), Knowledge Networks & Platforms (IIED/CASM); Associations (ICCM);

Comments

- Laws for the sector include:
 - Constitution of Kenya 2010 ; Petroleum (Exploration and Production) Act, Cap 308; Energy Act; Environmental Management and Coordination Act (EMCA); Income Tax Act; **Industrial Training Act, Cap 237; Occupational Safety and Health Act, Cap 514;** Land Act, Cap 280; **Petroleum (Exploration and Production) (Training Fund) Regulations, 2006 ;** Model PSC; PFM Act (Plus MTEF); Foreign Judgments Act.
- Need to segment analysis into thematic issues: licensing regime/contract award processes; revenue capture mechanisms (DROP/R-Factor); sector roles and responsibilities; upstream/midstream/downstream segmentation; fiscal issues; environmental issues; **local content**; **transparency and accountability**.
- Regulatory Framework: Inter-Ministerial Committee on the Policy and Legal Framework for Geology, Mining and Minerals; NAFFAC; MoE&P, MoP&D, MoEW&NR; MoF; MoLH&UD, NLC; MoI&ED; NEMA; KRA; CRA; Auditor General; Vision 2030, NESC; NITA
- Need to include analysis of the coherences/overlaps in laws, policies and institutions and what this means for governance of O&G sector.

1. Sector Roles and Responsibilities—Policy

PSC Negotiation

- Currently assigned to Ministry
- Energy Bill proposes that NAFFAC take over negotiation role
- Should Ministry retain responsibility? (with consultation with NAFFAC)

Contract Administration

- Currently assigned to Ministry
- Energy Bill proposes mix of NAFFAC, Ministry, and ERC
- Recommend establishment of upstream regulator (within or reporting to the Ministry),
- Would be responsible for conducting contract compliance audits & ensuring upstream activities carried out in accordance with law, regulations, and PSCs

GoK Participation

- Recommend NOCK (or separate upstream arm of NOCK) be responsible for participation role
- Depending on capacity, could be as upstream operator or GoK representative in commercial ventures with Contractors

Comments

- Its important for analysis to extend to Bills that are pending at various places: AG, Ministry, CIC, Parliament:
 - Energy Bill (Stand-alone for oil and gas?), the National Sovereign Wealth Fund Bill, the Access to Information Bill, the Community Land (Bill) Act, and the Environmental Management and Coordination (Amendment) Bill.
 - Analysis of pending/ongoing international negotiations also important: EAC/US BIT (**Investor-State Arbitration**) ; Double Taxation Agreements; Trade Agreements. What impact are these going to have on the oil and gas sector.
- Analysis of possible implications of these coherences/overlaps
- Evaluation of ongoing review initiatives on capacity building:
 - **Hunton & Williams**: (i) undertake a review of Kenya's existing petroleum sector legal, regulatory, and fiscal frameworks; (ii) provide guidance on the updates that will be required to align that framework with international and regional best practices; (iii) provide guidance on appropriate contractual and fiscal terms for the development of petroleum discoveries (iv) develop, deliver, and train certain GoK personnel on the use of a financial model to guide sector planning and negotiations with contractors.
 - KEPTAP: the World Bank has extended a USD 50 million loan under the Kenya Petroleum Sector Technical Assistance Project . (1) - *Petroleum Sector Reforms and Capacity Building* (\$39.68M); (2) reforms and capacity-building on *Revenue and Investment Management, Sustainable Impact of the Oil and Gas Industry* and project management costs.

Benchmarks

- Natural Resource Charter:
 - Is vision embedded in national strategy, legal frameworks, competent institutions?
 - Transparency, accountability, allowing for scrutiny.
 - Transparency in licensing/ resource allocation
 - Realizing full value of resources
 - Equitable distribution of benefit
 - Improving efficiency of SOEs, NORCs
 - Smoothing over volatility
 - Continuous improvement in standards
 - Investment in (sustainable) development
- The Intergovernmental Forum on Mining, Minerals, Metals And Sustainable Development.
- African Mining Vision:
 - *Transparent, Equitable and Optimal exploitation of minerals underpin broad-based sustainable growth and development*
 - *a developmental, transformative, knowledge-driven and integrated mining sector with downstream, upstream and side-stream linkages. (benefits)*

What Structural Transformation?

- Vision 2030 offers a cursory glance at the structural transformation (non-exhaustive though): *transform Kenya into a newly industrializing, middle-income country providing a high quality of life to all its citizens by 2030 in a clean and secure environment.*
- Economic Pillar: tourism, agriculture, wholesale and retail trade, manufacturing, IT enabled services, financial services;
- Social Pillar: Education and training; health; environment; housing and urbanisation; gender, children and social development; youth and sports;
- Political Pillar: the rule of law (Constitution of Kenya 2010; electoral and political processes; democracy and public service delivery; transparency and accountability; security, peace-building and conflict management.

How can O&G Sector Achieve Structural Transformation as Under AMV?

- In addition to optimising revenue returns policy and law should be concerned with:
 - Building linkages and diversification;
 - Promoting local enterprise development;
 - Participation across the value chain of the EI; and
 - Building local R&D capacity.
- Canada Investment Act; The review of applications from potential investors using the following parameters:
 - The net effect of the investment (project) on the level of economic activity in Kenya, employment, resource processing, utilisation of parts and services produced in Kenya, and exports from Kenya;
 - The degree and significance of participation by Kenyans in the business or the effect of the investment on competition within any industry in Kenya;
 - The compatibility of the investment with national, industrial, economic and cultural policies; (EAC Industrialization Policy) and
 - The contribution of the investment to Kenya's ability to compete in world markets

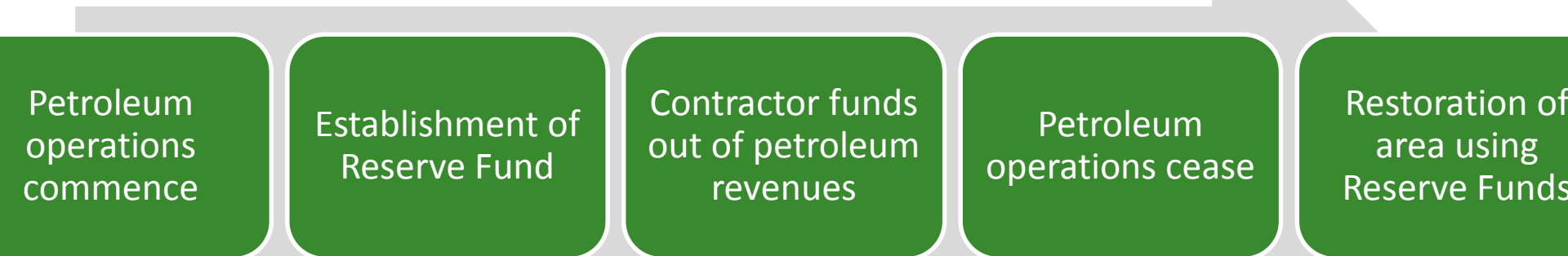
Key Issues

- Mining revenues and mineral rents management
- Geological and mining information systems
- Building human and institutional capacities
- Artisanal and small scale mining
- Mineral sector governance
- Research and development
- Environmental and social issues
- Linkages and diversification
- Mobilising mining and infrastructure investment

Environmental Matters—Abandonment & Decommissioning

Abandonment & Decommissioning—Key Concerns

- Contractors typically required to restore areas to original state after operations
- International best practices
- Can be costly process
- Concern is that contractors could avoid decommissioning at end of license term
- Recommended solution—establish a reserve fund to pay for decommissioning



Environmental Matters—Land Rights

Land Rights: Typical Approach

- Petroleum law refers to general land law for land rights issues (e.g., compulsory acquisition)
- Petroleum-specific rules are included in petroleum law (e.g., directional drilling)
- Community Land Rights?

Existing Approach

- Petroleum Act only mentions a few land issues; no reference to Land Act
- Energy Bill mostly refers to Land Act, but needs clarity (e.g., scope of right to construct on any land)

Recommendations

- Petroleum Act should refer to Land Act for all but petroleum-specific land rights matters
- Energy Bill should more consistently refer to the Land Act as appropriate