

LEGAL AND POLICY FRAMEWORK FOR OIL AND GAS GOVERNANCE IN KENYA

BY

Stephen Anyango PhD

info@consultemerald.org
www.consultemerald.org

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The discovery of large deposits of oil and gas in Kenya and the neighboring: Uganda Tanzania and Mozambique has resulted in renewed interest in the **Oil and Gas sector** in the region.

Today Kenya's long term strategy (vision 2030) considers extractive sector as a key driver for achieving the vision.

This is supported by certain theory of economic growth which suggests that natural capital abundance (especially HC) would provide revenues for the government and therefore lift citizens out of poverty.

However studies have linked oil and gas with a number of socio-economic problems including:

- Slow economic growth and risk of civil conflict,*
- Exposure of shocks to the national economy and*
- Environmental impacts of oil production*

In fact discoveries in Africa have been a “**curse**” as countries with oil has tended to have worse socio economic development outcomes, instability & ecological catastrophe.

Or degenerate into the paradox of plenty (the Dutch disease)

This is why stakeholders are concerned about the likely impacts of oil and gas exploitation on

- the socioeconomic development of the country,*
- livelihoods of local communities,*
- potential environmental degradation and*
- resource-based conflicts.*

But it has been demonstrated that sustainable utilization of oil and gas for the benefit of the nation and its people requires good governance in the sector.

Yet despite the rising interest in the sector, Kenya, has not made progress in developing strong policies & governance structures to oversee the sector (legal, institutional & regulatory Framework).

The challenge is therefore to develop appropriate policy, legal and institutional arrangements to govern the sector by considering the best practices as well as lessons learned from failures in other countries.

Overall Assignment Objective

is to critically analyze the legal and policy framework governing the oil and gas sector in Kenya, and give practical recommendations for improving the sector's governance.

It is hoped that the study's recommendations will contribute to securing a comprehensive and effective oversight of the sector governance.

Specific assignment objectives

1. Analysis of the status of oil and gas in Kenya in terms of challenges and opportunities in the sector.
 2. Assessment of the legal, policy and institutional framework for oil and gas extraction and production in Kenya
 3. Detailed assessment of the provisions of the energy policy applicable to the extractive industry
 4. Identify best practices in policy regulation in the extractive sector
 5. Make justified and practical policy recommendations for sustainable oil and gas extraction in Kenya,
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The study largely relied on qualitative methods of data collection.

The bulk of the work entailed a review of existing policies, legislation, regulations and institutional framework on the management of the sector.

An analysis of the policy, legislation and institutional framework in the sector was undertaken.

Data was collected mainly by the consultants

Data analysis

- Qualitative -reduced, organized and interpreted on the basis of themes generated from the TOR.
- Tools such as goal achievement matrix and matrix weighting were used to generate recommendations

Key Study Findings

The findings of the study has 4 components:

1. The status of oil and gas exploration in Kenya (Tends & Issues).
2. Regulation of the oil industry.
3. Key issues in reforming the legal and policy framework.
4. Identification of best practices in the governance of extractive sector.

1. the oil and gas industry is still nascent and Kenya has limitations in terms of skills and experience in the sector.
2. The oil and gas exploration is still actively going on, thus important oil and gas policy decisions are currently made without a clear view of the size/quantities of their oil and gas resource base.
3. The discoveries are announced by private companies and the country may be over relying on the oil reserve quantity data from foreign exploration company.
4. Limited local skills and experience as well as high Costs and risk of Exploration has resulted in foreign investors taking the lead therefore limiting the local content.

4. The discoveries are located in ASALs, & coastal marine environment characterized by years of marginalization and underdevelopment as well as being in sensitive ecosystems.

..Therefore likely to generate conflicts between the local community on one hand and the government, and investors on the other hand.....

5. The sector legal framework is weak and outdated, with the key instruments being the 1986 Petroleum Act and a standard Model PSC.

6. There are challenges in managing expectations amongst the stakeholders: National Government, County Government, Local Communities, Exploration companies and others.
7. Managing socioeconomic changes such as: conflict over the distribution of oil benefits, sociocultural and lifestyle changes, and the risk of social diseases.

Regulation of the oil industry

- The international legal framework
- Key Policy /legislation in the sector

The international legal framework

Oil and gas plays a key role in supplying the world's energy needs.

And due to its nature, exploration, processing, usage and end products it has attracted numerous global geopolitical attention on how it should be governed for the common good.

The international policy and legal agreements include

The international Policy & legal Agreements

The policy/legislation	Provision
The UN Convention on the Law of the Sea 1982 (UNCLOS)	Gives coastal states the exclusive right to authorize and regulate drilling and oil in the EEZ as well as environmental protection obligations related to pollution from oil spills and the operation and maintenance of installations
The International Convention on Oil Pollution Preparedness, Response and Cooperation 1990	Provides for international co-operation and mutual assistance in preparing for and responding to a marine pollution incident.
The Espoo Convention 2001	Convention on Environmental Impact Assessment in a Trans-boundary Context
United Nations Conference on Environment and Development (UNCED)	The concept of “sustainable development,”.

Key Policy /legislation in the sector

The policy/legislation	Provision
National Energy Policy	The guiding document on energy sector. Recognizes that exploration is in progress and aims at enhancing exploration.
Environmental management and coordination Act	Does not specifically address the sector activities, nor does it have specific provisions for conducting ESIA's in the sector.
Constitution of Kenya	The state has responsibility to ensure sustainable exploitation, utilization, management and conservation of the Natural Capital. And calls for equitable sharing of benefits.
Petroleum (Exploration and Production) Act,	Vests ownership of hydrocarbons the state. Regulation, negotiation by the Government on petroleum agreements.
Energy Act 2006	Consolidates energy laws; and establishes institution to regulate energy undertaking.
Ninth Schedule to the Income Tax Act	Detailed provisions governing capital allowances and deductions.
	<i>Although most of these; policies and legislations are currently at an advanced stage of review.</i>

The key institutions regulating the sector

Institution	Mandate
Ministry of Energy and petroleum	constituted a multi-stakeholder committee, the National Fossil Fuels Advisory Committee (NAFFAC) to support negotiations with OIEPs
The Energy regulatory Commission	Mainly has regulatory authority over the downstream petroleum sector
National Oil Corporation of Kenya Limited (NOCK),	spearhead exploration on behalf of the Kenyan government.
National Land Commission (NLC)	Especially for on shore reserves as they adjudicates the land resources in Kenya established by CoK (2010).
The Legislature (Parliament)	Required to ratifying /grants rights or concessions regarding the exploitation of natural resources including oil and gas.

The key institutions regulating the sector...

The Petroleum (Exploration and Production) Act, Cap 308 and the Model Production Sharing Contract (**PSC**) were developed when Kenya was considered as a low potential exploration zone with no known deposits.

Therefore no elaborate framework to address important upstream petroleum-sector issues including:

- Effective Communities engagement*
 - revenue sharing.*
 - environmental standards,*
 - local content, &*
 - transparency*
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Key issues in reforming the legal and policy framework & Identification of best practices

Based on international best practice, the study assessed the state of oil and -related governance in Kenya in relation to the “ideal”. Resulting into the following observations

Legal and policy framework & Identification of best practices

Issue	Kenya current frame work	Best practice
1. Delineation of Sector Roles (Exploration and production Structure)	NOCK controls up-stream and down-stream oil activities in Kenya.	<p>There should be clarity of goals, roles and responsibilities in line with National development objectives.</p> <p>The institutions that govern oil activities in Kenya need separation to cover upstream, mid-stream and down-stream activities.</p>
2. Allocation of oil and gas Revenues		<p>Allocation between; national, sub-national governments, and local communities</p> <p>Temporal consideration, funds for present development and poverty reduction and preserving funds for future generations</p> <p>Various revenue allocation models in other countries are available.</p>

Legal and policy framework & Identification of best practices

Issue	Kenya current frame work	Best practices
3. Environmental compliance and Standards	Domestic environmental law (is EMCA)	Most sector legislation (and accompanying model petroleum agreements) at minimum require contractors to carry out their obligations in accordance with industry accepted notions of environmental responsibility, frequently referred to as “good oilfield practices,”
4. Land Rights	land rights are generally controlled by the land law (the Land Act, 2012)	In general, most petroleum sector legislation does not contain comprehensive rules relating to land rights.
5. Transparency and accountability	Yet to be subjected to strong transparency and accountability measures.	Internationally there is consensus on the importance of transparency and accountability in promoting good governance. This requires multiple measures, both voluntary, i.e. compliance with the EITI and mandatory, regulatory measures. Currently, 41 countries are EITI-compliant

Conclusion & Recommendations

The existing framework requires substantial updates, particularly with respect to the issues mentioned below, in order to properly equip Kenya for managing what will hopefully grow into a thriving sector.

1. Attract the best qualified investor for the long run:
 2. Maximize economic returns to the country
 3. Earn and retain public trust and manage public expectations
 4. Increase local content and benefits to the broader economy:
 5. Ensure national oil company participation in the development of the resources
 6. Build capacity and enabling actors to be functional
 7. Enhancing accountability
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THANK YOU

We welcome discussions