

CIVIL SOCIETY FACT SHEET ON EXTRACTIVES GOVERNANCE

About Extractives in Kenya

The extractives sector/industry involves any operations that remove metals, minerals and aggregates from the earth. Over the years the extractives sector in Kenya has enhanced the exploration and exploitation of diverse minerals the country has, to include oil and gas. The exploration of minerals, metals and other aggregates commenced way before pre-independence, with Soda Ash being explored as early as 1911. In 1940, there was enacted the Mining Act (Cap 306) (now repealed) that governed the mineral exploration. Post-independence, minerals like Magnesite (1965), Fluorspar (1971) were explored. In 2017, the Government of Kenya approved a Nationwide Airborne Geophysical Survey that is set to map the country's minerals and natural resources. The survey is aimed at attracting more investment into the exploitation of the country's mineral resources among other key benefits.

The exploration of oil and gas in Kenya having commenced as early as 1950's did not seem to bear fruit until recently where oil deposits were discovered in Turkana and the same exploited. Recently the first shipment of oil was transported from Turkana in an experimental program dubbed the "Early Oil Pilot Scheme" (EOPS). This project provides an opportunity to deliver first oil in accordance with a timeline that meets the Kenyan Government's expectations. It is stated that there are at least 600 million barrels of oil in Turkana. The extractives sector in Kenya has witnessed transformation in the legal and policy frameworks that has been geared not only towards the full exploration and exploitation of minerals in Kenya but also to put in place safeguards to protect the local communities and revenue and its allocation. The Constitution of Kenya, 2010 established clear rights on matters touching on land and the environment to include natural resources. In 2016, the Government enacted the Mining Act 2016 and the accompanying Mining and Minerals Policy; and is in the process of reviewing the Petroleum (Exploration, Development and Production) Bill 2017 and other proposed laws to align with the aspirations of the Constitution 2010 and international best practices.

Other minerals and metals in Kenya

There are a variety of other minerals and metals that have exploited and explored from as early as the 1900's by both local, foreign companies and artisanal miners.

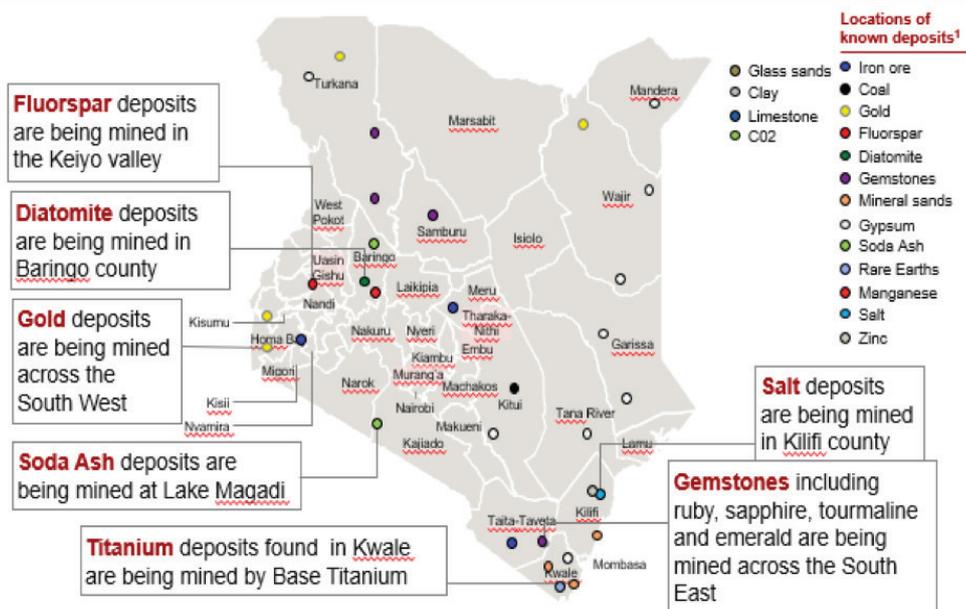
These minerals to include:

- ▶ Soda ash from Lake Magadi,
- ▶ Magnesite in Kitui,
- ▶ Fluorspar in Keiyo Kimwarer,
- ▶ Titanium in Kwale,
- ▶ Gold in Migori, Kakamega, Narok and Nandi,
- ▶ Gypsum in Tana River,
- ▶ Iron Ore in Homa Bay,
- ▶ Carbon Dioxide in Kireita,
- ▶ Sosiani and Koibatek and
- ▶ Coal in Lamu and gemstone.

1%

Extractives contribute to approximately one per cent (1%) to the gross domestic product (GDP) in Kenya.

Other minerals and metals in Kenya



There are a variety of other minerals and metals that have exploited and explored from as early as the 1900's by both local, foreign companies and artisanal miners. These minerals to include soda ash from Lake Magadi, Magnesite in Kitui, Fluorspar in Keiyo Kimwarer, Titanium in Kwale, Gold in Migori, Kakamega, Narok and Nandi, Gypsum in Tana River, Iron Ore in Homa Bay, Carbon Dioxide in Kireita, Sosiani and Koibatek and Coal in Lamu and gemstone.

Who are the Actors in the Extractives Sector?

The extractives sector brings on board different actors to include;

State Actors

Government	Law & Policy Makers	Regulators	Judiciary
<p><u>National Government</u></p> <ul style="list-style-type: none"> Office of the President – President Delivery Unit Office of the Attorney General and Department of Justice National Environmental Management Authority (NEMA). Kenya Revenue Authority (KRA) National Treasury – for revenues Commission of Revenue Allocation Office of the Auditor General – has a section dedicated to Oil and Gas National Fossil Fuels Advisory Committee National Land Commission Directorate of Occupational Safety and Health Services National Oil Corporation of Kenya Kenya Pipeline Company Limited <p><u>County Governments</u></p> <ul style="list-style-type: none"> Council of Governors – infrastructure and energy Committee County Governments – e.g. Turkana, Migori, etc. 	<ol style="list-style-type: none"> Parliament— <ul style="list-style-type: none"> National Assembly Senate – e.g. Senate Committee on Energy County Assemblies Ministry of Petroleum and Mining – the main policy maker in the extractives sector. Ministry of Industry, Trade and Cooperatives – dealing with local content policy issues County Executive Committees in charge of infrastructure and natural resources 	<ul style="list-style-type: none"> Energy Regulatory Commission Ministry of Petroleum and Mining 	<ul style="list-style-type: none"> High Court – Environment and Land Court Court of Appeal Supreme Court of Kenya

Non – State Actors

- Academia, e.g. Petroleum Institute of East Africa
- Civil Society Organizations (CSOs)
- Community Based Organizations (CBO's)
- Extractives (petroleum and mining) Companies both local and foreign based.
- Communities and the general public
- Private sector associations, such as Kenya Private Sector Alliance, Kenya Oil and Gas Association, Kenya Chamber of Mines.

Legislative and Policy Frame works on Extractives in Kenya

The Constitution of Kenya, 2010

- ▶ **Article 10** provides for **national values and principles of governance**. These values and principles bind all State organs, State officers, public officers and all persons.
 - ▶ These values and principles of governance include; patriotism, national unity, sharing and devolution of power, the rule of law, democracy, participation of the people. Human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised. Good governance, integrity, transparency and accountability and sustainable development.
 - ▶ **Article 35** provides for the right to **Access to Information**. It provides that every citizen has right to access to information held by the state and information held by another person as required for the exercise or protection of nay rights or fundamental freedom.
 - ▶ It is the duty of the state to publish and publicise any important information affecting the nation.
 - ▶ **Article 42 on Environment**. Every person has the right to a clean and healthy environment that includes the right to have the environment protected for the benefit of present and future generations through legislative and other measures and to have obligations relating to the environment fulfilled under Article 70.
 - ▶ **Article 60** provides for **principles of land policy** and states that land in Kenya shall be held, used and managed in a manner that is equitable, efficient, productive, and sustainable manner in line with the principles outlined in the Constitution.
 - ▶ **Article 62 on Public Land**, it is stated that public land includes all minerals and mineral oils as defined by law.
 - ▶ **Sub Article 3** provides that public land classified under clause (1) (f) to (m) shall vest in and be held by the national government in trust for the people of Kenya and shall be administered on their behalf by the National Land Commission.
 - ▶ **Article 66 on Regulation of land use and property**, it is provided that the State may regulate the use if any land or any interest in or right over any land in the interest of defence, public safety, public order, public morality, public health, or land use planning and that the legislation enacted by Parliament is to ensure that investments in property benefit local communities and their economies.
 - ▶ **Article 69 on Obligations in respect to the environment**, Sub Article (1) (a) provides that the State shall ensure sustainable exploitation, utilization, management and conservation of the environment and natural resources and ensure equitable sharing of the accruing benefits.



The term extractive is derived from the verb 'extract' which means to withdraw, remove, or take out, especially by effort or force. In terms of natural resources, extractives are raw materials withdrawn from the earth.

► **Article 71 on Agreements relating to natural resources** and provides that a transaction is subject to ratification by Parliament if it involves the grant and right or concession by or on behalf of any person, including the national government, to another person for the exploitation of any natural resource in Kenya and is entered into on or after the effective date. Parliament is tasked with providing legislation providing for the classes of transactions subject to ratification.

► **Article 174 on Objects of devolution**, the objects of the devolution of government are, (c) to give powers of self-governance to the people and enhance the participation of the people in the exercise of the powers of the State and in making decisions affecting them and (g) to ensure equitable sharing of national and local resources throughout Kenya.

Access to Information Act, No. 31 of 2016

This law gives effect to Article 35 of the Constitution on the right to Access to Information, it also confers upon the Commission on Administrative Justice the oversight and enforcement functions and powers in relation to access to information. The main purpose of this Act is to ensure that information is easily accessed by those who may need it, this thus informs proactive disclosure by entities both public and private.

Environment Management and Coordination Act No. 8 of 1999

This Act provides for a comprehensive legal framework on the management of the environment and all matters appertaining the environment. It is critical that the environment is preserved and managed as exploration of minerals is carried on, for the sake of both the current and future generations. The Act has established Regulations under it that are geared towards the protection and management of the environment.

The National Land Commission No. 5 of 2012

This Act gives effect to Article 67 of the Constitution. The National Land Commission is mandated to manage public land on behalf of the national and county governments, recommend land policy, advising on the comprehensive registration of title of land in Kenya and also have oversight responsibilities over land use. This Act is thus important in the extractives sector.

The Land Act No. 6 of 2012

This Act gives effect to Article 68 of the Constitution, 2010, on legislation on land. It revised, consolidated and rationalized laws relating to land. It also provides also for the sustainable administration and management of land and land based resources. Article 260 of the Constitution defines 'land' to include natural resources completely contained on or under the surface. It is thus an important statute in the extractives sector as land is acquired for the exploration and exploitation of natural resources to include minerals, oil and gas. It sets out the framework in which this is to be carried out.



Allowing people to seek and receive public documents serves as a critical tool for fighting corruption, enabling citizens to more fully participate in public life, making governments more efficient, encouraging investment, and helping persons exercise their fundamental human rights.

Land Registration Act No. 3 of 2012

This Act also revised, consolidated and rationalized the registration of titles to land and to give effect to the principles and objects of the devolved government in land registration.

Community Land Act 2016

The Act provides for the definition of community land, registration and protection of community land rights, free prior and informed consent particularly in relation to acquisition of land for government projects, governance and dispute resolution mechanisms.

Environment and Land Court Act No. 19 of 2011

This Act gives effect to Article 162 (2) (b) which provides for the establishment of the Environment and Land Court with equal status to the High Court to hear and determine matters and disputes on the environment and the use and occupation of title to land. This Act thus sets out the jurisdiction, functions and powers of the Court. This court plays a significant role in the matters of extractives as they touch both on the environment and land, it is thus important that disputes are settled timely to also enhance the protection of individual rights.

Mining and Petroleum Specific Laws and Policies in Kenya

Mining Act No. 12 of 2016

This Act gives effect to Articles 60, 62 (1) (f), 66 (2), 69, 71 of the Constitution, 2010, in so far as they apply to minerals. This Act provides for prospecting of minerals, the mining process of these minerals, their refinement, treatment and transportation and any other dealings relating to minerals within the country. This Act repealed the Mining Act Cap 306, Trading in Unwrought Precious Metals Act, Cap 309 and the Diamond Industry Protection Act, Cap 310, Laws of Kenya.

Regulations made under this Act include, among others:

Regulation	Scope
Mining (Use of Local Goods and Services) Regulations, 2017	Promotes job creation and local participation using Kenyan goods and services in mining operations.
Mining (Employment and Training) Regulations, 2017	Aims at promoting job creation using local expertise in the mining industry, the mining value chain and retaining the requisite skills within the country.
Mining (Community Development Agreement) Regulations, 2017	Prescribes procedures and other attendant matters in the signing of community development agreements between mineral rights holders and mine communities.

Mining and Minerals Policy 2016

The Policy comprehensively aligns the country's mining sector with the aspirations of Kenya Vision 2030, the provisions of the Constitution of Kenya (2010) and the African Union Mining Vision (2009) which aims at positioning mining as a key driver of Africa's socio-economic development.

Petroleum (Exploration and Production) Act, Cap 308

This law regulates the negotiation and conclusion petroleum agreements by the Government of Kenya, that relate to the expropriation for, development, production, transportation of petroleum. It repealed, the Mineral Oil Act Cap 307 and the Oil Production Act Cap 308 and the Regulations that were established by these statutes. The Petroleum (Exploration and Production) Regulations, 1984 and the Petroleum (Exploration and Production) (Training Fund) Regulations, 2006 are formulated under Cap 308.

Natural Resources (Classes of Transactions subject to Ratification) Act No. 41 of 2016

This Act gives effect to Article 71 of the Constitution, 2010 which provides for agreements relating to natural resources. It provides that a transaction is subject to ratification by Parliament if it involves the grant and right or concession by or on behalf of any person, including the national government, to another person for the exploitation of any natural resource in Kenya and is entered into on the effective date. Parliament is tasked with providing legislation providing for the classes of transactions subject to ratification.



Bills in Parliament

National Assembly:

- ▶ The Environment Management and Coordination (Amendment) Bill, 2014
- ▶ Petroleum (Exploration and Development) Bill, 2015
- ▶ Energy (Amendment) Bill, 2015
- ▶ Finance Bill, 2015

Senate:

- ▶ Natural Resources (Benefit Sharing) Bill, 2014

County Assembly Bills

- ▶ Taita Taveta County Mining Bill, 2016
- ▶ Turkana County Public Participation Bill, 2014

Policies

- ▶ National Energy Petroleum Policy 2015

The Extractives Industries Transparency Initiative (EITI) Principles

- ▶ Prudent use of natural resources should contribute to sustainable economic growth and sustainable development.
- ▶ Management of the natural resources is vested in the sovereign government for the interest of the people and national development.
- ▶ Public understating on revenue and government expenditure is important to assist in making informed choices and realistic options for sustainable development.
- ▶ Transparency and accountability to enhance financial public management.
- ▶ Respect of contracts and laws.
- ▶ Enhanced environment for domestic and foreign direct investment that financial transparency may bring.



- ▶ Practice of accountability by government to all citizens for the stewardship of revenue streams and public expenditure.
- ▶ Consistent and workable approach to the disclosure of payments and revenues is required, which is simple to undertake and to use.
- ▶ Payments' disclosure in a given country should involve all extractive industry companies operating in that country.
- ▶ All stakeholders have important and relevant contributions to make – including governments and their agencies, extractive industry companies, service companies, multilateral organisations, financial organisations, investors and non-governmental organisations.

African Mining Vision, 2009

The vision is to enhance a transparent, equitable and optimal exploitation of mineral resources to underpin broad-based sustainable growth and socio – economic development. It comprises of a knowledge-driven African mining, that contributes to growth and development. Sustainable and well governed mining sector, competitive industrializing African economy.

Gross Domestic Product (GDP)

Extractives contribute to approximately one per cent (1%) to the gross domestic product (GDP), and there are indications that this might increase following the discovery of petroleum and more minerals in Kenya.

Challenges Facing the Extractives Sector in Kenya

- ▶ Lack of enough information appertaining the extractives sector to the members of the public and the communities living in the areas where these activities are carried. There is no access to information and where granted, it is too limited and doesn't assist these communities to meaningfully participate in the sector.
- ▶ Failure to involve communities in decision making processes where extractives are being carried on. There is no public participation where members of these communities are required to share the views and air their concerns on matters of extractive. Being left in the decision-making process has seen communities protest and demand things done in the right way.



The problem that exists is power imbalance: mining companies have economic power, the government has political power and communities only have their rights which are often violated.



Host communities have suffered the burdens of mineral extraction, without enjoying commensurate benefits from the profits generated by the extractives sector due to lack of sufficient information on benefit sharing.

- ▶ There is no clear legal framework, policies and or regulations on how the revenue from extractives will be shared by the national and county governments and the communities. This revenue does not thus reach the communities in the grassroots for their benefit.
- ▶ Equally, there is no specific legislation to address local content issues especially in the petroleum sector in order to promote local participation through employment, business opportunities and capacity building
- ▶ Lack of adequate compensation where land has been acquired for the purposes of carrying on exploitation and exploration of minerals. The members of these communities are left landless given that they don't have alternative land to relocate to and without compensation they cannot acquire other land.
- ▶ Violation of human rights to include a right to clean and healthy environment, right to access information, the right to the highest attainable standard of health and access to justice.
- ▶ There is discrimination based on gender in the extractives sector where men are more favoured over women.
- ▶ Capital limitations by indigenous companies to invest in the industry.
- ▶ Low state of knowledge transfer within Africa generally.
- ▶ Key stakeholders in the extractives sector do not seem to work closely together; there are gaps in how they relate on matters of extractives.
- ▶ Lack of citizenry understanding on the legal framework on extractives; they don't have all the requisite information necessary to make meaningful engagement with other stakeholders.
- ▶ The legal framework on the extractives industry does not adequately provide for artisanal mining, making it seem that artisanal miners are isolated from the other more regulated large-scale mining.
- ▶ Poor implementation of policies and regulations where they exist. This does not enhance transparency and accountability of stakeholders and involvement of the local communities.
- ▶ Gaps in institutional capacities. For instance, some counties do not have platforms where members of the community can access information on extractives. Some institutions are not adequately capacitated, making it difficult to address impacts arising from extractives in remote or marginalized areas such as Turkana, Lamu, etc.
- ▶ Access to remedies for affected communities becomes a challenge especially given that most of these communities are found in marginalized areas where seeking legal redress in court for violation of their rights is difficult.
- ▶ Diminished transparency and accountability throughout the petroleum value chain.



Article 69 of the Constitution: In respect to the environment, the State shall ensure sustainable exploitation of natural resources and ensure equitable benefit sharing of the accruing benefits; and encourage public participation.

Opportunities in the Extractives Sector

- ▶ Increased revenue collection not only boosting the country's economy but also within the counties thus benefiting the members of the communities where extractives are carried on.
- ▶ Job creation for members of host communities in the extractive sector. There is a lot of non-technical work that can be carried on by the semi-skilled persons thus empowering them economically.
- ▶ Growing the extractives industry by providing clear legal framework with policies and regulations in relation to artisanal mining.
- ▶ The provision of more meaningful information in the extractives industry to the communities to enhance transparency and accountability in the industry.

Recommendations

1. Development of a clear legal and policy framework on local content, revenue collection, management and distribution by the national and county governments and the communities.
2. Public participation is vital in decision making processes in the extractives industry sector and as such communities and key players in the sector should engage communities in public forums so as to seek their views and concerns as they are directly affected by these activities.
3. Make information readily to members of communities as well as members of the public on matters on extractives, such information should be comprehensive in that it will communicate what exactly is happening within their areas.
4. Fund research in the extractives sector so as to have adequate information on the viability of the minerals we have.
5. Capacity building for all actors in the extractives sector.
6. Creation of avenues for local entrepreneurs to participate in the extractives industry.
7. Develop clear legal framework, policies and regulations to provide and cater for artisanal mining in the country. This omission makes it seem that artisanal activities do not make significant contributions in the extractives industry.

Section 183(5) of the Mining Act provides that the National Government will be entitled to 70%, the County Government 20% and the community where the mining operations occur will be entitled to 10% of the revenue.

Extractive Sector Glossary of Terms

Affiliate: two parties are affiliates if either party has the power to control the other, or a third party controls both.

Alternative Dispute Resolution: a process for resolving disputes between parties, often in lieu of or prior to litigation.

Arms' Length Transaction: a transaction where a willing (but not anxious) seller and buyer, with no prior relationship, act independently to reach an agreement.

Assignment: the transfer of one party's rights or property to another (in order for obligations to be transferred, the consent of the other contracting party may be required).

Capital Expenditure: the amount of money required to purchase the plant and equipment required for the project, for preliminary development and for working capital.

Commercial Discovery: the discovery of oil or gas of a sufficient quantity to make any potential production potentially profitable.

Concession: the grant of exclusive privileges by the state or a controlling authority. In the context of oil and gas contracts, it specifically refers to a grant of the rights to the oil and gas resources themselves, together with a right to enter the land or offshore area to obtain them, on which the oil and gas company carries out a commercial undertaking and pays rent and usually a royalty to the granting authority.

Contractor: the person or company who signs the contract to perform specified obligations. In the oil and gas industry, the contractor is typically an experienced oil and gas company, who may then sub-contract to others certain aspects of the work.

Cost Oil: a proportion of product or revenue from which the Contractor can recover its costs.

Expropriation: compulsory seizure of private property by, or compulsory surrender of private property to, a government authority, ostensibly for the public benefit.

Hydrocarbons: all natural organic substances composed of carbon and hydrogen, regardless of composition. This includes crude oil and natural gas.

Indemnity: an undertaking to compensate for or provide protection against damage, loss or liability. In a contractual relationship, the concept of indemnity can arise where one party agrees to pay for the potential losses of the other, or to protect themselves from liability arising from such losses.

IOC: an International Oil Company. An IOC is a company contracted by a state under a PSC to provide the finance and technical skills necessary to explore for and produce oil and gas.

Joint Operating Agreement: an agreement entered into between two or more participants to share the risk and expense of oil and gas exploration and production and to govern the operation of the oil and gas asset(s).

Liability: legal responsibility for the consequences of one's acts or omissions, enforceable by civil remedy or criminal punishment.

NOC: a National Oil Company. A NOC is a company that represents the relevant state or government body, and may take delivery of the state's share of production.

Profit Oil: the amount of product remaining after a pre-determined percentage has been deducted for cost recovery. This amount is then divided between the participating parties under the production sharing contract.

PSC: a Production Sharing Contract. A PSC is a widely-used agreement between a state and an oil company, which enables the company to explore and develop oil and gas reservoirs within a specified area in return for performance of specific obligations, including payment of royalties and tax.

Stabilisation: in the context of resources contracts, a stabilisation clause seeks to address a party's concerns that the state may, in future, reverse policies upon which the agreement was entered into; for example, the petroleum laws or taxation regime.



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