1

Setting the Scene

Overview of Kenya's Extractive Sector

1. Setting the Scene: Overview of Kenya's Extractive Sector

1.1 The Role of the Extractive Sector in Kenya's On-going Development

Until recently the extractive industry contributed only approximately 1% to Kenya's GDP, and less than 3% to total export revenues.[27] While mining operations have been conducted since the 1930s, albeit on a relatively small scale, prior to the 2012 discovery of oil in Turkana County, the extractive sector was not seen as important to Kenya's development. With the recent discovery of oil, however, this sector's contribution to GDP is expected to grow to as much as 10% by 2020, thereby repositioning the sector to play a prominent role in Kenya's development and poverty eradication.[28] World Bank projections suggest that if Kenya's average economic growth rate increases from its historical rate of 4% to 6%, then poverty is expected to fall 14% by 2030.[29]

Kenya boasts a population of approximately 44.35 million people that includes most ethno-racial and linguistic groups found in Africa.[30] Currently, petroleum exploration occurs almost exclusively in some of Kenya's poorest regions[31] mainly in the northern part of the country while mining operations[32] are more widespread in many regions.

The Kenya Vision 2030 is the country's development blueprint that covers the period from 2008 to 2030.[33] The Vision 2030 aims to transform Kenya into an industrialising, middle-income country that provides a high quality life to all its citizens by the year 2030 based on the following three pillars:

- **The Economic Pillar:** Aims to improve the prosperity of all Kenyans through an economic development programme, covering all regions in Kenya, and aiming to achieve an average GDP growth rate of 10% per annum beginning in 2012.
- **The Social Pillar:** Seeks to build a just and cohesive society where social equity exists in a clean and secure environment.
- **The Political Pillar:** Aims to realise a democratic political system founded on issue-based politics that respects the rule of law, and protects the rights and freedoms of every individual in Kenya.

Vision 2030 is to be implemented in successive five-year Medium-Term Plans. In 2007, the Vision 2030 mapped out six sectors whose growth and employment creation potential were seen as key in driving the country's economy, but the extractive sector was not one of them.[34] However, in late 2013, after the discovery of oil, the Vision 2030 earmarked oil and gas and a revamped mineral sector as the seventh sector that will enable the country to achieve middle-income status by the year 2030. The Plan notes that even though the sector has traditionally accounted for minuscule levels of GDP and total export earnings, recent discoveries of oil, gas, and other mineral resources point to an increasing importance of the sector in contributing to increased export earnings, higher GDP growth, broader social development, and as a major spur for infrastructure development and job creation.[35]

Currently it is expected that the extractive sector, among the other six key sectors, will drive the economy to achieve a 10% annual growth rate by 2017 and a sustained growth rate in the double digits thereafter. Consequently, the Government has set strategies to enable the country to reap the economic benefits from the extractive industry. For example, infrastructure development is another key sector in Kenya's Vision 2030. Accordingly, the country is investing heavily in infrastructure projects that collectively will ensure mining operations costs are reduced over time. These include: (1) New Paved Roads Construction Project, (2) Mombasa Port Efficiency Project, (3) Standard Gauge Railway (transport goods to/from the port under 4 hours), (4) the National Optic Fiber Project (is set to position Kenya as the leading communications hub in Africa), (5) LAPSSET Project (The Lamu Port and South Sudan Ethiopia Transport Corridor – transportation of cargo, oil pipelines (longest heated pipelines in the world - crude and refined) and refineries.[36]

1.2 Brief Overview of Kenya's Extractive Resources

Kenya has a wide range of mineral resources. The table below summarises the different classes of extractive industry products found in the country. Annex 2 and 3 provide further information on these resources and the locations they are found in the country.

Table 1: Classification of Hydrocarbons and Minerals Found in Kenya

Hydro-carbons	Industrial Minerals	Base Metals	Gem-stones	Dimension Stones	Precious Metals	Construction Aggregates
Oil	Limestone	Iron ore	Ruby	Soapstone	Gold	Sand
Gas	Diatomite	Copper	Sapphire	Granite		Gravel
Coal	Soda Ash	Manganese	Tsavorite	Limestone		Crushed stone
	Flourspar	Titanium	Amethyst	Marble		Slag
	Barite	Tungsten	Rhodo-lite garnets	Travertine		
	Gypsum		Tour-maline	Slate		
	Silica		Pyrite	Alabaster		
	Chromite			Tuff		
	Vermiculite					
	Granite					
	Wolla-stonite					

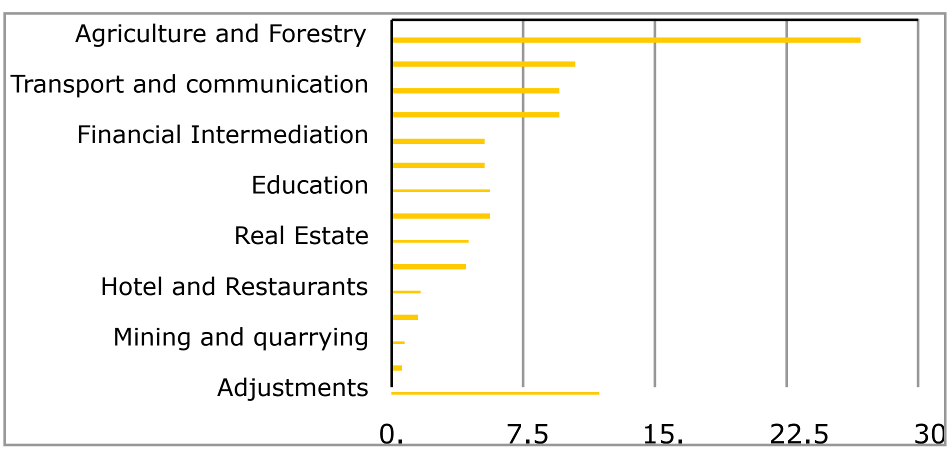
Source: Table made with information from the Ministry of Mining & Ministry of Energy and Petroleum Sourcebooks[37]

1.2.1 Brief History of the Mining Sector and Its Importance to Kenya's Development

While mining in Kenya is not a new phenomenon, the focus on the mining industry as an important contributor to Kenya's economy is a more recent development. Mining has been an active industry in Kenya for over 80 years. It is difficult to pinpoint just when mining activities commenced because until recently little attention has been paid to this sector. For example, in areas like western Kenya, gold mining has been ongoing since sometime in the early 1930s.[38] Similarly, soda ash and flourspar, in Kajiado and Kerio Valley respectively, have also been mined for many years.[39] In fact, among the minerals, together soda ash and flourspar have made the biggest contribution to the Kenyan economy.[40] Annex 3 shows the occurrence of the different minerals found in the country.

Prior to 2012, and the discovery of coal as well as rare earth minerals in the coastal region of the country, which are estimated to be worth USD 62.4 billion,[41] and iron ore, the mining sector contributed just under 1% to GDP and a mere 3% to total export earnings.[42] Moreover, prior to these recent discoveries, the mining industry was dominated by the production of non-metallic minerals. The delay in Kenya's discovery of metallic minerals is largely attributed to Kenya's lack of effort to enhance mineral explorations.[43] However, with these recent discoveries, the mining sector's contribution to GDP is expected to grow to between 4% and 10% in the coming years.[44] Kenya is also increasingly becoming a favoured destination for Foreign Direct Investment, now ranking sixth among favoured destinations in Africa.[45] Accordingly, with the promise of increased importance to the Kenyan economy, more attention is being aimed at the mining industry. Figure 1 provides a comparison of Kenya's different sectors and their respective contributions to the economy.

Figure 1: Extractive Sector Contribution to GDP (%)



Source: KNBS, Economic Survey 2012

Despite the mining industry's deep seeded history, not much about the industry – from the mining process and life cycle of exploration to exploitation, to the human rights impacts caused by mining activities – is widely known or understood by the general population. In large part, this is due to the fact that until recently much of the mining activities have been attributed to illegal and informal artisanal and small scale mining operations, which are often unregulated and difficult to monitor.[46]

The mining sector is generally grouped into two categories: artisanal and small scale mining (ASM) and large scale mining.[47] Although artisanal and small-scale mining are often times grouped together, this ignores the nuanced challenges and human rights impacts presented by each sub-group. Accordingly, where it is necessary to draw out the nuances between the two groups, this is done as follows: (a) 'artisanal' mining refers to the unorganised and currently illegal mining activity carried without the use of sophisticated machinery, and (b) 'small scale' mining refers to the organised miners that may or may not make use of sophisticated machinery but that have a higher revenue turnover.[48] Each player in the mining industry presents unique challenges for further development of the sector, from the creation of policies, laws, and methods of regulation and oversight, to the accessibility of remedy mechanisms, to the human rights impacts.

Because the mining industry has operated out of the spotlight for so many years, so too have the issues and challenges associated with it. However, with the establishment of a dedicated ministry (Ministry of Mining) in 2013, more information about the sector is coming into the public domain.

1.2.2 Brief History of the Oil & Gas Sector and Its Importance to Kenya's Development

Oil and gas explorations began in Kenya in the 1950s with the first well drilled in 1960.[49] Exploration continued at low levels for many years with only 33 wells drilled by 2012.[50] However, in March 2012,[51] substantive oil deposits were discovered by Tullow Oil, in partnership with Africa Oil and Marathon Oil, in Turkana County, located in the Northern part of Kenya.[52] In 2014, Tullow announced it had identified 600 million barrels of oil.[53] With additional reserves of oil expected to be found in Kenya, and if oil again reaches \$100 per barrel, at present Kenya's oil wealth is estimated to be \$260 billion.[54] The current depressed oil prices[55] in the global market have caused speculation as to whether oil finds will actually be exploited. However, the Government remains optimistic about advancing towards the exploitation of the oil. One of the operators has indicated that Kenya's oil could be exploited even if the global oil price is at \$25 per barrel[56] which gives the country a very high hope that the discovered oil will eventually be extracted and sold. Since the discovery of commercially viable oil deposits there have also been significant gas discoveries in the same region. Accordingly, oil and gas exploration remains ongoing with an estimated 23 exploration and production companies licensed to carry out exploration onshore and off-shore.

The announcement of the oil discovery created immediate, significant, and unrealistic expectations, both locally and nationally, which do not take account of the lifecycle of oil production as well as the time and investment necessary before any revenue can be realised.[57] On average, the lifecycle of oil production can take approximately eight to ten years from exploration to exploitation. In fact, Kenya's oil deposits are not anticipated to reach the point of exploitation until 2020.

After the discovery of Kenya's oil deposits, the Government increased its focus on the oil sector and the former Ministry of Energy was renamed to incorporate oil and gas in its title – now, the Ministry of Energy and Petroleum. The Ministry was reorganised in November 2015 during which a State Department for Petroleum headed by a Principle Secretary for Petroleum was established.[58]

The country is also planning for infrastructure that will support the growing sector. Among the planned developments are an oil pipeline from Lokichar, Turkana to the coastal town of Lamu, and rehabilitation of the Kitale-Lodwar road. Another development that will boost the sector is the planned Lamu port that is being constructed under one of the most ambitious infrastructure projects the country has ever undertaken, the Lamu Port South Sudan Ethiopian corridor project (LAPSSET).[59]

1.3 Kenya's National and County Level Governance Structure in the Extractive Sector

1.3.1 Government Institutions Governing the Extractive Industry in Kenya

Oil & Gas Institutions

- **The Ministry of Energy and Petroleum (MOEP):** Oversees both upstream oil and gas, downstream petroleum, electricity (both renewable energy and geothermal), as well as the coal sector. It is in charge of policies to create an enabling environment for the efficient operation and growth of the sector. It provides a long term vision for all sector players.

- **The National Fossil Fuels Advisory Committee (NAFFAC):** Issues licenses for oil and gas in Kenya for the upstream sector. NAFFAC is led by the MOEP and includes the National Oil Corporation of Kenya, the Attorney General, NEMA, the Kenya Revenue Authority, the Ministry of Finance and the Petroleum Institute of East Africa as members.

- **State-owned national oil company – National Oil Corporation of Kenya (NOCK):** The NOCK is situated under the Ministry of Energy. Until the year 2010 NOCK had been focusing only on the downstream retail sector, but this has recently changed as the institution acquired an exploration license (Block 14T).

Mining Institutions

- **The Ministry of Mining:** Set up in 2013 - the first ever in the country's history - to look into the mining activities in the country and undertake various activities with the aim of enhancing the mining sector. Ministry of Mining is responsible for issuing mineral licenses and providing oversight of the mining companies and their operations. The Ministry collects and analyses geological data for purposes of providing an understanding of the country's geological nature. The ministry has planned a collection of data that will map Kenya's mineral wealth, which is poised to be carried out using geological aerial survey technology.

- **Mineral Rights Board:** Established under Section 30(1) of the Mining Act, the Board is to give advice and recommendations to the Cabinet Secretary on matters relating to mineral rights agreements, areas to be designated for ASM or large scale, strategic minerals, fees and royalties payable under the Act and other matters. The Board members are drawn from various government ministries, the National Land Commission and industry professionals.

- **The National Environmental Management Authority (NEMA):** Sitting within the Ministry of Environment, Natural Resources and Regional Development Authorities, this is the institution charged with the regulation of environmental matters including those affecting the extractives sector. NEMA gives environmental licenses to extractive companies after an ESIA has been done. Its work is guided by the Environmental Management and Coordination Act (EMCA).

- **The Ministry of Land & Physical Planning:** This is the institution in charge of administration and management of land in Kenya. It is tasked with powers to reserve public land for any useful purpose such natural resources development.

- **The National Land Commission (NLC):** Established under Article 67 of the Constitution, the NLC among other functions, manages all public land on behalf of national and county government and makes recommendations on the national land policy.

- **The Kenya Revenue Authority:** Sitting within the Ministry of Finance, this is the body that collects all forms of taxes on behalf of the Government. It implements a number of laws including the Income Tax Act which relates to, among other things, the taxation of operations relating to oil, gas and mining activities.

Other Branches of Government

- **Parliament:** Parliament (which includes the National Assembly and the Senate) is tasked with overseeing the management of natural resources as prescribed by the Constitution of Kenya, 2010 (Article 71). In essence Parliament is expected to ratify transactions involving the grant of a right or concession for the exploitation of any natural resource. A bill to operationalise this constitutional provision-The Natural Resources (Classes of Transactions Subject to Ratification) Bill 2015 is currently under consideration. The Bill has been passed by the Senate with amendments and forwarded to the National Assembly for consideration. There is a constitutional deadline of 27 August 2016 by time which the law should be enacted. Furthermore, the Senate protects the interests of counties on matters such as sharing of revenues accrued from natural resources and is expected to exercise its oversight on this matter.

- **The Judiciary:** The Judiciary in Kenya handles any dispute that may arise from the extractive sector whether they relate to land rights, mineral rights, human rights or any other issues. Of particular importance is the Environment and Land Court established in 2010 by virtue of Article 162 (2) (b) of the Constitution of Kenya 2010 to settle matters concerning the environment and the use/ occupation of, and title to land. For instance a grievance or dispute on land with an extractive company would be determined in this court. This role is only limited where agreements expressly limit dispute resolution to arbitration as is common in many extractive agreements.

- **The Attorney General:** The Attorney General (AG) is the chief legal advisor to the government and plays a major role in the extractive sector. All the laws developed for the industry have to pass through the AG's office for legal scrutiny and processing. Extractive company-government agreements have to go through the AG's office before they are forwarded for ratification by the National Assembly.

- **County Governments:** Counties are devolved government structures with a range of administrative functions at the county level. County governments are the ones that give permission to companies to use the lands within the County. The County administrators also have a responsibility to protect the rights of the communities settled near the extractive industry operations. The County governments are also poised to manage the funds from extractive activities shared from the national government for both the community and themselves.

1.3.2 Devolution

One of the major changes resulting from the 2010 Constitution is the creation of a two-tiered structure of government: (1) the national Government, and (2) the county level government, which is comprised of 47 different counties.[60] Elections were held in March 2013 and the first county governors and county assemblies were elected to office.[61] While Kenya's devolution process has been among the "*most rapid and ambitious devolution processes going on in the world*"[62] it has only been underway for three years. Accordingly, the Government is still working out which institutions are responsible for what and how to divide roles amongst the players. In addition, at least some proposed county level bills evidence a failure to account for the laws already in place at the national level. A major effort must be made to ensure that the county level and national level laws and institutions work together harmoniously.

Equally as significant, the capacity of county level administrations and communities must be increased to understand the at times profound changes that will take place with extractive sector operations and production in their area. The ability of county level environmental authorities to effectively assess the quality of lengthy, technical environmental impact assessment (EIA) reports, negotiate effective action plans to respond to EIAs, monitor and enforce them (or other environmental laws) is questionable in many cases for potentially years to come. Even at the national level, it has been recognised that the National Environmental Management Agency (NEMA) needs to enhance its technical expertise and capacity in anticipating and managing environmental issues.[26] For many marginalized communities, with no experience of the sector, awareness raising about their rights, as well as risk and opportunities, and moderating expectations will be important. Through County Environment Committees[27], there is room for greater direct CSOs participation in influencing quality assurance and monitoring of the EIA reports and incorporation of community concerns.

1.3.3 Actors in Kenya's Extractive Sector

In addition to the Government institutions highlighted above, and the companies currently holding licenses in the sector (highlighted in Annex 2), there are a number of other initiatives and coalitions active in the sector: business membership organisations for the companies in the upstream oil and gas sector and for the mining sector respectively and civil society organisations have also taken a keen interest in the sector and with a number of initiatives and networks.

Business Membership Organisations

- **Kenya Oil and Gas Association (KOGA):** The association focuses on supporting private sector interests specifically in the upstream sector operating in Kenya. Companies become eligible to join the association upon signing a Production Sharing Contract (PSC) with the Government of Kenya. KOGA's main objective is to support its members to address the challenge of sustainability i.e. delivering value to shareholders, while providing economic and social benefits to impacted communities and minimising environmental footprint.

- **Kenya Chamber of Mines (KCM):**[63] This is the leading business membership organisation representing the mining industry in Kenya. It draws its membership from large and medium size mining companies but also has associate members that have an interest in the successful development of the sector.

Civil Society Initiatives

- **Kenya Extractive Sector Forum:**[64] Promoting sustainable management and use of Kenya's upstream oil, gas and minerals has been the subject of numerous exchanges over recent years among civil society organisations (CSOs), academic institutions working in the extractive sector, and mining and oil & gas companies in Kenya. Although the conversations have been useful, they have at times appeared unstructured, disjointed, and not inclusive. These experiences have highlighted the need for a common platform to promote open and continuous dialogue involving all concerned actors.

  The Kenya Extractive Sector Forum (ESF), co-chaired by the IHRB Nairobi Process[65] and the Institute for Law and Environmental Governance[66] aims to facilitate regular dialogue among businesses from the extractive sector, KOGA, KCM and other stakeholders with an interest in the sector, including civil society organisations, community representatives and academics. The ESF encourages sharing of information concerning ongoing projects and the identification of issues of mutual interest and plans to address them, all aimed at building trust, and providing opportunities for capacity building on aspects of the sector that are of value to all.

One of the Extractive Sector Forum's flagship initiatives is to convene quarterly workshops bringing together extractive sector companies, civil society, and academia to dialogue and share information on topical issues in the extractive sector.

- **Civil Society Platforms:** In Kenya there are three principle CSO networks operating at the national and county level on different aspects of the extractive sector (mining, oil and gas). The networks are the Kenya Oil and Gas Working Group (KOGWG),[67] Kenya Civil Society Platform on Oil and Gas (KCSPOG)[68] and Haki Madini Coalition.[69] Members of the KOGWG and KCSPOG work on human rights, transparency and accountability, land and other community issues emanating from both mining as well as upstream oil and gas, whereas Haki Madini focuses exclusively on the mining sector.[70] The three coalitions strive to work together for the common good of communities affected by extractives and the broader interests of the Kenyan population.

- **Information Centre for the Extractives Sector:** This is a multi-sector public platform that addresses concerns around the extractives industry by promoting knowledge, transparency and evidence-based stakeholder dialogue on the extractives sector in Kenya.[71]