

**KENYA CIVIL SOCIETY PLATFORM ON  
OIL AND GAS  
AGENDA FOR KENYA'S OIL AND GAS  
DEVELOPMENT**





We the Kenya Civil Society Platform on Oil and Gas having reviewed the state of development of the country's emerging oil and gas industry, having understood the benefits and dangers that come with oil and gas production, aware that the country's preparedness for the coming boom is in deficit, and appreciating our responsibility as civil society organisations and citizens of Kenya, have made the following observations which depict the true state of development of the oil and gas sector. We conclude that they need to be highlighted for consideration by the appropriate authorities to facilitate the development of the sector and ensure that it contributes to the development of our country.

## **Institutional Framework**

- a. The Cabinet Secretary wields excessive discretionary powers ranging from licensing of petroleum contracts, appointments of heads and boards of regulatory agencies and performance of regulatory functions. There is no clear separation of roles between the Cabinet Secretary's policy-making and regulatory roles.
- b. There is evidence of limited capacity in NOCK to harness the full potential of the hydrocarbon basins of the country. This will likely affect its operations as the commercial arm of the government in petroleum activities. NOCK also continues to have strong influence on policy-making creating another conflict of roles.
- c. There is no independent agency responsible for regulating petroleum operations. The structure and appointments of the Energy Regulatory Commission which regulates the entire energy sector including upstream petroleum does not give it the independence to check and balance political decisions.
- d. Parliament's role of ratifying Petroleum Agreements is well articulated in the Kenyan Constitution, but as oil and gas is a new industry Parliament cannot over a short period of time master the expertise to understand the complex and technical matters involved in the petroleum sector, let alone effectively scrutinise Petroleum Agreements. The capacity challenge in Parliament therefore limits its oversight power giving the Cabinet Secretary and Agencies of the State free license to undermine the licensing process.

## **Petroleum Revenue Management**

- a. There are high expectations among the people in oil exploration areas and this could translate into tensions when the expectations are not met before and during oil production.
- b. The Government of Kenya proposes to establish a Sovereign Wealth Fund but it is not clear yet what fiscal rule the government will adopt to determine the size of annual spending from the Fund.

- c. Government is perhaps not paying enough attention to the complexities of petroleum revenue management and its potentially devastating impact on the economy such as Dutch disease, non-productive spending, inflation and corruption. Rather than enact a specific legislation on petroleum revenue management with clear transfer and withdrawal rules as well as investment and savings rules, Government has included a few sections on revenue management in the Petroleum Exploration, Development and Production Bill 2014.
- d. Government is committed to the constitutional provisions on revenue sharing with County Governments. However, County Governments continue to demonstrate weak absorptive capacity to manage ceded revenues and are therefore likely to invest revenues in non-productive areas or used for recurrent expenditure. Also, patronage in the distribution of benefits at the county level could increase contestations among the people over resources leading to internal conflicts.
- e. Although NOCK is playing an important role in the oil and gas industry and aims to become a competitive commercial entity, there is no known proposal on how the company's operations and investments will be financed from petroleum revenues.
- f. Illicit financial outflows have caused considerable revenue losses to the Country through transfer pricing, weak thin capitalisation rules and other tax avoidance scheme. With oil exports likely to commence in a few years, export under-invoicing will likely feature in the oil industry and thereby affect the ability of the government to maximize revenues from petroleum. Also, companies including local firms that are incorporated in tax havens will contribute to increased base erosion and deny the state tax revenues.

## **Transparency and Accountability**

- a. Transparency shines light on secrecy and unearths the cost of opaque deals to the state, communities and citizens. Without transparency, citizens cannot ensure that oil revenues contribute to socio-economic development.
- b. The Constitution of Kenya has a strong provision on the right of access to information. However, the industry legislation provides for non-disclosure agreement which is not only inconsistent with the Constitution but also provide convenient avenues to perpetuate secrecy in the oil and gas industry.
- c. The current licensing regime for oil and gas concessions in Kenya does not promote transparency in the contracting process. There is requirement for the application of open and competitive bidding in licensing for oil concessions, no mandatory contract disclosure and also no requirement for the disclosure of beneficial ownership information. These non-disclosures increase governance



risks around petroleum contracts by strengthening the perception of “too lucrative legal benefits for firms”<sup>1</sup>.

- d. There is no framework for disclosure of petroleum revenues, as well as other relevant information relating to accounting for and managing revenues such as crude oil production volume, petroleum receipts, sales price and expenditure from petroleum revenues.
- e. Kenya has not acceded to the EITI process. EITI principles will inspire genuinely open, transparent and thorough auditing, which in turn informs meaningful multi-stakeholder scrutiny. The government therefore does not see the initiative as an invaluable tool in guaranteeing that oil revenues contribute to socio-economic development.

## Local Content

- a. The local content provisions in the existing legal frameworks have limited scope and leave out important components that make local content a strategic tool for facilitating the integration of the oil sector with the non-oil sector of the economy.
- b. There is capacity challenge to meet local content objectives. This is compounded by the lack of a comprehensive local content policy, strategy and legislation to ensure effective implementation of local content as a critical platform for adding value to the economy
- c. There are no safeguards against rent-seeking and local content related corruption such as fronting and bid rigging. There is a likelihood of local firms being imposed on foreign companies as condition for securing petroleum contracts; and this could provide room for politicians to perpetuate their interest in the oil industry at the expense of the nation.

## Land and Environmental Rights

- a. Lack of a Community Lands Act will compound the complex land management system in the country. This exposes oil investments to security risks as oil companies will constantly be confronted with community dissent.
- b. The right to Free Prior and Informed Consent is not legalised. Apart from compensation in exchange for community surface rights, there exist no other forums for aggrieved communities to seek redress.
- c. The burden that the oil and gas sector places on the environment risks further complications, and intensifies the threat of disputes. There is no legislation in

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<sup>1</sup> Joseph Ayee, Tina Søreide, G. P. Shukla and Tuan Minh Le “Political Economy of the Mining Sector in Ghana”, The World Bank Africa Region, Public Sector Reform and Capacity Building Unit, July 2011.

place by which communities can seek compensation for losing grazing land due to an oil spill, because there is no clarity over who owns the land. The vacuum of rights that emanates from stalled legislation is therefore an urgent issue.

- d. Oil spills and gas flaring will adversely affect livelihoods and the health of communities especially those near offshore activity. Polluted water could be harmful to human health through fishes or other marine food. Communities who rely on the land or water for their livelihoods risk the danger of losing them.
- e. Kenya's environmental laws and regulations have not yet been updated to address oil related environmental challenges. Also, Kenya's environmental institutions have limited capacity to deal with both onshore and offshore oil waste and other environmental hazards. The capacity challenge range from training deficits and logistics constraints.

# RESOLUTIONS



Following our analysis of the status of Kenya’s oil and gas development and conscious of the need for the Government of Kenya, Parliament, oil companies and civil society to work together in developing the appropriate policies, legal and institutional frameworks for the efficient and transparent management of the country’s oil and gas resources, we recommend as follows:

## For the Government

### Institutional Framework

- i. There should be clear separation of roles between policy making, regulation and commercial operation.
- ii. The Cabinet Secretary should focus on policy-making, proposing and development of bills in Parliament, developing regulations and granting licensing rights.
- iii. There should be an independent Authority to regulate petroleum operations including conducting due diligence on application for licensing rights. The Director General of the Authority should be appointed by the President, subject to the approval by Parliament.
- iv. NOCK should focus on commercial operations and the financing of its operations and investments should be clearly defined by law. Financing of NOCK should be done through a transparent budgetary process and approved by Parliament. The Corporation must be required to submit an annual programme of activities for approval by Parliament. The NOCK must also publish its annual financial statements.
- v. Parliament’s oversight role should be strengthened through capacity building. Parliament must submit petroleum Agreements to public hearing or invite public comments before their approval.

### Petroleum Revenue Management

- i. The Government should develop a comprehensive spending, investment and savings policy and legislate it. Spending of petroleum revenues should be guided by a Long-Term National Development Plan to prevent *ad hoc* spending. Spending priorities must reflect national consensus.
- ii. Government should establish separate frameworks for spending petroleum revenues through the Budget (Budget Fund), and saving for stabilisation against crude oil price volatility (Stabilisation Fund) and for future generations (Future



Generations Fund). There should be clear rules for transfers and withdrawals of revenues to and from the Funds.

- iii. There should not be borrowing against petroleum reserves or revenues under any circumstances. A clear statement prohibiting oil revenue-backed borrowing should be put in the law;
- iv. In line with the Constitution of Kenya, the Government should develop by law a formula for sharing petroleum revenues between Central Government, Counties and local areas.
- v. The capacity of County Governments must be developed to ensure efficient utilisation of ceded petroleum revenues. In addition, there should be formulated regulations to guide the use of ceded revenues to prevent Counties from using it for recurrent or non-productive spending.
- vi. Government should review the tax avoidance regulations to make them compatible with global rules and more so to make them effective tools for addressing illicit capital outflows through the oil industry. State revenue collection agencies must be supported to prevent the erosion of oil company tax base by effectively conducting cost and profit audits on the operations of oil companies.
- vii. While safeguarding investments government should limit use of stabilisation clauses to enable regulatory flexibility and maximise benefits from the oil and gas sector. As good practice Environmental concerns should not be included in stabilisation clauses and clauses should be limited to maintaining economic equilibrium.

## Transparency and Accountability

- i. There should be a legal framework for transparency across the oil and gas value chain. This includes contract transparency, revenue transparency and expenditure transparency.
- ii. Confidentiality clauses should be removed from petroleum agreements. Further clarification on confidentiality clauses is required as this may forbid disclosure of petroleum agreements
- iii. The Government must adopt open and competitive bidding processes in oil and gas concessions;
- iv. Government should legislate and establish a register for the disclosure of beneficial ownership information in all petroleum transactions. The disclosure of beneficial ownership information should be a qualifying condition for granting licensing rights.
- v. Mandatory disclosure of petroleum contracts, crude oil production volumes, sales price, petroleum revenues, withdrawals from petroleum funds and expenditure from petroleum revenues. Reporting should be time-specific preferably on a quarterly basis.



- vi. Government, as a matter of urgency, must take steps to subscribe to the EITI and reach candidate status in the next two years and compliance status in four years.
- vii. Government should introduce anti-corruption clauses in all petroleum agreements. The anti-corruption act should include an integrity reporting unit.

## Local Content

- i. Government must develop separate law and regulations on local content and spell out realistic targets and conditions for achieving local content in the oil and gas industry.
- ii. The National Oil Company of Kenya should be given first preference in granting oil concessions.
- iii. Government must establish a Local Content Development Fund with contributions from 1% of the value of all contracts and sub-contracts. The Fund should be used to support capacity building such as skills training and supporting small and medium scale enterprises providing goods and services to the oil and gas industry.
- iv. There should be a Committee established within the Upstream Regulatory Authority to monitor local content implementation.
- v. Government should adopt a local content segmentation scheme to prevent cartelisation by foreign oil companies. This ensures that subcontracts are divided into smaller parts to meet the funding and technical capacity of local firms and protect them from being out-bid by foreign companies. Government should further adopt preferential pricing rules to protect local firms. In addition, the government should consult Section 97 of the Mining Bill to ensure that there is no contribution made to political parties.
- vi. A comprehensive programme for transferring technology by foreign companies to local firms through training and mentoring should be developed.
- vii. There should be provisions that criminalise fronting for foreign and local firms, bid rigging, cartelisation and any form of corruption by a foreigner or a local firm through local content.
- viii. There should be a requirement for transparent reporting on local content covering the number of local personnel employed, goods and services procured by foreign and local companies, and beneficiaries of the proposed Local Content Development Fund.
- ix. Government should also ensure that its local content policies are gender-conscious. Supporting training of women to acquire skills and gain employment



in the oil and gas sector, including in professional roles such as geologists and engineers.

## Land and Environmental Rights

- i. The Community Lands Bill that protects the rights of communities affected by oil and gas operations should be passed into law as a matter of urgency to prevent land related conflicts in the oil and gas sector. The Bill should include the right of communities to be heard, the right to Free Prior and Informed Consent, the right to fair and adequate compensation and the right to seek redress when they are aggrieved. In regards to mining and resettlement, the government should consider borrowing a leaf from the Ghanaian mining law that includes clauses on resettlement of communities prior to exploration. An Evictions Bill is proposed to tackle this issue. In addition, a social licence may be issued to communities in the affected lands with clauses that provide compensation and allow them to graze on their land.
- ii. There should be areas declared as 'no exploration zones' and these areas should include small water bodies, grazing lands and other strategic locations.
- iii. County Governments and communities should be supported with technical capacity programmes to effectively participate in discussions on Oil Field Development Plans and Environmental Impact Assessment processes.
- iv. Government should introduce the exclusive liability principle in petroleum agreements to hold oil companies fully responsible for any pollution or damage arising from petroleum operations.
- v. Oil companies must be required to develop and publish Emergency Response and Oil Spill Response Plans.
- vi. Gas flaring must be prohibited except for operational purpose. There should be allowable limits on operational flaring and companies should be surcharged heavily or put before the Courts when they exceed the limits.
- vii. Government must also, as a matter of urgency, review and update the environmental laws of the country to respond to the new environmental threats the oil and gas sector poses to the country.
- viii. Also, Kenya's environmental institutions should be supported with financial and technical capacity to monitor environmental management plans of oil companies and to ensure that oil companies comply with the highest environmental standards.

## FOR PARLIAMENT

- i. Incorporate good governance principles including transparency and accountability standards in all petroleum and revenue management legislations.
- ii. At all times put the national interest above partisan and individual interest in their consideration of petroleum agreements and in all other matters related to oil and gas development in the country.

## FOR COMPANIES

- i. Develop, publish and implement policies on voluntary disclosure of payments, corporate social responsibility, human rights, anti-corruption and anti-bribery; and Environmental Social Impact Assessments (ESIAs).
- ii. Proactively state their willingness to participate in the EITI process, competitive bidding for oil contracts, to disclose their petroleum agreements and sub-contracts, and to adopt the principle of Free Prior and Informed Consent.
- iii. Establish a participatory community dialogue process to develop Community Development Agreements and Environmental and Social Impact Assessments; and to implement such agreements jointly with County Governments and Communities.
- iv. Protect and safeguard the rights of communities to their land, livelihoods, compensation and security.

## FOR DONORS

Require the adoption of full transparency by the Government in the oil and gas value chain including the adoption of EITI.

- i. Require active participation of citizens in decision making on matters related to the development of the oil and gas sector.



- ii. Provide technical assistance to the Government, its Agencies, Regulatory Institutions, Parliament and Civil Society Organisations.

## FOR MEDIA

- i. Monitor activities in the oil and gas sector including activities by Government, Oil and Service Companies and Regulatory Agencies.
- ii. Support independent institutions and Parliament to actively exercise their oversight responsibilities in the oil and gas sector.
- iii. Develop sensitisation programmes and to actively carry out such programmes at national, county and community levels to raise consciousness about the effects of oil and gas exploitation, appropriate remedies; and to develop a constituency for public oversight in the oil and gas sector.