

**THE 10TH EXTRACTIVES SECTOR FORUM ON IMPROVING
GOVERNANCE OF THE EXTRACTIVE SECTOR IN KENYA: FOCUS ON
TRANSPARENCY AND ACCOUNTABILITY**

**Sarova Panafric Hotel,
18th September, 2018**

About the 10th ESF

The forum, which is the 6th nationally and 10th overall, brought together approximately 40 participants drawn from the Civil society, Community-Based Organizations, the county and national governments, regional organizations, Non-Governmental Organizations, business people from the private sector and also from the extractives industry. The aim of the forum was to provide an opportunity to discuss Transparency and Accountability (T&A) in the context of the extractive sector in Kenya. Specifically, the forum unpacked the meaning of T&A from the different perspectives, clarified key issues for T&A, and brought stakeholders to a common understanding. Specifically, it identified practical solutions and ways to meaningfully improve T&A in Kenya's extractive sector.

Key amongst the emerging issues in T&A in the extractives include: A divergence in the definition of the concepts of Transparency and Accountability; Contextualization of the Idea of 'Transparency and Accountability' in Kenya; Importance of the Extractive Industries Transparency Initiative (EITI); outdated legislation; access to Information; lack of Political will to Implement T&A; and Good and Bad Practices in T&A and drew lessons for Kenya.

The forum recommended the need to Embracing Openness to Promote T&A; the need to develop a framework to strengthen Transparency and Accountability but also to create a holistic definition of the concept; the need to build the capacity of human resources so they can effectively address issues of lack of information through the media; and the need for need for strong legal and Policy Framework.

Introduction

Currently, most African countries, especially in the East African region, are discovering oil and other minerals within their territories. This has elicited international interest in the region. While exploration and production activities are still going on in different parts of Kenya, questions have arisen as to how, when, why, what and where different stakeholders in the extractives sector should account to the citizens of Kenya. There is an almost universal agreement on the need to foster greater transparency and accountability (T&A) in the management of the extractive sector. Towards this end, there have been calls to develop a framework to track progress, proceeds and any other process relevant to the extractives sector.

Such a framework would ensure good governance practices in the petroleum sector. According to the Petroleum-Exploration, Development and Production- Bill, 2017 the Cabinet Secretary is obliged to develop a framework for reporting, transparency and accountability in the Petroleum Industries value chain, Licensing and Contracts; Revenue Collection, Exploration and Production; Allocation and Management; and Retail, Regulation and Monitoring of Petroleum Operations (EB, 2018).

However, there seems to lack a common understanding among different extractive sector stakeholder groups on what T&A means to them, the issues for transparency, the scope and institutional roles regarding the same. Moreover, some stakeholders are concerned that transparency and accountability in the context of the extractive sector in Kenya is characterised more by rhetoric than actual work to expand transparency and accountability.

It is on this premise that ILEG, on behalf of the steering committee organized a one-day National Extractives' Sector Forum. This ESF shared learnings and brought some of the key community concerns to the national stage under the broader theme 'Improving Governance of the Extractive Sector in Kenya', with a focus on Expanding Transparency and Accountability. Among other things, it unpacked the meaning of T&A from the different perspectives; clarified key issues for T&A; and also helped identify practical solutions and ways to meaningfully improve T&A in Kenya's extractive sector.

Welcoming remarks

In their opening remarks, the speakers recognized that the extractives industry, especially Oil and Gas, is fairly new in the country and that there was a need to develop a T& A framework. Some of the benefits include economic development of countries that are heavily dependent on these resources; payment of external debts, strengthening the principal and agent relationship, dissuading corruption and poverty alleviation, better management of resource-revenues and building of Infrastructure.

The forum also noted that the discussion on Transparency and Accountability came at the right policy moment as it came at a time when the country was developing a framework for T&A which focuses on the upstream segment of Oil and Gas Development.

Emerging Issues in Transparency and Accountability in Kenya

1.1. The Definition of the terms Transparency and Accountability

Transparency entails making information available to citizens; this information should be relevant, accessible, timely and accurate. Accountability entails making servants in the private public and voluntary sectors to take responsibilities for their actions and ensuring that there is a mechanism for redress when these commitments are not met (Transparency and Accountability Initiative, 2017). Transparency and Accountability therefore ensures that citizens not only have a voice in matters that are important to them but can also take part in decision-making processes.

The forum noted that there are diverse stakeholders in the extractives sector and all of them view the concept of Transparency and accountability differently. For the Civil Society Organizations (CSOs), T&A should reflect costs, benefits and the final agreements. This therefore calls for the CSOs to hold government to account by enhancing access to information by making sure that it is available, adequate and timely and also promoting public participation especially in the extractives sector.

For the county government, T&A means balancing information that is in the public arena and what information the government has and managing expectations. This calls for the need to enhance coordination between the national and county governments to reduce the existing tensions and suspicion amongst them. T&A also entails linking development goals with the needs of the people at community level.

For the private sector, T&A entails making clear who will gain what and what is in it for them. Sharing of certain information could increase share prices on positive results of exploration. Hence there are strict rules on sharing of exploration data. Currently in Kenya, the forum noted that such information can only be released to the government when the investor's licence has expired to be used by Kenyans.

At the community level, T&A includes sharing information on existing resources, making clear issues of benefit sharing, good government-community relations and flow of information from government and investors and civil society organizations to and from the community. These divergent views have made it hard to develop a holistic framework to govern the extractives sector.

1.2. Contextualization of the Idea of 'Transparency and Accountability'

In a bid to achieve Transparency and Accountability, the forum learnt that the Kenyan National government joined the Open Government Partnership (OGP) in 2011. The idea of open governance is founded on the principle that if everyone was able to access information on the activities of the government, which have often been kept secret, then citizens will be able to scrutinize the activities of the government officers and hold them accountable for their actions.

The OGP, a partnership between Civil Society Organizations, was established in 2011 as a global forum for reformers at national level dedicated to making their governments more transparent, answerable, and responsive to their citizens. With regards to the extractives sector, the OGP Kenyan Chapter is working to create a more transparent and participatory development of climate policies at the national and subnational level; enhance preventive and punitive mechanisms in the fight against corruption and unethical practices; enhance transparency in the legislative process; publish Oil and Gas Contracts, including revenue information to ensure transparency and accountability of the extractive sector; ensure greater transparency around bids and contracts; create transparent public procurement process, public oversight of expenditure and ensure value-for-money towards citizen priorities, Improve access to government budget information and creating wider and more inclusive structures for public participation and to enhance right to information by strengthening records management and access to information.

At the moment, the forum noted that the OGP is on its 3rd cycle and had partnered with the Civil Society Organizations to pilot OGP projects in three counties. These projects include Promoting the use of space technologies and geographic information systems to facilitate planning and management in Vihiga County; promoting Public Participation in Makueni County and enhancing service delivery in Elgeyo Marakwet County.

1.3. Importance of the Extractive Industries Transparency Initiative (EITI)

Kenya has recently discovered oil resources and also has numerous mineral resources. The forum noted that this sector continues to be plagued by challenges such as lack of capacity, bad county-community relations, widespread corruption and lack of information. These stem from the lack of political will to commit to promoting transparency and accountability. However, these key challenges can be overcome by ensuring proper implementation of legislation, ensuring political goodwill to implement T&A and through an informed population.

Signing the EITI will enhance transparency and openness. The Extractive Industries Transparency Initiative is a standard by which openness and accountability in the management of the mineral resources is measured (EITI, 2018). All resources belong to Kenyan citizens and are held in trust to them by the national government. This initiative, the forum noted that it will help Kenyans know which companies operate in the extractives sector; this will promote better business conduct and promote trust between citizens and their governments.

1.4. Outdated Legislation

For a country to achieve T&A, it has to have strong legal and policy frameworks that will support this course. The frameworks also have to reflect new realities and address emerging issues. The Forum noted that Kenya still depends on the Petroleum (Exploration and Production) Act of 1986 to govern issues of T&A in the extractives sector today. The Act however, does not reflect emerging issues in the extractives sector today and so cannot effectively govern the sector.

1.5. Access to Information

Most statutes, policies, laws and regulations that guide the exploration, abstraction, production, transport and development of minerals and other natural resources

promote the right to access information. The forum noted that there still remains low levels of knowledge and information gap on minerals and oil resources amongst the general population. This has been attributed to the lack of goodwill of the national government to disclose information such as contracts, financial arrangements and agreements between the government and the investors.

Despite having a Model Production Sharing Agreement, and the Mining Act of 2016, which mandate State Enterprises to publish information that is of interest to the general public and for those that will be affected by a project, information on licences, fiscal terms, exploration and production data, revenue collection and information on beneficial ownership still lacks in the public arena. Moreover, those contracts that are signed by government remain unavailable to the general public. The forum noted that the media could play a key role in enhancing access to this kind of information; however, it is ill equipped in handling issues in the extractives sector.

1.6. Political will to Implement T&A

The forum noted that Kenya lacks political good will to promote openness especially on the part of national government. This, they argued that, just like Nigeria, would cause Kenya to lose its revenue to corruption and would also risk amongst other crimes financing international crimes such as terrorism and money laundering.

1.7. Good and Bad Practices in T&A: Lessons for Kenya

The forum noted that on the one hand, Norway and Ghana are good practices in the implementation of T&A in the extractives' sector. Norway strongly promotes Transparency and accountability in the extractives sector and has participated in the Extractive Industries Transparency Initiative (EITI) since 2003. In a bid to promote T&A, Norway has made all information regarding state revenues from the Norwegian petroleum, licences, concession agreements publicly available. It has also developed strong performance and financial auditing and monitoring institutions.

Like Norway, Ghana started participating in the EITI in 2003 and made its first report in 2006. Ghana has ensured T&A in its extractives sector by making changes to the fiscal regimes that govern the sector; for instance, the introduction of fixed royalty rates capital gains tax and higher ground rent. It has also developed a strong legal mechanism and that the government, through its Ministry of Petroleum and Energy publishes contracts between the government and the investors despite having no

policy on disclosure. The Country's Beneficial Ownership disclosure agenda seeks to promote good governance of the extractives sector while minimizing and ultimately eradicating the risks such as financing transnational crime and illicit financial flows.

Nigeria, Africa's largest producer of Oil and other mineral resources, was identified as a bad practice. Despite developing a Law on Transparency in 2007, it has never been implemented. The lack of good will to implement this law has caused the country to continue to experience unaccountable use of revenues and widespread corruption, unwillingness to disclose beneficial owners, lack of political will and lack of legislation requiring ownership disclosure.

Recommendations

The forum therefore recommended:

1. Embracing Openness to Promote T&A

Participants especially civil society resolved to use advocacy to push the national government to embrace openness by being part of T&A frameworks like the Extractive Industries Transparency Initiative (EITI)

2. Convergence on the definition of Transparency and Accountability

The forum called for the need to develop a framework to strengthen Transparency and Accountability but also to create a holistic definition of the term.

3. Role of Media

The forum noted the need to build the capacity of human resources so they can effectively address these issues. There is also need to understand the evolving nature of media and use technology to achieve T&A.

4. Need for strong legal and Policy Framework

The forum noted the need for the Parliament to pass the Petroleum Bill and sign it into law. They also noted the need to develop a law that will provide for rules of engagement between key stakeholders in the extractives sector.

Annex 1: List of Participants

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Appendix 2: Program

Tenth Extractive Sector Forum (ESF). *Tuesday 18th April 2018. The Cradle*
**IMPROVING GOVERNANCE OF THE EXTRACTIVE SECTOR IN KENYA:
FOCUS ON TRANSPARENCY AND ACCOUNTABILITY**

Programme: Monday 16th April 2018

- 8.30 – 9.15am Registration
- 9.15 – 9.30am Welcome and Introduction
- 9.30 – 10.00am Opening Panel
- Benson Ochieng, Executive Director, ILEG
 - Tom Onyango, Oxford Policy management (OPM)
 - Dr Abraham Sing'oei, Legal Advisor/Head – LiLO, Executive Office of the Deputy President
- 10.00 – 10.30am – Setting the Stage: Presentation on Transparency and Accountability in Kenya's Extractive Sector
- Melba Wasunna, Director – Extractives Baraza
- Comments, Questions, Clarifications
- 10.30 – 11.00am – Tea Break and Group Photo
- 11.00 – 1.00 Panel 1 Discussion: **TOWARDS A COMMON UNDERSTANDING OF TRANSPARENCY AND ACCOUNTABILITY IN THE CONTEXT OF EXTRACTIVE SECTOR IN KENYA**
- Moderator Benson Ochieng
- Panel Mr Philip Thigo, Open Government Partnership, Executive Office of the Deputy President
- Directorate of Mining, Ministry of Petroleum and Mining
- Hon. Moses Natome, CEC *Water Services, Environment and Mineral Resources.*
- Ms. Sandra Musoga, Article 19 Eastern Africa
- Tullow Oil Kenya
- Alexander Lama, Turkana Natural Resources Governance Hub (Hub)
- 1.00 – 2.00pm Lunch

2.00 – 3.30pm Panel 2 Discussion: **MOVING FROM RHETORIC To TRUE PURSUIT OF TRANSPARENCY AND ACCOUNTABILITY IN THE MANAGEMENT OF EXTRACTIVE RESOURCES IN KENYA**

Moderator Mohamed Ruwange, Strathmore University

Panel Directorate of Petroleum, Ministry of Petroleum and Mining

Moses Njeru, Kenya Chamber of Mines (KCM)

Base Titanium

Charles Wanguhu, Kenya Civil Society Platform on Oil and Gas (KCSPOG)

Hadley Becha, Community Action for Nature Conservation (CANCO)

Kwale County Natural Resources Hub (Hub)

3.30 – 3.45pm *Wrap-up*

Tea, Networking