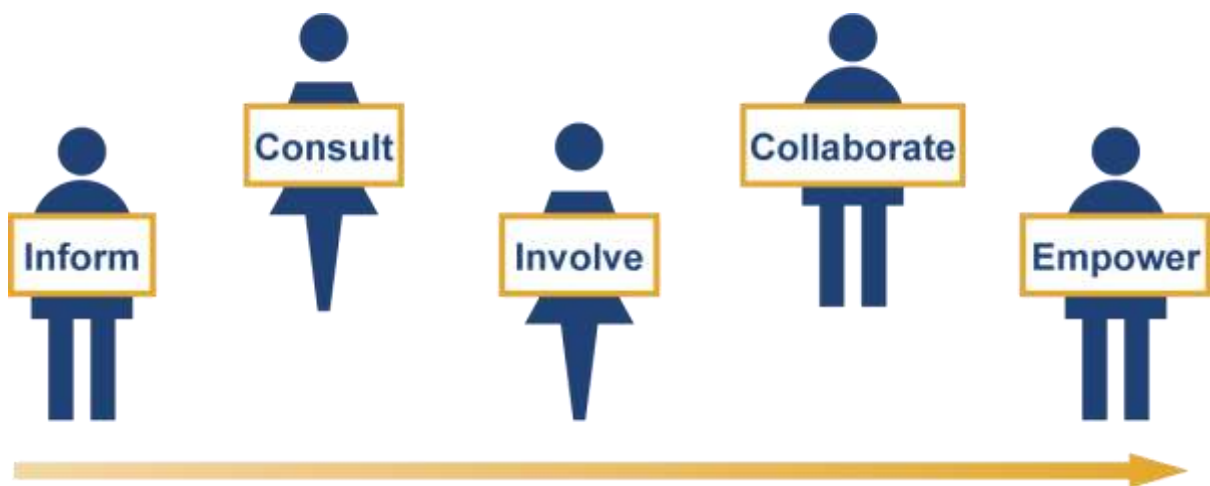




Community Engagement in the Extractive Sector



This paper discusses Community Engagement in the extractive sector in Kenya with focus on Turkana. The paper relooks at the Briefing Paper 'Stakeholder Engagement in Kenya's Extractive Sector: Principles & Pointers' that was developed by ILEG and IHRB-Nairobi Process following the 2nd Extractive sector Forum (ESF) held in Nairobi in April 2016, with a view to narrowing the scope to 'community engagement' and contextualizing it to Turkana. The paper aims to provide background for the 8th ESF, on 'Community Engagement' in Lodwar, Turkana on June 3rd 2018. ESF is a quarterly multi-stakeholder convening of companies, communities, national and county governments, civil society and academia that are actively involved in the extractives sector in Kenya. The ESF provides a safe space where the different players can discuss key social, economic and environmental concerns and challenges faced by the extractive sector in Kenya. For more information, contact ILEG on +254202349141 or email: ileg@ilegkenya.org.

1. Introduction

The emerging extractive industry in Kenya has significant potential to lift people out of poverty and contribute to the country's economic development. This is because the industry, if managed well, can generate considerable revenues that can support infrastructure development and delivery of social services.¹ At the same time, experiences from other countries show that the industry has been associated with extensive social, economic and environmental impacts on local communities, workers and sometimes nations' stability. This has prompted a demand for greater stakeholder engagement to discuss, share information and concerns, plan together and implement strategies to promote sustainable investments in the sector while minimising adverse impacts on the people and environment. But engagement with people with diverse interests, opinions, wants and needs is complex and hard. In fact, much that passes for 'community engagement' in Kenya is superficial and one-way. There are still challenges around ensuring that stakeholder, particularly community engagement in Kenya's extractive sector represent a constructive dialogue between companies, communities and relevant government departments. Concerns also abound as to whether stakeholder engagement in Kenya's extractive sector are geared towards delivering lasting positive environmental and social outcomes for local populations and broader society.

These challenges were discussed at the 2nd Extractive Sector Forum (ESF) held in Nairobi in April 2016. Based on the discussions and recommendations, ILEG and Institute for Human Rights and Business – The Nairobi Process (IHRB-Nairobi Process) developed an Issues Paper titled 'Stakeholder Engagement in Kenya's Extractive Sector: Principles & Pointers'.² This background paper relooks at the ILEG/IHRB-Nairobi Process issues paper with a view to narrowing the scope to 'community engagement' and contextualizing it to Turkana. The paper aims to provide background for the 8th ESF, on 'Community Engagement' in Lodwar, Turkana on June 3rd 2018.

2. What is Community Engagement?

Community engagement is the process of involving people in the decisions that affect their lives. It involves building on-going relationships which means the engagement should cover a broad spectrum of time and interactions. It is not a one-off event, but rather a continuous process that evolves, just as projects evolve into new phases and new decisions are made.

3. Distinguishing community consultations from community engagement

Consultations with potentially affected communities, around a specific project or a specific phase of the project is important and is indeed a requirement in some cases under Kenyan law, including as part of the Environmental Impact Assessment (EIA) process. Such time- and context-specific steps of consulting particular stakeholders form a core part of, but do not on their own constitute stakeholder engagement. Community consultation can be viewed as a process led by government or industry with a particular goal such as a specific project or plan to discuss specific issues. On the other hand, community engagement refers to the process of building ongoing relationships and trust with communities. Meaningful community engagement should start in the earliest stages of exploration and extend throughout the life of a project. It involves a spectrum for engagement from 'weak' engagement in which companies 'inform' and 'consult with' communities, to 'strong' engagement in which communities are involved in discussions on costs and benefits and empowered to take part in finding joint solutions and making mutual decisions. Informing takes place when a decision has already been made or action is required, and the government or company needs to make sure that communities are aware of the facts. Consulting takes place when a project requires some input, feedback or advice before part of the project or decision is progressed. Active participation takes place

¹ World Bank, "Extractive Industries Value Chain" (May 2009)

² ILEG & IHRB, 2016. Stakeholder Engagement in Kenya's Extractive Sector: Principles & Pointers'.

when the government or company collaborates with the community to work out what needs to be done and to develop solutions that are incorporated into decision making.

4. Why does community engagement matter?

Community engagement enables good governance and informed decision making by promoting shared responsibilities for decisions. It supports an open approach to managing risk by providing a strong foundation for understanding decisions and building trust amongst stakeholders about the decision-making process. Whether community engagement matter depends on what the communities, companies or government want to achieve in the community engagement process. For businesses it is first and foremost about whether it makes good business sense to engage communities.³ The engagement process helps companies to understand the evolving interests, issues and concerns of those impacted by business related activities over the life of the project. Engagement also builds confidence of communities if they see their rights and interests being taken care of. In other words, good community engagement ensures extractive industry companies secure a social licence to operate. Communities benefit by being involved in planning and decision-making, and having their concerns and interests taken on board and addressed promptly and adequately. On their part, governments fulfil their responsibility to ensure communities are adequately consulted before decisions are made on extractive industry developments. This also promotes harmony and conducive political and economic environment. Specifically, community engagement enables relationship building, helps in meeting legal obligations and international standards, creates opportunities for collaboration, and prevents or reduces costs of conflicts.

▪ Building Relationships

Community engagement helps to build trust among extractive industry stakeholders. It enables vital feedback among communities, companies and government and thus can contribute to improving relationships and creating more transparent, cooperative, and productive conversations.⁴ Perceptions are better understood when there is an ongoing and open engagement process with clear outcomes. Companies are strategically able to change their attitudes towards their stakeholders when they understand their concerns and vice versa.

▪ Meeting Legal Obligations and International Standards

Extractive activities are carried out in the context of national laws and regulations. Moreover, international standards increasingly place responsibilities on companies and give rights to other stakeholders such as communities.⁵ For instance, UN Guiding Principles on Business and Human Rights (UNGPs) requires business enterprises to engage in meaningful consultation with potentially affected groups and other relevant stakeholders, as appropriate to the size of the business enterprise and the nature and context of the operation.⁶ The Organisation for Economic Co-operation and Development (OECD) Guidelines on Multinational Enterprises require multinational enterprises to “engage with relevant stakeholders in order to provide meaningful opportunities for their views to be taken into account in relation to planning and decision making for projects or other activities that may significantly impact local communities”. The International Finance Corporation (IFC) environmental and social performance standards notes among other things, that companies have a responsibility to

³ OECD, “OECD Due Diligence Guidance for Responsible business conduct: Meaningful Stakeholder Engagement in the Extractive Sector”(2016)

⁴ Alberta Energy Regulator, “Alberta Energy Regulator Stakeholder Engagement Framework.” (July 2015)

⁵ 9 Alberta Energy Regulator, “Alberta Energy Regulator Stakeholder Engagement Framework.” (July 2015)

¹⁰ OECD, “OECD Due Diligence Guidance for Responsible business conduct: Meaningful Stakeholder Engagement in the Extractive Sector”(2016)

⁶ Principle 17, http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf

work with affected communities of Indigenous Peoples to ensure a meaningful engagement process, including on achieving Free, Prior and Informed (FPIC) where appropriate.

Citizen engagement is a central theme in Kenya's governance architecture. Participation of the people is not only a national value and principle of governance but is also an expression of the sovereignty of the people under the Constitution.⁷ Indeed, the centre-piece of Kenya's Constitution is a devolved government structure aimed at ensuring the participation of local communities in governance and decision-making. This is in recognition of citizen's right to manage their own affairs and to chart their own development path.⁸ Devolution is primarily intended to empower the citizenry; to enable them to exercise their sovereign power at the national and county levels (Article 1). The constitution and various laws in Kenya require that public participation be undertaken at all levels of government before government officials and body make official decisions. It also specifically requires public participation in the management, protection and conservation of the environment and natural resources.⁹

▪ **Creating Opportunities for Collaboration**

Community engagement can bring diverse perspectives together for collaborative problem solving and identify opportunities for collaborative action. By continuously informing, consulting, involving, collaborating and empowering communities, extractive industry companies, government or other stakeholders can help communities identify or create opportunities for collaboration or partnerships. Such opportunities may include advocacy initiatives, business opportunities, employment or capacity building programmes.

▪ **Avoiding or Limiting Costs of Conflicts with Stakeholders**

The extractive sector abounds with stakeholder related risks, especially in situations where engagement is defensive or reactionary. The cost implications can be high, starting with time costs as a result of delays or closure, to reputational risks that may negatively affect funding of projects. Another critical cost implication is staff time spent in resolving conflicts which would otherwise have been avoided if there was proactive and sustained engagement.

5. ESF Stakeholder Engagement Principles

The second Extractive Sector Forum on Community Engagement discussed and agreed on a set of stakeholder engagement principles and documented by ILEG and IHRB in the briefing paper 'Stakeholder Engagement in Kenya's Extractive Sector: Principles & Pointers'.¹⁰ The principles were informed by experiences from community engagement in Kenya, insights from the 2nd ESF Participants as well as international standards including the International Association of Public Participation core values.¹¹ They include:

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|------------------|-------------------|----------------------|
| ▪ Be Inclusive | ▪ Honesty and | ▪ Be Fit for Purpose |
| ▪ Start Early | Openness | ▪ Be Adaptable |
| ▪ Engage for the | ▪ Be Transparent | ▪ Commit to the |
| Long-Term | ▪ Be Specific | Process |
| ▪ Engage in Good | ▪ Make it Two-Way | ▪ Strive for Mutual |
| Faith, with | ▪ Be Accountable | Benefit |

⁷ Articles 10(2) (a) includes participation of the people as part of the national values and principles of governance.

⁸ Article 174

⁹ Article 69(d)

¹⁰ See Supra note 2.

¹¹ See, <https://www.iap2.org/page/corevalues>

Be Inclusive

There is need to take a broad view of stakeholders. Taking a narrow view of stakeholders - for example by considering only directly affected community, and not identifying other groups and organisations that may have a shared interest in the outcome, makes it harder to achieve success. Moreover, missing out on key groups such as women, youth, older persons as well as international development community means missed opportunities to understand different perspectives, gain insights into core risks and concerns, solicit new and locally-tuned ideas for preventing and mitigating risks. An effective engagement strategy should also be cognizant of the fact that interests change and new groups emerge as the project develops. It should therefore be versatile and flexible. For instance, how community is defined is critical for a successful community engagement strategy. The Constitution of Kenya identifies communities on the on the basis of ethnicity, culture or similar community of interest. The Petroleum (Exploration, Development and Production Bill, 2017 defines local community to mean people living in a sub county within which a petroleum resource is situated and are affected by the exploitation of that petroleum resource. It is important to note that exploitation of petroleum resources may impact communities beyond the borders of a sub-county. In Turkana for instance, pastoralists come from not only outside a subcounty but as far as outside the county at different times of the year. This means that even pastoralists from outside a sub-county may be impacted if petroleum exploration reduces or denies access to pastoral lands. Moreover, where petroleum exploration takes place very close to subcounty or county borders, some community members from close by counties who live near the petroleum exploitation sites may be impacted more than communities from the same sub-county or county but who live further away from the sites of petroleum exploitation. Successful community engagement therefore requires a broader definition of community, as this allows a more detailed examination of different community groups, their interest, influence and power. This in turn enables a more targeted approach to meeting their interests, and developing a broader, more inclusive relationships.

Start Early

Community engagement should start early and have a long-term view because relationships and trust take long to build. This means starting from the exploration stage when first impressions and first contacts are made. Starting early will also help in understanding the context and tailoring the engagement plans to the context. Lack of early engagement may create a vacuum which is often filled by rumours and false information, creating a breeding ground for suspicion.

Engage for the Long-Term

Thinking long-term means considering that some projects and local communities will be neighbours for many years so getting started on the right foot is important. It also means adjusting to the changing expectations and interests of stakeholders as projects progress and advance into new phases or are phased out, through closure and decommissioning – and scenarios in between such as where operations are halted unexpectedly, where ongoing commitments will need to be re-negotiated in light of revised circumstances. This can help companies justify different types of decisions if they have long-time horizon view of the entire engagement process. Engagement is thus seen not as a short-term way of negotiating the lowest compensation rates but about gaining and maintaining a broader social license to operate in the area on a long-term horizon. This approach also means that engagement is strategic rather than ad hoc.

Engage in Good Faith, with Honesty and Openness

Parties should engage with the genuine intention to understand how stakeholders are affected by the company's activities. The company should be prepared to address its adverse impacts and the community should honestly represent their interests, intentions, concerns and constituencies. Information from all parties should not be distorted or merely promotional but should provide a full,

accurate and honest approach to the issues. Each of the stakeholders in the engagement process should make an effort to learn more about each other - knowing who is across the table. All stakeholder should strive to exchange information about themselves that is pertinent to the engagement process and to update this whenever there is material change - this will include information such as when the key negotiating personnel change, forewarnings of major changes in projects or relevant political or regulatory changes.

Be Transparent

Communication should involve two-way-communication processes founded on access to timely, understandable and reliable information, and cater for different levels of knowledge and expertise. It involves the full and accurate disclosure of pertinent information concerning proposed developments in a form accessible and understandable to the affected people. When determining how to present information it is essential to consider the level of technical detail, local language and dialects, cultural sensitivities, literacy levels and most crucial are the local methods of disseminating information like use of oral explanation.

Be Specific

Provide specific information about potential and actual project impacts – both from the side of companies and other stakeholders – rather than only generalized information. Communication of information must be adapted to the intended audience (see above), but that does not mean it cannot be specific. For example, disclosing and discussing EIA reports including those conducted by independent parties, and the related action plans, as well as any other relevant documentation about the project and similar projects is relevant information, particularly for potentially affected stakeholders. Finding ways to jointly develop specific information about project impacts, such as through joint monitoring, can build trust and acceptance of information.

Make it Two-Way

Starting with early outreach activities, incorporate a variety of techniques to create multiple entry points for engagement and regular updates. Such a process should aim at building relationships, not just passing information about decisions already made. As such, engagement includes feedback mechanisms that empowers the community through community input into decisions regarding the project before the decisions are final and through receiving feedback on why and how their views were or were not taken into account.

Be Accountable

Take responsibility for any actions, omissions, decisions and commitments. As stakeholder engagement is about building trust, being reliable when called upon to honour commitments made is a core part of the process. Developing transparent commitment registers or agreements can make this concrete.

Be Fit for Purpose

Stakeholder engagement should be grounded in respect for stakeholders that allows for self-determination and different forms of engagement and expression by the different stakeholders. The engagement should be contextualized and adapted to the specific the socio-economic, political, cultural and geographical context of a project. Contextualization acknowledges diversity of and within stakeholders/communities and thus helps in adapting communication across all groups. In Kenya extractive sector operations are situated in regions with unique cultures and way of life and are influenced differently by the social and political circumstances. Businesses should thus scale their strategies relative to the risks and impacts their projects are likely to create²⁴ to ensure that engagement is respectful and productive.

Be Adaptable

Strive to have a process that easily accommodates change. Changes in circumstances that may not even be connected to the project may prompt stakeholders to identify urgent needs to be addressed. As a member of the community, the company should carefully weigh what kind of support (if feasible and appropriate) to offer. Likewise, communities should also show flexibility in their expectations particularly of expected benefits as operational circumstances change. How adaptable stakeholders are likely to be will also depend on the relationship of the parties and rely on openness in communicating the changes necessitating the adaptability.

Commit to the Process

Stakeholder engagement processes have to be planned and resources set aside. All parties need to recognize that such engagement is a skill that may need to be built. The most important is a commitment by the stakeholders to use the process to resolve disputes or differences that may arise in the first instance and to agree to solutions. But be aware that it may not solve all issues, and so it is important to respect other grievance resolution avenues that may be available to the parties. Company-developed or better jointly-developed operational grievance mechanisms are important, however stakeholders should be free to pursue other avenues that they consider credible. Importantly, localized avenues such as customary and other community sanctioned structures should be respected as critical avenues for dispute resolution.

Strive for Mutual Benefit

There will be no point of engaging if parties do not see benefits from the process – or benefits for only one side. Stakeholders need to establish the benefits in terms of the opportunities available as they engage – this may be about particular defined actions, such as those set out in a community development agreement, but there are likely to be more intangible benefits along the way such as building trust and reliability that may be equally as important.