



Meeting Report

Second Workshop of the Extractive Sector Forum in Kenya

Stakeholder Engagement:
Getting it Right

April 2016
Nairobi

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1. Introduction

The Extractives Sector Forum (ESF) comprises quarterly workshops bringing together companies, civil society organizations (CSOs) and academia to discuss key concerns and emerging issues in the extractive sector in Kenya.

The second ESF workshop held on April 20, 2016 in Nairobi, Kenya discussed stakeholder engagement with the aim of establishing a common understanding of key principles to guide stakeholder engagement. The approach involved experience sharing on what companies, CSOs and by extension communities want and need to know as they engage as stakeholders. This report seeks to highlight the key issues discussed based on participant presentations.

2. Charting the Critical Factors of Success

Participants shared a general understanding that there are several factors that are central to effective stakeholder engagement.

Cultural Sensitivity

It was noted that different cultures communicate differently and therefore effective engagement has to take into consideration culturally unique expressions of language, both verbal and non-verbal. Companies should be sensitive to culturally acceptable communication as this helps boost confidence and trust with communities. It was stressed that a culturally respectful approach is therefore essential to an engagement process that is most likely to yield constructive results.

Engaging Early

The most basic and important step in community engagement begins with understanding the culture and language of the community. The participants referred to this as a “knocking” approach that is really about negotiating entry into a community by acknowledging its unique way of life and language and integrating existing community structures in the consultation process. As such, stakeholder engagement and by extension community engagement is a process and not a one-time event as it consciously seeks to build relationships.

It was noted that the engagement process in Kenya typically starts at the national level where companies first engage with the National government, more specifically with relevant agencies or departments to secure exploration licenses or mineral rights and related permits. Participants noted a need to establish how to link the licensing process that is conducted at the national level to the actual engagement process on the ground. This is critical in helping engage as early as the process of licensing of companies.

Successful stakeholder engagement takes a long-term approach¹. Company participants at the workshop felt it is a challenge to evaluate engagement when they are not sure whether they will be in the community for three months or one year or for a much longer period. The company view of community engagement is thus influenced by how long they stay in a specific location.

Participants stressed that stakeholder engagement is about starting out early². This helps the company understand the context and build trust with stakeholders especially communities which takes time.³ In the Kenyan context as well as others, experience shows that companies take considerable time before coming to the ground to engage local stakeholders directly. It was noted that in many cases companies may have only a “vague” understanding of the community in which they are going to operate. One fact is that companies know where they are going to operate i.e. in a remote location with no basic social structures like roads, electricity, piped water, inadequate health facilities among other basic amenities. This to a great extent informs how they develop their operations plans in terms of accessing their sites and setting up camps.

Engaging with Diverse Stakeholders

As companies move to counties to start activities they must consider who they choose as a guide to introduce them to the community. It was observed that relying entirely on “community leaders” can be quite costly especially if a company engages those who communities may not be consider genuine. In fact his has the potential of keeping companies from meeting all the different groups and establishing relationships from the outset. As noted, crucially, companies need to be open to interacting with the whole cross-section of the community, identify the different interest groups and identify community leaders who are able to link them with the community members and groups for a more inclusive engagement process.

Communities are not the same everywhere and thus there is no such a thing as one size fits all approach when engaging communities. Considering there is no one homogenous group/community, participants noted that establishing the varied expectations of the different groups including women, the elderly and youth, is essential for an inclusive and meaningful process.

Some participants did raise concerns that companies target stakeholders they see as adding most value to their operations and risk marginalizing CSOs they may view as not being important. Such an approach puts a company at risk of losing out on the perspectives of important stakeholders who will in fact add value and deserve to be consulted. Companies may also choose to only engage those that seem to be supporting their objectives and may avoid or sideline those opposing the project. It is important that companies appreciate that all voices count whether for or against the project. Those isolated for not supporting the project may actually have vital information.

¹ IFC, [Stakeholder Engagement: A Good Practice Handbook for Companies Doing Business in Emerging Markets](#) (May 2007)

² Wilson, E, Best, S, Blackmore, E and Ospanova, S (2016) “[Meaningful community engagement in the extractive industries: Stakeholder perspectives and research priorities.](#)” International Institute for Environment and Development, London.

³ Wilson, E, Best, S, Blackmore, E and Ospanova, S (2016) “[Meaningful community engagement in the extractive industries: Stakeholder perspectives and research priorities.](#)” International Institute for Environment and Development, London.

While investing in stakeholder engagement is seen as vital, participants recognized it does not entirely secure companies from resistance to their operations. How well companies engage is thus critical to ensuring that systems and structures are built to address resistance and any other grievances that may arise in the course of their operations.

Understanding Competing Interests around Representing Communities

A question that was of interest among participants is how companies balance competing interests. For example, it was noted that in some cases companies have to contend with politicians wanting to control projects as a way of seeking public approval. Experiences by companies show that politicians sometimes wish to be consulted exclusively as representatives of the people and therefore may not be supportive of wider company consultation efforts because they feel that they haven't been accorded adequate importance based on their public positions. Companies recognize the important role that other stakeholders play and therefore have to consult as many stakeholders as they can.

Considering the Implications of Operations

Participants noted that it is important that as companies seek to enter communities they familiarize themselves with the legacies (if any) of companies that operated before in the region, but also think about the kind of legacy they want to leave behind and in particular how that will impact future projects. Often, initial investments are central to addressing perceived or actual resistance based on actions by previous investors.

It is on this basis that companies should think broadly on the extent of the implications of their operations when setting up operations. It was noted that companies must consider affected host communities and regional or neighbouring communities when identifying the range of stakeholders to engage. Engagement should be broad enough to include communities whose territory companies will use to access operation sites. Host communities should in the basic sense be those that host the oil, gas and mining facilities. Furthermore, the different levels of governance i.e. National and County governments need to also be engaged as well.

Attaining and Measuring Success

The workshop discussion stressed that as companies enter the community they should strive to create trust. This is achieved in part through an open mind and decisively sharing as much information about company operations as possible. It was noted that in most instances companies are concerned about the expectations of communities and therefore tend to hold back information that is essential for building trust. Essentially, companies should appreciate that engagement cannot be limited to those issues and groups that companies label as 'important' because there may be many additional critical stakeholders and concerns that companies may not be aware of. It was stressed that companies should therefore talk to everybody they have been asked to talk to

because these stakeholders present different interests, strengths and opportunities. This requires flexible engagement plans that can be adjusted on the ground.

Participants noted that a successful engagement strategy heavily depends on how communication is structured and conducted. Open and honest communication by both parties engaged is essential. This means there should be a strong feedback mechanism to sustain the relationship and monitor progress. Companies should not be seen as the only party that should give feedback and share information. Communities and other stakeholders have a part to play in giving feedback as well and sharing relevant information in their possession.

Success is also about proactively engaging internal stakeholders⁴ who have different experiences and perspectives. Internal stakeholders have to see the value of engaging external stakeholders and the need to ensure that relationships are maintained. Such an approach is viewed as essential in securing necessary goodwill and long term support over the life of the project.

Considering that extractive companies work through subcontractors, it was stressed that subcontractors need to understand the essence of stakeholder engagement so as to avoid jeopardizing operations. The approach should be that of ensuring that there is deliberate engagement and one that evolves as more experience is gained.

Communication is also about avoiding giving the wrong impression with regard to a certain course of action particularly when there is no commitment from the company about honoring it. For instance, it is important to avoid statements like “I will think about it”, or “we will discuss with management or headquarters”. To some stakeholders, this will sound like a commitment by the company or another actor to a specific action. Participants agreed that commitments should only be on things that stakeholders are able to deliver and honor whenever confronted. Unfulfilled commitments are essentially a detriment to the engagement process.

Understanding the Context

Meaningful engagement only makes sense when companies understand the context within which they operate. This helps to tailor the engagement plans as each situation presents different dynamics both social as well as political that are critical for developing engagement plans. It is also important to keep pace with the constant contextual changes taking place and how they are bound to influence engagement. Changes involving, for example, political transitions means adjusting engagement plans to address new demands. Participants noted that projects can withstand political changes if they avoid political ownership i.e. companies have to be above political patronage.

Engagement should therefore focus on building strong relationships at the grassroots with communities and other stakeholders and avoid the tendency to peg support on existing political affiliations that change with time. For instance, in Turkana there has been a development of an urban (more educated) and traditional Turkana which are

⁴ <http://www.csrrtraininginstitute.com/knowledge-centre/from-pariah-to-exemplar-applying-the-six-best-practices-in-stakeholder-engagement/>

effectively two separate groups within the region. No one leader singly represents such diverse views and interests. There are elders everywhere with differing authority which is difficult for an outsider to understand.

Understanding the use of local languages in expressing issues in different situations is seen as another central aspect of the engagement process. This is more evident when it comes to information sharing when it is vital that local languages are recognized and that effective translation is ensured given different usage and meanings in diverse contexts.

Sharing Relevant Information

Given that oil and gas is a new industry in Kenya, it is associated with a vacuum of information. Workshop participants noted that it is thus important to spend more time developing knowledge and understanding of the industry and how it operates. This includes proactively sharing relevant information to help bridge the existing information asymmetry in the industry which tends to put stakeholders at a disadvantage when engaging. Lack of information is also linked to the fact that the government may not have sufficient human resource as well as technical capacities which makes it more challenging for them to conduct effective stakeholder engagement.

Company example - Tullow

Information sharing is generally categorized depending on the different phases/stages of a project. For instance in Tullow's case, the company has developed a stakeholder engagement plan for the pre-development stage. This plan takes into consideration the different structures both at the National and County level targeting government and civil society organizations. Managing communication with stakeholders is one critical component for company attention. Tullow for its part is in the process of developing simplified summaries of EIA reports in the local language.

3. Community in the Mining Continuum: A Community Perspective

Community Perceptions and Concerns

Host communities and those directly affected by mining operations within their territories often have a different reaction and one permeated with perceptions and concerns over their future. Communities may express concerns about loss of their assets like land and livelihoods, as well as disintegration of existing structures and social fabric critical to the identity and existence of a community. The workshop participants discussed the need for companies and governments by extension to address community perceptions and concerns about areas that have been marked as having natural resource potential and areas for which licenses for exploration have been issued. Such perceptions and concerns have to be confronted via a balanced communication strategy and not just propaganda.

Control of Space

With discovery of minerals, community space and its control shrinks. Community concerns about this loss are valid and need consideration. As such, communities have to deal with a diminishing space characterized by everyday visibility of guard fences, road signs, logos and other signals which communicate restriction in carrying on as usual with the affairs of their community. Addressing these concerns requires a more deliberate and long-term engagement where companies move away from depending on external consultants to undertake engagement which, in most instances is short term, to a more or less permanent commitment to the engagement process whose aim is to understand and address community perceptions and concerns.

Perceptions of the Company's Relationship with the Government

It was observed that the 'dearer' a company is to the government, the further away the company often is from the community. This was attributed to the fact that communities in many cases do not have much faith in their government and companies may be perceived as having compromised the government or vice versa not to comply with agreed standards for their operations.

Distribution of Benefits and Opportunities

Participants were told that often community protests against extractive projects are because of the belief that they will not benefit from the actual extraction of minerals. Participants observed that communities fear the uneven distribution of benefits from the resources as seen when the distribution of jobs and other opportunities seemingly benefits 'outsiders' over 'locals' as well as men over women.

Jobs

Participants acknowledged the fact that employment benefits offer few fixed job opportunities for locals as many require high levels of skill which may not be present in the host community particularly those that are economically marginalised.

Revenues

It was noted that most significant opportunities generated by an extractive economy are the revenues paid to national governments. In Kenya, the Constitution envisages that these revenues should be shared between the government (both National and County) and the host communities. Indeed, the new Mining Law and the proposed Upstream Oil and Gas Law include revenue sharing provisions and moving forward it will be an areas that will be closely monitored to see how benefits will trickle down to affected communities.

Integrating local communities into the value chain

Local content was viewed by workshop participants as creating opportunities especially to local service providers to supply equipment, maintenance, labour, and advertising among many others. Despite CSR contributing to building local capacities, it was noted that such developments, the need for an inclusive system incorporating other nationals could potentially lock out the locals. Furthermore, there is the challenge of elite capture

with the local elites being the greatest beneficiaries of the opportunities presented by natural resource development projects.

Concerns about Environmental & Social Impacts

Community protests are sometimes based on environmental concerns such as pollution, destruction of important communal resources like forests, water ways and heritage sites. For rural communities whose livelihoods are dependent on a healthy environment, these concerns can be about their very survival – thus justifying further interrogation in order to understand the real underlying issues that communities wish addressed through a more meaningful engagement process.

Lack of Access to EIAs

On the question of environmental impact assessments (EIAs), there was a feeling that EIAs haven't been accessible to the public. This is despite the fact that they are an important process for stakeholder engagement. EIAs were seen as a preserve of companies and government being complex documents that need to be summarized and simplified for understanding. It was observed that the public as well as county governments haven't been proactive in requesting EIA reports which companies are willing to share.

Company Policies

Workshop discussions also included reflection on the fact that most company policies used in a specific local context are not always applicable to the given situation, and are instead often developed at corporate headquarters then cascaded down. Implementation of such policies becomes difficult because they are in most instances not tailored to meet local challenges and needs. Participants stressed that policies or tools used should be flexible and context specific to allow for ease of addressing issues that are constantly raised by communities.

Company Commitments

Another challenge is when the company representatives conducting the engagement do not have authority to make decisions which delays the process if they have to seek approval from national capitals or headquarters. This undermines the authority of the company representatives and they may not be trusted by the community to deal with their any of their concerns.

Addressing Community Perceptions and Concerns Effectively

The fears that communities raise whether perceived or actual are generally drawn in part from awareness of experiences by communities that have borne the brunt of poorly managed natural resources projects. Countries such as Nigeria are widely referenced to illustrate the negative aspects of the extraction of natural resources. Participants stressed that managing these perceptions becomes central to any successful engagement.

Training of employees on social and cultural matters is seen as critical in this context. Maintaining a presence of staff on the ground would only be valuable if they understand and appreciate the cultural uniqueness of communities within which they operate. As such companies have to go beyond just addressing environmental issues but seek to understand deep cultural and social aspects of communities within they operate and how these are bound to or are being affected by projects.

4. Understanding the Devolved Structure: Stakeholder Engagement Experience in Turkana County

Two Tier Governance and Technical Support

In the Kenyan situation it is necessary to strike a balance between the National and County government interests on one hand and community interests on the other hand. Workshop participants noted one of the challenges with the two levels of governance concerns their respective roles and how they share information.

Extractive activities are hosted at the County level and thus it is important that governance and administrative structures at this level be engaged yet to date, technical support initiatives to build capacity and understanding of the sector have targeted National government only. This creates an unbalanced capacity gap to the disadvantage of host County governments, especially those that have to deal with day-to-day challenges arising from the extractive operations.

Corporate Social Investment (CSI) Plans

The County Government Act 2012 stipulates that each county government develops a “County Integrated Development Plan” (CIDP) to guide the development process and that no public funds shall be appropriated without an integrated development planning framework. Thus CIDPs can be central to informing CSI projects and to ensure sustainability. However, it was observed that CSI projects have not yet been aligned to CIDPs but it is a consideration that companies are willing to look into.

Public Participation Legislation

Counties are required to develop legislation to guide public participation at the county level. The Turkana county government has developed a public participation law that provides guidance for public participation on matters relating to county administration. This and similar laws can provide general guidelines to companies as they develop their engagement strategies. However, ESF participants also agreed that county governments need to be proactive in engaging with companies.

5. Emerging Jurisprudence on Public Participation and the Link to Stakeholder Engagement

The following information was presented by Linda Awuor of Kenya Law Reports about how the Kenyan courts are interpreting the constitutional provision on public participation.

Kenya is a participatory democracy. Under Article 10(1) (b) of the Constitution, participation is not only encouraged but now a prerequisite under the law. The courts have observed that there is no hard and fast rule to determine effective public participation but that it is dependent on the individual circumstances.. Since 2010 there has been an increase of cases/petitions filed on public participation relating to extractives. The determinations of the cases have raised several interesting observations worth noting.

First, despite there being requirements under the Constitution for public participation it has been hard to measure effectiveness of the mechanisms used. While companies cannot engage with all members of a community, a guiding principle that is emerging is that participation has to be as inclusive as possible.⁵

Secondly, a majority of these cases have revolved around information sharing, the threat or actual deprivation/loss of property, cultural practices as well as lack of involvement in the EIA process. However, most have either collapsed or been thrown out for lack of sufficient evidence. For instance, in the petition by the residents of Fafi area Garissa County⁶, the court held that the petitioners had established that they had a lawful interest in the land in question. However, their claims of environmental degradation were arguable as they had not been supported by sufficient evidence. Many petitions are dismissed in court because petitioners fail to articulate how their rights have been violated and the specific remedy they are seeking based on the alleged violation of those rights.

Thirdly, the role of county government in public participation was seen in some of the cases as of paramount importance. In the Mui Basin Coal Mining petition⁷, the county government was absent from the process the entire time despite several invitations from the court. The court said the county government should have a say in these matters. The court's point is that if the county government is not involved from the beginning, its community members are most likely to be left out. In fact the county government was seen as a legal personification of the local community representing the interests of the community.

⁵ Ruling of the Peter Makau Musyoka & 19 others (MuiCoal Basin Local Community) v Permanent Secretary Ministry of Energy & 14 others [2014] eKLR

⁶ Pasred youth group/Forum & Other petitioners as named in the schedule annexed v attorney general & 5 Others [2015] Eklr

⁷ Peter Makau Musyoka & 19 others (Mui Coal Basin Local Community) v Permanent Secretary Ministry of Energy & 14 others [2014] eKLR
Constitutional Petition No. 305 of 2012 (Consolidated with Constitutional Petition No. 34 of 2013)

Further the courts also observed that public participation would only be possible where the public had access to information and was facilitated in terms of their reception of different views. The state has an obligation in ensuring that its citizens access information. In the Friends of Lake Turkana case concerning the Gibe III Dam, pertaining to the right to access environmental information, the court held that article 69(1) (d) of the Constitution of Kenya 2010 placed an obligation on the state to encourage public participation in the management, protection and conservation of the environment.⁸ This obligation extends to the state providing access to the needed information.

The link between public participation and stakeholder engagement lies in the various roles to be played by different stakeholders in the extractives sector. As seen from the emerging jurisprudence, the extractives sector, to be successful and aid in the development process has to incorporate a number of stakeholders that include communities, international development organizations, civil society, private companies and public entities. All these stakeholders have a role to play to ensure effective public participation.

The jurisprudence presented was viewed as not adequate in furthering public participation. There should be efforts therefore to ensure broad guidelines or principles to guide public participation. Article 196 of the Constitution sets good precedents on public participation at the county level by requiring county assemblies facilitate public participation and involvement in the legislative and other business of the county assembly and its committees. Furthermore Article 71 of the Constitution has profound implications on public participation since it provides that Parliament adopt legislation on agreements relating to natural resources: the law making process is itself participatory with public inputs being sought right from the drafting stage through to the committee stage but it remains to be seen how the public will be involved in the natural resources agreement making process as no new agreement has yet been entered into under the new Constitution.

Based on the different holdings by the courts, workshop participants sought to know whether the government is in the process of developing national guidelines on public participation. Such a move was however seen as one that is complex due to different issues that need public participation and which are unique in nature. As such, participants were directed to the guidelines on EIA⁹ by NEMA which fits well with extractives. Expanding the guidelines to include the social aspects is critical.

6. Corporate Social Responsibility vs. Corporate Social Investment

It was noted that the term “Corporate Social Responsibility” (CSR) can be defined and conceived of quite differently – at one end of the spectrum it is viewed as focusing merely on “feel good” projects that tend to be public relations efforts for companies rather than advancing sustainability.¹⁰ The workshop discussions sought to establish a

⁸ Friends Of Lake Turkana Trust V Attorney General & 2 Others Civil Suit no. 825 of 2012

⁹ http://www.nema.go.ke/index.php?option=com_content&view=article&id=91&Itemid=202

¹⁰ [2016: CSR is dead! What's next?](#) Roel Nieuwenkamp, Chair of the OECD Working Party on Responsible Business Conduct

common understanding of CSR as well as corporate social investment. Discussions highlighted divergent views on understanding of the two approaches.

Corporate social investment (CSI) was viewed by some as a broad based approach that encompasses CSR, characterized taking a long-term approach as companies seek to build relationships and engage in transformative investments and aiming for transformative impacts. The ultimate goal in CSI seems to be one of ensuring long term sustainability by leaving a community better than a company found it.

On the contrary, CSR was viewed by some participants as being an approach that results after companies have engaged in CSI. Therefore, CSR is perhaps best undertaken once relationships have been established with communities through CSI and companies therefore able to determine what sustainable contributions they can make to benefit communities where they operate. There were arguments that currently, CSR is more about companies complying with their investment agreements (some of which include provisions on CSR spending) and “checking the box” as opposed to the long-term relationship building that a CSI approach stresses. Responsibility was emphasized as a key word because CSR is about, “being responsible in all that you do whereas CSI is about building the community” as one participant observed. As such CSR may suggest companies cement relationships once they obtain a social license to operate which in most instances loses sight of the fact that social license is about a long-term commitment by both parties and that CSI is well placed to yield better results by ensuring that the development of the community is sustained by taking a long-term horizon.

CSR was also seen by participants as increasingly tending towards filling the gap in provision of basic services by doing that which governments are legally mandated to do e.g. building schools, providing water and health facilities rather than complementing these functions. As such, CSR appears to be encouraging communities to start demanding services from companies which traditionally are the duty of the government to fulfill. Furthermore if not well conducted, some felt this trend might lead to a disintegration of communities divided between those in support of and against intended projects.

7. Conclusion

The discussions established that all stakeholders have a role to play in the stakeholder engagement process. Companies on their part have a critical role in ensuring that they initiate engagement early to understand the context and build trust. The two tier system of governance rather than complicating the engagement process should seek to work towards establishing clear roles to ease the engagement process. County government as such should seek to proactively participate in engagement but more importantly invest in technical capacity to be able to engage with companies on technical issues. The emerging jurisprudence offers some general principles that can guide in the development of an engagement strategy and which the county government, concerned ministries, departments and agencies should distill in an effort towards developing clear guidelines on public participation at a minimum.

Finally, based on the discussions participants were asked to identify key principles to guide stakeholder engagement in the Kenyan context. The principles are an addendum to this report.

8. Contacts

For further information about the Extractive Sector Forum or to express an interest in participating in the next ESF event, please contact:

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