

# Proactive Disclosure Guidelines

For Multinational Corporations



**USAID**  
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**KENYAN SECTION** | Since 1959

Published by:

The Kenyan Section of the  
International Commission of Jurists (ICJ Kenya)  
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*The production of this Access to Information Advocacy Guide on Extractives in Kenya was funded by the USAID's Agile and Harmonized Assistance for Devolved Institutions (AHADI) Program. The contents are the responsibility of ICJ Kenya and do not necessarily reflect the views of USAID or the United States Government.*

# Proactive Disclosure Guidelines

## For Multinational Corporations

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## List of Acronyms

ACHPR	African Charter on Human and People's Rights Against Women
AU	African Union
CEDAW	Convention on the Elimination of All forms of Discrimination
CERD	Convention on the Elimination of All forms of Discrimination
CSO	Civil Society Organization
CSR	Corporate Social Responsibility
ESIA	Environmental Social Impact Assessment
FPIC	Free Prior Informed Consent
GHG	Greenhouse Gas
HSE	Health, Safety and Environment
HSSE	Health, Safety, Security and Environment
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICMM	International Council on Mining and Metals
IFC	International Finance Corporation
IMF	International Monetary Fund
LPG	Liquefied Natural Gas
NGO	Non-governmental Organization
OCHR	United Nations Office of the High Commissioner for Human Rights
OECD	Organization for Economic Cooperation and Development
OEEC	Organisation for European Economic Cooperation
OGP	Open Governance Partnership
PSA	Production Sharing Agreement
PSC	Production Sharing Contract
UDHR	Universal Declaration of Human Rights
UNAC	United Nations Convention Against Corruption
UNDRIP	United Nations Declaration on the Rights of Indigenous Peoples
UNFCC	United Nations Framework Convention on Climate Change

## Definition of Terms

**Accountability:** the act of holding the public and private sectors answerable and responsible for their actions.

**Crude Oil:** Crude oil is a mixture of hydrocarbons that exist in liquid form in natural underground reservoirs and which remain liquid at atmospheric pressure after passing through surface separating facilities

**Downstream:** The downstream, in turn, denotes the commercialization of petroleum products, referring to operations after the production phase — that is, oil refining and retailing, and the distribution of refined products

**Hydrocarbons:** Any organic compound that is made up of only hydrogen and carbon atoms is considered a hydrocarbon. Crude oil is a kind of liquid hydrocarbon

**Transparency:** the act of full disclosure of relevant information in a timely manner by the government and private sector in their activities for the public's comprehension.

**Stakeholders:** This refers to any number of individuals or groups that have an interest (or a 'stake') in some event or process.

**Upstream:** The upstream generally refers to the exploration and production aspects of the business and pertains to all the activities and equipment located in both the production train and above the surface by the wellhead





## Background

For the extractives sector, the twenty first century has been characterized by volatility in crude and commodity prices, new states joining the petroleum and mineral producers from diverse origins, many of which are from Africa. Most state leaders are aware of the potential that oil, gas and mining operations offer to kick-start or accelerate development within their respective countries and Kenya is no different.

Kenya's Oil and Gas Sector in Kenya has existed since the 1950's, it was only in 2012 when the first commercial discovery was made at Ngamia I, around Lokichar in Turkana. It's this commercial discovery in the back drop of Kenya's neighbor's also making commercial finds that sparked a lot of interest in it's upstream sector.

Today, globally, there are a myriad of investors than ever before, new markets in Asia are famished for Africa's exports. There's a impetus by most new states for revision of their decades old mining codes or inadequate or absent hydrocarbon laws and the lack of capacity to suit the present day and age setup, enabling such states to harness the full economic benefits of their resources.

A sound legal framework, well defined institutional responsibilities and procedures are important steps for such states and Kenya is no exception to enable it to effectively capture the full economic benefits of its natural resources. Such benefits include but are not limited to; economic capital at national and sub-national levels, business opportunities for local and mid-sized local companies from the supply chain, indirect or direct employment opportunities, resources for infrastructure development and the development of resource corridors. Kenya has made significant steps in developing policy and legal frameworks governing the extractives industry sector.

Though Kenya also faces a myriad of challenges that requires a balancing act, these challenges include but are not limited to; price volatility, the Dutch disease, resource curse, resource exhaustion, managing expectations (State, citizens and communities), guaranteeing long term stability for investors, determining fair shares between the government and investors, providing a competitive legal framework, ensuring environmental protection, conservation and putting citizens interests first.

Extractive industries are typically shrouded in secrecy - and Kenya's nascent oil, gas and mining sectors are no exception. Hence, the right to access to information<sup>1</sup> is important particularly in tackling one of these perceived threats and/or challenge, the "resource curse". The term refers to situations where, despite a country's minerals or oil wealth, poverty is exacerbated in part by weak or corrupt institutions, government mismanagement of revenues, and a failure to re-invest into projects that benefit the public—such as infrastructure, education, and healthcare.

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<sup>1</sup>Article 35, Constitution of Kenya, 2010.

It's in September 2006, that an international human rights tribunal ruled that access to information is a human right.<sup>2</sup> The Inter-American Court on Human Rights stated “[t]he right to freedom of thought and expression includes the protection of the right of access to State-held information.”<sup>3</sup> As a human right, access to information is considered to be pertinent in empowering citizens of any jurisdiction to make well informed decisions, to prevent and expose abuses, improve the delivery of services, protect other rights, and ensure that the government works in a better way and redresses past grievances.<sup>4</sup>

In Kenya, the Access to Information Act, 2016, came into effect on the 21<sup>st</sup> of September 2016. The Act sought to give effect to Article 35 of the Constitution<sup>5</sup> and conferred upon the Commission on Administrative Justice the oversight and enforcement functions related to access to information. The Act provides a framework for public and private entities to proactively disclose information that they hold and to provide information on request in line with the constitutional principles.<sup>6</sup> The Act vests upon citizens a right to access information held by the State and another person where such information is required for the exercise or protection of any right or fundamental freedom.

Despite there being a provision for proactive disclosure of information, there exists no local framework or mechanism in place by multinational companies carrying out extractive operations in Kenya to facilitate the realization of the right to access to information. This guide intends to cater for that existing gap, enhancing the capacity of multinational companies to perform their duty to proactively disclose information that is of importance to the citizenry.

## Overview of the Legal and Regulatory Framework

The legal and regulatory framework governing the extractives sector seeks to achieve several things namely; provide safeguards to national sovereignty over Kenya's natural resources, to encourage foreign investment for domestic exploration and advance local content (either through training, equipment and managerial experience, skills and technology). It provides for rights and obligations of actors, deals with the allocation of rights, land title, resettlement and compensation, taxes, royalties, profit share, environmental issues, transparency and disclosure.

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<sup>2</sup> *Claude Reyes et al. v. Chile*, [September 2006], IACHR.

<sup>3</sup> *Ibid.*

<sup>4</sup> David Banisar 'Freedom of Information Around the World- A Global Survey of Access to Government Information Laws', (2006), Privacy International, 6-7.

<sup>5</sup> The Constitution of Kenya, 2010, Article 35.

<sup>6</sup> Access to Information Act, 2016, Section 3 (b).

Kenya's legal configuration and hierarchy of laws is structured as indicated below.

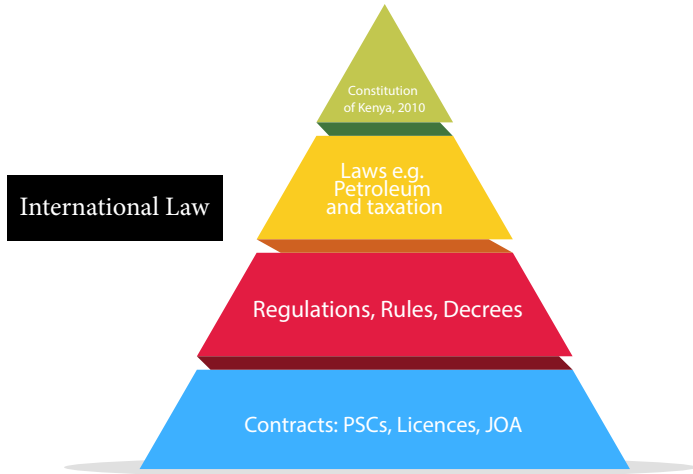


Fig 1: Hierarchy of laws in Kenya

International law is catered for under the Constitution of Kenya, 2010; Article 2 (5) lists other categories of law forming part of the laws under the Constitution of Kenya 2010 and includes the general rules of international law forming part of the law of Kenya. Sec 3(1) (b) of the Judicature Act recognizes legislation or statutes law as a source of law of Kenya by the words “All other written laws”. These words encompass; certain Acts of the UK Parliament applicable in Kenya, certain Acts of the Indian Parliament applicable in Kenya. Additionally Kenyan courts are required to rely on previous decisions of superior English courts subject to the qualifications in the Judicature Act. By virtue of Article 2 (5) of the Constitution, International Law comes into effect within the extractives industry through investment treaties and subsidiary legislation.<sup>7</sup>

There are various subsidiary legislations that are relevant to the extractives sector such as the National Land Commission Act, the Land Act, and the Land Registration Act; the Environmental and Land Court Act amongst others.

Regulations are also put into place to establish systems and procedures that operationalize statutory requirements. Contracts within the hierarchy of laws are distinct agreements between two or more parties; they are binding on named parties, apply to specific projects and are often confidential.

<sup>7</sup> Foreign Investments Protection Act, Chapter 518, Laws of Kenya; Foreign Judgments (Reciprocal Enforcement) Act, Cap 43 Laws of Kenya; Investment and Financial Analysts Act, No. 13 of 2015; Investment Disputes Convention Act, Cap 522 Laws of Kenya; and the Investment Promotion Act, No. 6 of 2004.

## Setting the context: why proactively disclose?

For the extractives sector, there's a growing movement for contract transparency and transparency throughout the whole petroleum value chain. Contract transparency directly relates to access to information and is essential for the responsible management of natural resources and the potential for growth and economic development that those resources can provide. Governments, citizens and investors all have much to gain from access to information within these contracts. Governments will be able to negotiate better contracts if they have access to contracts other than their own, as industry does. Coordination amongst government agencies in enforcing and managing the contracts will be easier. Citizen's distrust of hidden horrors will decrease and as such improve relationships with communities.

As in most countries and in Kenya, sub-soil resources, minerals, oil and gas (hereinafter referred to as "extractives") are the property of the citizens of the nation.<sup>8</sup> As such citizen ownership over these resources is vested by the supreme law of the land and is held in their trust by the State. Accordingly since such contracts would ordinarily cover a range of issues (fiscal terms and the allocation of risk, environmental mitigation and protection measures and provisions dealing with the displacement of local communities and their rights) citizens have a right to know how their government is selling their resources. This right to know comes about through freedom of information laws or the right to access to information.

One of the basic tenets of the rule of law is that all laws should be publicly available, contracts within the extractives industry govern a public resource project, as such constitute 'a law' over such projects that directly affect the lives, livelihoods and living conditions of a large population. It is undemocratic for these contracts to be kept secret. The absence of such contract transparency would be a breeding ground for flourishing fears, mistrust and conflict amongst stakeholders.

Access to contracts and information within the extractives sector is in the public interest, this interest far outweighs the interest of the State entity or private person.

Information that is not provided for in primary contracts but which citizens may seek access to ranges from: environmental mitigation costs, quality and quantity of the reserve, operational data, cost information, pending litigation, identity of shareholders, revenue and cash flow data, capital expenditures and operating expenditures.

In the case of *Freeman v Bureau of Land Management*<sup>9</sup> involved an application for a mining permit and private title to formerly public land under the US General Mining Law of 1872.

<sup>8</sup> The Constitution of Kenya, 2010, Article 62 (1) (f) & (3).

<sup>9</sup> *Freeman v Bureau of Land Management*, (D.Or.2007) 526 F. Supp. 2d 1178.

The Bureau of Land Management commissioned a study of the proposed project and produced a detailed report outlining Freeman's business plan. Concerned environmental groups requested for the report through the Freedom of Information Act, Freeman argued that the exemptions for trade secrets and commercial and financial information applied to all substantive terms of his proposed mining operation. The court rejected his argument and ordered disclosure, holding that only information not generally known to others in the relevant industry, such as novel and previously undisclosed production processes qualifies for exemption under the Freedom of Information Act. The court further held that Freeman had failed to show how disclosure of this information, even if it were not available publicly, would be disadvantageous to him.

The current Constitution makes provision for the right to information<sup>10</sup> and stipulates thus:

- “35 (1) Every citizen has the right of access to-*
- a. information held by the state; and*
  - b. information held by another person and required for the exercise or protection of any right or fundamental freedom.*
- (2) Every person has the right to the correction or deletion of untrue or misleading information that affects the person.*
- (3) The state shall publish and publicize any important information that affects the person.”*

Unlike the bill of rights which bequeaths rights to “every person”, under this Article 35 (1), this right is only applicable to citizens, implying that non-citizens cannot enjoy the same right to information held by the State.

This was also observed and held in the case of *Nairobi Law Monthly Company Limited v Kenya Electricity Generating Company & 2 Others*,<sup>11</sup> the learned judge grappled with the question as to whether the petitioner was a “Citizen” for the purposes of the enforcement of the rights bestowed under Article 35 of the Constitution. The learned judge held that “while it is true the petitioner is a Kenyan company and its directors and shareholders are Kenyan citizens, the petitioner itself is a legal person created under the provisions of the Companies Act. As a legal ‘person’, it may enjoy the rights conferred by Article 35 (2), which are conferred on all ‘persons’ but it is not a ‘citizen’ that may have a right of access to information as contemplated under Article 35 (1). In my view, the petitioner is a company with Kenyan nationality, but not Kenyan citizenship.”

From a reading of Article 35 (1), one can see that the intention was to create two distinct situations in respect of access to information, where a citizen is entitled as of right to access information held by the State and where a citizen could access

<sup>10</sup> The Constitution of Kenya, 2010, Article 35 (1).

<sup>11</sup> *Nairobi Law Monthly Company Limited v Kenya Electricity Generating Company & 2 Others*, 2013, eKLR.

information from another person.<sup>12</sup>

Article 33 of the Constitution is intrinsically linked to the right to information, as it provides that the right to freedom of expression includes freedom to seek, receive or impart information or ideas.

Restrictions or exceptions to the right to information in Kenya can be found in the express provisions of Article 24 of the Constitution,<sup>13</sup> which stipulates thus:

*“24 (1) A right or fundamental freedom in the Bill of Rights shall not be limited except by law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including –*

- i. the nature of the right or fundamental freedom;*
- ii. the importance of the purpose of the limitation;*
- iii. the nature and extent of the limitation;*
- iv. the need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others; and*
- v. the relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose.”*

From the aforementioned, the Constitution has set out limitations to the exercise of the right to freedom of information, any legislation that restricts the right to access to information would be unconstitutional, unless that legislation is corroborated per the drawback provision of the Constitution.

Article 232 (1) (f) of the Constitution, provides for the principles and values of public service which includes transparency and the provision to the public of timely and accurate information. Such principles and values are applicable to all State organs in both levels of government and state corporations.<sup>14</sup>

The Access to Information Act, 2016, came into effect on the 21<sup>st</sup> of September 2016. The Act sought to give effect to Article 35 of the Constitution<sup>15</sup> and conferred upon the Commission on Administrative Justice the oversight and enforcement functions related to access to information.

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<sup>12</sup> *Nairobi Law Monthly Limited v Kenya Electricity Company Limited & 2 Others*, 2013 eKLR, 71. See also; *Famy Care Limited v Public Procurement Administrative Review Board & Another*, High Court Petition No. 43 of 2012, 18 and 22.

<sup>13</sup> The Constitution of Kenya, 2010, Article 24.

<sup>14</sup> The Constitution of Kenya, 2010, Article 232 (2) (a) and (b).

<sup>15</sup> The Constitution of Kenya, 2010, Article 35.

The Act provide a framework for public and private entities to proactively disclose information that they hold and to provide information on request in line with the constitutional principles.<sup>16</sup> The Act vests upon citizens a right to access information held by the State and another person where such information is required for the exercise or protection of any right or fundamental freedom.

Such other right or fundamental freedom could include the right to public participation. *In the matter of Peter Makau Musyoka and 19 Others (Mui Coal Basin Local Community) vs The Permanent Secretary, Ministry of Energy and 14 Others*,<sup>17</sup> Justices Joel Ngugi, Lillian Mukende and B.Thuranira Jaden with regards to public participation stated the following:

*“As our case law has now established, public participation is a national value that is an expression of the people as articulated under Article 1 of the Constitution. Article 10 makes public participation a national value as a form of expression of that sovereignty. Hence, public participation is an established right in Kenya; a justiciable one – indeed one of the corner stones of our new democracy. Our jurisprudence has firmly established that courts will firmly strike down any laws or public acts or projects that do not meet the public participation threshold. Indeed it is correct to say that our Constitution, in imagining a new beginning for our country in 2010, treats secrecy on matters of public interest as anathema to our democracy.”* The aforementioned statement by the right Honourable Justices goes to show how all human rights are interconnected and that the violation of one human right or a component to it can lead to several other rights being violated in turn. For example, the refusal by a State entity or private person of a request to access to information for the exercise or protection of any right or freedom, could also be translated to violation of the right to public participation if such information was a prerequisite to the comprehension and proactive participation on the part of the public.

In spelling out the elements and/or the principles to public participation, the justices *In the matter of Peter Makau Musyoka & 19 Others vs. Permanent Secretary, Ministry of Energy & 14 Others*<sup>18</sup> stated that:

*“...whatever programme of public participation is fashioned, it **must** (emphasis added) include access to and dissemination of relevant information.”*

This position has been reaffirmed *In the matter of Republic vs. The Attorney General and Another ex parte Hon. Francis Chachu Ganya*:<sup>19</sup>

<sup>16</sup> Access to Information Act, 2016, Section 3 (b).

<sup>17</sup> *In the matter of Peter Makau Musyoka and 19 Others (Mui Coal Basin Local Community) vs. The Permanent Secretary, Ministry of Energy and 14 Others*, [2014], eKLR.

<sup>18</sup> *In the matter of Peter Makau Musyoka & 19 Others vs Permanent Secretary, Ministry of Energy & 14 Others*, [2014], eKLR, 20.

<sup>19</sup> *In the matter of Republic vs The Attorney General and Another ex parte Hon. Francis Chachu Ganya*, JR Miscellaneous Application No. 374 of 2012.

*“Participation of the people necessarily requires that the information be availed to the members of the public whenever public policy decisions are intended and the public be afforded a forum in which they can adequately ventilate them.”*

Public entities are to facilitate access to information in their possession, which information may include to provide any person with the reasons for any decision taken by it or particulars to a contract entered into.<sup>20</sup>

Interestingly, the *Access to Information Act* provides that even when there is an imperative as to confidentiality, as long as the information is a matter of public interest, disclosure has to take place and the person making the disclosure is protected<sup>21</sup> against punitive actions or any form of discrimination as a direct result of the disclosure.

Access to information must be made in the requisite manner and form.<sup>22</sup>The Act, provides that a request for information should fulfil the following requirements; it should be made in writing either in English or Kiswahili, sufficient information/particulars should be provided for the public officer or other official to understand what information is being sought out.<sup>23</sup> Access to information requests can also be unwritten, this is in the case of illiteracy or disability,<sup>24</sup> the official receiving the information however, should deduce the request into writing.<sup>25</sup>

Forms may be prescribed by public entities for making an application to access to information, such forms shall not however, unreasonably delay requests or place undue burdens upon applicants and requests for information should not be rejected on the basis of failure to use the prescribed form by an applicant.<sup>26</sup>

## Benefits of Proactive-disclosure

The right of access information is an affirmation towards greater transparency in the areas of significant public interest. The extractives industry is clearly one of these areas due to not only its great economic potential but also the fact that it encompasses fundamental human rights. However, unfortunately the industry is characterised by a combination of elitist management, immense corruption and unequal distribution of

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<sup>20</sup> Access to Information Act, 2016, Section 5 (1) (d) and (e).

<sup>21</sup> Access to Information Act, 2016, Section 16.

<sup>22</sup> Access to Information Act, 2016, Part III.

<sup>23</sup> Section 8 (1), Access to Information Act, 2016.

<sup>24</sup> Section 8 (2) Access to Information Act, 2016.

<sup>25</sup> Section 8 (3) Access to Information Act, 2016.

<sup>26</sup> Section 8 (4) Access to Information Act, 2016.



accrued benefits that is aided by the general lack of transparency in the sector<sup>27</sup>. One aspect of the extractives industry that should be subject to the right of access to information is the contracts entered into by resource companies with governments. Contract disclosure addresses the trust deficit in the extractives industry by correcting information asymmetry between governments, resource companies and communities<sup>28</sup>. It may lead to investment stability, improved revenue collection, decreased risk of renegotiation and minimised risk of conflict<sup>29</sup>.

Rosenblum and Maples<sup>30</sup> posit that while confidentiality is a legitimate part of contracts in the extractives industry, there is a need to improve contract transparency in management of the sector. In addition to promoting responsible management, they argue that contract transparency boosts the potential for growth and economic development.<sup>31</sup> Correction of the information asymmetry where industry players are better in contract negotiation than the government through public availability of all contracts means that the government is able to negotiate significantly better deals. This translates to better coordination among government agencies in management of the resources rather than an insular approach by each department. It is also rightly argued that citizens have a right to know how governments handle natural resources. In Kenya, for example, natural resources are held in trust by the government<sup>32</sup> on behalf of the people. This necessarily implies a right to information on aspects that affect the citizenry including, but not limited to fiscal aspects, environmental impact assessments and local content. The fact that contracts are the main governing law in the extractives sector also means that it is only democratic to ensure that the laws are publicly available. Rosenblum and Maples further posit that access to contracts is critical for effective public participation, minimizing conflict among stakeholders and boosts effective management of the industry as a whole.

Environmental information related to environmental and social impact assessments, mitigation of environmental impacts, permits to extract resources as well as monitoring and reclamation efforts<sup>33</sup> should be disclosed particularly to local communities who are

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<sup>27</sup> Dilan Ölcer, 'Extracting the Maximum from the EITI', Organization for Economic Co-operation and Development, (2009), 8

<sup>28</sup> OGP Openness in Natural Resources Working Group, Disclosing contracts in the natural resource sector, Issue Brief, February 2016, 1. Available at <[http://www.opengovpartnership.org/sites/default/files/FIN%20OGP%20Issue%20Brief%20K%20Disc\\_0.pdf](http://www.opengovpartnership.org/sites/default/files/FIN%20OGP%20Issue%20Brief%20K%20Disc_0.pdf)> accessed on 16<sup>th</sup> October 2018.

<sup>29</sup> *ibid*

<sup>30</sup> Rosenblum, P, Maples, S., *Contracts Confidential: Ending Secret Deals in the Extractive Industry*, Revenue Watch Institute, New York, (2009), 16.

<sup>31</sup> *Ibid*.

<sup>32</sup> The Constitution of Kenya, 2010. Article 62.

<sup>33</sup> OGP Openness in Natural Resources Working Group, Disclosing Environmental Information in the Natural Resource Sector, Issue Brief February, 2016, 1. <http://www.opengovpartnership.org/sites/default/files/FIN%20OGP%20Issue%20Brief%20Env%20Disc.pdf> accessed on 16<sup>th</sup> October, 2018.

most likely to suffer the effects of the same directly. The court in *Friends of Lake Turkana v Attorney General & 2 others*<sup>34</sup> held that the right to access environmental information, places an obligation on the state to encourage public participation in the management, protection and conservation of the environment. It went on further and held that access to environmental information was a prerequisite to effective public participation in decision-making and monitoring governmental and public sector activities.

Ownership structures of local and international resource companies are often subject to opacity, which may lead; to corrupt dealings that defraud resource countries of much needed revenue<sup>35</sup>. Beneficial ownership structures should therefore be fully revealed in order to allow for transparent corporate practices as well as revenue collection through taxation.

The long-term benefits for investors with respect to proactively disclosing information are the following:

- Enhanced business significance: here there's exists a growing confidence in the extractive company that it's managing important risks and positioning itself to take advantage of new opportunities
- Improved operations: for an extractive company amongst it's employees there would be a deeper understanding of a company's sustainability values, the proactive disclosure of information on their part would provide performance indicators and insight that supports this position
- Fortified relationships:CSO's, National and Sub-national government representatives, regulators, communities and other stakeholders will learn through a company's proactive disclosure how the company responsibly manages sustainability issues
- Heightened trust and credibility; here it's only through proactive disclosure that stakeholders would be able to understand a company's operations and intentions, this would enhance the trust in and the credibility of the company.

For citizens and communities, the benefits of proactive disclosure are the following:

- Hold government and companies to account
- The access to information would help them better understand how policies and priorities are established and why they exist
- The proactive disclosure would enable them to ask questions, assert their rights or demand improvements to their livelihoods from respective entities.

For the Government, the proactive disclosure of information benefits them as follows:

- It provides them with access to international standards and benchmarks, all in all strengthening their bargaining power, here government is enabled to enter into

<sup>34</sup> *Friends of Lake Turkana v Attorney General & 2 Others*, [2012], ELC Suit No. 825 of 2012 Environment & Land Court at Nairobi.

<sup>35</sup> OGP Openness in Natural Resources Working Group, Disclosing Environmental Information in the Natural Resource Sector, Issue Brief February, 2016, I. <http://www.opengovpartnership.org/sites/default/files/FIN%20OGP%20Issue%20Brief%20Env%20Disc.pdf> accessed on 16<sup>th</sup> October, 2018.

negotiations with companies on a more level playing field

- It allows for greater information sharing and coordination between state agencies and ministries
- It also signals to the industry that the country has a stable business environment and commitment to good governance.

## What to proactively disclose?

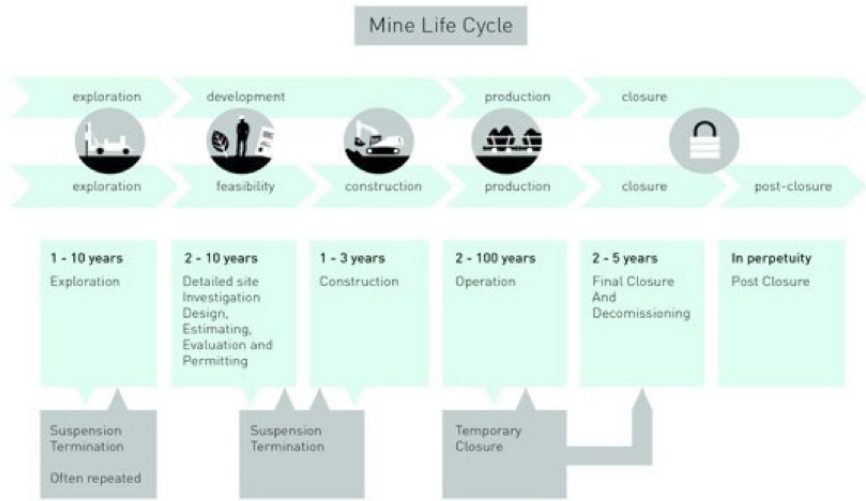
Generally speaking there should be proactive disclosure throughout the extractives value chain (both for Oil and Gas and Mining). At the exploration and extractive stage, it's important to know the details (anticipated size, potential value, expected timeline amongst other details) of the oil, gas, mineral exploration and extraction including associated challenges. This is important to avoid unrealistic or misaligned expectations, which could deter project development and implementation. The Free Prior and Informed Consent (FPIC) principle is important, especially in relation to communities.

The proactive disclosure of impact assessments provides an understanding of risks, benefits and potential impact of production. They also provide understanding of high polluting projects and mitigating factors put in place by companies to alleviate those challenges. Proactive disclosure sends a signal to communities that the company is considering all issues and is trying to mitigate potential harm.

The negotiation and licensing processes are also important steps to disclose. The prequalification criteria, list of bidders and the winning bid. The proactive disclosure of contracts entered into with the government by companies is good for their shareholders in knowing that the company got a good deal, additionally, it also provides community members and civil society organizations with the terms the company has with the government so that they can hold the government at both the national and sub-national level accountable. The World Bank's International Finance Corporation (IFC) requires extractive companies to disclose principal contracts. The International Monetary Fund (IMF) has called for natural resource contracts to be clear and publicly accessible. Industry groups like the International Council on Mining and Metals (ICMM) and IPIECA, the global oil and gas industry association for environmental and social issues, support access to information through contract disclosure.

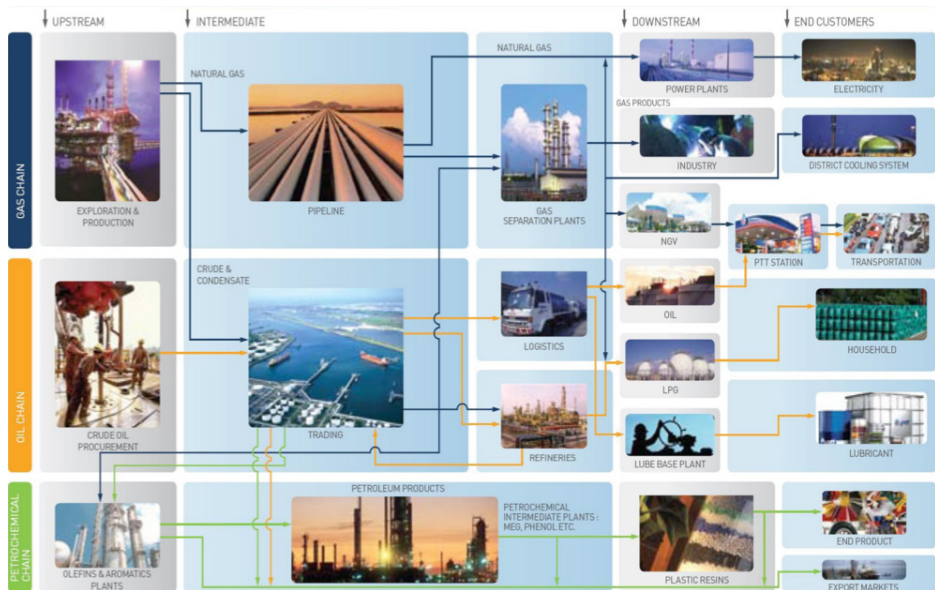
Proactive disclosure should also be done at both the revenue collection and management phases. It's important to know actual payments made by companies, revenues received by governments, fiscal aspects such as taxes, production entitlements, royalties, dividends, license fees amongst others. The reason for this is that it helps understand what companies are paying and how much governments are receiving, how revenues are managed and holding the relevant institutions and individuals accountable for these funds. As such there should be provision of comprehensive financial statements of companies and transparency on the part of government as well.

## The Mine Life Cycle



After Borealis and ICMM

## Source: Mining Contracts – Open Oil



## The Mining Act, 2016

The Act establishes two Directorates, one with respect to mines and the other with respect to geological surveys.<sup>36</sup> The Directorate of Mines through the Permanent Secretary is responsible to the Cabinet Secretary for facilitating access to information by the public, subject to any confidentiality restrictions<sup>37</sup> and may enter upon any land, license area, permit area, mine or premises at reasonable times for the purpose of obtaining such other information deemed necessary.<sup>38</sup>

Whilst the Directorate of Geological Surveys is responsible to the Cabinet Secretary through the Permanent Secretary for developing a national repository of geo-science information through the compilation, publication and dissemination of information and data concerning the geology and mineral resources of Kenya and facilitate access to this information by the general public.<sup>39</sup>

A duty also vests upon the Cabinet Secretary to ensure that a database of geoscience and information is kept and maintained and is made available to the public on request.<sup>40</sup> The Cabinet Secretary is also vested with an additional duty with respect to access to information, to ensure that mineral agreements between the State and right holders are made public via the official Ministry website.<sup>41</sup>

It is with this respect to the aforementioned obligation that the Cabinet Secretary is to publish regulations to provide for the accountable and transparent mechanisms of reporting mining and mineral related activities including revenues paid to the government and production volumes under each license or permit.<sup>42</sup> Disclosure is not limited, as annual records, reports, mineral agreements and any other relevant information shall be published on the Ministry's website.<sup>43</sup>

## The Petroleum (Exploration and Production) Act

This Act came into force on the 16<sup>th</sup> November 1984, it sought to regulate the negotiation and conclusion by the Government of petroleum agreements related to the exploration, development, production and transportation of petroleum.<sup>44</sup> The Act does

<sup>36</sup> Mining Act, 2012, Section 17.

<sup>37</sup> Mining Act, 2012, Section 20 (1) (i).

<sup>38</sup> Mining Act, 2012, Section 20 (2) (e).

<sup>39</sup> Mining Act, 2012, Section 21 (1) (g).

<sup>40</sup> Mining Act, 2012, Section 29.

<sup>41</sup> Mining Act, 2012, Section 119 (2).

<sup>42</sup> Mining Act, 2012, Section 119 (3).

<sup>43</sup> Mining Act, 2012, Section 119 (4).

<sup>44</sup> The Petroleum (Exploration and Production) Act, Chapter 308, Laws of Kenya.

not provide for disclosure or access to information to the public in so far agreements are concerned, there is a model production sharing contract whose confidentiality clause does not permit disclosure of any information between the government and the contractor.<sup>45</sup>

There is a draft Petroleum (Exploration, Development and Production) Bill, 2015 which is still underway.<sup>46</sup> The bill is set to replace the current Petroleum (Exploration and Production) Act, 2012 on all matters with respect to upstream petroleum operations. The bill requires the “publication of all petroleum agreements, records, annual accounts and reports of revenues, fees, taxes, royalties and other charges, as well as any other relevant data and information that support payments made and payments received.”<sup>47</sup>

### **The Natural Resources (Classes of Transactions Subject to Ratification) Act, 2016**

This Act seeks to give effect to Article 71 of the Constitution.<sup>48</sup> The Article and the Act provide that parliament shall ratify a grant of a right or concession by or on behalf of any person, including the national government, to another person for the exploitation of any natural resource in Kenya.<sup>49</sup> Article 260<sup>50</sup> defines person as to include a company, association or other body of persons whether incorporated or unincorporated. Article 71 provides for Parliament’s role in so far as natural resources are concerned,<sup>51</sup> that of having the responsibility of holding the government accountable in the conduct of the nations affairs, as representatives of the people.<sup>52</sup>

However, parliament’s oversight role in the aforementioned Article and Act is restricted by time and substance. In so far as time is concerned, such transactions of rights or concessions are only subject to ratification by parliament if they are entered into on or after the effective date, that effective date is the date the Constitution came into force.<sup>53</sup> This in turn means that any transaction of right or concession entered into before the effective date is not subject to Parliaments ratification and hence the citizens of Kenya’s oversight.

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<sup>45</sup> Model Production Sharing Agreement, Chapter 308, Clause 37, Laws of Kenya.

<sup>46</sup> [http://www.erc.go.ke/images/docs/Petroleum\\_Bill\\_3rd\\_Aug\\_2015.pdf](http://www.erc.go.ke/images/docs/Petroleum_Bill_3rd_Aug_2015.pdf) , accessed 25<sup>th</sup> September, 2018.

<sup>47</sup> Petroleum (Exploration, Development and Production) Bill, 2015, Section 111.

<sup>48</sup> The Constitution of Kenya, 2010, Article 71.

<sup>49</sup> The Constitution of Kenya, 2010, Article 71 (1) (a); Natural Resources (Classes of Transactions Subject to Ratification) Act, 2016, Section 3 (1) (a).

<sup>50</sup> The Constitution of Kenya, 2010, Article 260.

<sup>51</sup> The Constitution of Kenya, 2010, Article 95 (1) and (5) (b).

<sup>52</sup> A.W Bradley, K.D Ewing & C.J.S Knight, *The functions of Parliament, Constitutional & Administrative Law*, Pearson (Sixteenth Edition) 185.

<sup>53</sup> The Constitution of Kenya, 2010, Article 260.

In so far a substance is concerned, certain classes of transactions with respect to natural resources are not subject to ratification by parliament.<sup>54</sup> This is where a grant of a concession or right to exploit a natural resource is issued through a permit, license or other authorization in accordance with national or county legislation; or where such grant of a concession or right to exploit a natural resource is done through an agreement or contract; or where such grant of a concession or right to exploit natural resources is for scientific research, educational or non-commercial purposes; or where it's by a Kenyan national for subsistence purposes in circumstances in which the law does not require that a permit, licence or authorization be obtained and lastly; where such exploitation of a natural resource in quantities falls below a threshold prescribed by the Cabinet Secretary by notice in the *Gazette*.<sup>55</sup> This in turn means certain rights or concessions aren't subject to the scrutiny of government and can remain confidential.

One can only access such transactions of rights or concessions of natural resources that are limited by time or substance by virtue of Article 35 of the Constitution and the Access to Information Act. The Act provides that the Cabinet Secretary pursuant to a request under Article 35 of the Constitution, have certain provisions of the agreement redacted on account of commercial confidentiality, national security or other public interest considerations.<sup>56</sup> However, such decision by the Cabinet Secretary may be challenged through appropriate proceedings in the High Court.<sup>57</sup>

In Kenya, the limitations placed on access to information by the Access to Information Act, 2016 are; in instances where the disclosure of such information undermines national security, impedes the due process of the law, endangers the safety, health or life of any person, involved the unwarranted invasion of the privacy of an individual, substantially prejudices the commercial interests, including intellectual property rights of that entity or third party and infringes on professional confidentiality as recognized by law.<sup>58</sup>

These limitations can be set aside by a court of law whereas the public interest in disclosure of information outweighs the harm to protect interests.<sup>59</sup>

There is currently no requirement as to contractual disclosure or to releasing information on resource revenue management, especially in the Oil and Gas sector. However, the recently enacted *Mining Act, 2016* seeks to reverse the opacity that characterises contracts entered into by states and resource companies. Section 119 (1) of the Act states that all mineral agreements entered into in accordance with the Act

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<sup>54</sup> Natural Resources (Classes of Transactions Subject to Ratification) Act, 2016, Section 4 (2).

<sup>55</sup> Natural Resources (Classes of Transactions Subject to Ratification) Act, 2016, Section 4 (2).

<sup>56</sup> Natural Resources (Classes of Transactions Subject to Ratification) Act, 2016, Section 13 (1).

<sup>57</sup> Natural Resources (Classes of Transactions Subject to Ratification) Act, 2016, Section 13 (3).

<sup>58</sup> Access to Information Act, 2016, Section 6 (a-i).

<sup>59</sup> Access to Information Act, 2016, Section 6(4).

shall be public and be made accessible to the public. This is a significant step in ensuring contractual transparency in the country's burgeoning extractives sector.

The Mining Act, 2016, has made significant steps towards transparency and access to information in the extractives sector. Obligations are vested upon the Cabinet Secretary to ensure that mineral agreements between the state and right holders are published and are available on the Ministry's website. There exists an aim to ensure that transparency mechanisms are evident in the mining industry throughout the value chain.

The current Petroleum (Exploration and Production) Act makes no provisions of access to information in this sector by the public and disclosure of contracts, revenues and other related agreements. The Petroleum (Exploration, Development and Production) Bill, 2015, seeks to address transparency in this sector by making provision of the publication of petroleum agreements, annual accounts and reports of revenues, fees, taxes, royalties and other charges, payments made and received. This seems to be based on the efforts on the part of the government to avoid the resource curse that has plagued many extractive industries in various countries and in the wake of the social contract that exists between the government of Kenya and its citizenry with respect to the mineral wealth as enshrined in the Constitution of Kenya, 2010.

In July 2015 the Government of Kenya and the US Government entered into a joint commitment to transparency in decision making and financial flows related to the extractive industries.<sup>60</sup> The Government of Kenya also committed to implementing the Extractives Industries Transparency Initiative (EITI) domestically.<sup>61</sup> The Government of Kenya also committed to adopt and implement a progressive and transparent policy and legislative framework for upstream, mid-stream and downstream extractive activities including transparency in licensing procedures, publication of contracts, and environmental and conservation and labour requirements in line with international standards.<sup>62</sup>

In July 2011, Kenya became the first Sub-Saharan country to make Government data open through the presidential launch of the Kenya Open Data Initiative.<sup>63</sup> The Open Governance Partnership (OGP) was launched in 2011 to provide an international platform for domestic reformers committed to making their government more open, accountable, and responsive to citizens.<sup>64</sup>

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<sup>60</sup> <https://obamawhitehouse.archives.gov/the-press-office/2015/07/25/government-republic-kenya-government-united-states-america-joint> accessed 25<sup>th</sup> September 2018.

<sup>61</sup> Ibid.

<sup>62</sup> Ibid.

<sup>63</sup> <http://www.opengovpartnership.org/country/kenya> accessed on 25<sup>th</sup> September 2018.

<sup>64</sup> <http://www.opengovpartnership.org/> accessed on 25<sup>th</sup> September 2018.

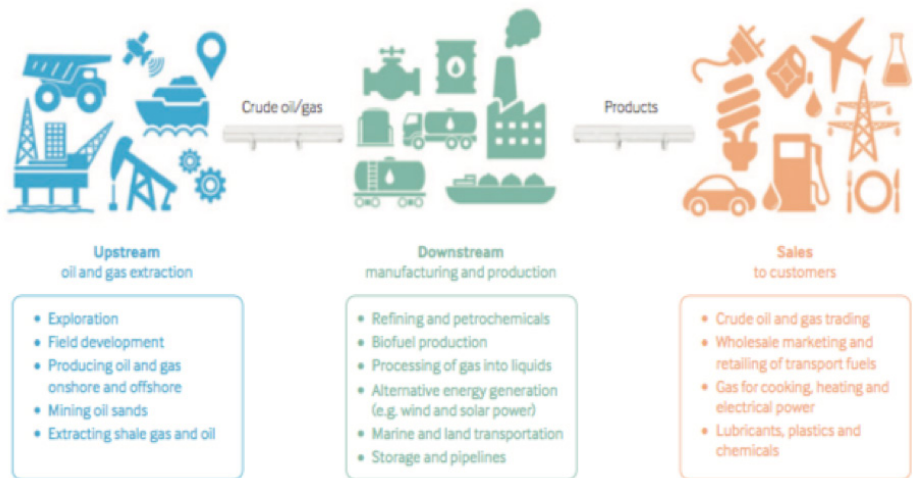


Elgeyo Marakwet County is one of the lead pioneer counties, at a sub-national level that has committed to directly engage with OGP in open government principles, transparency, and accountability and to provide access to information to citizens and non-state actors.<sup>65</sup>

The current President of Kenya, Uhuru Kenyatta, in a small group discussion at the Brookings Institution on August 7<sup>th</sup> 2014, on *Kenya's Domestic, Regional and International Priorities: A Conversation with President Uhuru Muigai Kenyatta*, when asked whether his government would back full disclosure of petroleum agreements in Kenya, his response was “Absolutely!”.<sup>66</sup> The President emphasized that the bill before Parliament on the upstream oil and gas sector seeks to address that, to ensure that Kenya gets it right in its petroleum sector and to avoid the pitfalls that many parts of the African continent have seen as a lack of transparency.<sup>67</sup>

## About the Guidance

This guidance aims to assist extractive companies carrying out operations in Kenya in proactively disclosing in line with Constitutional and legislative principles in disclosing relevant information throughout the extractive value chain. This is from upstream, midstream and downstream. Some company's activities can span several decades, a holistic approach to proactive disclosure throughout that life span has its benefits and impacts to the company as indicated earlier on.



<sup>65</sup> <http://www.opengovpartnership.org/node/8987> accessed on 16th October 2018.

<sup>66</sup> <https://www.brookings.edu/events/kenyas-domestic-regional-and-international-priorities-a-conversation-with-president-uhuru-muigai-kenyatta/> accessed on 16<sup>th</sup> October 2018.

<sup>67</sup> Ibid.

## Justification of the Guidelines

Extractive industries are typically shrouded in secrecy - and Kenya's nascent oil, gas and mining sectors are no exception. Hence, the right to access to information is important particularly in tackling the "resource curse". The term refers to situations where, despite a country's minerals or oil wealth, poverty is exacerbated in part by weak or corrupt institutions, government mismanagement of revenues, and a failure to re-invest into projects that benefit the public—such as infrastructure, education, and healthcare. Often, citizens of resource curse countries aren't able to hold their governments accountable for this abuse of power because they lack the information about their country's contractual arrangements, revenues generated and expenditures.<sup>68</sup>

Extractive industries are capital intensive, they create 'enclave economies' that are not connected to the local economies in which they operate, the cycles of boom and bust associated with volatile commodity prices lead to revenue instability, poor budgeting and cycles of fiscal bingeing and fiscal starvation by governments, undermining reliable service delivery and coherent infrastructure development.

It's been argued that contract transparency provides a strong incentive for government officials and company representatives to operate within the bounds of the law and not to deviate from general terms, as discrepancies would be disclosed and furthermore, it tackles the resource curse. The risk of conflict in developing countries is increased upon the discovery of valuable natural resources especially if the resource is oil<sup>69</sup>. The assertion of rights over resources by ethnic or rebel groups is common, seeking generation of income through the operation of some business for sustenance of military activities, leading to extortion and exploitation of natural resources and levying of protection charges on producers or carrying out the trade themselves.<sup>70</sup>

Corruption and the lack of transparency are perceived as political risks for foreign corporations as there are increased transactional costs, unpredictability in the business environment, resulting in determent of foreign investment, reducing economic development and resources revenue.<sup>71</sup> Extractive industries destroy communities by undermining livelihoods (land appropriations) and their disproportionate marginalization of women and communities living traditional lifestyles (its employment characteristics overwhelming favors men - oil and gas most of all as well as communities already integrated in the formal economy).

There's a growing movement for contract transparency and transparency throughout

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<sup>68</sup> B Shaffer and T Ziyadov, 'Beyond the Resource Curse', (University of Pennsylvania Press 2012), 2.

<sup>69</sup> I Bannon and P Collier, 'Natural Resources and Violent Conflict: Options and Action', (2003), World Bank, 5.

<sup>70</sup> Ibid [4-5]

<sup>71</sup> Abdullah Al Faruque, 'Transparency in Extractive Revenues in Developing Countries and Economies in Transition: A Review of Emerging Best Practices', (2006), Vol.24 No.1, Journal of Energy and Natural Resources Law, 70.

the whole extractives value chain. Contract transparency directly relates to access to information and is essential for the responsible management of natural resources and the potential for growth and economic development that those resources can provide. Governments, citizens and investors all have much to gain from access to information within these contracts. Governments will be able to negotiate better contracts if they have access to contracts other than their own, as industry does. Coordination amongst government agencies in enforcing and managing the contracts will be easier. Citizen's distrust of hidden horrors will decrease and as such improve relationships with communities.

Transparency has been defined to mean “*openness, clarity*”.<sup>72</sup> Transparency institutionalizes public discourse and provides a credible reflection of the situation at hand, acting as a sieve in separating credible information from specious claims thereby focusing on facts, bringing about compliance on the part of actors with their own internalized norms and facilitating self reflection by exposing actors to their own behavior.<sup>73</sup> The extractive sector in most countries is shrouded by secrecy, managed by political elites, plagued by lack of disclosure of information of revenues generated and the true value of the natural resources to its citizenry, such abstruseness has resulted in the vulnerability of the sector to corruption, stagnation of economies and conflict, thus the necessity to shed light on the politics and business of this sector through transparency.<sup>74</sup>

Transparency's significance within the extractive industry is to provide for better management of resource-revenues, precipitate economic development of countries that are heavily dependent on these resources, payment of external debts, infrastructure building, avoiding conflicts, strengthening the principal and agent relationship, dissuading corruption and poverty alleviation.<sup>75</sup> Transparency's role in responding to the resource curse would emanate through information disclosure of revenues generated,<sup>76</sup> encouraging debate for the purposes of holding the government accountable, translating to ensure diversification of revenue generated in non-resource sectors for a countries future sustenance and economic well being.

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<sup>72</sup> Black's Law Dictionary, (2004), 8<sup>th</sup> edition, St. Paul, MN: Thomson West.

<sup>73</sup> Thomas N Hale, 'Transparency, Accountability and Global Governance', (2008), Vol. 14, Global Governance 85-86.

<sup>74</sup> Dilan Ölcer, 'Extracting the Maximum from the EITI', (February 2009), OECD Development Centre, Working paper no 276 <[https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&uact=8&ved=0ahUKEWiCIrGEyY\\_UAhUgM8AKHQvLAT8QFggnMAA&url=https%3A%2F%2Fwww.oecd.org%2Fdevelopment%2Fpgd%2F42342311.pdf&usq=AFOjCNG34dJhQlxdj4O6hkxxg5KAzJjqFw&sig2=FIgBfE8RfdwtjikFBsEVZQ](https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&uact=8&ved=0ahUKEWiCIrGEyY_UAhUgM8AKHQvLAT8QFggnMAA&url=https%3A%2F%2Fwww.oecd.org%2Fdevelopment%2Fpgd%2F42342311.pdf&usq=AFOjCNG34dJhQlxdj4O6hkxxg5KAzJjqFw&sig2=FIgBfE8RfdwtjikFBsEVZQ)> accessed on 25<sup>th</sup> September 2018.

<sup>75</sup> Al Faruque (n 6) 69; I Bannon and P Collier (n 4)5.

<sup>76</sup> Jeffrey D. Sachs and Joseph E. Stiglitz, *Escaping the Resource Curse*, (Columbia University Press 2007), 44.

As in most countries, in Kenya, sub-soil resources, minerals, oil and gas (hereinafter referred to as “extractives” or “natural resources”) are the property of the citizens of the nation.<sup>77</sup> As such citizen ownership over these resources is vested by the supreme law of the land and is held in their trust by the State. Accordingly since such contracts would ordinarily cover a range of issues (fiscal terms and the allocation of risk, environmental mitigation and protection measures and provisions dealing with the displacement of local communities and their rights) citizens have a right to know how their government is selling their resources. This right to know comes about through freedom of information laws or the right to access to information.

One of the basic tenets of the rule of law is that all laws should be publicly available, contracts within the extractives industry govern a public resource project, as such constitute ‘a law’ over such projects that directly affect the lives, livelihoods and living conditions of a large population. It is undemocratic for these contracts to be kept secret. The absence of such contract transparency would be a breeding ground for flourishing fears, mistrust and conflict amongst stakeholders.

Access to contracts and information within the extractives sector is in the public interest, this interest far outweighs the interest of the State entity or private person. Information that is not provided for in primary contracts but which citizens may seek access to ranges from: environmental mitigation costs, quality and quantity of the reserve, operational data, cost information, pending litigation, identity of shareholders, revenue and cash flow data, capital expenditures and operating expenditures.

Rosenblum and Maples<sup>78</sup> posit that while confidentiality is a legitimate part of contracts in the extractives industry, there is a need to improve contract transparency in management of the sector. In addition to promoting responsible management, they argue that contract transparency boosts the potential for growth and economic development.<sup>79</sup> Correction of the information asymmetry where industry players are better in contract negotiation than the government through public availability of all contracts means that the government is able to negotiate significantly better deals. This translates to better coordination among government agencies in management of the resources rather than an insular approach by each department. It is also rightly argued that citizens have a right to know how governments handle natural resources. In Kenya, for example, natural resources are held in trust by the government<sup>80</sup> on behalf of the people. This necessarily implies a right to information on aspects that affect the citizenry including, but not limited to fiscal aspects, environmental impact assessments and local content.

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<sup>77</sup> The Constitution of Kenya, 2010, Article 62 (1) (f) & (3).

<sup>78</sup> Rosenblum, P., Maples, S., *Contracts Confidential: Ending Secret Deals in the Extractive Industry*, Revenue Watch Institute, New York, (2009), 16.

<sup>79</sup> Ibid.

<sup>80</sup> The Constitution of Kenya, 2010. Article 62.

The fact that contracts are the main governing law in the extractives sector also means that it is only democratic to ensure that the laws are publicly available. Rosenblum and Maples further posit that access to contracts is critical for effective public participation, minimizing conflict among stakeholders and boosts effective management of the industry as a whole.

Environmental information related to environmental and social impact assessments, mitigation of environmental impacts, permits to extract resources as well as monitoring and reclamation efforts<sup>81</sup> should be disclosed particularly to local communities who are most likely to suffer the effects of the same directly.<sup>82</sup>

## Using the Guidance

The guidance is a voluntary simple reference tool aimed at aiding the corporation's communication officers, sustainability officers, environmental, health and safety or socio-economic specialists with their corporate level pro-active reporting for internal or external stakeholder audiences. The guide can be utilized to report performance to different audiences.

The guide sets out minimum requirements, aids corporations in making informed choices in Kenya however, and it's not exhaustive in nature. Corporations should consider the guiding principles of every report when proactively disclosing information, the channels they will utilize to effectively communicate pertinent information, which will have maximum impact. Enunciating the corporations vision and strategy, detailing its governance and management systems, determining and prioritizing issues for reporting, before relying on the indicators within the guidelines and collecting relevant data to corroborate the same and finally providing an analysis and incorporating the data within it's report.

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<sup>81</sup> OGP Openness in Natural Resources Working Group, *Disclosing Environmental Information in the Natural Resource Sector*, Issue Brief February, 2016, 1. <http://www.opengovpartnership.org/sites/default/files/FIN%20OGP%20Issue%20Brief%20Env%20Disc.pdf> accessed on 25<sup>th</sup> September 2018.

<sup>82</sup> *Friends of Lake Turkana v Attorney General & 2 Others*, [2012], ELC Suit No. 825 of 2012 Environment & Land Court at Nairobi.

# Proactive Disclosure: The Reporting Process

Every company has its own reporting process, this guide only provides a reference style of reporting, company officials are not limited to this style and are free to develop it further to suit their particular needs.

## Guiding Principles

There exist guiding principles of equal weight and importance. They provide practical notions for contemplation as companies develop content for sustainability reporting. These principles are laid out below:

### 1. Relevant

Information reported should be of value and it should be organized in a way that is meaningful to the targeted audience. Consultations with stakeholders are recommended to arrive at solutions, which make sense to the end users of that information. This would enable persons who need to that information to easily locate the information that corresponds to their needs.

### 2. Comprehensible

Information should be clear and comprehensible by the majority of people it targets, making it easily accessible. Here information should be presented clearly in the major languages of the targeted audience. At a minimum, information should be made available in all the official languages of the region where there are a significant number of speakers of those particular languages.

### 3. Timely and complete disclosure

Multinationals need to have good information management systems, which allows them to release information in a complete and timely manner.

### 4. Available

Multinationals should ensure that information should be disclosed proactively through multiple channels to ensure it reaches relevant sectors of the targeted audience. Such corporations should make full use of but are not limited to, the Internet, other means, including notice boards, leaflets, public libraries, mobile phones, radio, TV and public meetings.

### 5. Low cost or free

Proactively disclosed information should be free of charge. Charges for copies or for postage for proactively disclosed information can be levied but should be reasonable and not extravagant, they should be set to pre-established fees.

### 6. Up to date

Information is of no relevance if it's not timely and correct. Proactively disclosed information should be regularly updated and all electronic or hard copies should provide when the information was released or updated.

## Channels for Proactive Disclosure

There exist several channels that can be employed in the reporting process, each with their own advantage and/or disadvantage to it. Multinational corporations could employ formal communication channels, this is a top down approach, where information about the corporation (policies and procedures) flow from the top to the bottom, this could be through internal memo's, press releases, publicly available information at a corporation's reception, info graphics of how a corporation operates in a particular area on notice boards or the handing out of flyers about the corporation to community members.

Multinational corporations could also employ informal communication channels to communicate a message; this could be through lunchtime gathering talks or public gatherings.

There also exists unofficial communication channels; this can take place in ways such as social gatherings between co-workers or community members on issues that have not been communicated from the company. Competent company officials should always be aware of unofficial information circulating in this unofficial communication channel and take positive measures to prevent false information from spreading.

Multinational corporations are encouraged to employ unique and innovative methods and tools of communication for maximum impact of the message they are trying to put across, taking into consideration the cultural perspective of their areas of operation. This can be done through utilizing power point presentations, videos, and theatrical performances in one's own language, story telling amongst many other forms. These methods can simplify a complex message and communicate the corporation's message across to relevant audiences effectively.

Corporations should be encouraged to always make public relevant information and the same should always be available. This can be done through corporation websites, here large amounts of information can be made publicly available, they should easily accessible not hidden under various tabs within the portals.

To effectively build up a corporations message, corporations must employ different channels of communication, they must obtain feedback from the bottom for example where they carry out their operations, how they operate is largely pre-determined by the composition of the surrounding community, the message put across would take this into consideration feeding off communication from the bottom.

## Stakeholder Engagement

Stakeholder engagement has an important function when it comes to the reporting process. Stakeholder views aid in ensuring the report is relevant, accessible and credible to third parties. Such reports provide valuable insights based on feedback obtained throughout the development of the report; when commencing the report obtaining feedback on the company's vision, strategy, governance, management plans, approach, relevant issues etc.; midway on the reporting process, here stakeholder views can be obtained through commenting on drafts produced or reporting expectations; and post-publication, stakeholders can give their views on final drafts in order for that to be taken into consideration for future reports.

## Proactive Disclosure: The Process

### Enunciate corporations vision and strategy

Here the company can set out how its priorities are integrated into its overall vision and strategy. The priorities should be listed and one should ensure that they cover both current operational issues, such as environmental issues and long-term considerations, such as climate change.

**Disclose Vision:** The multinational can reveal its vision, in line with its corporate values, principles and policy commitments. They can explain how they plan to create value for their shareholders, touch on sustainability issues and its approach in addressing them. There can be disclosure of how the corporation is tackling difficult challenges or decisions or dilemmas and setting out how they will be addressed; the strategy can be developed further throughout the report.

### Description of governance and management systems

Once the vision and strategy have been enunciated, the next step would be detailing the role of the board or executives with regards to the corporates values, principles and policy commitments.

**Outlining Board Governance:** The report should describe how the board operates, how often it meets, roles of senior executives and how they manage the corporations business on a day to day basis including engaging with stakeholders and integrating sustainability considerations into decision making.

**Detailing Management Systems:** A description of the corporations management systems should be provided and tied in together with the values, principles and policy commitments. Provision should be made on what systems have been applied and how they tie in with best practices and international standards. Detailed provisions of



systems can be provided on the corporations website. There should be enunciation of how such management systems require continuous improvement, planning, execution, monitoring and review.

**Determination and prioritization of material issues for reporting:** The Corporation as a next step in its report needs to determine and prioritize issues that should be reported. The issues that should be determined are those that in the view of both the corporations' management and external stakeholders affect the company's performance or strategy and/or inform stakeholder assessments or decisions about the corporation. These issues should be listed out. With respect to prioritizing them, this can be determined in the order of which issues are significant to the corporation and to stakeholders in that order, the issues can be determined in accordance with the themes laid out in this guide.

### **Selection of Indicators and the collection of Data**

After the determination and prioritization of the issues, the next step would be the selection of the indicators of the issues that fall under various themes. Corporations are encouraged to utilize the indicators provided within this guide for reporting purposes but are not limited to them to demonstrate how these issues are being addressed. Ongoing engagement with internal and external stakeholders throughout the development of the report can provide useful and early feedback on indicator selection, making the indicators more relevant.

After selection of the indicators, it's important to determine what quantitative and qualitative data the corporation would collect. The data collected should be in line with the indicator provided. The data collected should be timely, relevant and accurate.

### **Analysis and incorporation of the data into the narrative**

After the collection of the data, both quantitative and qualitative, there should be analysis of the data that describes performance context within the company's operations, values, principles and policies. The analysis should be able to provide the significance of the data collected, the nature of impacts on relevant stakeholders, the opinions of stakeholders on those impacts, the effect of existing strategy and management of results and strategic responses, goals or lessons learned. Progress should be explained in accordance with goals of the corporation.

After which the corporation should provide a conclusion of the whole process and how it arrived at addressing some of the pressing challenges in line with its policies, vision and strategy.

## Proactive Disclosure of Social Economic Issues and Indicators

Extractive projects have the potential to positively and/or negatively impact communities, economies, surrounding developments and the environment. As mentioned before, they can provide opportunities (local content) through the conversion of natural resources into the finished products and generating large revenues in the process.

Extractive activities can also disrupt or change existing land uses and industries that existed in a certain area before the operations. With extractive operations being initiated in mostly remote pastoralists areas, the surrounding community, which is used to a pastoralist life could opt to the supply of cattle as part of its services towards the company's catering operations. The extractive operations could bring about the demand for new goods and services within that area, which could lead to an increase in prices in the surrounding area of which the locals are not able to meet or provide bringing about an influx of these services and goods from outside the surrounding community. This could harbor discontent and discord from the community surrounding the extractive companies operations and could lead to conflicts with the extractive company and the community for a lack of benefits in the companies extractive companies activities.

Extractive companies need to ensure that they are able to proactively report on social economic issues to enable successful operations. When there's proactive disclosure from the very beginning and involvement of communities and stakeholders to an extractive project, developments towards that project tend to be positive and attitudes towards the projects are more supportive.

The United Nations Convention Against Corruption (UNCAC) was adopted by the General Assembly and entered into on 14<sup>th</sup> December 2005, it was the first truly global anti-corruption instrument that sought to address a wide range of preventive, detection and enforcement provisions internationally, setting out comprehensive provisions on asset recovery.<sup>83</sup>

Each state party under the convention undertakes to take the necessary measures, including legislative and administrative, in accordance with fundamental principles of it's domestic laws, to ensure the implementation of the convention.<sup>84</sup> The convention aims at promoting integrity, accountability and proper management of public affairs and public property,<sup>85</sup> this is pertinent to the extractives sector. Kenya is also bound by its commitment to the *African Union Convention on Preventing and Combating Corruption*

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<sup>83</sup> <https://www.unodc.org/unodc/en/treaties/CAC/> accessed 10<sup>th</sup> October 2018.

<sup>84</sup> <https://beta.extractiveshub.org/servefile/getFile/id/2390> accessed 25<sup>th</sup> September, 2018.

<sup>85</sup> United Nations Convention Against Corruption (UNCAC), 2005, Article 1.

to ensure transparency and accountability in the management of public affairs.<sup>86</sup> The convention seeks member countries to establish necessary conditions to foster transparency and accountability in the management of public affairs.<sup>87</sup> Such measures proposed are that State members should adopt legislative and other measures to give effect to the right of access to information that is required to assist in the fight against corruption and related offences.<sup>88</sup>

The Constitution of Kenya, 2010, provides for national values and principles of governance, these include good governance, integrity, transparency and accountability.<sup>89</sup> It sets out principles of leadership and integrity,<sup>90</sup> meritocracy in selection, objectivity, accountability for decision making. It also provides for principles of public finance – equity and accountability in the use of public funds.<sup>91</sup> Kenya enacted the Anti-corruption and Economic Crimes Act<sup>92</sup> which provided for various offences amounting to corruption, fraud, abuse of office, bribery, dishonesty amongst other offense and the prosecution of such offences.

The Leadership and Integrity Act<sup>93</sup> gives effect, establishes procedures and mechanisms for the effective administration of chapter six of the Constitution. The Act provides for guiding values and procedures,<sup>94</sup> gifts and benefits in kind<sup>95</sup>, bank accounts outside Kenya<sup>96</sup> amongst other issues.

The Kenya Bribery Act, 2016, main purpose was to criminalize the act of giving or receiving a bribe in the private sector. The Act has far reaching consequences on local and foreign business carrying out operations in Kenya in order to prevent acts of bribery. Legal obligations are created for private authorities who become aware of an act of corruption to report the same to the Ethics and Anti-Corruption Commission within 24 hours. The Act extends penalties to individuals who give or receive bribes in foreign jurisdictions and is not limited to Kenya's jurisdiction alone. Persons or entities associated with the multinational can also be held liable for an act of bribery. The act also provides protection for whistle blowers and witnesses.

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<sup>86</sup> <http://kenyalaw.org/treaties/treaties/38/African-Union-Convention-on-Preventing-and-Combating> accessed 1<sup>st</sup> October 2018.

<sup>87</sup> Ibid.

<sup>88</sup> Ibid.

<sup>89</sup> Article 10, Constitution of Kenya, 2010.

<sup>90</sup> Chapter 6, Constitution of Kenya, 2010.

<sup>91</sup> Article 201, Constitution of Kenya, 2010.

<sup>92</sup> Act No. 3 of 2003

<sup>93</sup> Act No. 19 of 2012

<sup>94</sup> Section 3, Leadership and Integrity Act, No. 19 of 2012.

<sup>95</sup> Section 14, Leadership and Integrity Act, No. 19 of 2012.

<sup>96</sup> Section 19, Leadership and Integrity Act, No. 19 of 2012.

The Public Audit Act,<sup>97</sup> gives effect to Article 229 of the Constitution of Kenya, 2010, it provides for the Office, functions and powers of the Auditor General. It also provides for the forensic and procurement audits. Other enforcement laws are also relevant to the extractive industry in so far as enforcement is concerned, these are; the Penal Code, the Criminal Procedure Act, the Foreign Judgments (Reciprocal Enforcement) Act. Important sources of policies and laws on corruption include the following; The United Nations Handbook on Practical Anti-Corruption Measures for Prosecutors and Investigators, the United Nations Guide of Anti-Corruption Policies, the United Nations Handbook on Practical Anti-Corruption Measures for Prosecutors and Investigators, the General United Nations Anti-Corruption Toolkit and the Compendium of International Legal Instruments on Corruption.

Below is a summary of social and economic issues and their indicators:

Issue	Indicator
Community and society	Community Impacts and Engagement Indigenous peoples Involuntary resettlement, disturbance Corporate Social Responsibility
Local Content	Local Content Practices
Human Rights	Human Rights Due Diligence
Business Ethics and Transparency	Preventing Corruption Transparency of payments to host governments
Labour practices	Diversity and Inclusion Grievance system

## Community and Society

1. The multinational should describe its policies, strategies and procedures for understanding and addressing local community impacts and engaging affected stakeholders. This description should be shared widely with the surrounding community and other stakeholders and where possible made available in the local language.
2. The company should provide a description of its stakeholder engagement strategies and processes that are targeted, timely, inclusive and representative of different social groups (women, youth, minorities and vulnerable groups). This should be communicated effectively to stakeholders.
3. The multinational should carry out social impact assessment, which aids the multinational in identifying, avoiding, mitigating and enhancing outcomes for

<sup>97</sup> Act No. 34 of 2015

communities. This is one of the most effective and detailed processes across the value chain.

4. The multinational company should put in place grievance mechanisms where relevant, but try and make sure that they are available at every stage
5. The multinational should ensure that there are instruments for periodic disclosure of information on company activities and management impacts
6. The multinational should ensure that there are monitoring and follow up procedures throughout the project life cycle

## Proactive Disclosure Elements

### Multinational corporations should:

Provide description of policies, programs and procedures for:

- Evaluating and focusing on local community impacts
- Engaging with affected stakeholders and responding to their grievances and concerns
- Public disclosure of information on company activities and management of impacts

1. There can be provision of case studies to elucidate efficacy and consequences from engagement with affected stakeholders and/or organization of impacts on local communities and their environmental and cultural resources.
2. Efforts should be described to assess and understand community perceptions of company impacts and activities
3. Multinational corporations provide their approach to partnerships with relevant stakeholders; CSO's, companies, governments, communities

## Indigenous Peoples

Persons known to identify with the indigenous people in Kenya are pastoralists, hunter-gatherers, fisher peoples and small farming communities. Pastoralists include the Turkana, Rendile, Borana, Maasai, Samburu, Ilchamus, Somali, Gabra, Pokot, Endorois. Whilst Hunter-gatherers include the Ogiek, Sengwer, Yaaku, Waata, El Molo, Boni, Malakot, Wagoshi and Sanya.<sup>98</sup> The Constitution of Kenya<sup>99</sup> provides for minorities and marginalised groups to be provided for special opportunities, this isn't limited to educational or employment opportunities but also economic fields such as the extractives sector.

<sup>98</sup> <https://www.iwgia.org/en/kenya/655-indigenous-peoples-in-kenya> <accessed 20th August 2018.>

<sup>99</sup> Article 56.

Article 18 of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)<sup>100</sup> states that indigenous people have the right to participate in decision-making to do with issues that affect their rights. Further, Article 19<sup>101</sup> creates an obligation for states to consult and cooperate in good faith with the indigenous peoples concerned in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them”. The fact that the consent has to be *informed* indicates that individuals have the right to access information that will enable them to make proper decisions.

There should be a description of policies, programmes and procedures by multinational corporations on how they plan to engage with indigenous peoples, how they will address their concerns and expectations.

**Multinational corporations should:**

- Multinational should provide a description of processes and mechanisms of identification, avoidance, minimisation and mitigation of potential impacts on communities, livelihoods, cultural heritage and the local environment.
- Multinationals should ensure that priority in so far as benefits from employment and educational opportunities are given to indigenous people.
- Multinationals should provide access to culturally appropriate grievance mechanisms
- Multinationals should provide information disclosure, consultation, informed participation and mutually acceptable solutions with consent when dealing with indigenous peoples
- Multinationals should ensure that their operations don't interfere with but rather promote their reasonable access to water and health services;

## Involuntary Resettlement and/or Disturbance

**Universal Declaration of Human Rights (1948)**, (UDHR) adequate housing has been recognized as a fundamental human right. **Article 25** ***“Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood circumstances beyond his control”.***

<sup>100</sup> [http://www.un.org/esa/socdev/unpfii/documents/DRIPS\\_en.pdf](http://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf) accessed 1<sup>st</sup> October, 2018.

<sup>101</sup> Ibid.

Other international instruments recognize this right, the International Covenant on Economic, Social and Cultural Rights (ICESCR), the International Covenant on Civil and Political Rights (ICCPR) the Convention on the Elimination of all Forms of Racial Discrimination (CERD), Convention on the Elimination of all forms of Discrimination Against Women (CEDAW) and the Convention on the Rights of the Child. Regional treaties also provide for it: The African Charter on Human and People's Rights, Kenya is a state party to all these treaties and conventions.

Constitution of Kenya at **Article 43** has also formally recognized the right to housing. The right to housing should be ensured to all persons irrespective of their income or access to economic resources. In 1993, the UN Commission on Human Rights issued a resolution categorising forced evictions as a gross violation of human rights, and in particular the right to adequate housing. **UN Basic Principles and Guidelines on Development based Eviction and Displacement (2007)** have provided some guidance on measures to adopt in order to ensure that development-based evictions.

The Guidelines *inter-alia* place an obligation on the State to ensure that evictions only occur in exceptional circumstances and that any eviction must be authorised by law; carried out in accordance with international human rights law; are undertaken solely for purposes of promoting the general welfare and that they ensure full and fair compensation and rehabilitation of those affected.

The Guidelines also articulate the steps that States should take prior to taking any decision to initiate an eviction; that the relevant authority should demonstrate that the eviction is unavoidable and is consistent with international human rights commitments; that any decision relating to evictions should be announced in writing in the local language to all individuals concerned sufficiently in advance stating the justification for the decision; that alternatives and where no alternatives exist, all measures taken and foreseen to minimize the adverse effect of evictions; that due eviction notice should allow and enable those subject to the eviction to take an inventory so as to assess the value of their properties that may be damaged during evictions and most importantly that evictions should not result in individuals being rendered homeless or vulnerable to other human rights violations. Finally, that there must be resettlement measures in place before evictions can be undertaken.

The Guidelines go further to lay down the conditions to be undertaken during evictions as follows; that there must be mandatory presence of Governmental officials or their representatives on site during eviction; that neutral observers should be allowed access to ensure compliance with international human rights principles; that evictions should not be carried out in a manner that violates the dignity and human rights to life and security of those affected; that evictions must not take place at night, in bad weather, during festivals or religious holidays, prior to elections, during or just prior to school exams and at all times the State must take measures to ensure that no one is subjected to indiscriminate attacks.

The UN Guidelines in addition provide what ought to happen after the eviction; that the person responsible must provide just compensation for any damage incurred during eviction and sufficient alternative accommodation and must do so immediately upon evictions. At the very minimum, the State must ensure that the evicted persons have access to essential food, water and sanitation, basic shelter, appropriate clothing, education for children and childcare facilities. The multinational should ensure that there are grievance mechanisms in place, its policies, programmes and procedures for involuntary resettlement should be communicated well in advance and be carried out together with the State.

## Corporate Social Investment

Corporate Social Responsibility (CSR) refers to voluntary actions undertaken by mining companies to either improve the living conditions (economic, social, and environmental) of local communities or to reduce the negative impacts of extractive projects. Voluntary actions are those that go beyond legal obligations, contracts, and license agreements.

### Multinational corporations should:

- Involve and consult communities in the development of CSR programs that have a long term positive impact on them
- Process methods for assessing and evaluating social investment effectiveness
- Consider how such social investments could attract additional funding to the community from other sources, other long-term partnerships or development activities when coining the concept.
- Describe the companies social investment strategies, programs and procedures
- Should allow communities to consult amongst themselves when it comes to social investment activities, discuss the multinational proposal as a group, elect a representative or group of representatives to be involved throughout the process of the social investment
- Should provide the community with all the necessary documentation as pertains the social investment, ESIA's where necessary amongst others
- Should ensure that such social investments don't breach any cultural practices
- Should document all meetings with communities
- Should make sure that nothing is left unclear or unexplained
- Should allow the community to have time to consult before making any final decisions



## Local Content Practices

Local content should be guided by a clear definition of the country's development objectives and focus on three pillars: local capacity building (skill development); local content (participation); and local value addition (broader benefits). When it comes to multinationals and local content, they should aim to build capacity and skills for the extractive sector however, it should focus on their transferability to other sectors. This will enhance the competitiveness of Kenya's broader economy and is an effective way of securing sustainability; in effect using the extractive sector as a catalyst for structural transformation.

### Multinational corporations should:

- Clearly outline its policies, programs and procedures in so far as sourcing goods, services and human resources are concerned;
- State what is the total amount of capital investment spent by the multinational corporation in the development of the project;
- Provide for what is the export value of the resource per annum. How does it compare with other sectors of the economy.
- Provide for what is the GDP contribution of the project to Kenya annually.
- Should ensure involvement of surrounding community in participation of provision of services and skills where appropriate.
- Provide information on how local employment strategies promote diversity (gender, ethnic, disabilities) at all levels
- Provide data on how many local employees are given training opportunities;
- Provide information on indirect job creation and economic development as a result of the multinational's extractive related activities;
- Should ensure involvement/inclusion of locals at all levels of operations and phases of the value chain as much as possible
- Should ensure preference and consideration is given first of local supply of goods, as long as they meet the criteria
- Should aim to build skills that are transferable to other sectors, so that once the multinational has finished carrying out its activities and leaves, those skills can be easily employed and utilized in other sectors.
- Describe strategies, programs and procedures aimed at providing employment opportunities to residents or nationals;
- Provide for long term benefit projects/legacy projects that the extractive project will have a significant influence on the socio-economic environment in the region.
- Provide the number and/or percentage of local (national) versus international staff/employees in management and other senior roles;

**Multinational corporations should:**

- Provide information on the proportion of funds spent on goods and sources sourced locally;
- Provide for the multinational corporations community development management plan;
- Provide plans for the post mining land use;
- Provide information on the local inputs, including spare parts, maintenance and operating consumables that depend on local input;
- Provide information on the indirect and induced jobs created by virtue of the multinational carrying out its operations in a certain area.
- Provide prequalification criteria for potential local suppliers (this criteria should not be prohibitive for locals trying to get inroads in supplying goods or services);
- Provide information on local business development which is as a result of increased economic activities and opportunities made possible by the multinationals activities/operations and its local economic benefits;
- Aim to efficiently communicate its local content practices at all stages and phases of the project;
- Provide information on the royalties and direct taxation, estimated tax revenues generated from the extractive project.

## Human Rights Due Diligence

The United Nation Declaration of Human Rights in 1948<sup>102</sup>, popularly referred to, as the *UDHR* was an outcome of World War II, this stemmed out of a broad worldwide consensus that sought to place the individual human being under the protection of the International community.<sup>103</sup> National Governments had failed in their duty to ensure that life and liberty of their citizens are protected, based on the atrocities committed against specific ethnic groups.<sup>104</sup>

Article 19 of the UDHR<sup>105</sup> thereof recognized the right of access to information. In this instrument, access to information is not only about promoting and protecting rights to information, it is equally concerned about promoting and safeguarding communication (or the use of information) to voice one's views, to participate in democratic processes that take place at all levels (community, national, regional and global) and to set priorities for action.

<sup>102</sup> <http://www.un.org/en/universal-declaration-human-rights/> accessed 11<sup>th</sup> February, 2017.

<sup>103</sup> <http://legal.un.org/avl/ha/iccpr/iccpr.html> accessed 11<sup>th</sup> February, 2017.

<sup>104</sup> Ibid.

<sup>105</sup> <http://www.un.org/en/universal-declaration-human-rights/> accessed 12<sup>th</sup> February, 2017.

Multinationals should respect human rights, which entails the avoidance of infringing on the human rights of others and should address the adverse human rights impacts with which they are involved. The United Nations Human Rights Council unanimously endorsed the Guiding Principles on Business and Human Rights.<sup>106</sup> Resource companies have an obligation to comply with all relevant laws and respect human rights. Per Principle 13<sup>107</sup>, enterprises have the responsibility to avoid causing or contributing to adverse human rights impacts through their own activities and they should nevertheless address such impacts when they occur. Furthermore, business enterprises should seek to prevent or mitigate adverse human rights impacts linked to their business relationships even when they have not contributed to those impacts. Human rights expectations on resource companies should be clearly set out in legislation and other policy documents and enforcement of the same should be robust but without interfering with legitimate business practices. Business enterprises should also be encouraged to report on the effect that their activities have on human rights. The scope of these guidelines clearly extends the right of access to information, which has locally been affirmed by statute and the constitution as a human right.

#### Multinational corporations should:

- Provide a description of any relevant processes, positions, or policy to ensure respect for human rights through the life cycle of activities and within the supply chain, referencing human rights framework and guidance adopted by the multinational;
- Carry out a human rights impact assessment;
- Ensure that stakeholders and community members are informed about the context of engagement in advance and one should use a language in which they understand, promote dialogue;
- Ensure that company decision making allows for follow up of communication given;
- Provide information and proactively disclose the relevance of human rights to the multinational's operations, including local challenges and opportunities;
- Provide procedures in place to identify, assess and address human rights impacts for local communities and/or initiatives;
- Provide a description of strategies employed that support the company's approach to human rights amongst the community;
- Provide case studies to illustrate how potential human rights issues related to the company operations are being assessed and addressed;
- Provide approach and processes to promoting respect for human rights and labour practices.

<sup>106</sup> United Nations Office of the High Commissioner for Human Rights (OCHR), 'Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework (2011) UN Doc HR/PUB/11/04.

<sup>107</sup> SRSG, 'Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises', 14.

Corporate Level		
Steps	Activities	Engagement
<p><b>Step 1: Immersion</b> Build human rights experts' knowledge of the business and the company's knowledge of human rights issues and expectations.</p>	<ul style="list-style-type: none"> <li>Review company strategy and relevant policies and processes.</li> <li>Review recent human rights disclosures and results from relevant assessments and engagements.</li> <li>Benchmark industry peers.</li> <li>Form a cross-functional task force to lead the HRIA.</li> <li>Align expectations and knowledge of process internally, possibly through human rights training for key company leaders.</li> </ul>	<p>Carry out internal interviews with key departments (e.g., human resources, purchasing, product development, etc.) to hone in on the human rights issues that are likely to be relevant to the company.</p>
<p><b>Step 2: Mapping</b> Identify the most relevant human rights issues for the company by mapping the real and perceived intersection points with human rights across all operations.</p>	<ul style="list-style-type: none"> <li>Customize a human rights mapping tool for the company's context and objectives.</li> <li>Determine the organizing framework for mapping (i.e., by business line, region, and value chain step).</li> <li>Conduct a media search, including cases and allegations against the company or peer companies.</li> <li>Map the operations against the full universe of potentially relevant human rights issues to identify risk and opportunity areas.</li> </ul>	<p>Conduct external interviews with key stakeholders and experts to verify results.</p>
<p><b>Step 3: Prioritization</b> Prioritize human rights risks and opportunities to determine where the company should focus resources (note that all impacts and risks should be addressed).</p>	<ul style="list-style-type: none"> <li>Prioritize the relevant human rights risks identified in Step 2 based on risk to rights holders, using likelihood, scale, severity, and remediability.</li> <li>Rank opportunities based on the company's overall strategic goals and ability to have an impact.</li> </ul>	<p>Share a summary of findings from external interviews with company participants.</p>
<p><b>Step 4: Management</b> Build a robust approach to addressing impacts, managing risks, and maximizing opportunities by strengthening the company's human rights strategy, policies, processes, and engagement.</p>	<ul style="list-style-type: none"> <li>Conduct a gap analysis of current policies and processes based on the priorities identified in Step 3.</li> <li>Strengthen the current management system based on the gap analysis results.</li> <li>Draft a human rights strategy based on the most important risks and opportunities.</li> <li>Develop action plans to further investigate identified issues, including through in-depth HRIsAs.</li> <li>Build an ongoing due diligence process.</li> <li>Develop a plan to raise awareness and build capacity internally.</li> </ul>	<ul style="list-style-type: none"> <li>Share high-level HRIA findings with key stakeholders and experts.</li> <li>Gain input from key stakeholders and experts about the new human rights strategy.</li> </ul>

Source: BSR

## Business Ethics and Transparency

Corruption and the lack of transparency are perceived as political risks for foreign corporations as there are increased transactional costs, unpredictability in the business environment, resulting in determent of foreign investment, reducing economic development and resources revenue.<sup>108</sup> Corruption goes against the national values of which Sate Officers, public officers and all persons in Kenya are bound by.<sup>109</sup>

Proactive disclosure would makes corruption riskier and less attractive, through the increased probability of a corrupt official of being caught and the stigmatization and negative publicity that comes with it which acts as a deterrent, as well as the difficulty presented for distortion of information in the aim of avoiding being labeled corrupt. Therefore proactive disclosure would respond to the resource curse by making officials more accountable to the public.

The Organisation for European Economic Cooperation (OEEC) was established in 1948 to run the US-financed Marshall plan for reconstruction of a war ravaged continent.<sup>110</sup> The OECD had in place Guidelines for Multinational Enterprises (OECD Guidelines) and revised them in 2011 to include a chapter on human rights, which is consistent with the UN Guiding Principles on Business and Human Rights.<sup>111</sup>

The guidelines are recommendations provided by governments to multinational enterprises on principles and standards of good practice consistent with applicable laws and internationally recognized standards, observance is voluntary and they are not legally enforceable.<sup>112</sup>

Chapter four of the guidelines provides for human rights recommendations upon multinational enterprises that they ought to respect human rights and seek ways to prevent or mitigate adverse human rights impacts that are directly linked to their business operations, products or services.<sup>113</sup> It goes further to provide that enterprises operations should reference at a minimum the bill of human rights in the UDHR and the ICCPR.<sup>114</sup>

<sup>108</sup> Abdullah Al Faruque, 'Transparency in Extractive Revenues in Developing Countries and Economies in Transition: A Review of Emerging Best Practices', (2006), Vol.24 No. 1, Journal of Energy and Natural Resources Law, 70.

<sup>109</sup> Article 10 (1) (c), Constitution of Kenya, 2010.

<sup>110</sup> <http://www.oecd.org/about/history/> accessed 25<sup>th</sup> May 2017.

<sup>111</sup> Rae Lindsay and others, 'Human Rights Responsibilities in the oil and gas sector: applying the UN Guiding Principles', (2013), Journal of World Energy Law and Business (JWELB) Vol. 6, No.1, 4. <<https://doi.org/10.1093/jwelb/jws033>> accessed 25<sup>th</sup> May 2017.

<sup>112</sup> <http://www.oecd.org/daf/inv/mne/48004323.pdf> accessed 29<sup>th</sup> April 2017.

<sup>113</sup> Ibid.

<sup>114</sup> Ibid.

The United Nations Convention Against Corruption (UNCAC) was adopted by the General Assembly and entered into on 14<sup>th</sup> December 2005, it was the first truly global anti-corruption instrument that sought to address a wide range of preventive, detection and enforcement provisions internationally, setting out comprehensive provisions on asset recovery.<sup>115</sup>

Each state party under the convention undertakes to take the necessary measures, including legislative and administrative, in accordance with fundamental principles of its domestic laws, to ensure the implementation of the convention.<sup>116</sup> The convention aims at promoting integrity, accountability and proper management of public affairs and public property,<sup>117</sup> this is pertinent to the extractives sector.

Kenya is also a state party to the African Union, as such its bound by the freedom of information obligations imposed by the African Charter on Human and Peoples' Rights (the Charter).<sup>118</sup> The ACHPR at Article 9 reaffirms the right to information. It however, goes on further at Part IV to explain that this right does not exclude information held by public or private bodies, where there's a refusal one can seek redress from an independent body or court. There exists an obligation on public bodies in the absence of requests made to publish information of significant public interest.

Kenya country is also bound by its commitment to the *African Union Convention on Preventing and Combating Corruption* to ensure transparency and accountability in the management of public affairs.<sup>119</sup>

The convention seeks member countries to establish necessary conditions to foster transparency and accountability in the management of public affairs.<sup>120</sup> Such measures proposed are that State members should adopt legislative and other measures to give effect to the right of access to information that is required to assist in the fight against corruption and related offences.

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<sup>115</sup> <https://www.unodc.org/unodc/en/treaties/CAC/> accessed 10<sup>th</sup> February 2017.

<sup>116</sup> <https://beta.extractiveshub.org/servefile/getFile/id/2390> accessed 25<sup>th</sup> September 2018.

<sup>117</sup> United Nations Convention Against Corruption (UNCAC), 2005, Article 1.

<sup>118</sup> African Commission on Human and Peoples' Rights, *African [Banjul] Charter on Human and Peoples' Rights*, adopted 27 June 1981; < [http://www.achpr.org/english/\\_info/charter\\_en.html](http://www.achpr.org/english/_info/charter_en.html) > accessed 25<sup>th</sup> September 2018.

<sup>119</sup> <http://kenyalaw.org/treaties/treaties/38/African-Union-Convention-on-Preventing-and-Combating> accessed 1st October 2018.

<sup>120</sup> Ibid.

Multinationals operating in Kenya are also bound by the Anti-corruption and Economic Crimes Act<sup>121</sup> and the Ethics and Anti-corruption Commission Act,<sup>122</sup> where corruption and economic crimes are provided, the statutory authority mandated with investigating these crimes, the offences and punishments are provided.

**Multinational corporations should:**

- |  |  |
|--|--|
| <ul style="list-style-type: none"> <li>○ Provide the company's policy that seeks to address bribery and corruption</li> <li>○ Ensure that employees are aware of the same and are involved in awareness programs;</li> <li>○ Provide for internal procedures for reporting and following suspected violations;</li> <li>○ Provide for risks associated with bribery and corruption which are relevant to company operations;</li> <li>○ Provide in as far as possible for participation and level of involvement in voluntary initiatives or international conventions;</li> </ul> | <ul style="list-style-type: none"> <li>○ Provide a description of company policies and programs on revenue transparency</li> <li>○ Provide for the scope of legal and policy mandates for government revenue reporting with which the multinational corporation is obliged to comply with;</li> <li>○ Provide explanations in changes in the reported data given compared to previous years;</li> <li>○ Provide reports on other payments outside the scope of national or regional reporting standards or practices.</li> </ul> |
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## Diversity and Inclusion

Multinational corporations should ensure that within their corporate setup, their workforce should contain the relevant diversity and inclusion; in Kenya special reference is made to the gender (the 2/3<sup>rd</sup> rule as prescribed under the Constitution<sup>123</sup>), ethnicity and disability.

Diversity and inclusion stems from the basic bill of rights that stipulates that every person is equal before the law and has the right to equal protection and equal benefit of the law.<sup>124</sup> Diversity and inclusion considers all Kenyan's whether a minority, marginalised groups, older members of society, persons with disabilities and youth despite their gender.<sup>125</sup>

<sup>121</sup> Act No. 3 of 2003.

<sup>122</sup> Act No. 22 of 2011.

<sup>123</sup> Article 27 (8) Constitution of Kenya, 2010.

<sup>124</sup> Article 27 (1) Constitution of Kenya, 2010.

<sup>125</sup> Articles, 10 (1) (b), 54, 55, 56 and 57 of the Constitution of Kenya, 2010.

**Multinational corporations should:**

- Proactively provide information for the workforce composition data for gender, ethnic and disability categories;
- Proactively provide for the company's reporting policies, programs and procedures to promote workforce diversity and inclusion;
- Illustrate where applicable the implementation of the two third gender rule
- Ensure workforce composition caters for relevant diversity and inclusion throughout all positions as well as management positions;

## Grievance Mechanisms

Grievance mechanisms are formal, can be legal<sup>126</sup> or non-legal complaint processes that can be used by individuals, workers, communities and/or civil society organisations that are negatively affected by certain business activities and operations. These mechanisms should not charge any fees for complaint processes as this is viewed as a disincentive.

Multinationals may contribute or cause socio-economic or environmental abuses or violations of individuals, workers or communities. Grievance mechanisms are not substitutes for legal avenues for redress, they can be used by complainants on ways to seek remedies and deescalate issues.

**Multinational corporations should:**

- Provide a description of their policies, approach and/or mechanisms to address non-retaliation and grievances raised either internally or externally (internally from within the corporation by an employee and externally from outside the corporation by stakeholders or affected/aggrieved person)
- Provide the assurance of it's independence and objectiveness in handling complaints
- Ensure awareness of existence of grievance mechanisms by community members and company workers
- Provide accurate, timely and relevant information in so far as the grievance handling is concerned;
- Address complaints raised rapidly;
- Ensure complainants understand limitations to the grievance mechanisms (what can or can't be done)
- Ensure timely resolution of grievances raised for stakeholder confidence
- Ensure room for further appeal to other statutory constituted bodies for further resolution of grievance where one is dissatisfied;

<sup>126</sup> Chapter 10, Constitution of Kenya, 2010.



## Proactive Disclosure of Environmental Issues and Indicators

Extractive activities result in environmental impacts, these can occur on, immediately or after the conclusion of extractive activities. There's infrastructure development as a result of extractive related activities, in some instances there's deforestation along roadways constructed for transporting the extracted products and loss of biodiversity through hunting, poaching.

Extractive companies together with the State and local communities are better placed to reduce environmental impacts if they know where the sensitivities exist, they would be able to mitigate impacts within the legal and policy framework.

The following summarizes the environmental issues and indicators in the extractive industry:

Issue	Indicator
Climate Change	Greenhouse gas emissions Flared gas
Biodiversity & ecosystems	Biodiversity and Ecosystems
Water	Discharges to water
Local Environmental Impact	Spills to the environment & waste Decommissioning

### Greenhouse Gas Emissions

Greenhouse gases trap heat and warm the planet. Extractive related activities contribute to greenhouse gas emissions through the burning of fossil fuels and the finished products (fuel- transportation).

In Kenya, protection against Greenhouse Gas Emissions is provided for under the Constitution by ensuring that every person has the right to a clean and healthy environment for themselves and future generations.<sup>127</sup> The State has an obligation through its regulatory function to ensure the sustainable exploitation, utilization, management and conservation of the environment and natural resources and to eliminate processes and activities that are likely to endanger the environment.<sup>128</sup>

The United Nations Framework Convention on Climate Change (UNFCCC) at Article 2 provides for the “*stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system.*”

<sup>127</sup> Article 42, Constitution of Kenya, 2010.

<sup>128</sup> Article 69 (1) (a) and (g), Constitution of Kenya, 2010.

*Such a level should be achieved within a time frame sufficient to allow ecosystems to adapt naturally to climate change, to ensure that food production is not threatened and to enable economic development to proceed in a sustainable manner.”* It does not prohibit the emission of greenhouse gases; rather it seeks to restrict these activities when they exceed a certain threshold. The objective also sets a timeline for when the environmental standard must be met, requiring that such changes take place, so as to not affect: ecosystem adaptation, food security and economic development occurring in a sustainable manner. Article 4 to the convention provides that all parties “*shall adopt national policies and take corresponding measures on the mitigation of climate change, by limiting its anthropogenic emissions of greenhouse gases and protecting and enhancing its greenhouse gas sinks and reservoirs.*”

There’s the Kyoto Protocol, it’s major feature is that it sets binding targets for 37 industrialized countries and for the European Union. The major distinction between the Protocol and the Convention is that while the Convention **encouraged** industrialised countries to stabilize GHG emissions, the Protocol **commits** them to do so. Recognizing that developed countries are principally responsible for the current high levels of GHG emissions in the atmosphere as a result of more than 150 years of industrial activity, the Protocol places a heavier burden on developed nations under the principle of “common but differentiated responsibilities. The Parties included in Annex I to the protocol shall, individually or jointly, ensure that their aggregate anthropogenic carbon dioxide equivalent emissions of the greenhouse gases listed in Annex A do not exceed their assigned amount, calculated pursuant to their quantified emission limitation and reduction commitments inscribed in Annex B and in accordance with the provisions of this Article, with a view to reducing their overall emissions of such gases by at least **5% below 1990 levels in the commitment period.**

The Paris Agreement unites all the world’s nations in a single agreement on tackling climate change for the first time in history. Coming to a consensus among nearly 200 countries on the need to cut greenhouse gas emissions is regarded by many observers as an achievement in itself and has been hailed as “historic”.

The Kyoto Protocol of 1997 set emission-cutting targets for a handful of developed countries, but the US pulled out and others failed to comply. However, scientists point out that the Paris accord must be stepped up if it is to have any chance of curbing dangerous climate change. Pledges thus far could see global temperatures rise by as much as 2.7C, but the agreement lays out a roadmap for speeding up progress. The Paris Agreement seeks to do the following:

- To keep global temperatures “well below” 2.0C (3.6F) above pre-industrial times and “endeavour to limit” them even more, to 1.5C
- To limit the amount of greenhouse gases emitted by human activity to the same levels that trees, soil and oceans can absorb naturally, beginning at some point between 2050 and 2100

- To review each country’s contribution to cutting emissions every five years so they scale up to the challenge
- For rich countries to help poorer nations by providing “climate finance” to adapt to climate change and switch to renewable energy.

Extractive companies can contribute to addressing the risks associated with climate change; they may opt to report on climate change risks and management within the context of their own business operations.

Multinational corporations should:	
<ul style="list-style-type: none"> <li>○ Proactively report on climate change positions, policies or principles applied;</li> <li>○ Responsibilities and accountability for managing climate change risks;</li> <li>○ Proactively report on the stakeholder engagement approaches taken;</li> </ul>	<ul style="list-style-type: none"> <li>○ Proactively report on emissions, mitigation measures and/or strategies, programs, initiatives and activities</li> <li>○ Provide research and development activities directed towards reducing GHG emissions;</li> <li>○ Proactively report on GHG regulatory compliance approaches including participation in emission trading schemes.</li> </ul>

## Flared Gas

Gas flaring is a combustion device to burn associated, unwanted or excess gasses and liquids released during normal or unplanned over-pressuring operation in many industrial processes such as oil-gas extraction, refineries, chemical plants, coal industry and landfills. Gas flaring is a significant source of greenhouse gases emissions. It also generates noise and heat. Gas flaring is also a significant factor driving global warming. More than 16,000 gas flares at oil production sites around the world result in about 350 million tons of climate-changing CO2 being emitted into the atmosphere every year.

Multinational corporations should:	
<ul style="list-style-type: none"> <li>○ Proactively report hydrocarbon gas flared for each relevant business activity (e.g. oil and gas production, refining).</li> <li>○ Proactively report quantity of hydrocarbon gas flared from operations;</li> <li>○ Proactively report contributions of flaring to the company’s total GHG emissions;</li> </ul>	<ul style="list-style-type: none"> <li>○ Proactively report geographic locations/regions of significant flaring;</li> <li>○ Proactively report mitigation measures for gas flaring;</li> <li>○ Proactively report flares reduction activities including sustainable reduction improvements versus short-term fluctuations.</li> </ul>

## Biodiversity and Ecosystems

Humanity's survival depends upon the conservation of nature; Soil, water, atmosphere, and of the forests and plants that these life forms sustain. Biodiversity is valuable precisely because it is the output of the four billion year old evolutionary range of variety and because it therefore has fine-tuned resilience to physical conditions, as well as powers to adapt to them and thus provides a buffer against future assaults on life supporting systems. Unlike such non-reusable resources such as minerals biological diversity cannot be substituted for by human innovation; it is valued for its naturalness."

Ecosystem is a subset of nature's global economy, a local or regional system of plants, microorganisms and animals working together to survive. There is a symbiotic relationship. Concept of ecosystem limits – collapse if critical threshold passed.

### With respect to biodiversity and ecosystems, multinational corporations should:

- Proactively promote the respect of the established protected areas of biodiversity and not carry out any extractive related activities in those areas;
- Proactively promote the management of habitats that are close by it's area of operations;
- Proactively promote the management of ecosystems that are close by it's area of operations;
- Proactively promote the company's management approach (policy, strategy, plans and outcomes) in addressing biodiversity and ecosystem aspects that come up;
- Proactively describe the mitigation measures and potential impacts on biodiversity and ecosystems;
- Proactively describe how community and stakeholder concerns are assessed, evaluated and addressed.

## Water

Over a billion people lack adequate access to portable water or basic sanitation. Water supply is already seriously inadequate in much of equatorial Africa and Central Asia.

Desertification is exacerbated by over-extraction of underground water supplies. Pollution has reduced the supply of potable water. Irrigation accounts for 80% of use in developing countries. Dam construction/hydropower – displacement. Population growth and increased living standards increasing demand for freshwater globally. Depletion of freshwater having impacts on ecosystem health.

UNCESCR, General Comment No 15: The Right to Water, UN Doc e/c 12/2002/11 (2003) Human right to water is indispensable for leading a life in human dignity. Prerequisite for the realization of other human rights: The human right to water entitles everyone to sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic uses. An adequate amount of safe water is necessary to prevent death from dehydration, to reduce the risk of water-related diseases and to provide for consumption, cooking, personal and domestic hygienic requirements.

River pollution generally originates from industrial effluent, agricultural run-off or domestic sewage discharge. Modern treaties tend to require states to regulate and control river pollution, prohibiting only certain forms of pollutant discharge, and distinguishing between new and existing sources. International law does not prohibit all pollution however quality of freshwater resources should not be altered in such a way as to result in significant or substantial damage to the point that the resource may no longer be used or that its potential for use is materially diminished.

Water is an integral part to oil and gas operations.

**Multinational corporations relying on the use of water should:**

- Proactively report on total volume of fresh water withdrawn;
- Proactively report on total volume of fresh water consumed;
- Proactively report on total reduction in fresh water withdrawn or consumed due to water reduction measures or water replaced or re-cycled/reused within the boundaries of the reporting company;
- Proactively provide information on company use of fresh groundwater extracted for remediation or to control the migration of contaminated groundwater;
- Proactively report the total volume of fresh water returned to the freshwater environment;

## Spills to the Environment and Waste

Oil spills can come from a number of sources, including tankers and oil extraction and storage facilities. Spills from tankers are usually the result of a breach in the hull, either from running aground or hitting an object in the water. Major oil spills, such as the 2006 spill off the coast of Lebanon or the 2002 Prestige accident off the coast of Spain, can pose serious threats to birdlife, fisheries, and marine ecosystems.

**Multinational corporations should:**

- Proactively provide and describe the strategies and risk-based processes to be employed to prevent accidental releases of hydrocarbons and/or other materials to the environment;
- Proactively disclose the number and volume of hydrocarbon spills;
- Proactively provide for emergency preparedness plans and response actions to counter spills and other emergencies;
- Proactively report total quantity in metric tones of hazardous waste disposed;
- Proactively report separately quantities of waste stored awaiting treatment prior to disposal or recycling;
- Proactively describe efforts to minimize the generation of waste and improve on the company waste management practices

## Decommissioning

Decommissioning involves the safe plugging of the hole in the earth's surface or cessation of operations and the controlled process of retiring a facility from service and disposal of the equipment used during extraction operations. For decommissioning, the sizes of the installations are usually massive. Decommissioning options: Top Sides: Pull them apart & re-cycle; Sub-structure: total removal (if you do remove them where do you remove them to, or once you remove them do you dispose them elsewhere in deep water), partial removal or just leaving them in place.

The issue is the Cost: a big challenge, hierarchy of legislation & regulation, International; law of the sea convention, IMO. Decommissioning considerations requires very early planning/consideration (from field development stage), State of the Law-international, regional, local law. They should be addressed in joint ventures contracts, lease, and license obligations. Best precautionary principle; waste hierarchy principles. Attention to other uses of the sea, fishing, health and safety law.

Tax provisioning, security for decommissioning costs? Engineering challenges. Cost effectiveness removal projects-supply chain. Full and open consultation-stakeholders, NGO's. It should also be established who pays for decommissioning. A decommissioning fund should be setup early in field life.

Multinational corporations should:	
<ul style="list-style-type: none"> <li>○ Proactively report the company's approach for planning and executing decommissioning for both onshore and offshore assets;</li> <li>○ Proactively provide the number, location, status and brief description of significant decommissioning and remediation projects;</li> <li>○ Proactively describe the technology and research to be utilized for decommissioning and remediation;</li> </ul>	<ul style="list-style-type: none"> <li>○ Proactively report the total financial provision made by the company for decommissioning offshore and/or onshore projects</li> <li>○ Proactively keep the public, surrounding communities and relevant authorities informed of decommissioning process and progress;</li> <li>○ Proactively inform the public, surrounding communities and relevant authorities of any mitigating measures sought to be employed in the decommissioning process.</li> </ul>

### Proactive Disclosure of Health and Safety Issues and Indicators

There are quite a number of hazardous activities in the extractive industry, that call for the proper management of the health and safety risks related to these hazards. These health and safety risks have to be managed systematically across a company's activities. Companies are encouraged to independently report on their overall approach to managing health and safety risks, including planned proposals and procedures to improve performance standards. The independent reporting mechanisms encourage the mitigation of health and safety risks and reduce the number of incidents in the long run.

The following summarizes the health and safety issues and indicators in the extractive industry:

Issue	Indicator
Workforce protection	Occupational Health and Safety

### Occupational Health and Safety

Legislation specifically for the extractives sector is yet to be developed for occupational health and safety. In the absence of this the Occupational Health and Safety Act regulates work related injuries.

The extractives sector is a high-risk sector in so far as work related injuries are concerned and safety is important considering international historical incidences (Piper Alpha etc.). Many countries often approach health and safety from either two perspectives; a prescriptive approach – where legislation aims to cater for and provide detailed rules and regulations that operators must follow; and a case management approach; where the onus is on the operator to take all measures necessary to ensure safety measures are employed at their best of their abilities, with the regulator playing a monitoring role. The second approach avoids operators checking boxes when it comes to health and safety, hence compromising standards and is the preferred method.

**Multinational corporations should:**

- Report occupational injuries separately for employees and contractors
- Describe incidents of major consequences, together with impacts and response actions
- Describe initiatives employed to reduce occupational incidents
- Describe incidents where lessons were learnt



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