



## TRANSPARENCY IN KENYA'S EXTRACTIVE SECTOR

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### OVERVIEW

Transparency is a necessary ingredient for the achievement of accountability and good governance in the management of natural resources. It requires that all stakeholders with official roles in the management of natural resources and the revenues they generate - including the government and the private sector - proactively disseminate information that helps citizens understand how key decisions in the public interest are made. Allowing an informed opinion on whether those involved in the extractive sector are following the rules.

Three important transparency considerations include:

- ***Ensuring availability and accessibility of laws and policies:*** Availability denotes the attainability or obtainability of information and/or laws, while accessibility prescribes the ease in which information can be reached and/or acquired. Put into context, a law could be available online and printed in English but its accessibility could be hampered by low internet access, high illiteracy levels or difficulties in navigating online portals.
- ***Ensuring comprehensive disclosure:*** Adequate and comprehensive disclosure fosters effective public participation because citizens become aware of the dealings between the state and extractive companies.
- ***Developing and managing effective information management systems:*** This encourages 'openness' and increases confidence amongst stakeholders that the sector is being well managed through the applications of laws by strong public institutions in an apolitical environment.

The Extractives Baraza has commenced a series of reviews and analyses on transparency and accountability in Kenya's extractives sector. The analysis is guided by considerations set out in the Natural Resource

### PRIORITY ISSUES

- 1. Availability, Accessibility and Comprehensive Disclosure:*** knowing whether the legal framework and processes governing resource management is available to the public.
- 2. Information and Data Management:*** publicly reporting accurate and complete information that is able to be used and analysed.

Charter Benchmarking Framework. We have developed a transparency scorecard the ‘*Kenya Transparency Scorecard*’ to summarise our key findings.

## **THE KENYAN CONTEXT**

Kenya is regarded as a frontier country in so far as mining and petroleum activities are concerned. These industries are however ramping up and while they can generally be beneficial to the country, in many other countries, especially those with emerging economies, they have had bad economic, social and governance outcomes - a phenomenon known as the ‘resource curse’. It is therefore imperative that Kenya positions itself well to ensure the benefits accrued from the natural resources outweigh any costs on the economy, society and affected communities.

The best known pathway to achieving this is using the transparent collection and dissemination of information to hold people to account. In summary, transparency and accountability allows governments to identify gaps in policy sooner rather than later and also helps reveal potential corruption risks.

Kenya’s journey to achieve transparency and accountability in its natural resource sector was fast-tracked with the enactment of the Constitution on the 27<sup>th</sup> of August 2010. Among its key provisions is Article 35 (1) which guarantees every citizen the right to access information held by the State or another person if such information is required for the exercise or protection of a human right. Article 35 (3) further directs the state to “publish and publicize any important information affecting the nation”. With specific reference to natural resources, the Natural Resources (Classes of Transactions Subject to Ratification) Act as read with Article 71 of the Constitution subjects any transaction which involves the grant of a right to another person for the exploitation of any natural resource of Kenya to ratification by parliament. This thereby eliminates any privity of contracts presuppositions. However, it is important to note that the right to information is not absolute, it is qualified by specific limitations enshrined in both the Constitution (Article 24) and several statutes. For example, the Mining Act 2016 limits the right of access to information where disclosure is likely to: substantially prejudice the commercial interests, including intellectual property rights, of that entity or third party from whom information was obtained; and infringe professional confidentiality as recognized in law or by the rules of a registered association of a profession.

Another key legislation is the Access to Information Act No. 31 of 2016 which mandates public entities including State Owned Enterprises (SOE) in the extractives industry, to avail and publish information to persons who are likely to be affected by the extractives activities.

There are several other industry-related legislations which also provide for transparency, not least those in the home-country of the investor. Despite the existence of these fairly robust laws, it is important to interrogate the implementation and enforcement, by the state and its agencies.

### **PRIORITY ISSUE 1: Availability, Accessibility and Comprehensive Disclosure**

Kenya’s regulatory framework is quite robust in providing for the right to access information. Indeed, the government has been successful in publishing statutes, bills, regulations and other policy documents in both the petroleum and mining sectors. However, the government has so far, not disclosed any oil, gas or mineral agreement.

In addition to Kenya's Constitution and existing laws, that already have robust FOI provisions, public disclosure of contracts and financial arrangements can be enabled by freedom of information (FOI) laws and the key natural resource legislations and proposed laws – including the Mining Act 2016, the Petroleum (Exploration and Production) Act of 1986 and the Petroleum (Exploration, Development and Production) Bill 2015. They generally mandate the relevant SOE to publicise information that is of general interest to the public and specifically to those individuals that might be affected by a project.

Despite the existence in Kenya of a publicly available Model Production Sharing Agreement (only for the petroleum industry), signed contracts remain undisclosed. Perhaps this is pursuant to the *privity of contracts doctrine* as espoused by confidentiality clauses prevalent in most oil, gas and mining agreements.

This position needs thorough assessment against the constitutional and statutory provisions that appear to favour contract disclosure.

## **PRIORITY ISSUE 2: Information and Data Management**

Open data denotes data that is made freely available for usage by the civil society, citizens, government and others to monitor extractives activities and hold duty bearers to account. In the extractive industry context, key information about resource projects includes licenses, estimated production volumes, export volumes, contract terms, fiscal terms, negotiations and payments made in connection with resources, among other key factors. It should also cover the management of the extractive sector, the revenues accrued and their subsequent usage.

The information collected should be published in an open and machine-readable format and should be subject to an open data use license that enables unfettered analysis.

Where possible, data released by government should be disaggregated to the level of specific resource projects, location and product type, to allow for complete analysis. The government has to some extent made this possible by availing information in respective websites for different projects it takes part in. The national government recently launched an online portal highlighting the progress of infrastructure projects in the country. The government also maintains an open data portal but most of the information on the extractive industries is not published in part due to the following factors:

1. The fiscal terms of oil, gas and mining contracts are not disclosed and payments, royalties and fees collected by the government are not made public. This makes it difficult to desegregate revenues from the extractive industry.
2. Revenues from SOEs such as the National Oil Corporation of Kenya, Kenya Pipeline Company, Kenya Petroleum Refineries Limited are aggregated at the level of the supervising ministry, making it hard to ascertain how much loss or profit each SOE enterprise makes.

## THE KENYA TRANSPARENCY SCORECARD

The Extractives Baraza has developed a ‘Transparency Scorecard’ as a localized, easy to understand way to assess transparency in Kenya’s extractives sector. It is based on a version of the Natural Resource Charter Benchmarking Framework, developed by the Natural Resource Governance Institute (NRGI), to score each of the subcomponents of Precept 2.1 (“*Transparency: Does the government ensure that resource management is sufficiently transparent for all actors to effectively understand and scrutinize decision making and its implications?*”). Guided by the guidelines as set out under Precept 2.1 of the Benchmarking Framework, the Extractives Baraza scored five key aspects namely:

1. Access to the Legal Framework
2. Information Management
3. Open Data
4. Disclosure Rules
5. Comprehensive Disclosure.

The scorecard uses a ‘traffic light approach’ where different colour schemes denote the status of the item being scored against three key criteria – Existence, legal foundation and compliance.

COLOUR	IMPLICATION IN THE SCORECARD		
	EXISTENCE <i>(This will examine whether an assessed factor exists)</i>	LEGAL FOUNDATION <i>(This will examine whether the assessed factor is included in statute)</i>	COMPLIANCE <i>(This will test whether there exists implementation of the assessed factor)</i>
<b>RED (R)</b>	Non-existent	Non-existent	No compliance
<b>AMBER (A)</b>	Ambiguous	Weak Ambiguous	Partial
<b>GREEN (G)</b>	Existent Not ambiguous	Strong	Full

## KENYA TRANSPARENCY SCORE CARD

ASSESSED FACTOR	INDICATOR	SCORE			NOTES
		R	A	G	
1. Access to the Legal Framework	Availability			3	<ul style="list-style-type: none"> <li>Kenya has extractive-centric laws including the Mining Act 2016 and the Petroleum (Exploration and Production) Act 1986 (PEPA), last revised in 2012. There also exists the Petroleum (Exploration, Development and Production) Bill 2015, among others, which are available through the National Law Council Reporting (NCLR) website.</li> <li>Notices of impending laws, policies and regulations are published in the Kenya Gazette.</li> <li>There are various independent platforms from which legislation may be accessed e.g. the Extractives Baraza, the Extractives Hub.</li> <li>There exists a publicly available Model Production Sharing Agreement 2015 for the petroleum sector.</li> </ul>
	Accessibility		2		<ul style="list-style-type: none"> <li>Laws and regulations are available online and in English.</li> <li>They are available in a machine-readable format.</li> <li>They are available free of charge.</li> <li>Kenya's limited internet connectivity in marginalised areas hampers accessibility.</li> <li>Most, if not all laws, are written in English therefore posing barriers in terms of literacy levels and language barriers</li> </ul>
	Dissemination of Public Information	0			<ul style="list-style-type: none"> <li>Legally, Parliament is required to engage stakeholders through public participation exercises during development of laws and regulations/policies. In practice, the coordination of public participation is often found wanting particularly by members of civil society who decry short deadlines given for them to provide input and lack of accountability thereafter on whether their input shaped the eventual legislation.</li> </ul>

				<ul style="list-style-type: none"> <li>• There are no consistent efforts to sensitize communities or the general public on the provisions of laws once they have been passed. This task is often left to civil society, which results in patchy dissemination.</li> <li>• Even if most laws on natural resources can be found on the NCLR website, Kenya's limited internet connectivity in marginalised areas hampers dissemination.</li> <li>• Kenya's moderate to high illiteracy levels and language barriers act as impediments.</li> </ul>
	Contracts Between Gov't & Extractives Companies			<ul style="list-style-type: none"> <li>• The PEPA statute provides a Model Production Sharing Agreement whereas the Mining Act 2016 does not.</li> <li>• All mineral contracts- oil, gas and mining are not locally publicly available save for those filed according to the disclosure rules of the extractive company's home states. Any ancillary documents- annexes, schedules, documents incorporated by reference and amendments are also not disclosed.</li> </ul>
<b>2. Information Management</b>	Capacity of the National Statistics Office(s)	•		<ul style="list-style-type: none"> <li>• The Kenya National Bureau of Statistics (KNBS) admits to resource and capacity challenges in their Strategic plan. However, in 2015, the KNBS received a grant to develop their capacity, a positive step towards resolving any technical capacity drawbacks.</li> </ul>
	Existence of effective Inter-Governmental Information Systems			<ul style="list-style-type: none"> <li>• Kenya implements the IFMIS system and is committed to a fully integrated and sustainable financial system.</li> <li>• However, the IFMIS system only connects agencies within the national government and not the devolved system of government.</li> <li>• There are some technical and human capacity challenges in implementing IFMIS.</li> <li>• Kenya has experienced some IFMIS-related losses.</li> </ul>
	Existence of an EITI process.			<ul style="list-style-type: none"> <li>• Kenya is not an EITI Member</li> <li>• However, the proposed Petroleum (Exploration, Development and Production) Bill 2015 contains provisions that mirror elements of EITI.</li> </ul>
<b>3. Open Data</b>	Timeliness			<ul style="list-style-type: none"> <li>• Both the Ministry of Energy and Petroleum and the Ministry of Mining attempt to publish information on their websites but these are not updated regularly</li> <li>• Both Ministries also publish handbooks and other easy-to-read materials but distribution to the general population remains a challenge</li> </ul>

	Level of Desegregation		Yellow		<ul style="list-style-type: none"> <li>The websites of respective Ministries give snapshots/highlights of specific extractive projects.</li> </ul>
	Machine Readable Format			Green	<ul style="list-style-type: none"> <li>Most of the information is disclosed through online portals.</li> </ul>
	Non-discrimination		Yellow		<ul style="list-style-type: none"> <li>The information is available free of charge. However, it is not accessible to persons living with disabilities and those with no access to internet services.</li> </ul>
	Licensing			Green	<ul style="list-style-type: none"> <li>The available data is not restricted by the government.</li> </ul>
<b>4. Disclosure Rules</b>					
	Constitution		Yellow		<ul style="list-style-type: none"> <li>The right to access to information is guaranteed as fundamental right and freedom under Article 35, which also mandates the state and any other person to publish information (proactivity).</li> <li>Articles 24 &amp; 25 of the Constitution stipulate limitations to the right.</li> <li>It does not stipulate procedures of request and turn-around-time.</li> </ul>
	General Statute (Access to Information Act No.31 of 2016)			Green	<ul style="list-style-type: none"> <li>The right to access to information is affirmed as a fundamental right and freedom in the fully-fledged law.</li> <li>Mandates the state and any other person to publish information (proactivity).</li> <li>Stipulates limitations to the right to access information under section 9.</li> <li>Stipulates procedures of request and timelines upon when information should be published under sections 8-12.</li> </ul>
	Sector- specific Statutes (Petroleum (Exploration and Production) Act 1986 and Mining Act 2016)		Yellow		<ul style="list-style-type: none"> <li>Provide for disclosure but does not prescribe follow-up/accountability measures.</li> </ul>
<b>5. Comprehensive Disclosure</b>					
	Local Disclosure Mechanisms		Red		<ul style="list-style-type: none"> <li>None</li> </ul>
	International Disclosure Mechanisms		Red		<ul style="list-style-type: none"> <li>None</li> </ul>

## THE KENYA TRANSPARENCY SCORECARD

This document may be referenced as: Melba K. Wasunna *Kenya Transparency Scorecard* (Extractives Baraza, 2017, Issue 1)

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