

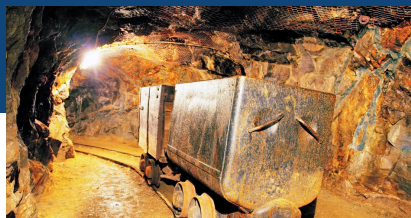
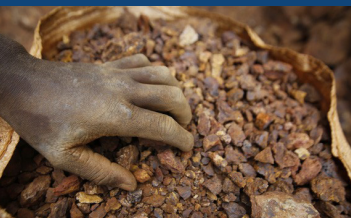


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CITIZEN'S ACCESS TO INFORMATION GUIDE



Introduction

ICJ Kenya is involved in the extractive industry to advocate for good governance of the natural resources through promotion of implementation of the access to information constitutional principles, law and policy within the context of extractive governance. Citizens' right to access information is vital for the promotion of transparency and accountability in extractive governance.

Transparency in the extractive sector involves the public disclosure of information about how mineral resources in a country are managed and about how revenues derived from the mineral resources are spent. Transparency and accountability also calls for effective disclosure of information in a timely and accurate manner.

Why access to information?

Access to Information is a fundamental right enshrined under Article 35 of the Constitution of Kenya, 2010. Generally, it is important to enable the citizens to make informed decisions, to participate in the decision-making processes, and to hold their leaders to account. When it comes to the extractives industry, access to information is necessary to enhance transparency and accountability, public participation, and good governance in the management of natural resources within the community. Public bodies hold information not for themselves but as custodians of the public good and everyone has a right to access this information.¹



70% of residents in **Kwale** were not involved in decision making on the development projects undertaken by Base Titanium. *Report on Household Survey by Hakijamii carried out between 22-26th May 2017 in Bwiti and Nguluku.*

Allowing people to seek and receive public documents serves as a critical tool for fighting corruption, enabling citizens to more fully participate in public life, making governments more efficient, encouraging investment, and helping persons exercise their fundamental human rights.

Article 69 of the Constitution: In respect to the environment, the State shall ensure sustainable exploitation of natural resources and ensure equitable benefit sharing of the accruing benefits; and encourage public participation.

¹ Resolution on the Adoption of the Declaration of Principles on Freedom of Expression in Africa, 32nd Ordinary Session of the African Commission on Human and Peoples' Rights, 17-23 October 2002, Banjul, the Gambia. Available at <http://www.achpr.org/sessions/32nd/resolutions/62/>

Consequences to Lack of Access to Information?

Failure to promote access to information prevents citizens from making informed decisions or even hold the various actors in the extractive industry accountable. This then creates an air of mistrust between the citizens (who own the resources) and the contractors.

This consequence has already been witnessed in Kenya where there was an impasse in Turkana County regarding the Early Oil Pilot Scheme (EOPS). The citizens of Turkana county contested the government's decision to truck the oil to Mombasa claiming that they had not been adequately informed of the development.

Due to the nascency of the extractives industry, access to information provisions as relates to the sector are still green on the matter. Information is available but, on an ad-hoc and uncoordinated manner. This then raises tension between the producers and the community living around resource areas.

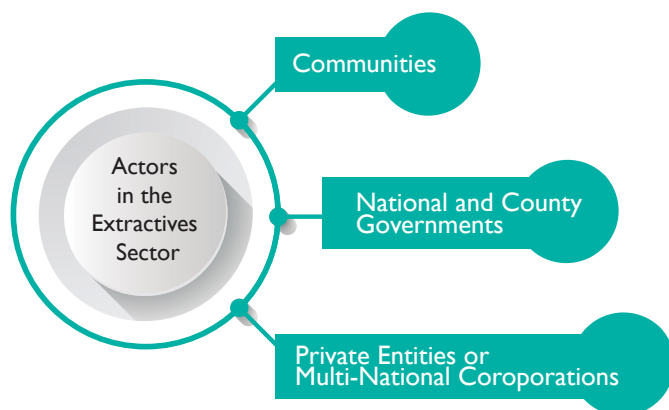
Role of Actors in the Extractives Industry

To apportion the duty to disclose information, it is imperative for practitioners to appreciate the various roles of actors in the sector.

Who is involved in the extractives?

The actors in the extractives industry include;

- The communities where the extractives are derived;
- The National Government, as the custodians of the resources;
- The County Government, where these resources are domiciled; and
- The private entities or multinational corporations dealing in extractives.



I. The Community

The community plays a critical role in the extractive industry. The community issues the Social License to Operate, a necessary prerequisite to smooth operations. Generally, citizens stand as the beneficiaries in the extractive industry through revenues, payments, windfall taxes and social investments conducted by the Operators.

The Mining Act now makes it mandatory for an operator seeking to obtain a Large-Scale Mining License to enter a Community Development Agreement with the community thereby stipulating, in advance, the projects it intends to invest on behalf of the community.

Case Example

Niger Delta

The Niger Delta in Nigeria is an example of how, failure to integrate access to information as a component of transparency and accountability in the EI leads to the phenomenon known as resource-curse, environmental pollution and degradation, inflation leading to high costs of goods and services, and corruption.

Drilling past the Resource Curse pg. 115



“The presumption of disclosure also means that agencies should take affirmative steps to make information public. They should not wait for specific requests from the public. All agencies should use modern technology to inform citizens about what is known and done by their Government. Disclosure should be timely.”

Barrack Obama, 21st January, 2018.

Host communities have suffered the burdens of mineral extraction, without enjoying commensurate benefits from the profits generated by the extractives sector due to lack of sufficient information on benefit sharing.

81%

From a household survey of local communities in Bwiti ,
eighty one percent of the respondents interviewed stated that they have not seen any benefits from the mining operation.



Base Titanium has become the **seventh largest** producer of ilmenite and third largest producer of rutile in the world with the operationalisation of the mines in **Kwale**.

2. Government

2.1 County Governments

These are the decentralized executive entities at the devolved level for each county within Kenya. The county governments directly control the regions where extractive sector activities are being undertaken. They also manage the funds from extractive activities shared from the national government for both the county governments and community allocation. County assemblies play a role in passing legislation as well as oversight on the use of funds.²

Moreover, by virtue of environment management being a devolved function, the county governments have a huge say in the environmental and social impact assessments carried out before exploration and development activities.

Lastly, towards the attainment of a Social License, the county government plays a critical role in mitigating any conflicts between the community and the operators.

2.2. National Government

The State has the responsibility to ensure sustainable exploitation, utilization, management and conservation of the environment of natural resources and ensure equitable sharing of the accruing benefits.³ Secondly, the 2010 Constitution promotes proactive disclosure and bestows upon the State a duty to publish and publicize all important information affecting the nation.⁴

It is also a fundamental duty of the State and every State organ to observe, respect, protect, promote and fulfil the rights and fundamental freedoms in the Bill of Rights thereby mandating operators to operate within the tenets of human rights adherence.⁵

The national government performs its role through its three arm as follows;

3. Law Makers:

Parliament (as a whole) has the authority to ratify agreements relating to natural resources and to develop legislation for the same. Other roles that parliament plays include;

- 1.The Decision to Extract** – Determining whether the benefits of extraction outweigh the costs using a number of key considerations including environmental, social and economic impact.⁶
- 2.Negotiating the Best Deal** – The mechanism for awarding exploration & exploitation licenses and contracts, emphasizing transparency and accountability throughout the entire process.⁷
- 3.Developing Resources Properly** – Making sure that Governments and extractives companies comply with obligations and regulations including the maximization of local content across the board.⁸
- 4.Collecting and Maximizing Revenues** – Ensuring a transparent and accountable system of revenue collection that promotes the public disclosure of revenues paid by companies and revenues collected by Governments.⁹
- 5. Managing Revenues towards Sustainable Development** – Spending resource revenue in line with development agendas.¹⁰

²Extractives Baraza, "Key institutions in Kenya's Extractive Industry," Available at <http://extractives-baraza.com/resources/overview-of-kenyas-extractive-industry/key-institutions>

³Article 69 (1) of the Constitution of Kenya, 2010

⁴Article 35(2), Constitution of Kenya

⁵Article 21(1) of the Constitution of Kenya, 2010.

⁶ Extractives Baraza, "Governing the Extractives Sector in Kenya: Understanding the Role of Parliament: A Brief Guide" available at <http://extractives-baraza.com/assets/content/PDF/EB%20documents/Governing-the-Extractives-Sector-in-Kenya-Understanding-the-Role-of-Parliament.pdf>

⁷ Ibid

⁸ Ibid

⁹ Ibid

¹⁰ Supra, note 7.

3.1. Executive

The executive implements laws on extractives and formulate policies in the extractives industry. Access to timely and correct information can empower the citizens with the knowledge they need to scrutinize the policies that affect their human rights and the leverage to hold the duty bearers to account. The Ministry of Mining as a public body is mandated to make public information such as the production of sharing agreements.

3.2 Judiciary

The judiciary plays a key role in the administration of justice. The constitution guarantees access to justice. The Judiciary is tasked with handling any disputes that may emanate from the extractive sector whether they relate to land rights, mineral rights or any other issues from the sector. This role is only limited where agreements expressly limit dispute resolution to arbitration as is common in many mineral agreements.¹

4. Multinational Corporations

The private companies fall under the ambit of private bodies as defined under the Access to Information Act.¹² A private body includes a 'private entity or a non-state actor that has exclusive contracts to exploit natural resources' or 'private entity or non-state actor that is in possession of information which is of significant public interest due to its relation to the protection of human rights, environment or public safety or to exposure of corruption or illegal actions.

What information can you seek?

The foundation of the right to access to information is disclosure. There are however varying interpretations as to full and/or partial disclosure. Operators rely on carefully crafted confidentiality clauses to restrict access to information. Ordinarily, information is sought on;

- Contracts and other agreements as beneficiaries, including the community benefits sharing agreements;
- The environmental impact assessment;
- Mineral agreements; all mineral agreements entered into in accordance with the Mining Act are to be public and be made accessible to the public.

Are there timeframes for accessing information?

Public officers or private bodies are mandated to decide on the citizen's application to access information within twenty-one (21) days.¹³ However, they may extend their decision-making process by fourteen (14) days where the request is for large information, or processing the information within twenty-one (21) days would interfere with operations of the information holder.¹⁴

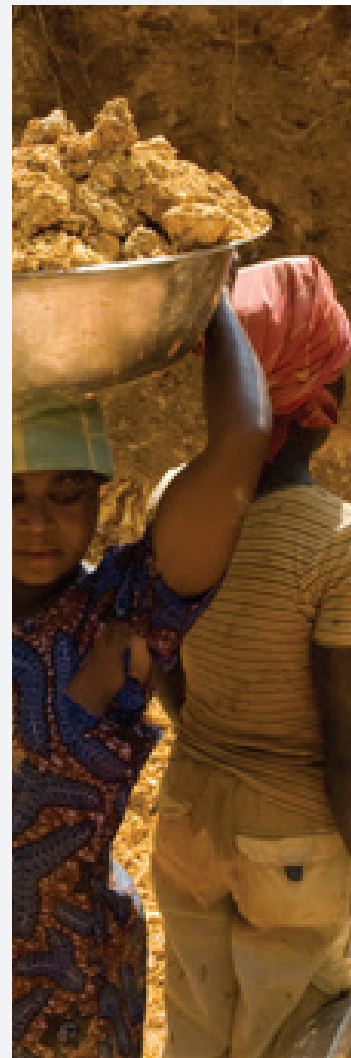
What feedback should you expect?

Where the decision to provide access to information has been made, the communication of the decision should be done in writing to the applicant within fifteen (15) days of receiving the application. The Written communication contains;

1. An advise whether the information is in edited form or not;
2. Payable fees for access and the calculations on how the fees was arrived at;
3. Method of payment of the fees;
4. Proposed means of access to information once the fees has been paid; and
5. The applicants right of appeal in respect of the payable fees.

Once the applicant has paid fees as advised, the public officer or public body is to provide the information or permit for inspection to the applicant within two (2) working days.

Right to information, freedom of information and right to access information are used interchangeably but refer to the same issue.



¹¹ Supra, note 4.

¹² Section 2 of the Access to Information Act, No. 31 of 2016.

¹³ Section 9(1), Access to Information Act.

¹⁴ Section 9(3), Access to Information Act.

What are the available remedies?

1. Public Interest Litigation

Every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened.

The Constitution guarantees the right to a clean and healthy environment.¹⁵ If a person alleges that a right to a clean and healthy environment is being or is likely to be, denied, violated, infringed or threatened, the person may apply to a court for redress.

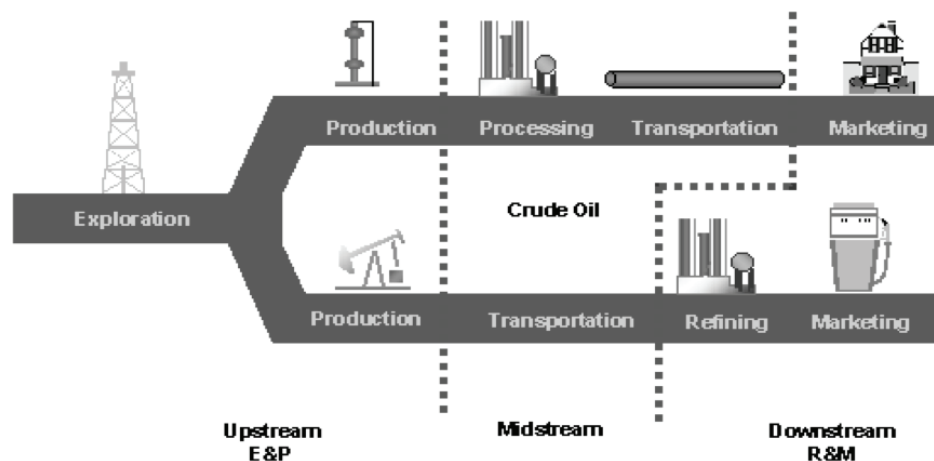
2. Compensation

Monetary compensation can be sought where a right has been infringed or where the citizens within the extractives regions have been affected by the extractive activities.

Article 42 of the Constitution: Every person has the right to a clean and healthy environment, which includes the right--

- (a) to have the environment protected for the benefit of present and future generations through legislative and other measures, particularly those contemplated in Article 69; and
- (b) to have obligations relating to the environment fulfilled under Article 70.

The Oil and Gas Value Chain



- a. **Upstream Petroleum Operations** generally refers to the exploration and production aspects of the petroleum business and pertains to searching for potential underground or underwater crude oil and natural gas fields, drilling exploratory wells, and subsequently drilling and operating the wells that recover and bring the crude oil or raw natural gas to the surface.
- b. **Midstream petroleum operations** means all of or any of the operations related to petroleum transportation, storage, refining operations, or natural gas processing operations that are related to multiple development areas including operations for the liquefaction of natural gas.
- c. **Downstream petroleum operations** means all or any of the operations related to distribution of petroleum to residential, industrial, power generation and other end users.



¹⁵ Article 42, the Constitution of Kenya, 2010

Access to Information Gaps in the Oil and Gas Value Chain

Kenya's oil and gas governance framework is anchored on the 1986 Petroleum (Exploration and Production) Act, Cap 308. Suffice to say that at enactment, having not been an oil producer then, the Act is laden with governance gaps- most of which relate to access to information.

The table below summarises the various gaps as relates to access to information and inferably, lacunae in governance of the sector.

UPSTREAM STAGE	STAGES OF THE VALUE CHAIN	ACCESS TO INFORMATION GAPS
Constitution of Blocks	Mapping of Blocks	Field Data and Processed Data is not publicly available.
	Acquisition (Licensing and Award) of blocks	Direct Negotiations: The government employs direct negotiations with a potential investor and the procedure and outcome(s) and are not disclosed to the public.
	Financial and Technical Evaluation of Bidders	The current legislation (Petroleum Exploration and Production Act) is not clear on how this is conducted and the line ministry (Ministry of Petroleum & Mining) hasn't given clear guidelines and parameters.
	Assignments and Transfers	Since this is left at the behest of the Cabinet Secretary, the outcome is never communicated publicly.
	Revocation & Relinquishment	The cabinet secretary has unfettered discretion hence curtailing transparency and accountability.
Contracts	Production Sharing Agreement (PSA)	The Agreement(s) have not been disclosed to the Public.
		The Model production sharing agreement annexed to the Petroleum law does not disclose the fiscal terms of the contracts.
	International Oil Company- Subcontractor Contracts	Contracts between the main contractor and the sub-contractor are not disclosed. The fiscal terms are also not disclosed in order to assess any revenues and/or payments.
	Parliament involvement	The constitution mandates the ratification by Parliament of these contracts and yet none has gone through this process.
Petroleum Operations	Petroleum Operations	Due to a clash of mandates between the various institutions involved, it is difficult to hold anyone to account with regards to access of information.
	Audit and Cost Recovery (C.R)	Since this is tied up to the fiscal terms of the Production Sharing Agreement, the non-disclosure does not enable access to information on this.
		The government has not yet established the institutional set-up to oversee cost recovery and hence it is practically impossible to hold any office to account regarding this.
Financial Benefits	Revenues and Payments	Besides revenues that will come in after first oil, the government receives payments related to the oil exploration. They include- surface fees, training fees and signature bonuses. These however have only benefited the national government to the exclusion of the county government and communities.
		All payments received are bundled-up in an omnibus payment and hence no segregation. This is a significant accountability gap.
		This is left at the behest of the cabinet secretary as the funds are deposited in the Ministry's training Fees Account. The utilization of these payments isn't monitored.



The Institutional Framework; What and Whom to Query

It is important to first understand the extractives value chain in terms of what information needs to be sought and from which institution. As stated earlier, the sheer nascency of the industry has hampered advocacy groups (including county governments where these resources are domiciled), from asking the right questions.

The table below demystifies;

- a) the extractives value chain;
- b) points to the necessary information that could be sought across the value chain; and
- c) points out the relevant institutions that could harbour the information sought.

UPSTREAM STAGE	STAGES OF THE VALUE CHAIN	RELEVANT INFORMATION	INSTITUTION(S)	JUSTIFICATION
Constitution of Blocks	Mapping of Blocks	Size and acreage of the Blocks (Field Data)	-NOCK - Directorate of Geological Surveys- MoM&P	-The MoM&P has delegated this role to NOCK. NOCK is the repository of all field and processed data.
		Seismic maps (Processed Data)	-NOCK - Directorate of Geological Surveys- MoM&P	- NOCK as the repository of this information highly restricts access and information is available at a fee. -S.7(1) Cap 308- ...the Minister may, by notice in the Gazette, divide Kenya and the continental shelf into numbered areas....
	Acquisition (Licensing and Award) of blocks	Procedure to Acquire the Blocks	MoM&P	- Kenya has never conducted bid rounds and awards blocks through open door negotiations.
	Evaluation of Bids	Technical Evaluation Criteria	-NAFFAC -Cabinet Secretary- MoM&P	- The parameters are therefore set by the Cabinet Secretary- MoM&P.
		Financial Evaluation Criteria	-NAFFAC -Cabinet Secretary- MoM&P	-The National Fossil Fuels Advisory Committee is mandated to negotiate with investors on the licensing of petroleum blocks for exploration and production. - S.5(4) Cap 308- The powers of the Minister under this Act to sign or revoke a petroleum agreement shall be exercised by him or a person specially authorized by him..... -NAFFAC has representation from NOCK, the Office of the Attorney General, MoM&P, NEMA, KRA, Commissioner for Mines and Geology, The Petroleum Institute of East Africa, Treasury, University of Nairobi- (Geology department, Department of Public Law and the Institute of development Studies)

UPSTREAM STAGE	STAGES OF THE VALUE CHAIN	RELEVANT INFORMATION	INSTITUTION(S)	JUSTIFICATION
		Environmental and Social Impact Assessment	-NEMA. -Contractor. -County Government.	-NEMA is tasked pursuant to S.57A of the EMCA to ensure that an integrated social and environmental impact assessment is conducted. - The information can also be acquired from the contractor as S.57A mandates the contractor to carry out the assessments and present them before NEMA for verification and authenticity.
		Acquisition of <i>The Social License to Operate</i>	-Contractor - County Government	- Noting that there is no formal requirement an investor needs to demonstrate formal engagements with the communities involved. This can be done through adducing corporate social investment plans and/or documented engagements with the community. - This can however be justified by the submission of the Integrated Environmental and Social Impact Assessment.
	Assignments and Transfers	Farm Outs (Adherence to contractual obligations)	-MoM&P - Office of the Attorney General -NAFFAC -NEMA	- Guided by Cap 308 this is left at the behest of the Cabinet Secretary- MoM&P. -A Farm-in can be treated as the acquisition of a new license by the <i>farmee</i> and hence subjected to the process of license acquisition. - NEMA has to ensure that the <i>farmoo</i> has met their environmental and social obligations pursuant to the existing license. Alternatively, these responsibilities could be inherited by the <i>farmee</i> . - The <i>farmee</i> has to ensure the acquisition of the social license to operate. - By virtue of the environment being a devolved function pursuant to Schedule IV of the Constitution, the County Government has to be involved.
		Farm-Ins (Technical and Financial Qualifications)	-MoM&P - Office of the Attorney General -NAFFAC	
		Acquisition of <i>The Social License to Operate</i>	- County Government - Contractor	
		Environmental and Social Impact Assessment	-NEMA - County Government - Contractor	

UPSTREAM STAGE	STAGES OF THE VALUE CHAIN	RELEVANT INFORMATION	INSTITUTION(S)	JUSTIFICATION
	Relinquishment	Adherence to contractual obligations governing relinquishment	-Cabinet Secretary-MoM&P - Office of the Attorney General	- It is important to assess if the contractor has met its end contractually pursuant to the existing license i.e. through the payment of the requisite fees.
		Environmental protection concerns	-NEMA - County Government	- The contractor needs to ascertain decommissioning of <i>wild cats</i> . - S.7(3)- The Minister may require a contractor to relinquish portions of a block to which a petroleum agreement relates in the manner specified in the agreement.
	Abandonment & Decommissioning	Adherence to contractual obligations governing abandonment and decommissioning.	-Cabinet Secretary-MoM&P -Office of the Attorney General	- The Decommissioning Plan forms part of the development plan and includes a schedule for the amortization of costs and cost recovery of costs, which are estimated to be incurred when the development is decommissioned.
		Environmental protection concerns	-NEMA - County Government	- The Decommissioning Plan includes heavy environmental law implications, and this has to be checked as well. - The County government has a major role to play in ensuring environmental compliance.
Contracts	Production Sharing Agreement (PSA)	Non-fiscal terms of the contract	- MoM&P - Contractor	-Anchored by the constitution, the PSA ought to be disclosed to the public- being an agreement that manages natural resources. -As a custodian of the country's revenues, the National Treasury is also privy to his information. - The contractor is also privy to the contract and has access to the terms. -S.8 as read with S.5(1) Cap 308- The Government shall enter into petroleum agreements only with contractors who have the financial ability, technical competence and professional skills necessary to fulfil the obligations under the petroleum agreement.
		Fiscal Terms of the Contract.	-Cabinet Secretary-MoM&P - Contractor -National Treasury	
		Publication of the contract.	-Cabinet Secretary-MoM&P - Contractor -National Treasury	

UPSTREAM STAGE	STAGES OF THE VALUE CHAIN	RELEVANT INFORMATION	INSTITUTION(S)	JUSTIFICATION
	IOC-Subcontractor Contracts	Non-fiscal terms of the contract.	-Cabinet Secretary-MoM&P - Contractor -National Treasury	<ul style="list-style-type: none"> - The terms of these contracts form a significant quotient of the fiscal terms of the PSA. Implicit therefore that information can be derived by querying the contractor on what fiscal terms agreed between them (main contractor) and the sub-contractors. - These contracts are also revealed during the calculation and auditing of cost recovery.
		Fiscal Terms of the Contract.	-Cabinet Secretary-MoM&P - Contractor -National Treasury	
		Publication of the contracts.	-Cabinet Secretary-MoM&P - Contractor -National Treasury	
	Parliament involvement	Ratification of the Production Sharing Agreement	- The National Assembly	-Article 71 subjects agreements relating to natural resources to ratification by parliament.
Petroleum Operations	Petroleum Operations	Conversion of the Carried Interest to a full working interest.	-NOCK - Contractor	<ul style="list-style-type: none"> - Contractors have ordinarily briefed the public on the progress through their various communication mediums. - NOCK, being an agent of the government (and by extension the people) has a fiduciary duty to communicate progress relating to the exploitation of oil and gas. - S.5(3)(c)- The Minister shall supervise petroleum operations carried out under a petroleum agreement
		Paying for the Participating Interest.	- National Treasury - Office of the Attorney General	<ul style="list-style-type: none"> - A participating interest is acquired through various procedures that involve the buying in a stake of the exploration development. This appropriation is ordinarily conducted through appropriation by the National Treasury. - NOCK, as the government representative has a duty to update the government on the various activities during petroleum operations.
		Petroleum operations: Participating Interest	- NOCK	

The Institutional Framework; What and Whom to Query

UPSTREAM STAGE	STAGES OF THE VALUE CHAIN	RELEVANT INFORMATION	INSTITUTION(S)	JUSTIFICATION
	Joint Venture Operations	Disclosure of the JOA.	- NOCK - Cabinet Secretary- MoM&P - Contractors - National Assembly	- In the case of a J.V, the government will ordinarily be represented by NOCK. NOCK then holds a fiduciary duty to update the government on the petroleum operations and the terms of the Joint venture Agreement. - Again, pursuant to Article 71, the J.V Agreement is subject to ratification by Parliament.
	Audit and Cost Recovery (C.R)	Auditing of the Cost Recovery.	- KRA - Office of the Auditor General. - Commission on Revenue Allocation. - Contractor	- This is jointly done by the contractor and the various government bodies tasked with auditing national revenue. - Each institution holds a sacrosanct mandate as relates to the auditing. - The Contractor must cooperate thereby facilitating smooth audits.
		External Audits of Cost Recovery.	- NOCK - Contractor	- Noting that Kenya lacks the capacity to undertake this, a consultant can be hired to undertake the same and develop in-house capacity.
Financial Benefits	Revenues and Payments	Payments: Training Fees, Surface Fees and Signature Bonuses	- Cabinet Secretary MoM&P	- The Ministry keeps the Training Fees Account where payments are remitted. - The Cabinet Secretary has the prerogative of utilising the accrued funds. He should therefore account for the utilization.
		Revenues: cost oil and profit oil	- National Treasury	- Tasked with the collection of national revenues, the treasury should also account for receipt and spending of the same.
		Taxes ancillary to the petroleum revenues.	- KRA	- KRA should receive and account for any windfall taxes affiliated to the oil and gas activities.

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