



Photo: Kieran Doherty

# TESTING COMMUNITY CONSENT

## Tullow Oil project in Kenya

**This case study assesses the extent of Tullow Oil's compliance with the principle of Free, Prior and Informed Consent (FPIC) in Turkana County, Kenya. It examines the company's engagement in selected communities and finds that, while community engagement processes have improved in important ways, it has yet to achieve FPIC. The study provides recommendations that contribute to the evidence base for FPIC practice beyond this project, in order to improve FPIC implementation across the oil and gas industry.**

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# SUMMARY

Oil discoveries in the South Lokichar Basin in Turkana County have brought Kenya into the global spotlight of emerging oil producers. At the same time, questions remain about what impact these discoveries will have on the future of the historically marginalized county and the traditional pastoralist communities who live there. A remote and arid county in the north of the country, Turkana has one of the highest poverty rates in Kenya (94.3 percent) and very low levels of education (82 percent of its residents have no formal education).<sup>1</sup> Turkana society is highly patriarchal, especially in traditional pastoralist families and communities.

Tullow Oil is the operating partner of the oil fields in the South Lokichar Basin, as part of a joint venture with Africa Oil. As it receives International Finance Corporation (IFC) financing through Africa Oil, Tullow Oil is obligated to comply with the IFC Performance Standards, including the requirement to ensure that companies have obtained the Free, Prior and Informed Consent (FPIC) of communities of indigenous peoples affected by their operations. Tullow Oil's own Human Rights Policy (2016) stipulates requirements for obtaining 'broad community support' and 'the informed agreement' of communities affected by projects. Oxfam, in line with global thinking, describes FPIC as 'the principle that indigenous peoples and local communities must be adequately informed about projects in a timely manner and given the opportunity to approve (or reject) a project before operations begin. This includes participation in setting the terms and conditions that address the economic, social, and environmental impacts of all phases of extraction and post-extraction operations.'<sup>2</sup> Further, communities should have the right to continue to provide informed consent, or alternatively to withdraw consent, during the implementation of the project, in line with agreed procedures. FPIC is global best practice in ensuring that communities understand and consent to investments; in the case under review, it was also required by IFC as a condition of its loan.

However, the social and economic realities of Turkana County present serious challenges for FPIC implementation. In any situation involving consultations and negotiations with a major company, a large and diverse cross-section of the community is more likely to benefit if a range of its members are confident in their rights to engage, are willing and able to participate, are widely informed and are able to access additional information when needed. Rural Turkana County does not conform to this ideal situation. Concerted efforts and ongoing improvements are needed from multiple actors, including Tullow Oil, to enable the realization of FPIC in Turkana. Given the highly sensitive and challenging context, adherence to the principles of FPIC will be of paramount importance to the protection and respect of the rights of affected community members, as well as to the success of the project.

# THE PURPOSE OF THIS STUDY

This case study assesses the application of FPIC by Tullow Oil in Turkana County, Kenya, with reference to Oxfam's understanding of FPIC, to IFC requirements for FPIC and to Tullow's own Human Rights Policy. The research examines perceptions of consultation processes and agreements related to Tullow Oil's requests in 2016 for two areas of land of four hectares each, to be used as sites for well pads new appraisal wells in Ngamia and Amosing oil fields. (Well pads are areas that have been cleared of trees and other obstacles, and built up to support a drilling rig).

The research was undertaken in February and March 2017, and focused on the affected communities of Nakukulas and Lokicheda, along with the neighbouring pastoralist settlements of Lotimaan, Lokisim Ekori and Kodekode, all of which are located southeast of Lokichar in Turkana East sub-county.

In August 2015 IFC provided an investment in the form of an equity subscription agreement of \$50m to Africa Oil Corporation for exploration and appraisal in a number of oil blocks in the South Lokichar Basin in Turkana County. Based on a review by IFC, Africa Oil has a contractual obligation to ensure that its management systems and programmes comply with all eight of IFC's Performance Standards. These standards provide requirements and guidance on identifying and reducing social and environmental risks and impacts by companies in which IFC invests; they include IFC Performance Standard 7, which requires FPIC by affected communities.<sup>3</sup>

Although the immediate contractual obligations lie with Africa Oil, Tullow Oil has accepted that its role as 50 percent owner as well as operating partner for the joint venture partnership means that it must ensure that the day-to-day activities of the overall project are in compliance with IFC requirements.<sup>4</sup> Tullow Oil's Human Rights Policy<sup>5</sup> commits the company to obtain 'broad, community support' and 'informed agreement', but provides no guidance on implementation. This research therefore uses the IFC Performance Standards as the main standards against which Tullow Oil's compliance with FPIC is assessed.

## METHODOLOGY

This research used a qualitative case study approach to document a range of perceptions about the first year of Tullow Oil's implementation of FPIC. It involved a literature review, interviews with key informants and community interviews in the affected communities, followed by validation workshops in Lodwar and Nairobi. Interviews with nearly 200 different individuals involved community members and leaders, Tullow Oil staff, civil society organizations (CSOs) and county and national government officials. The analysis focuses on identifying key commonalities and differences in perspectives, and on differences in the presentation of facts. This qualitative case study methodology did not use a representative sample, and therefore did not record the exact number of specific responses to each question. That said, certain messages were repeated across interviews, so the report notes at times that 'a majority of respondents said', or 'most people acknowledged'.

# FINDINGS

All but one of nearly 200 respondents said that they felt Tullow's community engagement process had improved in important ways since 2015, and agreed that the process continues to evolve. Despite improvements in their approach, however, the evidence suggests that Tullow Oil and Africa Oil are not yet achieving their FPIC obligations in the communities around Nakukulas and Lokicheda. Tullow can implement some steps relatively quickly that should improve the process, which can also be applied in communities in neighbouring oil fields where Tullow has or will start new FPIC processes in coming months and years.

There are quite different understandings by respondents on what was actually agreed in 2016, compounded by a serious lack of access by community members to the documentation of the consultations, negotiations and agreements – a core requirement of IFC's Performance Standard 7 and a central tenet of the principle of FPIC. Tullow Oil insists that it has extensive documentation, both on paper and on video, but it did not make this available for review. The communities themselves and county government have no documentation of the processes of the 2016 consultations. Copies of the final agreements are apparently held by just two community leaders; the Area Chief informed the researchers that he was unable to locate his copy of the agreement, and the holder of the other was travelling and not available at the time of this study. Many community members were not aware of the existence or contents of the documents, and residents expressed differing understandings of what was agreed with Tullow Oil. At the same time, no one in the communities expressed a desire for the documentation to be held confidentially.

**All respondents felt that Tullow's community engagement process had improved in important ways since FPIC was triggered in August 2015, and that it continues to evolve. However, there is insufficient evidence of compliance with FPIC requirements.**

Without proper, accessible documentation, it is impossible to confirm what information the communities were given during consultations about potential positive and negative impacts of Tullow Oil's proposed use of land, or to verify the contents of the agreements themselves. Further, there are gaps in the company's efforts to maintain consent following the agreements, most notably a lack of systematic formal discussions with community representatives involving monitoring of progress towards commitments.

This lack of widely known, accessible documentation runs counter to the strong emphasis on transparency and accountability throughout IFC Performance Standard 7, as well as in the IFC Access to Information Policy. For example, the latter makes an explicit commitment to encouraging IFC's clients to be transparent about their business, including making available project-level information to 'stakeholders (including Affected Communities) and other interested members of the public, to understand better, and to engage in informed discussion', unless there is 'a compelling reason not to disclose such information'.<sup>6</sup> Evidence that project-level information is not sufficiently available to community members, especially to women, is revealed by their own statements that they are unaware of basic documentation and by their different opinions on the contents of agreements.

Further, while women and youth in the larger settlements of Nakukulas and Lokicheda said that they were able to participate and to voice their issues during

the consultations, women in the smaller pastoralist villages of Lotimaan, Lokisim Ekori and Kodekode felt differently. They noted that traditional practices made it harder for them to know about, participate in or influence consultations. This presents a gap in ensuring the participation of vulnerable groups, including women, as required by IFC Performance Standard 7 and Tullow's Human Rights Policy.

The consultations to date have emphasized the short-term implications of Tullow's request for access to land to be used for well pads for two new wells to appraise the extent and size of already discovered oil fields. They have not placed this sufficiently within the context of how this phase of drilling fits within what is potentially a multi-decade oil production operation or the various implications of 'go – no go' decisions. Having a clear understanding of the full range of potential risks and impacts across the project life cycle is a necessary prerequisite for people to be able to make informed decisions.

In terms of positive initiatives, Tullow Oil is helping the communities to form well pad committees that will manage the funds that the company will pay as compensation for land access, and which will oversee use of this income for projects or investments identified by the communities themselves. This is a positive step, but it needs greater attention and fine-tuning. These committees are dominated by relatively well-off, influential men. This runs the risk of male-biased elite capture and the marginalization of women's voices, combined with personal conflicts of interest. The committee members have little experience in managing such investments.

While Tullow Oil can and should continue to improve its efforts to meet FPIC standards, there are important issues that lie beyond the control of the company. National and county governments have obligations to support the development of local communities regardless of external investments, especially in light of the social, economic and political marginalization of rural Turkana County. Community members uniformly called for the Turkana County government to be much more actively involved in the process of consultations, agreements and monitoring. More generally, in this context of social and political marginalization, there is inadequate engagement by government and by CSOs in helping to build the capacity of the leaders and members of the communities interviewed.

CSOs have started to address some important issues. However, most of them lack experience with FPIC, as well as the reliable, long-term funding needed to develop their own capacity and skills and to support affected communities.

Community leaders and members generally have limited understanding of the oil industry and little experience in negotiating long-term arrangements with international investors, and are not clear on how to maintain active, informed roles in the monitoring of any agreements. Further, although there are only about 30 communities affected by oil prospecting in the tight geography of the oil fields (comprising nine oil blocks within a 30x45km area around Lokichar town), to date the communities themselves have had limited opportunities to build a common approach, to share experiences or to develop a common voice in engaging with external investors.

# Recommendations

The recommendations of this report propose actions for various institutions, including Tullow Oil, Africa Oil, county and national governments, IFC, CSOs and the affected communities themselves.

## **Tullow Oil and Africa Oil: The companies should address a number of issues to improve their efforts to achieve FPIC, some of which can be done relatively simply, quickly and inexpensively:**

- Facilitate efforts by communities and county government to document consultation processes and agreements in appropriate languages and to ensure that this is readily accessible by all community members.
- Broaden the short-term approach to ensure that FPIC consultations clearly explain immediate issues (such as a request for access to a particular piece of land for a new well) in the context of the potential positive and negative impacts of a multi-decade project.
- Maintain and deepen informed consent through formal, routine monthly monitoring meetings with community leaders, and at least quarterly with the broader community. Such meetings should be clearly documented and such documentation should be made available to community members and government representatives. This would build upon the already frequent presence in the communities of the company's Community Liason Officers. This would ensure that communities are in a position to continue to provide informed consent, or alternatively to withdraw consent in line with agreed procedures. This would also enable county and national governments to be more fully aware of the situation.
- Follow through on all outstanding commitments, whether these are based on negotiations over land access or are part of the company's corporate social responsibility efforts. The widespread perception that Tullow does not keep its promises – and the mistrust that stems from this – undermines any new efforts to develop what could be a truly FPIC-compliant process.
- Support well pad committee members to broaden their skills in areas such as ensuring inclusive representation of women and pastoralists, understanding the oil industry and the legal framework, negotiating, planning, managing documentation and ensuring transparency and accountability in their representation of the broader community.
- Ensure that ongoing community consultation processes effectively include and enable the participation of vulnerable groups, particularly women and those from pastorlist communities.

## **IFC: IFC can strengthen and ensure adequate implementation of its requirements in several ways:**

- Bring in third party, independent specialists, such as legal advisors, to support communities in understanding issues and monitoring FPIC.
- Require its client companies to ensure that communities have the capacity to compile, store and maintain agreements and other key documents in ways that are accessible and useful for all community members, including women and youth.
- Require routine formal monitoring with active involvement of community leaders and other community members.
- Ensure that independent monitoring work includes more active engagement with diverse segments of affected communities.

- Enforce its contract disclosure requirement to help ensure that communities have adequate information regarding the fiscal terms of agreements reached between companies and governments.

**Communities: The communities themselves can take important steps:**

- If resources and time allow, the communities affected by the oil industry around Lokichar could join forces in establishing routine communications and a common learning platform, enabling them to share experiences and ideas, to seek out advice from independent experts and to serve as a united front, as they face common issues.
- Community leaders need to ensure that diverse members of the population, including men and women, youth and elders and residents of settlements as well as pastoralist families, are able to participate and influence decisions. They should ensure that marginalized groups, such as women and young people in outlying pastoralist villages, are represented on well pad committees and in all key discussions.
- Well pad committees must provide regular and clear communication with the broader communities, including pastoralist communities and settlements, of proceedings and discussions held within the committees and with the government and/or companies.

**Government: Communities could benefit from greater involvement by county and national governments, which should:**

- Learn more about the oil industry and the positive and negative implications of each phase in a multi-decade initiative.
- Become more actively involved in consultation processes, in overseeing negotiations and in helping to shape agreements to the benefit of local community members.
- Provide communities with independent information and guidance.
- Engage in routine monitoring with local community members to ensure that agreements are respected.
- Build in use of key FPIC concepts and language in national and county legislation, regulations and procedures.
- Facilitate and support processes to draw up long-term local community development plans that reflect a common, long-term vision that incorporates the needs and interests of diverse members of the community, including men, women and young people in settlements and in pastoralist families.

**Civil society organizations: The oil industry is a new area of work for CSOs, particularly those operating in Turkana County. CSOs can do various things to help ensure that FPIC principles are followed:**

- Deepen understanding of the oil industry, learn about how their existing skills may be usefully deployed in this new context and within longer-term FPIC processes and develop new capabilities that build on what they already do to support affected communities.
- Influence the Kenyan legal framework to more explicitly mention FPIC and to build in consistent use of key FPIC concepts and language. This involves both the framing of proposed legislation (such as the Petroleum Bill of 2016) and regulations that guide the implementation of recently passed laws (such as the Community Land Act of 2016).



- Support communities in building capacity in understanding the oil industry, building skills in advocacy and engagement, and documenting and monitoring FPIC processes.

**Multiple actors: There are also important opportunities that, rather than being the responsibility of a single actor, require the concerted efforts of multiple stakeholders in order to have the desired impacts. A more collaborative approach on key issues is itself an important foundation to FPIC:**

- Develop better, more routine internal communications within and between key institutions, including Tullow, IFC, county and national governments, CSOs and affected communities.
- Support cross-learning and the establishment of a learning platform that brings together all communities in the major oil fields in Turkana County, helping them to understand the opportunities and risks of the burgeoning oil industry over the coming years.
- Provide communities with access to independent specialists and sources of information on the oil industry.
- Invest in building the capacity and confidence of current and potential community leaders, including a strong focus on the active participation of women and families living in outlying pastoralist villages, enabling them to engage with companies on a more informed basis.
- Ensure consistent and transparent documentation of FPIC processes and ensure that such documentation is made available and accessible to affected communities and other interested and relevant stakeholders.

# 1 INTRODUCTION

## WHAT IS FPIC?

Free, Prior and Informed Consent (FPIC) is both a principle and a process that safeguards the rights of indigenous communities which are affected by major investments. FPIC is a right for indigenous peoples and is also emerging as a principle of best practice for sustainable development, used to reduce social conflict as well as to increase the legitimacy of a project in the eyes of all stakeholders and rights holders. In Africa, regional institutions, civil society organizations (CSOs) and others have called for FPIC processes to be applied when natural resource-based projects have the potential to affect communities, regardless of whether affected communities identify themselves as indigenous peoples.<sup>7</sup>

The four components of FPIC are summarized in Figure 1:



**Figure 1: From Oxfam infographic ‘A Community’s Right to Decide: FPIC’<sup>8</sup>**

Oxfam describes FPIC as ‘the principle that indigenous peoples and local communities must be adequately informed about projects in a timely manner and given the opportunity to approve (or reject) a project before operations begin. This includes participation in setting the terms and conditions that address the economic, social, and environmental impacts of all phases of extraction and post-extraction operations.’<sup>9</sup>

The United Nations Expert Mechanism on the Rights of Indigenous Peoples (EMRIP) discusses FPIC at length, and notes that it ‘affirms the prerogative of indigenous peoples to withhold consent and to establish terms and conditions for their consent’.<sup>10</sup>

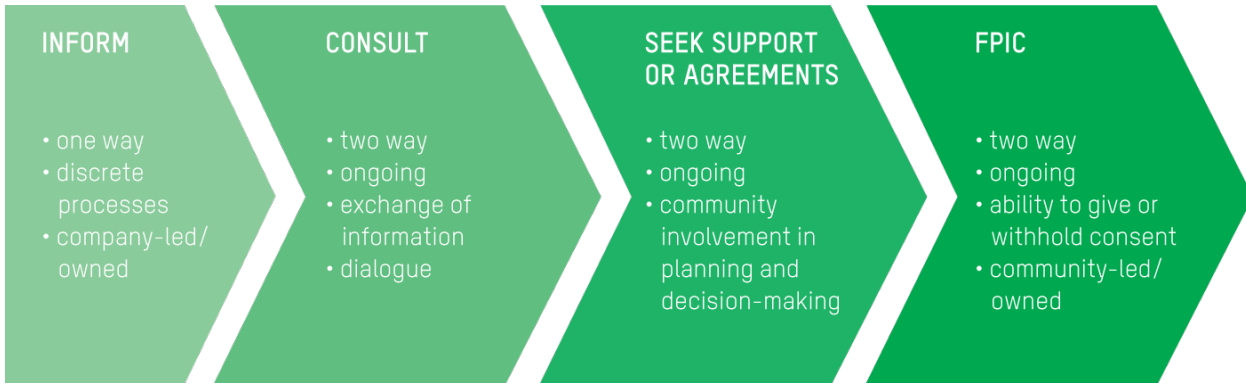
### Box 1: International understanding on FPIC

A growing number of inter-related standards, resolutions, principles and policies require FPIC. Some examples, in chronological order, include:

- International Labor Organization, Indigenous and Tribal Peoples Convention, No. 169, June 1989. One of the earliest and most important international conventions setting out FPIC.
- United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), 2007. Sets out international legal norms; Article 19 explicitly calls for FPIC.
- Africa Mining Vision, 2009. Adopted by heads of state at an African Union summit, noting 'public participation to secure consent'.
- UN Framework and Guiding Principles on Business and Human Rights, 2011. Puts responsibility on governments to protect human rights and on companies to respect rights in line with national and international law.
- Pan-African Parliament, January 2012. Focused on large-scale land acquisitions, the Parliament called for FPIC by affected communities.
- African Commission on Human and Peoples' Rights, 2012. Resolved that African Union member states should ensure FPIC.
- International Finance Corporation Performance Standards, September 2012. The standards require private sector clients to obtain the consent of affected indigenous communities.
- International Council on Mining and Minerals, May 2013. The Indigenous Peoples and Mining Position Statement incorporated a reference to FPIC, stating that 'indigenous peoples can give or withhold their consent to a project'.
- Equator Principles, June 2013. These guidelines for private sector financial institutions are largely based on the IFC Performance Standards. Signed by 89 financial institutions, they cover 70 percent of international project finance in emerging markets.
- World Bank Environmental and Social Framework, August 2016. Taking effect in early 2018, these standards shift from requiring 'Free, Prior, and Informed *Consultation*' to 'Free, Prior, and Informed *Consent*', along with stakeholder engagement through the project cycle.

Extractive industry companies and industry bodies increasingly have policies that refer to key international treaties and standards that require FPIC. Beyond requirements for compliance, more and more companies understand that there are benefits for themselves as well as for communities. As a recent report by Oxfam America pointed out: 'Companies that obtain community consent and respect the community's rights insulate themselves from expensive conflicts that would threaten profits and in some cases make projects economically unfeasible. In recent years, many businesses have seen projects crumble as communities have found the capacity and will to oppose and shut down operations.'<sup>11</sup>

To help illustrate this, Oxfam has developed a spectrum of community engagement for use with the extractives industry, ranging from low compliance (one-way information sharing) to high compliance (FPIC).



**Figure 2: Oxfam Community Consent Index 2015**

Oxfam encourages companies to intentionally move towards FPIC, starting with the adoption of explicit and unambiguous policy commitments to FPIC and publicly available implementation guidelines. All companies should conduct thorough and participatory monitoring and evaluation of FPIC processes being implemented. Companies should also develop clear and overarching commitments to gender that respect the rights of both women and men and involve both women and men in consultation and decision-making processes.<sup>12</sup>

## ENABLING ENVIRONMENT FOR FPIC

Inequality and the differing abilities of people to actively and fully engage in consultations and in decision making are vital issues in FPIC. In many situations, representatives of a multinational corporation that regularly undertakes high-pressure, technical negotiations for huge amounts of money sit with members of a remote rural community who have never been involved in negotiations of this scale. In such cases, the playing field is simply not level. Communities going into negotiations need to understand their rights, the issues and how to engage, and need to have access to the information required to support their understanding and their decisions.

The operating environment for FPIC in Turkana County has significant limitations. Turkana is the largest, most marginalized and poorest county in Kenya. It borders the counties of West Pokot and Baringo to the south, Samburu to the southeast and Marsabit to the east. The most recent census conducted in 2009 indicated that the county had a total population of 855,399, of whom 52 percent were male and 48 percent female.<sup>13</sup> With an estimated growth rate of 6.4 percent, the population in 2017 is estimated at about 1,400,000. The population is young; 60% of the county's estimated population in 2017 is 19 or younger.<sup>14</sup> It is estimated that the county's deprived child population is 76 percent. In this context of a very young and poor population, education is limited; 82 percent of residents have no formal education, 15 percent have some primary education, and just 3 percent have secondary education<sup>15</sup> (gender-disaggregated data on education are not available). Incomes are low: only 5.6 percent of people have paid employment,<sup>16</sup> and the poverty rate is one of the highest in the country at 94.3 percent.<sup>17</sup> Patriarchal norms that emphasize male leadership in communities and within families are pervasive. Internal power dynamics are significant barriers to active engagement, especially for women. In sum, the county is very remote and very poor, with low levels of literacy and numeracy, and few people are well informed about the oil industry and the issues under discussion.



Herders at a water pan. Photo: Alejandro Chaskielberg

As in other pastoralist areas of northern Kenya, land in Turkana is communally owned, although it is entrusted to the government for its management according to the 2010 Constitution. The area is arid, and the majority of families are pastoralists, with about 80 percent of the population involved in grazing and other forms of self-employment such as weaving and charcoal selling.<sup>18</sup> The oil exploration and impending production came with high expectations of benefits such as employment and business opportunities for the community. However, it also generated anxieties among local communities with regard to issues such as disruption of grazing land, impacts on water and increased interest by land speculators. Turkana communities feel that they are unheard and complain about a lack of transparency and failure to disclose information on contracts that have been signed. They are increasingly accusing businessmen, government officials and other politicians of not consulting them and of corruption and the 'grabbing' and selling of community land, particularly around the urban centres of Lodwar and Lokichar.<sup>19</sup> In general, communities' trust in political leadership and governance institutions depends heavily on how they are consulted and how well these institutions protect community assets against encroachment onto traditional grazing land by alternative economic activities, such as oil exploration, urban expansion, mining, tourism resorts and other large-scale infrastructure projects.<sup>20</sup>

Beyond power differences between the company and the community, internal inequality and inequity are vital issues within many communities. Every society is composed of women, men, youth, elderly people and diverse marginalized groups, all of whom have varying levels of capacity and opportunity to engage in negotiations. Some, such as pastoralists, are simply not available to participate in extended negotiations at certain times of the year. In highly patriarchal societies, women may be excluded from meetings or the times and locations of meetings may make it hard for them to participate in light of their multiple daily chores. Even when they are able to attend meetings, they may often literally take a back seat and be expected to be relatively silent while men manage the conversations. A key challenge for FPIC is ensuring that consent is granted by a diverse range of community members, and not only by traditional leaders and other influential people, who often tend to be older men. This goes beyond just having a range of people sit in meetings. FPIC processes require careful design to ensure that the full range of community members are involved, informed and able to understand the issues, and are able to participate meaningfully. The fundamental importance

of equity and diversity means that FPIC processes should be carefully designed to be highly representative of all segments of the community and responsive to power relationships based on gender, age and other social identifiers to avoid male elite capture during consultations and in agreements. Monitoring systems should, at a minimum, disaggregate by gender and age.

## GUIDANCE ON FPIC PROCESSES

FPIC processes vary depending on local circumstances, and on how each community engages in the process. There is no single agreed set of activities to undertake in an FPIC process, nor specific indicators to determine when it has been achieved. However, a number of international organizations have produced helpful guidance on the question of how FPIC should be implemented. Some of these are noted in Box 2.

### Box 2: Selected guidance on implementation of FPIC

Oxfam Guide to FPIC: <https://www.oxfam.org.au/what-we-do/mining/free-prior-and-informed-consent/>

UN-REDD Programme Guidelines on FPIC:

<http://www.unclearn.org/sites/default/files/inventory/un-redd05.pdf>

Food and Agriculture Organization of the United Nations (FAO) resources:

<http://www.fao.org/indigenous-peoples/our-pillars/fpic/en/>

PIPlinks, Middlesex University School of Law and the Ecumenical Council for Corporate Responsibility (2013). *Making Free Prior & Informed Consent a Reality: Indigenous Peoples and the Extractives Sector*. <http://solutions-network.org/site-fpic/files/2012/09/Making-Free-Prior-Informed-Consent-a-Reality-DoyleCarino.pdf>

IIED (2013). *FPIC and the extractive industries: a guide to applying the spirit of free, prior and informed consent in industrial projects*.

<http://pubs.iied.org/16530IIED.html>

Forest Peoples Project (2010). *Free, Prior and Informed Consent – Making FPIC Work for Forests and Peoples*.

<http://www.forestpeoples.org/topics/rights-land-natural-resources/publication/2010/free-prior-and-informed-consent-making-fpic-wo>

Initiative for Responsible Mining Assurance (2017). *IRMA Standard for Responsible Mining (Draft 2.0), Chapter 2.10 Free Prior and Informed Consent FPIC*. <http://www.responsiblemining.net/irma-standard/irma-standard-draft-v2.0/chapter-2.10-free-prior-and-informed-consent-fpic>

Roundtable for Sustainable Palm Oil Guidelines: <http://www.rspo.org/news-and-events/announcements/free-prior-and-informed-consent-guide-for-rspo-members-2015-endorsed>

# STANDARDS USED IN THIS STUDY

## IFC Performance Standards

IFC's Sustainability Framework includes eight Performance Standards (PS),<sup>21</sup> which provide requirements and guidance for identifying and reducing social and environmental risks and impacts by companies in which IFC invests. The standards are a core part of its Sustainability Framework, along with the IFC Policy on Environmental and Social Sustainability and the IFC Access to Information Policy. The IFC PS emphasize the need for companies to follow the mitigation hierarchy, ensuring that projects anticipate and avoid negative impacts when possible, mitigate impacts if they occur, compensate or offset any remaining impacts and manage impacts throughout the project life. The PS have influenced the development of other global standards, and are the subject of a large literature. This research therefore uses them as the primary standards against which Tullow's compliance with FPIC is assessed.

The IFC standards are contractually required for the project that Tullow Oil is implementing on behalf of its partners, including Africa Oil and Maersk. Tullow Oil has agreed to develop the oil fields in line with the Performance Standards as well as the Environmental and Social Action Plan agreed with IFC.<sup>22 23</sup> This is in line with Paragraph 8 of IFC's PS1, which emphasizes 'activities and facilities that are directly owned, operated or managed (including by contractors) and that are a component of the project'. The IFC Guidance Note, paragraph 52, goes on to discuss the importance of 'third parties that are operators of associated facilities ... that have a particularly close relationship with the project', while paragraph 73 states that the third party should undertake 'actions and measures necessary for the parties to perform the agreement consistent with the management system and program[me]s'.<sup>24</sup>

This study emphasizes IFC Performance Standards 1 and 7. IFC PS1 – 'Assessment and Management of Environmental and Social Risks and Impacts'<sup>25</sup> – is the foundational standard, requiring an environmental and social management system for all IFC-supported projects, with guidance on informed consultation and participation. PS1 applies to all projects that have environmental and social risks and impacts, and establishes the importance of (i) integrated assessment to identify the environmental and social impacts, risks and opportunities of projects; (ii) effective community engagement through disclosure of project-related information and consultation with local communities on matters that directly affect them; and (iii) the client's management of environmental and social performance throughout the life of the project.<sup>26</sup>

PS7 – 'Indigenous Peoples'<sup>27</sup> – is part of the stakeholder engagement hierarchy introduced in PS1, and builds on the process of 'Informed Consultation and Participation' (ICP). Paragraphs 13–17 explain the specific circumstances where FPIC must be achieved, including (i) impacts on lands and natural resources subject to traditional or customary use by indigenous peoples; (ii) relocation of indigenous peoples from traditional or customary lands or natural resources; or (iii) significant impacts on indigenous peoples' critical cultural heritage, or proposed commercial use of their cultural heritage.

IFC further emphasizes the importance of documentation:

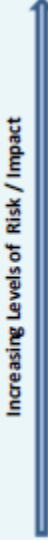
'FPIC builds on and expands the process of informed consultation and participation described in Performance Standard 1 and will be established through good faith negotiation between the client and the Affected Communities of Indigenous Peoples. The client will document: (i) the mutually accepted process between the client and Affected Communities of Indigenous Peoples, and (ii) evidence of agreement between the parties as the outcome of the negotiations. FPIC does not necessarily require unanimity and may be achieved even when individuals or groups within the community explicitly disagree.'<sup>28</sup>

IFC PS1 and PS7 and their accompanying Guidance Notes provide specific requirements and suggestions on how to carry out environmental and social assessments and stakeholder analysis and how to implement a process of FPIC, with the understanding that the details must be worked out in each local context. Throughout the Performance Standards, there is a strong emphasis on disclosure of information, on active consultations and on ongoing reporting back to affected communities (see Appendix 1 for an assessment of Tullow Oil's compliance with specific requirements of the IFC loan to Africa Oil and with its own Human Rights Policy, and Appendix 2 for additional excerpts on relevant issues).

Beyond the Performance Standards, IFC generally emphasizes transparency and accountability. For example, its Access to Information Policy explicitly encourages IFC clients to be transparent about their businesses, including making available project-level information to 'stakeholders (including Affected Communities) and other interested members of the public, to understand better, and to engage in informed discussion', unless there is 'a compelling reason not to disclose such information'.<sup>29</sup> IFC's Policy on Environmental and Social Sustainability requires the disclosure of contracts signed between host governments and companies, including 'the principal contract with government that sets out the key terms and conditions under which a resource will be exploited, and any significant amendments to that contract'.<sup>30</sup> This information is fundamental to ensuring that citizens, and communities in particular, can review fiscal terms and formulate a realistic picture of the potential benefits offered by a project.

IFC uses a continuum of increasingly intensive community engagement, which builds up depending on the risks and potential impacts of a project.<sup>31</sup> This starts with simple communication and consultation. A process of ICP leading to 'Broad Community Support' (BCS) for the project is required when there are potentially serious negative impacts, or when indigenous peoples are involved. FPIC processes are the most rigorous, used only in the specific situations noted previously in PS7. FPIC processes must incorporate all elements of ICP and Good Faith Negotiation (GFN), leading to documentation of a mutually accepted process and evidence of the agreement with indigenous communities (see Figure 3).



Level of Risk/Impact		Stakeholders	Client Responsibilities	IFC Responsibilities	
 Increasing Levels of Risk / Impact	Significant	Indigenous Peoples under these circumstances: 1) Impact on Lands/Natural Resources; 2) Resettlement of IPs; 3) Impacts on critical cultural heritage, including commercial use of cultural heritage.	Free, Prior and Informed Consent (FPIC). <i>Good Faith Negotiation</i> whereby client documents mutually accepted process, and evidence of agreement.*	Verification	Ongoing Supervision of Community Engagement. Update of ESAP as per AIP
		Impacts on critical cultural heritage, including use for commercial purposes involving Non-IP Affected Communities.	ICP + Good Faith Negotiation (GFN): client undertakes process that builds on ICP (described below) but also employs good faith negotiations resulting in a documented outcome.*	BCS Determination	
		1) Adversely affected Indigenous Peoples. 2) Potentially significantly adversely affected communities.	Informed Consultation and Participation (ICP): ICP builds upon the steps in <i>Consultation</i> (described below) and is a more in-depth process leading to client incorporating views of Affected Communities into decision-making and documenting process.*	BCS Determination	
	Moderate	Adversely affected communities and stakeholders.	<b>Consultation:</b> Disclosure. Two way dialogue. Grievance Mechanism. Stakeholder Engagement Plan. Ongoing reporting to communities on relevant Client's Action Plans.*	Verification	
	All Investment Activities	General Public	<b>External communication:</b> Client implements and maintains procedure to receive, register, screen and address communications from the public, document responses, and adjust management program.	Verification	
(*) It is expected that client responsibilities regarding stakeholder engagement activities are additive at each stage from bottom to top.					

**Figure 3: Levels of stakeholder engagement in IFC's Sustainability Framework<sup>32</sup>**

In addition to the general requirements for FPIC, IFC identifies project-specific requirements in publicly available Environmental and Social Review Summaries as part of the investment package. Specific requirements for Africa Oil (and, by extension, for Tullow Oil) are listed in Appendix 1.<sup>33</sup>

## IFC obligations for Tullow Oil in Turkana County

Africa Oil's contractual obligation to comply with the IFC Performance Standards flows through to Tullow Oil as the operating partner for the joint venture. When IFC invested \$50m in Africa Oil through an equity subscription agreement in August 2015, Africa Oil held 50 percent in the joint venture, with Tullow Oil holding the other 50 percent and acting as operating partner in blocks 10BB, 13T, 10BA and 12A in the South Lokichar Basin.<sup>34</sup> Based on its pre-investment analysis, IFC rated this as a Category A project, meaning that it has 'potential significant adverse social or environmental impacts that are diverse, irreversible, or unprecedented'.<sup>35</sup> IFC's Environmental and Social Review Summary of Africa Oil notes that this project must comply with all eight IFC Performance

Standards,<sup>36</sup> which are a core part of IFC's Sustainability Framework, along with the IFC Policy on Environmental and Social Sustainability and the IFC Access to Information Policy.

The IFC Performance Standards lay out general obligations for clients, and the associated Guidance Notes (GN) provide advice on how to comply. The two key triggers for IFC's FPIC standards in Tullow's operations are the following:

IFC PS7, paragraph 4 notes that indigenous peoples may be referred to in different countries by such terms as 'indigenous ethnic minorities', 'minority nationalities', 'first nations' or 'tribal groups'. In line with this, the Constitution of Kenya's definition of 'marginalized people' in Article 260 clearly fits the broad Turkana community, as it refers to nomadic or settled 'pastoral persons and community' that, because of its relative geographic isolation, has experienced only marginal participation in the integrated social and economic life of Kenya as a whole'.<sup>37</sup> This is buttressed by the Commission on Revenue Allocation of Kenya's classification of Turkana as the most marginalized community in the country.<sup>38</sup>

Tullow's exploration and potential extraction of oil involves 'impacts on lands and natural resources under customary ownership and use by the indigenous people'. As noted in IFC PS7, paragraph 13, this is one of the three circumstances that trigger the need for FPIC in terms of IFC investments, the other two being in cases where projects will require the relocation of indigenous peoples or may significantly impact their critical cultural heritage.<sup>39</sup>

As the direct recipient of the investment, Africa Oil must ensure that its management systems and programmes comply with IFC standards. Africa Oil must then work with Tullow Oil, as the operating partner, to ensure that Tullow complies with IFC standards, properly documents its work and submits evidence as required. In PS1, paragraph 8 highlights the importance of 'activities and facilities that are directly owned, operated or managed (including by contractors) and that are a component of the project'. The IFC Guidance Note for PS1, in paragraph 52, elaborates on this, noting the importance of 'third parties that are operators of associated facilities ... that have a particularly close relationship with the project. Because of this relationship, the client should normally have some commercial leverage on the operators of such facilities.' Paragraph 66 of the Guidance Note says that the 'management program[me] should apply broadly across the client's organization, including its contractors and primary suppliers over which the client has control or influence, and to specific sites, facilities, or activities'.

PS1, paragraph 17, states that 'the client, in collaboration with appropriate and relevant third parties [which includes contractors and operators], will establish, maintain, and strengthen as necessary an organizational structure that defines roles, responsibilities, and authority to implement the [Environmental and Social Management System]'.<sup>40</sup> Paragraph 73 of the PS1 Guidance Note indicates that when 'functions are outsourced to contractors or third parties, the client's agreement with these parties should include actions and measures necessary for the parties to perform the agreement consistent with the management system and program[me]s'.

In addition to the general requirements of the Performance Standards, IFC has identified more specific obligations. It undertook a pre-appraisal site visit to Turkana in January 2015 and a full appraisal in April 2015. These led to the development of its Environmental and Social Review Summary, last updated on 22 December 2015, which laid out specific obligations and deadlines for Africa Oil

and hence for Tullow Oil. These obligations largely involve the production of studies and reports, most of which are still under development. The table in Appendix 1 lists the specific obligations, the required or suggested evidence of compliance, and Oxfam's assessment of Tullow Oil's progress in meeting these requirements.

## **Tullow Oil's Human Rights Policy**

Tullow published its Human Rights Policy in 2016. The policy mentions important concepts that are relevant to FPIC, but does not provide guidance on implementation.<sup>41</sup> Key excerpts include:

- 'To engage meaningfully with and obtain broad, community support from impacted communities throughout the project life cycle, including, where appropriate, using traditional community governance mechanisms and obtaining the perspectives of vulnerable groups, including women';
- 'To obtain the informed agreement of project-affected communities early in the project cycle, and prior to major project developments or changes that would significantly affect them';
- 'To ensure that affected communities have access to a transparent and fair non-judicial project-level grievance mechanism which operates in a timely and predictable manner.'

When requirements come from multiple sources, IFC stipulates that projects must achieve 'whichever is more stringent'.<sup>42</sup> In this case, while the Tullow Oil Human Rights Policy is in line with the IFC standards, the latter are clearer and are more stringent.

## **Government of Kenya regulatory requirements**

Kenya's legal framework does not explicitly use the key terms used in FPIC – 'free, prior, and informed consent'. However, the country has some existing laws and constitutional protections that can be used to emphasize fundamental FPIC principles. These also provide a foundation that could be used to bring more explicit attention to FPIC into the legal framework. For example, IFC emphasizes the need for FPIC when the affected communities are 'indigenous people'; PS7, paragraph 4, notes that different terms may be used in different countries.

Similarly, Kenya's legal framework does not explicitly refer to FPIC. In fact, the current petroleum law provides concessions for exploration in oil blocks before affected communities are even aware of the process; there is no legal requirement to seek 'prior consent' before a company begins early exploration, apart from the Environmental Impact Assessment (EIA) process, which is meant to be consultative with affected communities. However, the principles of public participation are provided for in multiple articles, such as Article 35, which highlights the importance of access to information, providing every citizen with 'the right of access to information held by another person and required for the exercise or protection of any right or fundamental freedom. Every person has the right to the correction or deletion of untrue or misleading information that affects the person'.

Chapter 5 of the Constitution goes on to give communities the right to own land collectively 'on the basis of ethnicity, culture or similar community of interest' and provides for affirmative actions to protect these rights. It also grants relevant rights such as the right to resources, a clean and safe environment, livelihoods

and culture, and encourages 'public participation in the management, protection and conservation of the environment'.

Two key pieces of legislation guide the implementation of EIAs in Kenya. The Environmental Management and Coordination Act (EMCA, 1999, amended 2015) established the National Environment Management Authority (NEMA), a government agency tasked with the general supervision and coordination of matters relating to the environment.

The Environmental (Impact Assessment and Audit) Regulations (June 2003) guide EIAs. Article 22 requires that when an EIA has been received by NEMA, a public hearing must be conducted to ensure that members of the public have the opportunity to give both oral and written comments. The date, venue and process of advertising the hearing should be accessible and convenient to the people who are likely to be affected by the project.

The Community Land Act, enacted in September 2016, provides for the recognition, protection and registration of community land rights and guides the management and administration of community land, including the roles of county governments in relation to unregistered community land. This act provides for community administrative structures that should ensure that communities are informed and compensated before their land is acquired for prospecting purposes or for any other functions.

While the Community Land Act is already law, regulations that will guide its implementation have yet to be developed. Other bills that have yet to be passed offer opportunities to directly influence the wording of new legislation, as well as of the subsequent regulations that will guide implementation. The Public Participation Bill of 2016 seeks 'to provide a general framework for effective public participation'. This could be shaped to clearly guide public participation in engagement with companies and not only with government, including FPIC processes. The Petroleum Bill, also still under consideration at the time of writing, could similarly be designed to require processes in line with FPIC principles.

## 2 METHODOLOGY AND SITE SELECTION

Since IFC's FPIC requirements were triggered in 2015 and Tullow Oil's Human Rights Policy Statement was published in 2016, the company has undertaken consultation processes with four communities in Turkana County, all with the intention of gaining access to new land for well pads, each measuring about 200x200 metres (four hectares). Two of these involved consultations and agreements in the second half of 2016, for further appraisal of the size and extent of the Ngamia and Amosing oil fields in Block 10BB, South Lokichar.<sup>43</sup>

The communities of Nakukulas and Lokicheda, and the small pastoralist villages of Lotimaan, Lokisim Ekori and Kodekode, are located about 30km southeast of the town of Lokichar. These are the communities most directly affected by the Ngamia and Amosing wells, which lie within 7km of them. According to the Area Chief, Nakukulas has about 2,500 residents and Lokicheda about 3,000; he could not provide a gender or age breakdown. The pastoralist villages of Lotimaan, Lokisim Ekori and Kodekode, also located near the wells, each have about 30–40 families (approximately 180–240 residents per village). The area is quite arid and sparsely populated, with an estimate of fewer than five people per square kilometre outside of settlements. Pastoralist families live in or move across this area in search of water and grazing for their animals, returning to their villages during the rainy season. Neither the county government nor the Kenya National Bureau of Statistics (KNBS) was able to provide estimates of the number of pastoralist families.

These communities were chosen for this case study for several reasons:

First, they account for two of the four FPIC processes undertaken since the IFC investment (at their own direction, Nakukulas residents engaged in consultations about the proposed Amosing-6 well pad; residents of Lokicheda engaged in consultations about Ngamia-10).

Second, the Ngamia and Amosing oil fields represent the bulk of Tullow's work in Turkana County. They host 18 of the 34 wells drilled so far; the other 16 wells are scattered across a further seven oil fields in a radius of about 30km from Lokichar town.

Third, this provides opportunities for comparing changes over time. These communities have engaged with Tullow multiple times over the years. Tullow's first oil strike in Turkana came at the Ngamia-1 well site in 2012; the communities have since granted land to the company for a total of 18 well pads and associated infrastructure, such as access roads. The study allowed interviewees to compare Tullow's processes before and after IFC's FPIC obligations were triggered in 2015 and Tullow's Human Rights Policy was published in 2016.

Designed to draw out a range of opinions, the qualitative research was undertaken in February and March 2017, with some follow-up interviews in May. It began with a review of literature and telephone interviews with some key informants, leading to the design of open-ended questionnaires for semi-structured interviews. The bulk of the research involved focus group discussions, key informant in-depth interviews and community meetings with over 200 different individuals, including over 90 women and 75 men in affected communities.

Follow-up interviews and validation workshops in Lodwar and in Nairobi sought feedback on initial findings and recommendations. Outside of the communities, interviews involved staff from Tullow Oil, county government staff and elected officials, national government representatives, CSOs and IFC.

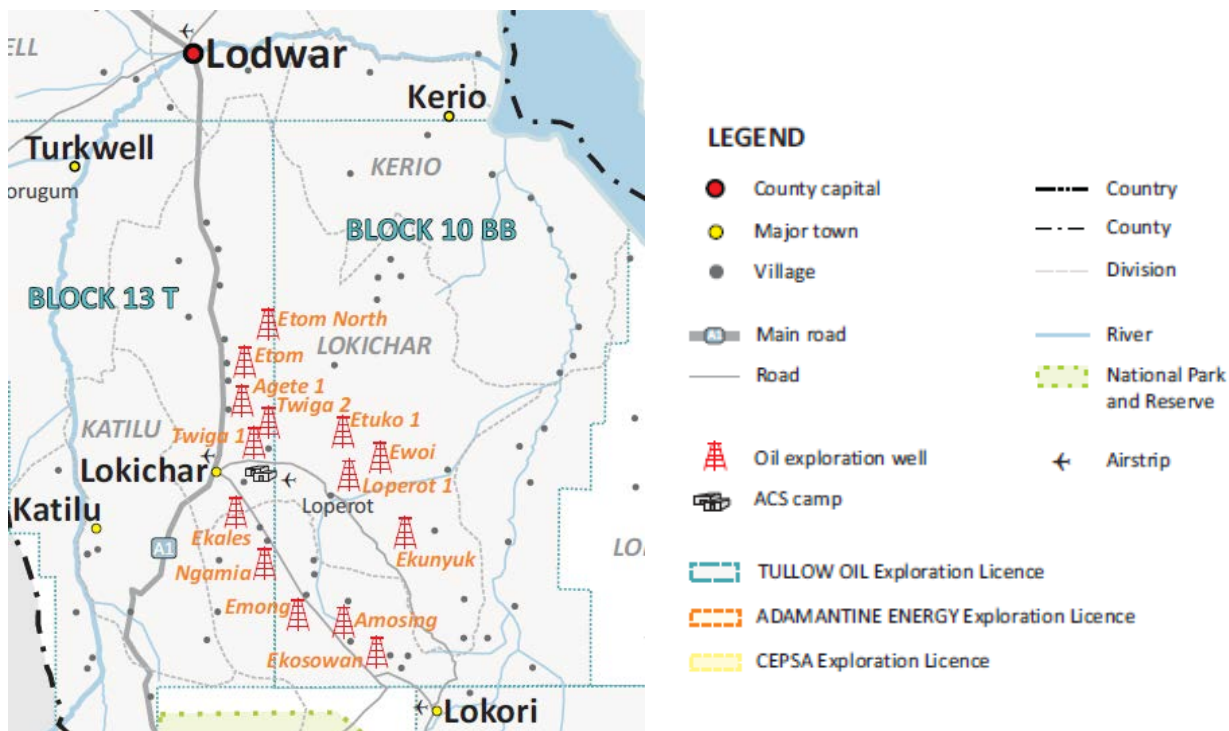


Figure 4: Location of wells in Block 10BB of South Lokichar Basin<sup>44</sup>

## TULLOW OIL AND FPIC

Africa Oil received its concession for oil exploration in Turkana County in 2009. Tullow Oil subsequently bought a 50 percent share in 2010, coming in as operational partner. Maersk Oil purchased half of Africa Oil's shares in 2015, leaving Tullow as the majority partner in blocks 10BB (which includes Nakukulas and Lokicheda communities), 13T and 10BA.<sup>45</sup> All work in these blocks is still in the exploration and appraisal phase. The joint venture partners have received a three-year extension to the Second Additional Exploration Period for a period of three years (expiring 18 September 2020) on Blocks 10BB and 13T.

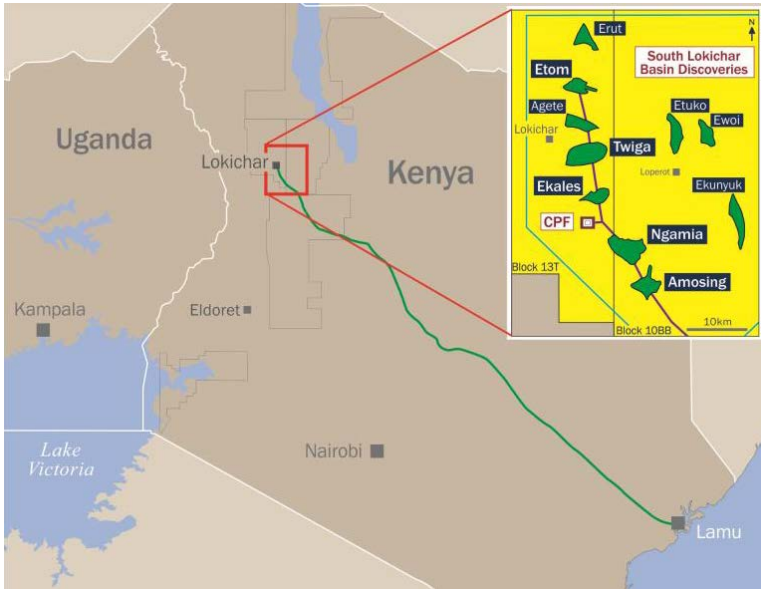
### **Box 3: Timeline of Tullow Oil operations in Turkana**

2009: Africa Oil acquires interest in first blocks in Turkana  
2010: Tullow Oil acquires 50 percent joint interest and role of operator in some blocks, including Block 10BB  
2012: Tullow's first discovery at Ngamia-1  
October 2013: protests and road blockages at various Tullow work sites  
2015–16: Exploration and appraisal  
August 2015: IFC investment in Africa Oil, triggers IFC Performance Standards  
February 2016: Tullow Human Rights Policy released  
July–October 2016: Consultation processes with Lokicheda and Nakukulas communities  
November 2016: Signing of agreements and ceremonies  
December 2016–March 2017: Construction and drilling in Amosing-6 and Ngamia-10

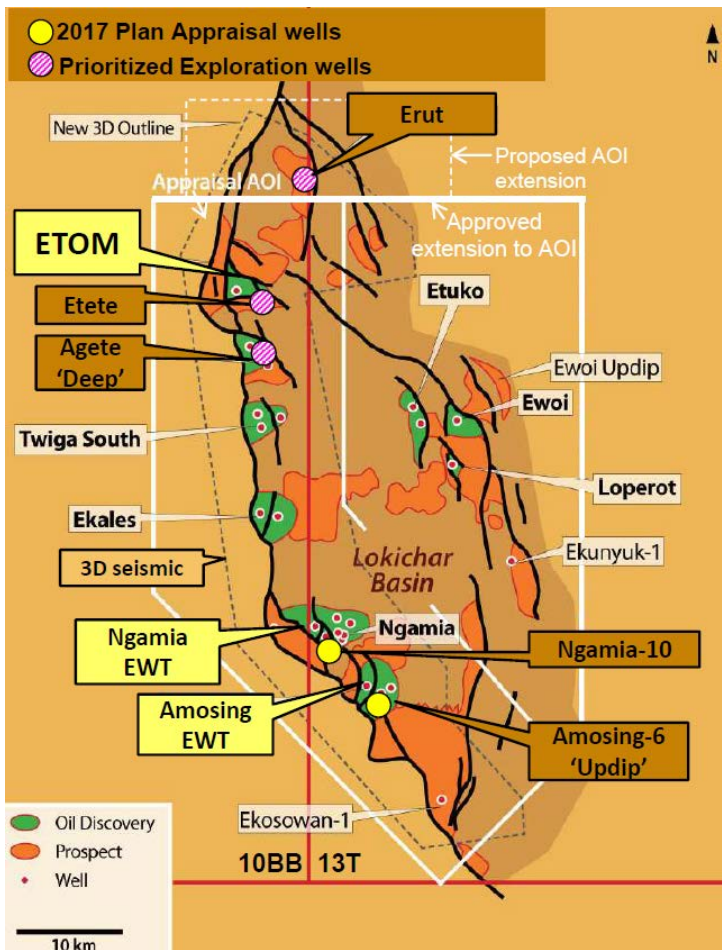
The first oil find in Turkana County was in the Ngamia oil field in 2012, and it has been followed by several more. Across the county, 34 wells have been drilled in nine oil fields; 18 of these wells are in Ngamia and Amosing fields. The results indicate that there are large quantities of oil present, but as of June 2017 the company had not yet moved into production.<sup>46</sup> The timeline for subsequent phases is still not settled: there may be a decision by 2018 or 2019 to invest in production, and actual production could start sometime around 2023–25, but this is uncertain. As a result of Tullow's oil discoveries, the Kenyan government had commissioned an Early Oil Pilot Scheme (EOPS) seeking to exploit and market oil on a small scale in order to test the market, but this plan was shelved before it could be implemented. Current estimates indicate that a production phase could last for 20–25 years or more, depending on multiple factors such as the amount of oil found, rate of extraction from multiple sites and future discoveries.

Tullow Oil has engaged in consultations with local communities for all of its land requests, and in relationship to jobs and other benefits for communities. This has been a rocky road at times; community protests in October and November 2013, including at Ngamia and Amosing oil fields, forced Tullow into a two-week suspension of operations. This stoppage, largely focused on demands for jobs and contracts for local companies, highlighted 'the need for clear rules of engagement between investors and hosts'.<sup>47</sup>

Tullow's Deputy General Manager for Operations, Frederic Briens, noted that oil exploration in Turkana County is very easy from a technical perspective: for example, the work is all on-shore, the oil is not deep below ground and the sub-surface rock lends itself to drilling. However, he emphasized that community engagement is the most difficult part of the operation for Tullow; Briens said that Tullow is aware that it has made mistakes, and is constantly looking for ideas on how to improve its practices.<sup>48</sup> This sentiment was repeated by over a dozen Tullow employees, in six individual and group interviews.



**Figure 5: Location of Ngamia and Amosing, southeast of Lokichar in the southwestern part of Tullow Oil's Block 10BB<sup>49</sup>**



**Figure 6: Africa Oil: Turkana County oil fields<sup>50</sup>**

In the period between the IFC investment in August 2015 that triggered the contractual requirement to comply with FPIC and the beginning of this study, Tullow Oil initiated four community consultation processes. Each process involved multiple meetings to discuss the company's request for land for a new well pad. Two processes involved Etete and Erut well pads, to the north and east of Lokichar town; two more involved land in the Ngamia and Amosing oil fields. The



latter two, which are the focus of this study, are appraisal wells that are intended to help Tullow better understand the size of existing oil discoveries.<sup>51</sup>

Africa Oil reports that an independent assessment gives ‘confidence that we will exceed the [petroleum reserves] threshold required for development and we continue to push forward for development sanction during 2017’.<sup>52</sup> The corporation notes that tests at Amosing and Ngamia oil fields ‘met or exceeded expectations’ and that, of the 754m barrels of oil discovered, 448.4m barrels (59.5 percent) were in the Ngamia and Amosing oil fields.<sup>53</sup> Further, Africa Oil notes that there is a possibility of finding up to 1.6bn barrels in its South Lokichar fields. This increases the likelihood of a number of community engagement processes in the area in coming years, and underscores the importance of ensuring that Tullow’s approach adequately complies with IFC standards.

## FPIC CONSULTATIONS IN 2016

By 2016 the oil fields of Ngamia and Amosing were already established, with nine wells in Ngamia and five in Amosing. As part of its ongoing appraisal process, Tullow Oil identified two additional sites at which it wanted to drill further appraisal wells, with the aim of better understanding the size and productivity of the existing oil fields. In July 2016 the company asked community leaders of the closest settlements, Nakukulas and Lokicheda, to participate in site visits. On these visits the chief and chiefs’ elders,<sup>54</sup> all of whom are men, looked for important features, with particular attention to the quality of the grazing land involved, large and important trees and any critical social features, especially graves.

After the field visits, company representatives met with these and other community leaders to discuss the request and the findings of the site visits. Tullow Oil initially wanted to have a joint process, with consultations for both sites under discussion simultaneously with the combined communities of Nakukulas and Lokicheda. The leaders of the communities instead chose to have parallel processes, with Nakukulas community discussing the proposed Amosing site and the Lokicheda community discussing the proposed Ngamia site.

One of the first requirements from the two communities was that, before discussions about the requested land could continue, Tullow Oil should begin work on infrastructure development projects (construction of school classrooms, provision of school desks and improvements to a health post) that had been promised in 2014 but which had not yet been delivered. After Tullow ensured that contractors began these projects, consultations for the new land requests resumed.

Once they began, these parallel consultation processes each involved multiple meetings in various locations over the period August–October 2016; respondents provided differing estimates of the actual number of meetings, ranging from two to up to 15. The final agreements were reached in November 2016; a large community ceremony was held that month, for which Tullow provided food in the shape of several camels and goats. All men, women and youth interviewed in the main Nakukulas and Lokicheda settlements who said that they had participated in one or more meetings indicated that they felt free to speak up, and that their opinions were heard.

However, pastoralist women who live outside these main settlements felt less able to participate, noting that meetings normally happened during the daytime, when they were out with their animals. Also, they felt less able to influence

discussions when they did participate, with the men in their families expecting that women should engage less in the conversations.

The national government was represented in this process by the Area Chief, who is a national government appointee. In contrast, the county government was absent from the entire process. The Ward Administrator, who represents government at the closest administrative level, started his job only in August and did not participate either in the process of negotiation or in the agreements, nor did he sign the agreements as a witness on behalf of the county government. Elected politicians were not involved at all, based on an explicit desire by communities to keep them out of the process. Community members were thoroughly unhappy with the roles played previously by locally elected politicians, such as the local Member of Parliament; these politicians were seen as having used their prior role as intermediaries between Tullow and the communities to serve their own personal interests.

There are a number of CSOs in Turkana County. However, none of these organizations was directly involved in the consultations between Tullow Oil and the communities of Nakukulas and Lokicheda in 2016. The two main CSOs working on livelihoods and the management of natural resources near Lokichar are Friends of Lake Turkana (FoLT) and the Alemun Pastoralist Empowerment Initiative. They have a small number of staff and volunteers in Lokichar, at times overlapping, who tend to have little experience in issues related to the oil industry. However, their work on natural resources and on other issues of relevance (such as gender equity and the establishment of community associations) seems to provide a valuable base. Staff from the two local CSOs noted that they have serious resource constraints, in addition to limited technical capacities in negotiations related to extractives. This lack of experience was highlighted by the perception of one respondent, who said that the lack of a legal basis meant that there was no space for formal roles for CSOs in these negotiations; he did not consider them relevant such as in providing or helping communities to access independent information, or helping communities to analyse proposals from Tullow.

While the actual agreements were not provided and details are not available, the chief's elders, the members of a newly formed well pad committee and Tullow staff all agreed on two key provisions. First, in previous agreements, the communities were 'paid' in kind, with Tullow bringing in contractors to build infrastructure projects such as classrooms, health posts and water points. This changed in 2016; rather than retaining responsibility for providing infrastructure, Tullow and the communities agreed that the company would pay the community Kshs 7m (about \$70,000) in cash under a land access agreement for each well pad. Second, the 2016 process involved separate agreements on employment opportunities (including specific numbers and types of short-term jobs on the appraisal wells over a three-month period. After the agreements were reached, Tullow Oil proposed the establishment of a single well pad committee to represent all the affected communities. This committee has six community representatives (all men), as well as representatives from government and from Tullow Oil. This committee is supposed to decide how the money will be used, to set up a bank account for it and to oversee the expenditure of the funds.

Tullow Oil staff say that they have detailed documentation of the process and of the agreement, but the researchers were not provided with access to this information, despite multiple requests. Tullow officials did not provide any specific rationale for withholding documentation. Junior staff deferred to senior staff. Senior staff noted the research team's requests; while they never directly refused to provide information, neither did they ever make it available.

The community leaders in Nakukulas and Lokicheda have no documentation on the process (for example, the dates of meetings, types and numbers of participants or issues discussed). The Area Chief agreed that he has copies of the agreements, but said that he was unable to locate them.

By the time the interviews for this study took place, about four months after the agreements were made, the well pad committee had been formed and had opened a bank account, but money had not yet been transferred. This transfer was awaiting a decision by the committee on how the funds would be used. A number of people in the communities had been given short-term jobs; however, local people had blocked roads and staged protests about the type, number and length of employment opportunities. No formal meetings had been held involving Tullow Oil and the community leaders or the well pad committee to monitor progress.

# 3 FINDINGS

## OVERALL ASSESSMENT

Virtually all respondents felt that Tullow's community engagement process had improved in important ways since IFC's provision on FPIC was triggered in August 2015, and that it continues to evolve. However, there is a lack of evidence to support the company's claims of compliance with FPIC requirements. In particular, the 'informed' and 'consent' requirements of FPIC have not been adequately complied with, and community access to documentation falls far short of expectations.

### Tullow's community engagement is improving

Tullow's community engagement process has been developing for years, with both significant problems and improvements along the way. While all respondents from the two communities, government, civil society and Tullow Oil itself acknowledged problems with Tullow's community engagement in previous years, virtually all felt that the process had improved in important ways in recent years, and that the 2016 processes were better than the previous efforts. Tullow staff said that they were continually trying to improve and that the process continues to evolve; events such as the 2013 protests and the IFC investment have stimulated this.

Community members, including men and women, frequently cited specific improvements in the process used during the second half of 2016, including:

**Proactive, informal outreach:** Rather than calling meetings only when the company wants something, Tullow's Community Liason Officers (CLOs) now visit communities on a daily basis, with frequent informal discussions.

**Cutting out politicians as intermediaries:** Tullow used to work largely through local politicians, such as MPs and Members of the County Assembly (MCAs). This intermediary role for elected officials was widely disliked in the communities.<sup>55</sup> Now, Tullow talks directly with community members; this change is very popular in communities, and was mentioned by many people during interviews.

**Senior Tullow management is involved:** Community elders highlighted their appreciation of the fact that Tullow's negotiating team did not just involve mid-level staff, as apparently was the practice in the past. They noted that Frederic Briens, Tullow's Deputy General Manager, was directly involved himself.

**Building community control:** Instead of having Tullow itself hold responsibility for building infrastructure as compensation for land access, the new process involves the transfer of funds to a newly formed community well pad committee.

**Physical presence:** Tullow's camp is over 30km from the communities; this is a significant distance for anyone without transportation. Tullow is finalizing the construction of offices in affected communities, including Nakukulas, to facilitate routine contact. While the Nakukulas office was still under construction at the time of the fieldwork for this study, this could be another way of simplifying access to information, and could provide a more accessible venue for anyone who wants to submit a grievance.

*'We wish Tullow had used this process before.'*

Muya Logoto, chief's elder, Nakukulas

*'The current process is better, the previous process was hidden ... done privately in restaurants and clubs by politicians.'*

Anonymous youth in Nakukulas

*'We weren't even aware [of details of agreements] on previous wells.'*

Nabu, youth in Nakukulas

Despite these improvements, there are gaps, as Tullow Oil has acknowledged. The following sections highlight some of these.

## FPIC has not been achieved

FPIC is a package: all four of its components must work together in an integrated fashion for community consent to be truly free, prior and informed. That said, it is useful to break down the analysis to understand the four major components of FPIC in order to better identify what is working and what needs to improve, as is done in IFC's example of validation methods suggested in the IFC PS1 Guidance Note Annex C.<sup>56</sup> The following is a summary review of each of the components of FPIC processes related to Tullow Oil's request for use of land for two well pads and roads in 2016.

**Free:** There is no evidence of intimidation or coercion of any sort. However, while there is no evidence that Tullow has sought to manipulate the process by providing selective or incorrect information on potential impacts, the lack of documentation means that it is impossible to confirm this. Also, the timing of meetings has made it harder for some community members to actively participate, especially women pastoralists who are often not available during the day.

**Prior:** The Government of Kenya granted the licence for oil exploration in Turkana County before the communities were aware of the project; in this sense, communities did not have the option of providing prior consent to the overall investment. However, Tullow Oil's 2016 consultation processes with the communities of Nakukulas and Lokicheda regarding its requests for land for the two new well pads were undertaken, agreements were reached and a public ceremony was held before activities began on-site.

**Informed:** While all informants agree that each of the two parallel consultation processes involved multiple meetings over several months between Tullow and community members in Nakukulas and Lokicheda, there is no available documented evidence of the consultation process, no information on what numbers of men or women participated, what information on potential positive and negative impacts of the proposed project was provided to communities, what concerns may have been raised or how concerns were addressed. This is exacerbated by the lack of readily available copies of the agreements themselves. Further there are significant differences of understanding within the communities about what was actually agreed, just four months after the agreements were finalized. Those who have seen copies of the agreements, including Tullow staff and community leaders, say that the documents were written only in English, which is not spoken or read by many people (and by very few women). Finally, there have as yet been no regular monitoring meetings to ensure that agreements are followed and that community consent continues to be granted. These issues indicate a lack of widespread, accurate information underpinning consent.

**Consent:** Respondents uniformly agree that communities reached agreements for Tullow to use land for two new well pads. However, while FPIC agreements do not require unanimous consent within communities, there should be a common understanding of their contents. The IFC Guidance Note for PS7, paragraph 39, points out that '(a)greements should have demonstrable support from the constituency defined through the risks and impacts assessment process and with whom the process of engagement and [Good Faith Negotiations] has occurred'.

Community leaders who were directly involved, such as the Area Chief, chief's elders and members of the well pad committee, all have a common understanding of the contents. However, it is impossible to confirm broad community support for the agreements. Many of the men, women and youth respondents were unable to explain the basic content of the agreements, or they contradicted one another in their explanations, often assuming that Tullow's work on prior commitments was part of the new agreements. Pastoralist women who live outside of the main settlements seem to have had little involvement or influence. Finally, documentation of the process and agreements is neither known by or openly available to the entire community.

In terms of the Oxfam Community Consent Index (see Figure 2), the consultations for land to be used for well pads at Ngamia-10 and Amosing-6 did involve seeking support and agreement. However, community involvement in planning and decision making was uneven, and information was and is lacking. Overall, despite the improvements in Tullow's processes compared with previous years, the consultations in 2016 did not meet the requirements of FPIC. The following points provide background for this assessment.

## **Communities lack sufficient access to documentation**

The best evidence for compliance with FPIC would involve triangulation among documentation and interviews with multiple informants. Readily available documentation should also provide the basis for ongoing monitoring of agreements. However, such documentation is not available.

The requirements in IFC's PS7 clearly call for documentation of "(i) the mutually accepted process between the client and Affected Communities of Indigenous Peoples, and (ii) evidence of agreement between the parties as the outcome of the negotiations".<sup>57</sup>

Documentation of the process should specify when meetings happened and who participated in them, and should outline the information that communities were given about the possible social, environmental and economic impacts of Tullow's proposed use of their land. Documentation of the agreements should specify the terms and enable subsequent monitoring. Paragraph 19 of the Guidance Note for PS7 also points out that 'project information should be made available in an understandable format, using indigenous languages where appropriate'.

Despite several requests, the field team were unable to see any documentation of the consultations or the agreements in the 2016 cases under review. Most community members did not appear to know much about or have access to such documents; only the chief, chief's elders and members of the well pad committee could speak about written agreements, and they were not able to find copies of these documents. The issue of documentation held by communities has been noted in other sectors. For example, the Forest Stewardship Council of Canada suggests that 'verification will require that the Organization and the Indigenous community maintain a complete record of the FPIC process'.<sup>58</sup>

## **Without documentation, and in light of different opinions, it is impossible to confirm that the process and agreements were sufficient for FPIC**

Tullow staff repeatedly insisted that the company had extensive documentation of consultations and of the agreement, both on paper and on video, but were unwilling to make this available for review. While no one is obligated to provide documentation to external researchers, the real problem is that the community members themselves have no documentation of the negotiation process, and most have little awareness of the final agreements.

The chief's elders clearly acknowledged that they had signed the agreements with Tullow, but said that the Area Chief was in possession of the communities' copies. The Area Chief agreed that he had signed and received copies, but said that he was unable to locate them. Tullow has hired several respected members of the community as Village Socialization Officers (VSOs) to provide a means of regular engagement with communities; one of the VSOs characterized this role as being 'Tullow's eyes within the community'. However, the VSOs interviewed said that they had never seen the agreements. A group of men in Lokicheda aged 20–30 were not even aware that such agreements existed; some became keenly interested when the research team asked about the existence and the contents of these documents, and started to ask to see them.

As previously noted, Tullow officials did not provide any specific rationale for withholding documentation. IFC standards do not openly require public access to documentation of FPIC processes; the most reasonable justification for secrecy would be if the communities themselves had requested that the information be kept confidential. However, throughout multiple interviews, focus group discussions and a final community meeting, none of the community members or community leaders in Nakukulas or Lokicheda indicated a desire for such confidentiality, nor did Tullow staff cite a concern for confidentiality. The lack of ready access by community members to the documentation required by IFC, combined with inconsistent understandings of what was agreed, means that 'consent' to the access to land has not met FPIC standards.

Tullow staff said that the agreements were read out in the local language at the agreement ceremonies, and that signatories were introduced. Community members uniformly said that these ceremonies involved speeches and a lot of meat, but no one recalled hearing agreements read out, explained or shown, or signatories being introduced. Again, without documentation from the agreements ceremony, it is impossible to verify the contradictory statements.

This all indicates two types of gaps in 'informed' consent: Tullow does not seem to have ensured broad, internally consistent understanding between itself and the community, and there is poor communication between community leadership and community members.

This lack of access to documentation goes beyond the communities. Neither Tullow Oil's own Government and Public Affairs (GPA) team in the county seat of Lodwar, nor any of the county government officials interviewed, have copies of any documentation. Tullow's GPA team noted that this was problematic since they deal with government, and should be fully aware of what Tullow is doing with communities. Some government officials, such as those at the Ministry of Energy, Environment and Natural Resources, noted that it would be easy and more

transparent to provide copies to government officials, from ward level (the most local level of county government) up to county ministerial level.

This lack of access to documentation is not uniform across the communities in which Tullow Oil operates. Community leaders from Lochwaa (a settlement about 40km north of Nakukulas and Lokicheda, and not part of this case study) provided copies of their signed agreements with Tullow.<sup>59</sup> However, these only include specifics of the agreement with Lochwaa and therefore cannot be used as the basis for comparison with the understanding of diverse community members in Lokicheda and Nakukulas. This indicates that there is an opportunity for Tullow to work with communities to understand the value of documentation, to help them maintain documentation that is accessible to the entire community and to use documentation as a valuable tool to improve transparency and accountability during monitoring processes within the community and with the company.

Transparency is a vital aspect of ensuring that the broad community understands the issues, provides informed consent and continues to give informed consent. Agreements whose clauses are fully understood only by a limited number of male community leaders, as appears to be the case in Nakukulas and Lokicheda, are not sufficiently transparent.

The issue of transparency is receiving increasing attention globally. For example, the World Bank notes: '[T]ransparency and contract disclosure are increasingly being pursued, and it is recommended that the [Community Development Agreement] be made transparent to improve demand for accountability.'<sup>60</sup> Similarly, the Initiative for Responsible Mining Assurance (IRMA), in standards under development for mining companies, notes:<sup>61</sup>

*2.10.5.1. The operating company shall document, in a manner agreed to by the indigenous peoples, the FPIC process that was followed. This documentation shall be made publicly available unless the indigenous peoples' representatives have explicitly requested otherwise.'*

While many agreements between companies and communities are confidential, there are precedents for greater transparency. Some go so far as uploading details on company websites:

**Argyle Diamond Mine, Australia:** The 'Argyle Diamond Mine Indigenous Land Use Agreement (ILUA) is the product of almost three years of negotiation between Traditional Owners, the Kimberley Land Council and Argyle Diamonds'.<sup>62</sup> The website has significant information on the process and agreement.<sup>63</sup>

**Raglan Nickel and Copper Mine in Northern Quebec, Canada:** The Raglan Agreement (1995)<sup>64</sup> was the first mining agreement to be signed in Canada between a mining company and an indigenous community. The details of this agreement are heavily documented, publicly available and widely known.<sup>65</sup>

**Ahafo Community and Newmont Gold, Ghana:** This 2008 agreement details the formula for Newmont to pay a share of revenues from gold production to affected communities, stipulates how the revenues will be used and establishes a foundation to oversee the process.<sup>66</sup>

None of the community leaders or members in either Nakukulas nor Lokicheda indicated that documentation of their agreements with Tullow Oil should be confidential. 'Informed' communities should be able to demonstrate that they know exactly what has been agreed and should be able to refer to agreements made in their name. If documentation is more widely available, it can guide other communities in their FPIC efforts.



## Divergent opinions, contradictory claims

In addition to documentation of consultations and agreements being unavailable, different respondents in the community, government and Tullow reported contradictory understandings of what was agreed. For example:

**Process:** There are widely differing estimates of the number of community meetings held during the consultation and negotiation process for Ngamia-10 and Amosing-6, ranging from two meetings to 15. While it is not particularly important that everyone knows exactly how many meetings have been held, one would hope that the process leads most people to realize that there were multiple meetings over an extended period of time in multiple locations, allowing a diverse range of people to participate.

**Contents of agreements:** There is clearly misunderstanding amongst many community members over the contents of the agreements, including confusion of the terms of this new 2016 agreement with outstanding work related to Tullow's social investment portfolio from 2014. Tullow says that there were separate agreements in 2016 for employment opportunities (including specific numbers and types of short-term jobs on the appraisal wells over a three-month period), as well as land access agreements involving cash payments of Kshs 7m (about \$70,000) to the community for each well pad, to be controlled by the new well pad committee that will implement projects. However, when asked about the agreements, many men, women and youth mentioned the construction of classrooms, purchase of school desks and improvements to the local health post. Community elders noted that these infrastructure projects were actually based on agreements from 2014, which had been long delayed. Moreover, no one knew how long Tullow planned to use the land in question – a key issue in informed consent.

**Roles in implementation:** At a validation meeting involving a range of interviewees for this study, Tullow Oil staff showed part of a memo outlining the composition of the well pad committee that is intended to receive the compensation money and to oversee identification and implementation of the projects it will fund. The Ward Administrator responsible for Nakukulas and Lokicheda expressed surprise when he saw that he was listed as head of the committee, stating that this was the first he had ever heard of his selection for this role.

While it is unrealistic to expect hundreds of people to remember exactly the same details, it is reasonable to expect that most of them have a common understanding of the basics of the process and of the agreements reached. Although there will be differences in details, the process should result in most people in the affected communities being able to explain at a broad level, along the lines of 'We gave Tullow some land for drilling two new oil wells, which they can hold for several years. In return, they are giving some short-term jobs and paying some money to the new well pad committee, for projects that we will identify. One possible benefit of this new drilling is A; one possible negative result is B.'

Especially given diverging opinions about what happened and what was agreed, the role of documentary evidence is even more vital. Transparent, routine use of key documents would help to build a common understanding over time, while also providing the basis for ongoing monitoring.

## FPIC processes require special focus on women and vulnerable groups

As noted previously, Turkana County is very poor, remote and politically marginalized. The population is very young, with nearly 60 percent under the age of 19, and there extremely low rates of participation in formal education, with low levels of fluency in either English or Swahili. This reality creates serious barriers to effective access to information and to the community's ability to negotiate, and also creates major challenges to FPIC processes.

The social, economic and geographical realities of Turkana exacerbate this situation for key segments of the population. Beyond permanent settlements such as Nakukulas and Lokicheda, many people have homes in smaller outlying villages, from which they practise pastoralism. They move seasonally with their camels and goats, during which time they are not readily available for community meetings.

***'A child cannot be given out to her husband by a man alone.'***

Proverb cited by a female member of the community

It can be particularly hard for women in pastoralist communities to engage. Women in the seasonal pastoralist villages of Lotimaan, Lokisim Ekori and Kodekode identified key barriers. Many said that they did not know much about Tullow's consultations, and had not participated in meetings, since information was controlled by men. For those who wanted to participate, key constraints were location and timing: community meetings were held during the day when female pastoralists are out with their animals, and never when they are actually in the village at night. This assumes that they are in their villages at all, since pastoralists spend several months per year on established migration routes. For example, during the dry season, the families in these three villages tend to take their animals to the hills and plains west of Nakukulas and Lokicheda, and are not present no matter what time of day meetings are held. Further, traditional norms make it harder for pastoralist women to actively engage even when they are physically present. Nakorod Epungure, a woman from Lokisim Ekori, a small pastoralist village next to the Amosing oil wells, stated that 'men dominate Tullow meetings'. Her sentiments were echoed by another woman, Arukudi Ngimusug from Lotimaan, near to the Ngamia wells, who said: 'Women are always excluded from Tullow meetings and job opportunities.' Most felt that men controlled the discussions and got most of the benefits, such as jobs. Explaining that men and women should work together in negotiations on behalf of the whole community, Leah Ailet referred to a Turkana proverb to explain the importance of involving women in the discussions: 'A child cannot be given out to her husband by a man alone.'

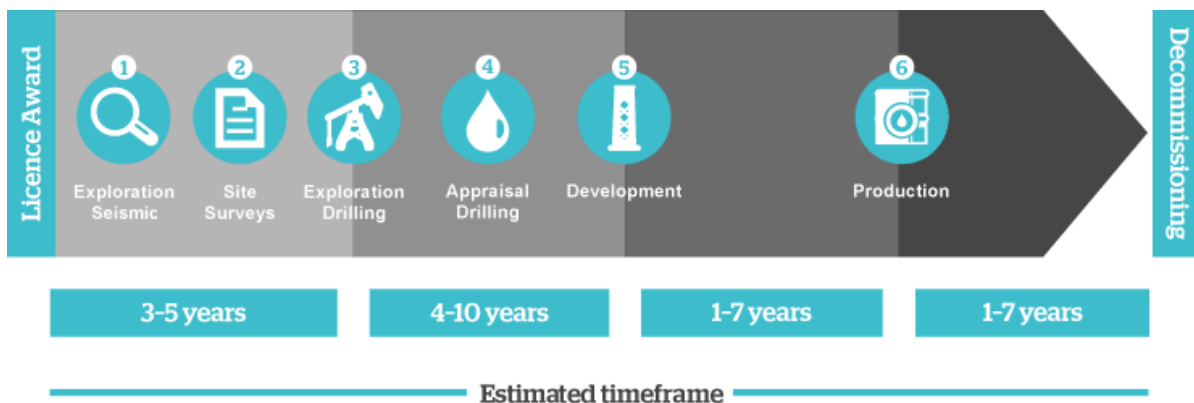
Such barriers are not uncommon when remote communities engage in complex negotiations with companies.<sup>67</sup> IFC notes that special efforts are needed in such situations. It requires its clients to identify vulnerable members of the population, and to 'propose and implement differentiated measures so that adverse impacts do not fall disproportionately on them and they are not disadvantaged in sharing development benefits and opportunities'.<sup>68</sup> Avoiding disproportionate impacts depends on their ability to engage in the discussions, to have access to information and to influence decisions in the first place.

## The focus is very short-term

Tullow's work in Turkana County involves nearly three dozen wells in nine oil fields across hundreds of square kilometres, with a network of roads and a main camp. The overall investment has already moved along the oil and gas cycle (see Figure 7) from licensing to exploration and appraisal. In some locations, such as the Ngamia and Amosing oil fields that affect the Nakukulas and Lokicheda communities, the promising amounts of oil already discovered indicate that development and production could start in the next five years or so, with a lifecycle of at least 20–25 years, followed by subsequent phases of decommissioning and eventual abandonment.

To ensure FPIC, the company should undertake new FPIC processes for each phase of proposed work on a particular well pad or cluster of well pads, as the project moves from exploration to appraisal, to development, to production and on to decommissioning and abandonment at the end of extraction. The 2016 consultations represented new steps in a series of sequential consultations, building upon previous work.

However, the framing of the discussions does not seem to capture how these two new wells fit into the broader context. Eighteen of the 34 wells in Turkana County, the main road connecting all the oil fields to the coast and the site of a proposed oil pipeline are all close to Nakukulas and Lokicheda communities, but there is no evidence that these longer-term options were discussed during the 2016 consultations. Instead, the negotiations and agreements emphasized compensation for Tullow's immediate use of land during the appraisal stage.



**Figure 7: Phases in the oil and gas cycle<sup>69</sup>**

For communities to take truly informed decisions, they must understand that there are several points at which the company is faced with 'go – no go' decisions, often based on factors outside its immediate control (such as the quality and quantity of oil in the ground, costs of extraction, oil prices and logistics of transporting it to market). Each phase may or may not lead to subsequent phases. Rather than talking only about each phase in isolation, communities should be provided with information on the possible cumulative impacts of successive phases and helped to analyse the overall positive and negative impacts that may ensue.

IFC PS1, paragraph 8, explains that this includes attention to '(c)umulative impacts that result from the incremental impact ... from other existing, planned or reasonably predictable developments'. IFC PS7, GN15, clearly indicates that 'the Affected Communities of Indigenous Peoples should have access to relevant project information prior to any decision making that will affect them, including

information on potential adverse environmental and social impacts affecting them at each stage of project implementation (i.e. design construction, operation and decommissioning)' (emphasis added). This could include information about the results of major decisions that will only be taken later, with two simple scenarios:

- If the oil field and this site in particular do not go to production, what are the positive and negative implications?
- If the oil field and this site do go to production, what are the potential positive and negative implications?

For example, while all community members interviewed knew about the Tullow request for additional land for the two new well pads, none mentioned discussions about what might happen if the investments move on to full production.

Community members themselves emphasized short-term issues, such as job opportunities and community projects. They did not discuss how these short-term appraisal wells fitted into the larger picture, including an oil production phase that could potentially last for decades. They did not seem familiar with the positive or negative issues that might be associated with long-term production, such as construction and maintenance of an oil pipeline across the landscape and across traditional pastoralist migration routes, the impacts of potential oil spills, security issues or inflows of people seeking new jobs moving into the communities.

## **Insufficient effort to maintain informed consent**

One of the problems appears to be a lack of sufficiently routine and formal monitoring and review, as required in PS1, paragraphs 22–24. Once FPIC is achieved, it must be maintained based on ongoing attention to implementation, including 'corrective and preventative actions' as needed. IFC notes that 'stakeholder engagement is an on-going process',<sup>70</sup> requiring 'periodic reports to the Affected Communities that describe progress with implementation of the project Action Plans on issues ... identified as a concern to those communities'. These reports should happen 'not less than annually'.<sup>71</sup> Tullow's own Human Rights Policy similarly commits the company 'to engage meaningfully with and obtain broad, community support from impacted communities throughout the project life cycle'.

IFC PS1 requires only annual reports, but this is a low bar. According to IFC, its Environmental and Social team goes beyond this requirement and visits the project sites every six months to verify the commitment by Africa Oil and Tullow to the implementation of the Environmental and Social Action Plan and the Performance Standards. In addition, as part of the monitoring of the project, an Independent Monitoring Group visits the project site every six months and its reports are made public on Africa Oil's website. The website currently includes reports on such monitoring visits dated January 2016, September 2016 and March 2017.<sup>72</sup> External reviews will be conducted annually once the project moves into production.<sup>73</sup>

***Tullow's Community Liason Officers 'are frequently in the community, but don't hold regular community meetings'.***

Nabu, youth in Nakukulas

Even more important than six-monthly visits by external specialists, Tullow should look into developing local relationships more fully. At the time of writing, the lack of monitoring and reporting to the community on compliance with prior commitments was at risk of carrying over into the new agreements made in 2016. Tullow does maintain an internal Commitments Register, and CLOs are in the communities on virtually a daily basis. However, community members uniformly

said that this frequent engagement involved informal discussions between Tullow field staff and small numbers of community members. Every single community member who was interviewed (including the Area Chief and members of the well pad committee responsible for implementing the agreement) flatly denied that there had been any routine meetings to keep them informed of progress in the four months between the signing of the agreements in November 2016 and the interviews in March 2017. If there is a broad demand for this, it would be easy and inexpensive to set up a process of monthly meetings with community leaders and quarterly public meetings involving local Tullow staff and diverse community members, all based on a review of progress towards agreements and discussion of any issues arising.

IFC also requires a grievance mechanism 'to receive and facilitate resolution of Affected Communities' concerns and grievances' concerning social and environmental performance.<sup>74</sup> Tullow's Human Rights Policy commits to ensuring 'that affected communities have access to a transparent and fair non-judicial project-level grievance mechanism which operates in a timely and predictable manner'. This grievance mechanism does exist, and is used. Researchers were shown some of the entries, which dealt with complaints by individuals (e.g. a Tullow vehicle accidentally killing a goat; a former employee seeking redress in relation to termination benefits). Complaints are raised to Tullow staff, usually with the CLOs working full-time in the affected communities, who record the grievances in a log book. Tullow seeks to respond to such grievances within two weeks, and no community members complained about the grievance process.

However, community members clearly perceive this as a process to use for individual complaints though not for raising broader complaints related to overall agreements between the company and the affected communities. Two pertinent examples arose during interviews. First, as noted previously, dozens of community members referred to Tullow's long delays in building promised infrastructure, and felt it necessary to raise this as a precondition to new negotiations in 2016. Second, while interviews for this study were under way, young men were blocking roads in protest at what they felt was a lack of compliance by Tullow on promises for jobs associated with the 2016 agreements. No one in the communities saw the grievance mechanism as the appropriate tool to monitor the overall agreements – nor should it be used for that. Project-level monitoring should be routine and systematic; perceptions of gaps in the implementation of the overall agreement should be addressed through routine, formal meetings at a senior level, not treated as grievances lodged with junior-level field staff.

This issue highlights that the ongoing process of achieving and maintaining FPIC is actually more complex than a 'consultation process leading to agreement'. Simply emphasizing the consultation process and the agreement actually reduces attention given to other key aspects of a long-term relationship. First, the consultation actually involves negotiations, not just 'consultation', yet communities like Nakukulas and Lokicheda often need support on how to negotiate with international companies that transact major business deals as part of their daily work. Second, after consent is reached and an agreement is formalized, both the company and the community need to invest in routine monitoring and accountability, with support from government and perhaps from CSOs.

There is plenty of appropriate guidance, including from outside the IFC standards. As one study notes: 'While the community may wish to carry out its own monitoring independently, the project holder should seek to involve the community in its monitoring of project implementation related to agreements and consent. This starts with designing the monitoring approach, including what

activities and issues will be monitored, what monitoring methods will be used, who will do the monitoring, and how the results will be recorded.<sup>75</sup> Even after granting consent, communities 'have the right to grant, withhold or withdraw consent at any time; therefore, it is imperative that the [company] establish a continuous process' of engagement.<sup>76</sup> Maintaining FPIC therefore has to go beyond documented consultation and agreement. FPIC builds on good faith negotiations, and involves a continuous process of implementation and monitoring to ensure accountability.

## **Absence of government and CSOs increases reliance on Tullow**

The second most common criticism made by a wide range of community members (after the complaint that Tullow does not keep its promises) was that government has largely withdrawn from the area. All respondents agreed that:

- County government did not participate in the two 2016 consultation processes;
- Neither local nor international CSOs were directly involved in supporting these FPIC processes;
- Relationships and communication must improve all around;
- The community's only source of information on the issues is Tullow itself.

***'Government has handed the community over to Tullow. Tullow is like our father.'***

Chief's elder, Nakukulas

The communities clearly want the county government to be more actively involved, both to oversee the process and to help ensure compliance with agreements. At the same time, they clearly do not want elected officials (e.g. 'politicians') involved, since they feel that politicians have played self-serving roles as intermediaries in the past.

The relationship between Tullow and county government officials is a mixed one. Tullow staff explained that they frequently engage with the county government in Lodwar, including via monthly meetings on themes of common interest (land, water, opportunities for local businesses, etc.). They acknowledge that there are internal gaps in communications between county- and sub-county levels of government, and that information may not reach the ward level. However, they insist that they have invited the sub-county government to all consultations and agreement ceremonies. Several suggested that sub-county officials failed to attend not because they were not invited but because Tullow does not pay allowances, due to Kenya's Bribery Act and international standards.

The Ward Administrator, at the most local level of county government, confirmed that he was not involved in the 2016 negotiations. He adamantly denied receiving invitations, and said that he had neither signed nor seen the agreements. During the validation meeting for this research, he expressed surprise to see himself identified as well paid committee chair on a document stamped by the sub-county Department of Social Services. He also complained, along with other members of county government, that Tullow spends too much time with national government in Nairobi and Lodwar, and insufficient time working directly with county officials.

Some CSOs have done relevant work in Nakukulas and Lokicheda. For example, organizations including the Alemun Pastoralist Empowerment Initiative and FoLT have provided training to pastoralists on their resource rights and on how to form

associations to enable them to advocate for themselves. However, these organizations often struggle along, with limited funding to address the relatively new issues around a young oil industry. Funding stops and starts, with some projects enabling work for only 3–6 months at a time, far less than the sort of sustained effort that is required.

Given this gap in support from government and CSOs, communities lack independent, unbiased sources of information, and so rely largely on Tullow. Community leaders themselves have little experience in seeking out information from other sources. No community should be 100 percent reliant for information on the company with which they are negotiating.

## **Mixed reviews on public participation and understanding of agreements**

One of the most difficult aspects of community engagement is the requirement to work with traditional leadership structures, which are predominantly comprised of older men, combined with the need to emphasize inclusive participation by those who are often left out of decision making, especially women, youth and pastoralist families who are physically absent.

Virtually all of the 97 women and youth interviewed in Nakukulas and Lokicheda settlements said that they were able to participate in meetings related to the 2016 land requests, were allowed to voice their opinions and felt that they had some influence over decisions. However, the three dozen pastoralist women interviewed in Lotimaan, Lokisim Ekori and Kodekode villages noted a very different situation: they were either not informed about the consultations, were unable to participate due to meetings being scheduled during the day when they were out with their animals, or they were expected by men in their families to keep their thoughts to themselves.

Even the positive feedback has to be compared with people's very different understandings of what the agreements actually involved. As noted above, Tullow staff and community leaders recounted broadly similar understandings. However, many community members (men, women and youth) referred to infrastructure projects that were in fact not directly part of the agreements, and did not know much about the formation of the well pad committee or the promised cash payment of Ksh 7m for each of the well pads.



Photo: Alejandro Chaskielberg

## Community well pad committee: a good idea that needs support

One of the new features of Tullow's engagement with communities starting in 2016 was the establishment of a well pad committee that is intended to receive compensation money from Tullow, to work with the communities to identify how to use the money and to oversee implementation in all affected communities. This is a step towards meeting IFC's call for evolving 'from a focus on project impact mitigation and development measures towards Indigenous People-managed development models supported by defined project contributions and/or benefit-sharing mechanisms'.<sup>77</sup> Based on interviews with five of the six community representatives on the committee and discussions about the committee with many others, it seems that this is a good initiative overall. However, there are elements that need attention by Tullow and by the community itself, with support from government and civil society.

### Postive aspects

**Geographical representation:** The committee includes six community members: two members each from Nakukulas, Lokicheda and Lokusim Ekor.

**Enhancing community responsibility:** Previously, compensation by Tullow came in the form of infrastructure projects that were directly managed by the company itself, through contractors. This new approach can enable community leaders to take over responsibility for managing this work.

**Flexibility of cash instead of in kind payment:** The agreement for each well pad includes a cash payment of Ksh 7m (\$70,000). The community can decide how to use this money; in addition to infrastructure, committee members spoke of options such as school bursaries for students.

**Guidance through broader composition:** In addition to the community members, the committee includes a representative from Tullow, the Area Chief



(national government), chief's elders and the Ward Administrator (county government).

## Problems

**Elite male domination:** The committee appears to involve influential men choosing other influential men. All six community committee members are men. They themselves said that they were selected by the Area Chief and chief's elders; a teacher in the community noted that the same men are 'repeatedly selected for community committees'.

**Insufficient skills:** Members have little experience in project planning, designing tenders, supervising contractors or managing funds.

**Conflicts of interest:** Three of the six community members have established companies expressly to obtain contracts with Tullow, and want to bid on projects supported by the money they themselves will oversee as members of this committee. During in-depth interviews, two separate members expressed surprise that their dual roles as committee members and as potential bidders for projects would constitute a conflict of interest. (One of these men asked for help in understanding how to avoid this problem. He noted the widespread practice by government staff of setting up private companies that win tenders from the same government ministries where they work, and asked how the situation of the well pad committee members was different.)

**Poor communication:** The Ward Administrator expressed total surprise during the validation meeting for this research when Tullow staff said that he was listed as chair of this committee; he adamantly claimed that he was hearing of his proposed role for the first time.

IFC anticipates problems with such efforts, noting that 'clients should assess the capacity of the existing institutions and decision-making processes to deal with the wide array of new issues introduced by the project. In many situations, projects introduce issues that existing institutions and decision-making processes are poorly equipped to address.'<sup>78</sup> It is certainly possible to address these problems, and Tullow staff say that there is a capacity-building plan. However, during the research, the committee members themselves said that they were not aware of any such plan.

## Slow implementation of prior agreements

***'Tullow plays a game with the community. When it wants something it's very nice, but when it gets something, it becomes hard to find.'***

Nakukulas elder

***'Tullow doesn't keep its promises.'***

Woman in focus group discussion, Lokicheda

Despite the improvements in Tullow Oil's consultation process, most community members do not trust the company. A major reason for this lack of trust is the common perception that Tullow breaks its promises, based on the slow implementation of commitments from previous consultations or from corporate social responsibility (CSR) projects. This was one of the most frequent complaints heard from men, women and youth in Nakukulas and Lokicheda.

Most of the complaints were related to Tullow's slow implementation of its commitments on the development of infrastructure as part of its social investment

programme, such as the construction of classrooms, provision of school desks, water supplies and improvements to the local health post. To be clear, delay in CSR efforts is not an FPIC compliance issue when infrastructure projects have not been negotiated as compensation for land access. However, this was one of the most frequent complaints made by people in Nakukulas and Lokicheda, and it has implications for efforts to achieve FPIC in land negotiations.

Tullow staff uniformly agreed that projects had been delayed, but felt caught in a bind. They emphasized their efforts to contract local businesses to build infrastructure; this is both part of the company's 'local content' obligations as well as a response to local demands that Turkana business owners should have opportunities. Tullow staff noted that many of the local contractors are relatively inexperienced, and delays in fulfilling promises were due to contractors' inability to fulfil contractual terms on time.

Regardless of the justification, this under-performance dramatically undermines Tullow's institutional credibility in Nakukulas and Lokicheda, creating an unnecessary barrier to good faith negotiations. Tullow should take firm steps to ensure that all existing agreements are implemented. In principle, the new model involves payment of money to the well pad committee, which is then responsible for implementation. Tullow will then have a role in helping the inexperienced committee members to manage the use of these funds and to report back regularly to the communities.

## **Unmet community expectations on employment**

One of the other most common themes voiced by community members involved high expectations for employment. This came up repeatedly, in all types of interviews, with men, women and especially youth. A wide range of people, especially young men but also quite a few women, emphasized that Tullow should employ significantly more people, in better jobs for better pay, and for longer periods of time. This issue has been recognized; however, in general the demands for employment far outstrip the number of jobs actually available.<sup>79</sup>

During the fieldwork, young men from Nakukulas and Lokicheda mounted roadblocks to demand more jobs linked to the development of new well pads in early 2017. They complained that Tullow was not providing the jobs it had committed to during the November 2016 agreements. This could indicate a lack of understanding by community members of what was promised, or a lack of compliance by Tullow with the promises; confirmation would require comparing the signed agreements with the actual jobs provided.

The demand for jobs is understandable in an environment where the unemployment rate is 94 percent<sup>80</sup> and economic options are very limited. However, this is an example of a widespread complaint that is manifested through public displays of anger and frustration, and a single company such as Tullow Oil will never be able to satisfy this demand by itself. As noted previously, broader understanding of agreements and a more systematic joint monitoring process, based on public use of basic tools such as the formal agreements and the Tullow Commitments Register, could help build relationships between Tullow and local communities and provide a mechanism for addressing such complaints. At the same time, the existence of very high but unmet expectations for a large number of long-term, well-paid jobs does not constitute a lack of compliance by Tullow.

# Recommendations

## **Ensure that documentation is accessible and culturally appropriate, and that it is used**

Tullow should work with communities to ensure that documentation is more accessible, more appropriate and more useful. To enable this to happen, Tullow should develop a formal protocol for the documentation, dissemination and use of key documents. This system should be designed in collaboration with, and clearly explained to, community members, community leaders and government officials. These documents will help communities to develop simple systems for maintaining and, most critically, actually using their own documentation when making decisions, monitoring process, proposing improvements or raising grievances. Copies of all documentation should be held by the well pad committee, Tullow Oil, and national and county government officials.

In and beyond Turkana, in line with its own Access to Information Policy, IFC should clearly stipulate that key documentation should be in the public domain, including the posting of agreements online, unless there are specific requests from the community to maintain confidentiality.

Greater transparency in processes and agreements would also help to develop a foundation of common knowledge about what such consultations, agreements and monitoring processes could involve, leading to a set of 'good practice' lessons in Kenya.

## **Emphasize FPIC throughout the Turkana oil fields**

Tullow should frame each of its future site-specific FPIC consultations as part of the broader multi-decade project, with attention to potential positive and negative impacts for different communities and diverse community members. Each consultation process, and the monitoring systems following any agreement, should be designed to identify lessons that will improve subsequent work.

Consultations in each site-specific process should ensure full information and understanding about how the particular issues under discussion contribute to future options (going to production vs not going to production), with attention to a range of potentially positive and negative social, economic, environmental and political impacts arising from each phase (development, production and eventual abandonment). Consultations should include full participation by both women and men, and any gender-specific impacts and benefits should be identified and addressed.

Tullow should finalize and share its Stakeholder Engagement Framework, and ensure that documentation on consultation processes, agreements and monitoring systems is readily available to members of affected communities.

## **Build community ownership and a learning platform of affected communities**

If communities want to truly benefit from constructive engagement with Tullow, while understanding and avoiding pitfalls, it will require an increased investment of their time to support communication and learning. Some of the actions required are simple and can be done within each community, such as starting to keep good records of meetings and agreements and insisting that these be used during regular monitoring meetings.

At the moment, communities affected by Tullow's work in different oil fields seem to be working in isolation from one another, yet they are all going through similar processes at much the same time. While Tullow Oil must implement a separate FPIC process for each phase of work at each site, communities can benefit from the fact that many of the issues are common across different locations. Rather than each community continuing to work in isolation, in sequential or parallel negotiations with Tullow, leaders of the 30 or so communities affected by the nine oil fields could form a 'Learning Platform of Affected Communities'. This platform could share information, identify external sources of independent information and technical support and present a more consolidated case to Tullow.

### **Provide access to independent external experts**

In addition to providing information directly to communities, Tullow should help ensure that communities have access to independent sources of information and technical support by paying the costs of one or more third party advisors. This process should ensure that communities are able to choose their own advisors from a range of options.

These external experts could assist in multiple ways, such as providing communities with information on the potential short-term and long-term benefits and risks of proposed investments, helping the community to compile and use documentation in monitoring processes after any agreements, and so on. This access to unbiased technical expertise would help ensure that various community members really understand options, can air their questions and concerns, discuss differences of opinion and enable the community to come to a consensus without the company being present.

The use of external advisors is in line with the UN Global Compact's Guide to the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), which states that companies should '(c)onsider making arrangement for independent monitoring of the FPIC process and its outcomes, by engaging an independent expert chosen in consultation with the indigenous peoples concerned'.<sup>81</sup>

### **Support leaders and strengthen the well pad committee**

IFC notes that '(t)he process of achieving the FPIC of Affected Communities of Indigenous Peoples may require investment in building relevant institutions, decision-making processes and the capacity of Affected Communities. Clients should approach the achievement of FPIC from a development perspective that prioritizes the sustainability of development activities implemented with the Affected Communities of Indigenous Peoples' (emphasis added).<sup>82</sup>

One aspect of capacity building must include support to those existing leaders who already have some influence and opportunities, including traditional leaders. The UN Global Compact notes that companies should provide 'support (e.g. financial, logistical, etc.) to strengthen the capacity of a community's decision-making processes, being mindful that doing so does not create undue pressure to give consent'.<sup>83</sup>

The technical competence of the well pad committee needs some capacity building in areas such as monitoring action plans, financial management, designing tenders, overseeing contractors and accounting. Tullow should support the committee to improve its functions and its accountability.

## **Broaden opportunities for women, youth and pastoralists**

Tullow, government and CSOs should proactively seek to build important skills and experience in the communities, emphasizing equity, gender equality and women's empowerment. Beyond supporting those (mostly men) in the community who already have power and positions of influence, Tullow, government and civil society should invest in improving capacity, confidence and opportunities for women, youth and pastoralist families (especially pastoralist women).

Tullow can change some of its engagement practices, such as agreeing on times and locations for planning and monitoring meetings with pastoralist families, and having separate gender- and age-disaggregated discussions to open up opportunities for women and youth so that all are able to participate, they feel comfortable during discussions and they can influence decisions.

It would be useful to add more seats for women and young people on the well pad committee, supported by intensive on-the-job training and mentoring.

## **Use community development plans as road maps**

Previous funding from Tullow has gone into some useful development of basic social infrastructure, but there is no overall local community development plan in place. Without a plan, the communities and the well pad committee have to go through a new process of identifying how to spend money every time funds come in. Going beyond simply a plan for physical infrastructure, a participatory process of developing such a plan could lead to a common, long-term vision that incorporates the views of diverse members of the community.

Tullow could support broad community development planning, facilitated by a combination of relevant government planning specialists, CSOs and independent external specialists. These plans could draw from but also influence the Turkana County Integrated Development Plan<sup>84</sup> and any Ward Development Plan that may be developed in future.

## **Strengthen and increase routine monitoring to improve transparency and accountability**

Beyond the current biannual external reviews, Tullow should build local relationships by establishing more frequent, formal monitoring and correction meetings to support the ongoing maintenance of FPIC. In addition to the existing frequent, informal visits by Community Liason Officers, this could involve formal monthly progress reviews with the well pad committee and quarterly community reviews.

Tullow should work with community leaders to establish joint monthly meetings with the well pad committee, and larger quarterly or at least semi-annual meetings to update the overall community on plans, progress and constraints. These would involve review of the agreement and the Commitments Register, and attention to any issues arising. In addition to Tullow, community members and the county and national government representatives on the well pad committee, CSOs operating in the area could be invited as observers.

## **Fulfil company commitments to communities**

The widespread perception in both Nakukulas and Lokicheda communities that Tullow does not keep its promises undermines all new efforts to develop a truly FPIC-compliant process. Tullow should urgently make good on all outstanding promises.

While the company has a Commitments Register, it is clear that this is not used as a regular monitoring tool with community members. It would be easy to set up a public review mechanism of all agreements on all consultations and promises with each community since Tullow arrived in Turkana. This review should involve discussion of the reasons for delays, the impacts of such delays and any adjustments required in timeframes. After this, routine monitoring meetings involving Tullow, the community and government representatives should simply have a standing agenda point to follow up on progress of commitments.

### **Build consistent communication within and between institutions**

The experiences in Nakukulas and Lokicheda communities highlight the need for more systematic, open communication between the company and government at a local level. Both Tullow and the county government need to actively and consistently communicate with one another at county, sub-county and ward levels, and ensure that information is sufficiently shared within their own structures.

At a minimum, information shared and agreements reached between Tullow and county-level government should be shared with sub-county and ward-level administrators, with community leaders and community bodies such as well pad committees and with Tullow's own local staff. Tullow and county government, who meet regularly, can further apply the practice and hold regular engagements (perhaps less frequently) at local level, including with sub-county and ward-level administrators, relevant staff of technical ministries, the Area Chief and perhaps well pad committee members.

### **County government should engage**

Respondents specifically noted key functions that government should play in relationship to Tullow's engagement with communities, including providing general guidance, witnessing processes and agreements, overseeing compliance and building community capacity to negotiate. This is part of government's obligation to provide oversight and support to citizens. Further, the company pays taxes to the county government for each well pad; some of this money could be set aside to cover the costs of ensuring that a county representative participates in all key negotiations and ongoing monitoring processes.

Tullow and community leaders on the well pad committee should ensure that the Ward Administrator, as the representative of the county government, is fully informed of all activities sufficiently in advance. County and national government representatives should become much more proactive in keeping themselves informed about Tullow's work, and should participate in key events such as meetings of the well pad committee on which they already hold positions.

### **Develop civil society work on FPIC**

CSOs should make concerted efforts to learn about the oil industry, learn about how they might adapt their existing skills to be useful in this new context and develop new capabilities that build on what they already do. CSOs do not have to play formal roles in negotiations. They can support communities, either by directly providing assistance or by helping them to get in touch with other organizations or experts, for example, to better access and understand information, or by facilitating the establishment of community associations and helping to address complex gender and power dynamics within communities.

Rather than each organization going through this process independently, some CSOs are already combining forces in an intensive learning process. The Kenya

Civil Society Platform on Oil and Gas (KCSPOG) is an important player in this space, and could play an important role in continuing to enable CSOs to become more informed and proactive. Tullow itself could provide some technical training, while helping CSOs to find independent sources of expertise on the oil industry.

### **Integrate FPIC principles into the national legal framework**

There is no explicit mention of FPIC in Kenya's legal framework. However, CSOs should work to build the consistent use of key FPIC concepts and language into multiple bills and regulations. There are several existing opportunities.

For example, the Community Land Act, enacted in September 2016, includes several relevant sections:

- Part III: Administration and Management of Community Land: This provides for the functions and powers of Community Land Management Committees, which will be empowered to negotiate with investors on behalf of communities. Advocacy could emphasize the importance of the representation of women and marginalized people such as pastoralists, along with capacity building for these committees.
- Part IV: Article 36: Noted as 'Benefits sharing', this identifies specific provisions for a 'free, open and consultative process' between communities and potential investors, leading to agreements on the use of community land. It also highlights the opportunity for communities to request technical guidance in negotiating agreements.
- Part VIII: Settlement of Disputes Related to Community Land: National regulations could provide a framework for company grievance procedures, a key aspect of FPIC.
- Article 48 (2) (c): This provides that the Cabinet Secretary should make regulations for 'the requirements of investor partnerships'.
- Article 48 (h): This deals with 'public education and awareness on the rights of communities over community land'.

This law still requires regulations to guide how it will be implemented. This provides an opportunity to build in more language and guidance that are explicitly in line with FPIC.

Other bills are pending in Parliament, such as the Public Participation Bill and the Petroleum Bill, and it is possible to influence their wording to be in line with the principles and concepts of FPIC before they become law. The Public Petroleum Bill of 2016 proposes some protection relevant to FPIC, such as:

- Part IX (2) explicitly calls for prior consent of land owners before any 'exploratory activities relating to upstream petroleum operations'.
- Article 117 highlights the right of communities to be informed prior to upstream petroleum operations.

Other aspects of the Petroleum Bill need improvement. For example:

- The bill is blind to gender equity considerations and to other forms of discrimination.
- It seems to refer only to public participation in processes run by the government; this could be broadened to also guide public participation in private sector consultations and negotiations.
- The bill is silent on global and African standards on FPIC.

*'NGOs can play an important role in delivering local services and serving as advocates for community interests. In some cases, they are seen by communities as more impartial than government organizations and company representatives.'* – IFC

## **IFC should strengthen its requirements**

IFC can do more to ensure that its existing requirements are met, as well as make some of its requirements more forceful, both in Turkana and more generally. Some of these include:

**Documentation is for communities, too:** IFC should require its clients to ensure that communities have the capacity to compile, store and maintain agreements and other key documents, ensuring that these are accessible to community members.

**Bring in third party specialists:** Especially where communities face social, economic and political marginalization, such as in Turkana County, IFC should ensure that they have the option of taking advice from independent external specialists.

**Require more frequent and community-focused monitoring:** In general, joint monitoring and review with communities should happen more frequently than 'at least annually', as required in PS1. This should be enhanced through direct formal quarterly engagement between IFC clients and the affected communities. IFC should also require external monitors to allocate time and resources to engage directly with community leaders and with a diverse and representative sample of community members, including both men and women. As noted in the IFC Access to Information Policy, information from such monitoring work should be publicly available to the entire community, few of whom have access to the Internet.

**Enforce its contract disclosure requirement:** Although IFC requires the company to disclose publicly its contract with the Kenyan government, neither Africa Oil, Tullow Oil nor the Kenyan government has disclosed the contract. Information on the fiscal terms of the project is vital for Kenyan citizens and local communities to formulate a realistic picture of its potential benefits.



## 4 CONCLUSION

The growing oil industry in rural Turkana County provides an important opportunity to provide benefits for local communities, while learning more broadly how to design and implement a process of seeking free, prior and informed consent in a remote and challenging area. Most interviewees feel that Tullow Oil's community engagement process has improved in important ways since 2015. However, evidence from two community consultations in Nakukulas, Lokicheda and nearby pastoralist settlements in 2016 does not adequately demonstrate that FPIC has been achieved and indicates that the process does not fully comply with IFC's FPIC requirements, nor with Tullow's own Human Rights Policy.

Some of the problems seem to be due to a lack of understanding or to rectifiable gaps in implementation by Tullow Oil. Most notably, the lack of readily available and widely understood documentation in communities, which is a core requirement of IFC Performance Standards 1 and 7, could be very easily fixed in a very short time. This documentation could then be used to help address a number of other shortcomings. Even more important is the fact that there are widespread differences of opinion within the community on what was actually agreed; this is a key factor in the assessment that there is insufficient evidence to demonstrate widespread informed consent at a community level. More accessible and simpler documentation could also provide the basis for a more systematic, routine and participatory monitoring system to ensure that problems are quickly identified and addressed.

Other issues are more complex, grounded in a social and economic foundation that makes FPIC in Turkana a difficult proposition. Even with good documentation and monitoring, the power imbalances between a multinational company and local communities, as well as within the communities themselves, require much more active engagement from government and civil society.

Another shortcoming identified by this study is the extent to which the participation of women, particularly those from pastoralist families and settlements, and other marginalized groups has been achieved in FPIC processes to date, as required by IFC PS1 and PS7 and also by Tullow's Human Rights Policy. This is particularly true of the well paid committee, which is male-dominated. Concerted efforts by multiple stakeholders, including Tullow, are needed to support not just the interests of local elites – mostly male leaders with social, political and economic power. For FPIC to be achieved, the process must also ensure that a range of men and women from different social groups, such as pastoralist women and youth, are able to engage in consultations, influence decisions and benefit from the results.

For a company planning a multi-decade investment, the business case behind FPIC, and the negative impacts of repeated community protests, might result in better compliance than calls to justice or even to contractual compliance. At the same time, good faith efforts by the company need to be backed up by strong external incentives. The two major sources of such external influence are IFC and national and county governments.

The next few years in Turkana County provide a significant opportunity. Tullow Oil will probably undertake a small number of FPIC consultations each year, all within a very tight geographical area in which there are only about 30 communities. This means that a concerted effort by Tullow, Africa Oil, government, CSOs and the communities themselves could build on existing processes to develop lessons on

how to seek FPIC in this context, while fully accepting that communities have the right to deny consent. The lessons from these communities would be of great value as evidence and ideas for FPIC in other settings, as well as in other industries.

# APPENDIX 1: COMPLIANCE WITH IFC REQUIREMENTS AND TULLOW'S HUMAN RIGHTS POLICY

Specific requirements for Tullow Oil: Table 1 provides details of requirements, deadlines and necessary evidence of compliance, all taken from the IFC Environmental and Social Review Summary (ESRS) for Africa Oil in Turkana, Project Number 36699, last updated 22 December 2015.85 Numbers refer to specific paragraphs (e.g. IFC PS1, para. 27 means IFC Performance Standard 1, paragraph 27).

Table 1: IFC Requirements for Africa Oil in Turkana County – from IFC Environmental and Social Review Summary, Dec 2015			
Requirement in ESRS	Source of requirement	Desired evidence of compliance	Comments by Oxfam
<i>'Develop <b>Stakeholder Engagement Plans</b> per requirements of PS1.'</i> <i>Deadline: 31 March 2016</i>	IFC PS1, para. 27	Client's Stakeholder Engagement documents. Confirmation from members of affected communities.	The consultants were not able to see these. Tullow says that it has a Stakeholder Engagement Framework, with more specific, usually project-focused Stakeholder Engagement Plans (SEPs) tied to discrete, definable project events. For example, a specific well site could have an Engagement Plan for several months for land access and initial drilling. Documents on the Tullow website, such as the Environmental Project Reports for Ngamia-D, are not the full SEP. Community members confirmed that Tullow Community Liason Officers are frequently in the community, but know nothing of a formal engagement plan.
<i>'The Company will complete the additional requirements for <b>Free Prior Informed Consent (FPIC)</b>, per the circumstances listed in <b>PS7</b>, and complete a mutually acceptable <b>process</b> between Company and affected community and provide</i>	IFC PS7, para. 12	Client's schedule and record of stakeholder engagement. Client's record of discussions with recognized stakeholder representatives, respected key informants and legitimate	The research team saw no evidence of documentation, although Tullow says that it has documentation of processes and agreements. Community members widely confirm that agreements were made, but there are differences of opinion on their contents. The community does not have any documentation of the process. The Area Chief, chief's elders and members of

<p><i>evidence of an agreement between the two parties on the outcome of the negotiation.'</i>  <i>Deadline: 31 March 2016</i></p>		<p>representatives of sub-groups (e.g. women, minorities).  Confirmation from members of affected communities.</p>	<p>the well pad committee all acknowledge that agreements were signed, but these are not readily available to community members. The Area Chief (a national government appointee) says that he has a copy of the agreements, but cannot locate them. The Ward Administrator (county government) did not sign and does not have documentation of either process or agreement.</p>
<p><i>'Provide <b>evidence of an agreement</b> between Company and community on the <b>outcome of FPIC negotiations.</b>'</i>  <i>Deadline: 30 June 2016</i></p>	<p>IFC PS7, para. 12</p>	<p>Copy of agreements.</p>	<p>As in previous line, there is verbal acknowledgement of agreements, but the agreements themselves are not available.</p>
<p><i>'The Company will develop <b>Land Acquisition and Livelihood Restoration Plans (LALRP)</b> for each of the two countries (Kenya, Ethiopia).'</i>  <i>Deadline: 31 March 2016</i></p>	<p>IFC Environmental and Social Review Summary, December 2015</p>	<p>Copy of plan.</p>	<p>Not available. Tullow says that this is still being developed.</p>
<p><i>'The Company will prepare and submit <b>ESIAs</b> to IFC addressing local regulatory requirements and IFC PSs in any case where wells progress to production. These will be presented to IFC for review and approval at least four months prior to start of any substantive construction.'</i>  <i>Deadline: 31 December 2016</i></p>	<p>IFC Environmental and Social Review Summary, December 2015</p>	<p>Copy of ESIA's.</p>	<p>Not yet relevant; no wells have progressed to production.</p>

**Table 2: Tullow Human Rights Policy, 2016**

Commitment in the Policy	Comments by Oxfam
<p>'To engage meaningfully with and obtain broad, community support from impacted communities throughout the project life cycle, including, where appropriate, using traditional community governance mechanisms and obtaining the perspectives of vulnerable groups, including women.'</p>	<p>There was broad consultation leading to the agreements. Community meetings included men, women and youth. All women and youth in Nakukulas and Lokicheda said they felt that their inputs in meetings were heard. However, participation of pastoralist women was more limited, both by timing and location of meetings and by social factors that limited women's ability to express opinions in community meetings. There are conflicting understandings amongst community members of the main contents of the agreement; for example, many referred to new infrastructure projects, even though these were actually related to outstanding promises from 2014. Also, the community holds no documentation of the process, including when meetings occurred, who participated, what was discussed or what issues arose. This calls into question how 'informed' the support actually is.</p>
<p>'In a form appropriate to the circumstances, to obtain the informed agreement of project-affected communities early in the project cycle, and prior to major project developments or changes that would significantly affect them.'</p>	<p>There was broad consultation leading to agreements before work was initiated, and there have been no changes to the project so far. However, there is no locally available documentation of the process, copies of the agreements held by community leaders are not known by or available to community members and there are differing understandings of what was actually agreed. This does not indicate 'informed agreement'.</p>
<p>'To avoid or, where that is not possible, minimise involuntary physical or economic resettlement and provide compensation for loss of assets, and improve or restore the livelihoods and standards of living of people resettled.'</p>	<p>There is no involuntary physical resettlement. Economic resettlement and loss of assets at the exploration and appraisal stage largely involve loss of access to grazing land and natural resources, and damage to family property. Oxfam heard of a few cases of loss (such as animals hit by Tullow vehicles); these are all settled through the grievance process.</p>
<p>'To ensure that affected communities have access to a transparent and fair non-judicial project-level grievance mechanism which operates in a timely and predictable manner.'</p>	<p>People understand and use the grievance mechanism for personal issues (e.g. livestock hit by Tullow vehicles), but no community members mentioned this mechanism as being useful for the resolution of broader problems. Instead, people said that they make Tullow aware of problems concerning the company's commitments by blocking roads.</p>

## APPENDIX 2: IFC PS1 AND PS7

The IFC Performance Standards 1 and 7 emphasize disclosure of information, consultations and ongoing reporting back to affected communities. Some relevant sections include:

PS1 para. 29, Disclosure of Information: ‘... The client will provide Affected Communities with access to relevant information on: (i) the purpose, nature, and scale of the project; (ii) the duration of proposed project activities; (iii) any risks to and potential impacts on such communities and relevant mitigation measures; (iv) the envisaged stakeholder engagement process; and (v) the grievance mechanism.’

PS1, para 30, Consultations: ‘The client will tailor its consultation process to the language preferences of the Affected Communities, their decision-making process, and the needs of disadvantaged or vulnerable groups. If clients have already engaged in such a process, they will provide adequate documented evidence of such engagement.’

PS 1 para 36, Ongoing Reporting: ‘The client will provide periodic reports to the Affected Communities that describe progress with implementation of the project Action Plans ... on issues that the consultation process or grievance mechanism have identified as a concern to those Communities ... not less than annually.’

PS7 para 10, Participation and Consent: ‘... engagement process includes stakeholder analysis and engagement planning, disclosure of information, consultation, and participation, in a culturally appropriate manner.’

PS7 GN35: ‘... document mutually accepted engagement and negotiation process ... and evidence of agreement.’ [...] ‘Impacts on vulnerable groups within the Affected Communities of Indigenous Peoples should be adequately addressed during negotiation and in relevant documentation.’

PS7 GN36: ‘... FPIC should rely on identification, recognition and engagement of greater numbers or representativeness of stakeholder sub-groups.’

PS7 GN37: ‘... may require investment in building relevant institutions, decision-making processes and the capacity of Affected Communities.’

PS7 GN38: ‘... an agreement should document the roles and responsibilities of both parties ... includ[ing]: (i) agreed engagement and consultation process; (ii) environmental, social and cultural impact management (including land and resource management); (iii) compensation and disbursement framework or arrangements; (iv) employment and contracting opportunities; (v) governance arrangements; (vi) other commitments such as those pertaining to continued access to lands, contribution to development, etc; and (vii) agreed implementation/delivery mechanisms to meet each party’s commitments. The agreement between parties should include requirements to develop time-bound implementation plans. Examples of agreements include a memorandum of understanding, a letter of intent, and a joint statement of principles.’

PS7 GN39: ‘Documentation should include evidence of support from the Communities.’

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December 2016. After revisions to the IFC website, the ESRS was at  
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For further information on the issues raised in this paper please email [advocacy@oxfaminternational.org](mailto:advocacy@oxfaminternational.org)

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