

August 6, 2019

Delivered via email: cao@worldbankgroup.org

Office of the Compliance Advisor Ombudsman
International Finance Corporation
2121 Pennsylvania Avenue
NW Washington, DC 20433
USA

Dear Sir/Madam:

RE: Block 12A in Kenya – Kerio Valley Region
Oil and Gas Exploration by Tullow Oil and Delonex Energy

The Kerio Valley Community Organisation (KVCO), on its own behalf and on behalf of the complainants named in Appendix “A” (collectively, the Complainants), submit this complaint pursuant to the Compliance Advisor Ombudsman (CAO) Operational Guidelines with respect to oil and gas exploration activities carried out in the Block 12A concession (Project) in the Kerio Valley, Kenya by Delonex Energy and Tullow Oil (Companies).

The International Finance Corporation (IFC) is contributing to the Project through its investment in Africa Oil and Delonex Energy, as further detailed below.

Summary of the Complaint

The Complainants submit that the IFC, together with its client, Delonex Energy, directly and through its operating partner, Tullow Oil, have breached the IFC Performance Standards. The Complainants submit that the Companies have breached Performance Standard 1 by failing to: (i) disclose information; (ii) engage with appropriate stakeholders; (iii) identify and address relevant risks; and (iv) carry out informed consultations with the communities of Arror, Muchukwo, Kinyach, and Barwessa (Communities) in the Kerio Valley.

The Complainants further assert that the IFC has failed to properly review, supervise and monitor the Companies’ performance in this regard. The IFC’s and the Companies’ failures to comply with the IFC Performance Standards during the exploration phase of the Project have adversely impacted the Complainants, and have the potential to result in further adverse impacts on the Communities during subsequent phases of the Project. In early March 2018, a further exploration campaign commenced in the Kerio Valley, making the lack of stakeholder engagement an ongoing, urgent issue of concern.¹

The Complainants further submit that as a result of the Companies’ failure to provide information and consult with the Communities in accordance with Performance Standard 1, there are existing, and an increased risk for further, violations of the other IFC Performance Standards, including Performance Standards 3, 4 and 5.

The Complainants request that the CAO take immediate steps to investigate the issues set out in this complaint and address the Complainants’ concerns regarding the Companies’

¹ *Delonex Energy, Kenya*, online: <http://www.delonexenergy.com/assets/kenya/>

lack of engagement and breaches of the Performance Standards to date. The Complainants further request that the CAO recommend to the IFC that it work with the Complainants and the Companies to develop and implement a process of engagement to ensure that the Communities are consulted with and that their concerns in relation to the Project are addressed on an ongoing basis.

I. BACKGROUND

a. The Complainants

The Complainants are residents of the Communities in the Kerio Valley. The Kerio Valley is located between the Cherangani Hills and the Tugen Hills in Kenya within the area designated by the Kenyan Government as Block 12A for the purpose of oil and gas exploration. A map of Block 12A is attached to this complaint as Appendix "B."

KVCO is a grass-roots, non-governmental organization which provides support and advocacy to communities in the Kerio Valley. The Complainants have authorized KVCO to represent their interests for the purpose of this complaint. Attached as Appendix "A" is a copy of 140 signatures from community members in the Kerio Valley supporting KVCO in its complaint to the CAO.

For reasons of security and fear of reprisal, we ask that the names of the Complainants be kept confidential, and only be named as KVCO or the Complainants in any correspondence with the Companies and IFC Management in respect of this complaint.

The Complainants are supported by the Justice and Corporate Accountability Project (JCAP). JCAP is a volunteer-driven transnational, collaborative, community-based legal clinic based in Osgoode Hall Law School, York University and Thomson Rivers University Faculty of Law, Canada.

b. The Companies

i. Tullow Oil

Tullow Oil is a multi-national oil and gas exploration company with headquarters in London, U.K. Tullow Oil has a 40% ownership in Block 12A concession, with Tullow Oil having operatorship of the Block 12A from September 2010 to April 2018, when it transferred operatorship to Delonex Energy.²

Adjacent regions of Block 10BB and 13T are also explored or extracted by Tullow Oil in partnership with Africa Oil and Maersk.

² *Tullow Oil, Kenya*, online: <https://www.tullowoil.com/operations/east-africa/kenya>.

It should also be noted that Africa Oil purchased an interest in the Block 12A from Platform Resources Inc. on February 16, 2010 and obtained financing from IFC on January 1, 2012 in the amount of \$50 million. However, as of the date of this complaint, Africa Oil no longer has a share in Block 12A.

ii. Delonex Energy

Delonex Energy is a sub-Saharan oil and gas exploration company currently active in Kenya and other countries. Delonex Energy has two major investors: the IFC and Warburg Pincus, a private equity firm. At this time, Delonex Energy has a 60% interest in the Block 12A project, entering the project in January 2016 and expanding its stake in 2018.³ Since April 2018, it has had operatorship and has been playing an active role in the exploration activities in Block 12A.⁴

Until recently, Africa Oil was also a partner in Block 12A with Tullow Oil and Delonex Energy. We understand that the IFC has provided funding to Africa Oil for its projects and explorations, as explained below.

A timeline of activities in Block 12A as well as engagement between the Companies and KVCO is attached to this complaint as Appendix "C".

II. ELIGIBILITY REQUIREMENTS

The Complainants submit that this complaint meets the CAO's eligibility requirements for the following reasons:

a. Block 12A is an IFC-financed project

The IFC has provided funding in support of the Project (oil and gas exploration activities carried out in the Block 12A concession in Kenya) since August 31, 2015, when it invested \$50 million in Africa Oil.⁵ In November 2013, the IFC became a 10% equity investor in Delonex Energy.⁶ In January 2016, Delonex Energy acquired a stake in Block 12A.⁷

Block 12A has been identified by the IFC as a "Category A" project due to the likelihood that potentially significant and diverse impacts could be associated with the exploration and development activities of the project."⁸ According to the IFC, "the investment [in Block 12A] will have impacts that must be managed in a manner consistent with the Performance Standards."⁹

b. The Companies are required to adhere to the Performance Standards and the IFC is required to ensure compliance

In the case of its direct investments, the IFC "requires its clients to apply the Performance Standards to manage environmental and social risks and impacts so that development opportunities are enhanced".¹⁰ As the holder of a 60% interest in Block 12A, Delonex Energy

³ *Delonex, Kenya, supra*, note 1.

⁴ *Tullow Oil, Kenya*, online: <https://www.tullowoil.com/operations/east-africa/kenya>.

⁵ *Africa Oil, Corporate History*, online: <http://www.africaoilcorp.com/s/corporate-history.asp?ReportID=585965>.

⁶ *IFC, Project Information Portal, Delonex Energy*, online: <https://disclosures.ifc.org/#/projectDetail/SII/33557>.

⁷ *Delonex Energy, Delonex Energy completes farm-in to Tullow Oil operated Kenya Block 12A* (28 January 2016), online: <https://www.delonexenergy.com/2016/01/28/delonex-energy-completes-farm-tullow-oil-operated-kenya-block-12a/>.

⁸ *Africa Oil, IFC*, online: <http://www.africaoilcorp.com/i/pdf/hsec/2-IFC-Dec-2015.pdf>

⁹ *Ibid.*

¹⁰ *IFC, Performance Standards*, online:

must adhere to the Performance Standards in order to maintain financial support from the IFC.

As an operating partner, Tullow Oil is also obligated to adhere to the Performance Standards. Pursuant to the IFC Guidance Note for Performance Standard 1, “[i]f 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 programs”.¹¹ In a similar project in Kenya, Tullow Oil accepted that its role as operating partner requires that it ensure that the day-to-day activities in relation to that project comply with the Performance Standards.¹²

For its part, the IFC must conduct appropriate environmental and social due diligence to confirm that the investment and its outcomes will be consistent with the objectives of the IFC Performance Standards – that is, that the project will not pose undue and unmitigated risks or impacts on the environmental or local communities.¹³ This due diligence includes reviewing the client’s assessments of environmental and social risks and ensuring that those risks are adequately identified and appropriate mitigation plans are in place. Where third parties, such as Tullow Oil, are involved, the IFC must review its client’s identification of third-party risks, and determine whether such risks are manageable, and if so under what conditions, so as to create outcomes consistent with the Performance Standards. Certain risks may require IFC to refrain from supporting the proposed activity.¹⁴

The IFC must also conduct regular monitoring and supervision of its investments.¹⁵ If the IFC finds that the client is failing to comply with those commitments, the IFC must work with the client to bring it back into compliance, and if the client fails to re-establish compliance, the IFC will exercise its rights and remedies, as appropriate.¹⁶

c. The Complaint relates to issues within the jurisdiction of the CAO

The Complaint relates to the Companies’ failure to engage with the Complainants, including failing to provide adequate and clear information regarding the impacts of the Project and failing to consult with the Complainants about the Project on an ongoing basis, and the IFC’s failure to ensure such obligations are satisfied as required by Performance Standard

https://www.ifc.org/wps/wcm/connect/Topics_Ext_Content/IFC_External_Corporate_Site/Sustainability-At-IFC/Policies-Standards/Performance-Standards.

¹¹ *Ibid.*, paragraph 73. Performance Standard 1 further indicates that “activities and facilities that are directly owned, operated or managed (including by contractors) and that are a component of the project” remain critical. The IFC Guidance Note states that “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.”

¹² In November 2017, Oxfam published a report regarding a project in South Lockichar Basin in which Tullow Oil is the operating partner. According to the Oxfam report, “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.” See report at Oxfam, *Securing Communities’ Right to ‘Free Prior and Informed’ Consent in Kenya’s Extractive Sector*, online: https://kenya.oxfam.org/policy_paper/securing-communities'-right-'free-prior-and-informed'-consent-kenya's-extractive-sector

¹³ IFC Sustainability Policy, online:

https://www.ifc.org/wps/wcm/connect/115482804a0255db96fbffd1a5d13d27/PS_English_2012_Full-Documents.pdf?MOD=AJPERES, paras. 7, 20-21.

¹⁴ *Ibid.*, para. 23.

¹⁵ *Ibid.*, para. 45.

¹⁶ *Ibid.*, para. 24.

1 and the IFC's Sustainability Policy. These consultation failures also contribute to violations of Performance Standards 3, 4 and 5. These issues fall within the jurisdiction of the CAO pursuant to the Operational Guidelines.

III. BREACHES OF IFC PERFORMANCE STANDARDS

a. Performance Standard 1 – Assessment and Management of Environmental and Social Risks and Impacts

Performance Standard 1 requires clients to engage “directly” with affected communities and other stakeholders in a “dynamic and continuous process”. A core objective of Performance Standard 1 is to:

[P]romote and provide means for adequate engagement with Affected Communities throughout the project cycle on issues that could potentially affect them and to ensure that relevant environmental and social information is disclosed and disseminated.¹⁷

Performance Standard 1 encompasses a number of discrete requirements. The Complainants submit that the Companies have breached Performance Standard 1 by failing to: (i) disclose information; (ii) engage with appropriate stakeholders; (iii) identify and address relevant risks; and (iv) carry out informed consultations with the Communities. Further details are set out below.

i. Disclosure of Information

Performance Standard 1 requires companies to disclose relevant project information so that communities and other stakeholders can “understand the risks, impacts and opportunities of the project.”¹⁸ This includes providing information regarding: (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.¹⁹ Information must be made accessible in a culturally-appropriate local language(s) and understandable to affected communities.²⁰

The Companies have breached the disclosure requirements of Performance Standard 1 by: (i) failing to provide information upon request; (ii) providing inadequate information; and (iii) failing to provide information with respect to the grievance mechanism.

First, KVCO on behalf of the Communities repeatedly requested that the Companies provide information which would enable them to understand the potential impacts of the Project on their rights and interests. In many cases, the Companies failed to provide the requested information, or provided the information only after repeated requests and significant delay. Copies of correspondence from the Complainants requesting information from the Companies is attached to this Complaint as Appendix “D.”

¹⁷ IFC, *supra*, note 10, Performance Standard 1, s.3.

¹⁸ *Ibid.*, Performance Standard 1, s.29.

¹⁹ *Ibid.*, Performance Standard 1, p. 8.

²⁰ *Ibid.*, Performance Standard 1, s. 30.

Community members have had the same difficulty as KVCO in obtaining information from the Companies. In December 2018, JCAP and KVCO conducted five community meetings with approximately 50 community members per meeting. The attendees included Chiefs, elders, women, and NGOs. A persistent theme at each meeting was the Communities' dissatisfaction with the information they had received from the Companies. Community members stated that they felt completely in the dark about what the Companies were doing, what they were planning on doing, and how those activities would affect the Communities. Simple steps such as making the 2011 Environmental and Social Impact Assessment regarding proposed seismic survey in Block 12A (2011 ESIA) and 2015 Environmental and Social Impact Assessment on exploratory drilling (2015 ESIA) available to the Communities in an easily-accessible format had not been done. Access to the 2015 ESIA was been difficult to obtain in any form. KVCO only obtained the 2015 ESIA after repeated requests to Tullow and the National Environment Management Authority (NEMA) over many months.

Second, where information was provided, the documents lacked sufficient detail to enable the Complainants to meaningfully understand and respond to potential impacts of the Project. For example, the 2015 ESIA has a number of shortcomings. First, the Project Area purports to encompass exploratory drilling in the entirety of Block 12A (an area of approximately 20,521.6km²). The 2015 ESIA does not specify the sites of exploratory wells, thereby making it impossible to identify how drilling activities will affect the area and the specific communities that reside within Block 12A.

In addition, the information provided to community members in conducting the 2015 ESIA was wholly inadequate. Appendices 3 and 4 of the 2015 ESIA contain the documents provided by Tullow to "support stakeholder engagement".²¹ These documents focus on the technical nature of drilling and are excessively general on all other aspects. At no point do they mention potential environmental risks posed by the Project.

The inadequacy of the information provided is reflected in the 2015 ESIA's summaries of the comments received at the community meetings held by the Companies from 22 September to 3 October 2014. The following are examples of comments received:

1. "During the Seismic Survey period, there was no accurate information given to the community members on Tullow proposed activities."²²
2. "Request that the community be well educated on all matters pertaining to oil and gas exploration activities to avoid issues pertaining to distortion of information".²³
3. "Inform the locals directly since the different officers tend to distort the information hence members of the community are mislead."²⁴
4. "We request to have a meeting inclusive with all the leaders within the Community and share information".²⁵
5. "Another meeting inclusive of all the stakeholders should be convened to avoid distorting of information".²⁶

²¹ 2015 Block 12 A Exploration Environmental and Social Impact Assessment (2015 ESIA), Appendix E, pp. 300 and 304.

²² *Ibid.*, p. 732.

²³ *Ibid.*, p. 690.

²⁴ *Ibid.*, p. 717.

²⁵ *Ibid.*, p. 715.

²⁶ *Ibid.*, p. 715.

6. "Sharing information of issues and concerns raised after the completion of the ESIA to all stakeholders".²⁷
7. "The community should get the right to information so that their expectations are well managed by Tullow."²⁸

This inadequacy of information provided has also been reported in the context of the 2011 ESIA. Information was presented in formats which were not easily accessible to the Communities, and additional details were not provided when requested by community members.

Similarly, the 2017 Site-Specific Assessment (2017 SSA) regarding the seismic survey for the Project does not include: (i) detailed information of the activities involved in the survey; (ii) documentation of village-level meetings or explanatory documents in local languages, or; (iii) the names, qualifications and experience of the contributors to the study, other than the members of the field survey team. Copies of the 2011 ESIA, 2015 ESIA and 2017 SSA are attached to this Complaint as Appendix "E."

Third, the Companies failed to provide the Communities with accessible information regarding the grievance mechanism for the Project. Performance Standard 1 requires clients "to ensure that grievances from Affected Communities...are responded to and managed appropriately".²⁹ During the 2015 ESIA community meetings, participants frequently raised questions about the grievance mechanism. Tullow's consistent response was to talk to the Chiefs first, as indicated in the 2015 ESIA. As will be explained below, relying solely on the Chiefs to provide information regarding the grievance mechanism and other issues related to the Project is contrary to the Performance Standards.

Delonex, which has operated the Block 12A since April 2018, has not rectified these gaps in information disclosure and therefore is continuing them, in direct violation of the IFC Performance Standards.

The IFC has failed in its due diligence obligations to ensure that the IFC Performance Standards were satisfied. Further, it is notable that the IFC itself did not disclose the relevant environmental assessments. As such, the IFC is also in breach of its information disclosure obligations (under its Access to Information Policy³⁰ and under the Performance Standards), by failing to make relevant environmental assessments for the Project available online.

ii. Stakeholder Engagement

Performance Standard 1 emphasizes the importance of engaging the appropriate stakeholders in relation to each Project:

Clients should identify the range of stakeholders that may be interested in their actions and consider how external communications might facilitate a dialog with all stakeholders...

When the stakeholder engagement process depends substantially on

²⁷ *Ibid.*, p. 713.

²⁸ *Ibid.*, p. 715.

²⁹ IFC, *supra*, note 10, Performance Standard 1, "objectives".

³⁰ IFC, Access to Information Policy, online: <https://disclosures.ifc.org/#/accessInfoPolicy>.

community representatives, the client will make every reasonable effort to verify that such persons do in fact represent the views of Affected Communities and that they can be relied upon to faithfully communicate the results of consultations to their constituents.³¹

As detailed above, the Companies have failed to meaningfully engage and consult with KVCO. This is directly contrary to the Companies' requirement to identify and engage with a "range of stakeholders."³² The Kerio Valley consists of several distinct communities, and there is no overarching community governance body. KVCO, alongside a farmers' NGO which is partnered with KVCO, are the only community organizations that provide broad representation of the Communities. KVCO works directly with the Communities, is a trusted and respected organization, and has obtained consent from the Complainants to pursue this complaint on their behalf.³³ Most members of KVCO are from the Kerio Valley. Failing to consult with KVCO undermines the Companies' ability to effectively engage with the Communities.

In addition, contrary to the Complainants' requests for a direct process of engagement, Tullow Oil has advised that it intends to carry out engagement regarding the Project through the County Government and the Elgeyo Marakwet and Baringo County Civil Society Forum rather than with KVCO or the Communities. Correspondence from Tullow Oil setting out its position on engagement is attached to this Complaint as Appendix "F." To our knowledge, there has been only one meeting of the Elgeyo Marakwet and Baringo County Civil Society Forum since 2016.

Delonex is taking the same approach to engagement and consultation since it assumed operatorship in April 2018, and as such is continuing the violations noted above.

The Companies' heavy reliance on local Chiefs to discharge their consultation obligations, as indicated in the 2015 ESIA, also constitutes a breach of this Performance Standard.

Companies are required to "make every reasonable effort to verify that [community representatives] do in fact represent the views of Affected Communities."³⁴ Chiefs of the Communities in the Kerio Valley are appointed by the National Government of Kenya. They are not directly elected by or accountable to community members. While some Chiefs are well-respected by the Communities, others are not. The Companies were repeatedly told by community members during the meetings carried out pursuant to the 2015 ESIA that they could not rely solely on the Chiefs. Despite these concerns, Tullow Oil indicated that it intended to continue to rely on the Chiefs for engagement activities in respect of the Project.

The following reproduces some of the concerns expressed by community members with respect to relying on Chiefs and the response from Tullow:

1. Concern: "The chiefs should not make any decision on matters pertaining to the community on their own." Response: "When Tullow wants to do something they normally

³¹ IFC, *supra*, note 10, Performance Standard 1, ss. 26-27.

³² *Ibid.*

³³ See Appendix "B".

³⁴ IFC, *supra*, note 10, Performance Standard 1, ss. 26-27.

- use the chiefs to mobilize the community for barazas”.³⁵
2. Concern: “Fear among the community that the chiefs have been paid and that is why they are supportive of the project.” Response: “The issue of inequality in compensation has been noted.”³⁶
 3. Concern: “During the last seismic Tullow communicated more with the chiefs as opposed to the community leaders leading to favourism [sic] in distribution of opportunities”. Response: “Tullow will go to the community and hold barazas”.³⁷
 4. Concern: “Last time you only involved the chiefs hence need to consider the public to avoid conflict”. No response noted.³⁸
 5. Concern: “Tullow should involve the people directly not through the chiefs since they are not giving the accurate information to the mwananchi [citizens]”. No Response noted.³⁹

These concerns raised by community members should have been noted by the IFC as part of its due diligence. The IFC should have asked Delonex what the Companies had done to ensure that consultation was inclusive and meaningful. In the absence of any meaningful attempts to engage the Communities, the IFC should have undertaken appropriate remedial action to ensure compliance with Performance Standard 1. In failing to take these steps, the IFC has breached its obligations.

iii. Identification of Risks and Impacts

Performance Standard 1 requires clients to “establish and maintain a process for identifying environmental and social risks and impacts of the project.”⁴⁰ The process must “consider all relevant environmental and social risks and impacts of the project, including the issues identified in Performance Standards 2 through 8.”⁴¹ The Companies breached this requirement by failing to address the Communities’ concerns about how the Project could affect security of title to their lands.

The vast majority of people in the Kerio Valley do not have title deeds to their land.⁴² This issue places community members in the precarious position of having significant extractive operations take place on their land with no ability to prove their ownership. The Companies’ operations increase the risk of “land grabs” by wealthy and prominent persons or corporations.⁴³ These concerns are amplified by Kenya’s ongoing history of fraud and

³⁵ 2015 ESIA, *supra*, note 21, p. 703.

³⁶ *Ibid.*, p. 692.

³⁷ *Ibid.*, p. 779.

³⁸ *Ibid.*, p. 788.

³⁹ *Ibid.*, p. 831.

⁴⁰ IFC, *supra*, note 10, Performance Standard 1, s.7.

⁴¹ *Ibid.*

⁴² *Ibid.*, p. 238.

⁴³ In December 2017, for instance, the Kenyan government forcibly evicted members of the Sengwer community from their traditional lands in the Embobut Forest of Elgeyo-Marakwet County, ostensibly as part of a conservation effort. In the process, 50 homes were burned down, one community member killed, and another maimed. See: *Indigenous World 2018*, online: <https://www.iwgia.org/images/documents/indigenous-world/indigenous-world-2018.pdf> pp 466. Moreover, land grabs have also been spurred by the entry of a number of multinational corporations into the country. Events in Turkana County, home to the Kerio valley and with a population approaching a million people, are emblematic of this wider trend. Land in Turkana County is almost entirely communally owned with Kenyan citizens having no title. Only in urban areas, of what is a mostly rural county, are people given allotment letters as proof of ownership. Oil and gas explorations as well as infrastructure projects have catalyzed land disputes in the county. See: Food and Agriculture Organization, *The Community Land Rights of Women and Youth in Tana River and Turkana Counties: A Synthesis Report*, 2, online: <http://www.fao.org/3/a-i7074e.pdf>.

corruption pertaining to land ownership.⁴⁴

At the 2015 ESIA community consultations, participants repeatedly raised the issue of title insecurity. The following is a sample of some of the comments and responses received during the 2015 ESIA community consultations:

Question: "How will Tullow handle issues pertaining to compensation due to the lack of title deeds in areas where demarcation has not been done?"

No response noted.⁴⁵

Question: "How will Tullow handle issues pertaining to land title deed when conducting compensation since the majority of the locals do not have this?"

No response noted.⁴⁶

Question: "Fear that once oil is discovered, the community will not benefit for this since they lack title deeds."

No response noted.⁴⁷

Question: "Before any commencement of the proposed drilling program, the community should be given title deeds first."

No response noted.⁴⁸

Question: Title deeds is a must before any commencement of Tullow proposed activities.

No response noted.⁴⁹

Question: "The community should first be issued with titled deeds before drilling starts."

Response: "Point noted but issues of title deeds is not on Tullow side; you should tal [sic] to the area MCAs, Chiefs and ward representatives."⁵⁰

⁴⁴ According to Transparency International, the top three most corrupt sectors of Kenya are the Police, the Judiciary and Land Services. See Transparency International Kenya, *East African Bribery Index – 2017*, online: <https://tikenya.org/wp-content/uploads/2017/09/East-African-Bribery-Index-EABI-2017-1-1.pdf>. Kenya placed 149th out of 183 countries in Transparency International's 2018 Corruption Perception Index. See: Transparency International, *Corruption Perceptions Index 2018*, online: <https://www.transparency.org/cpi2018>

⁴⁵ 2015 ESIA, *supra*, note 21, p. 686.

⁴⁶ *Ibid.*, p. 688.

⁴⁷ *Ibid.*, p. 692.

⁴⁸ *Ibid.*, p. 696.

⁴⁹ *Ibid.*, p. 696.

⁵⁰ *Ibid.*, p. 698.

Question: "The communities need title deeds before any exploration starts so that there are [sic] no conflicts in the future?"

Response: "Issues of title deeds can be handled by the county governments so I hope the ward representative and the area chiefs can handle that."⁵¹

The failure to address tenure security is a breach of Performance Standards 1 and 5. As noted above, Performance Standard 1 requires that clients identify and address "all relevant environmental and social risks ...including the issues identified in Performance Standards 2 through 8". Security of tenure is directly related to Performance Standard 5 – land acquisition and involuntary resettlement. This standard also guarantees protection for people occupying land without formal, traditional or recognizable usage rights.⁵² Moreover, it is clearly a risk associated with the Project. The Companies' operations are creating a pressing need for tenure security in order to prevent fraudulent land transactions and protect rightful landowners.

It is not open to the Companies to ignore the issue of tenure and redirect the Complaints to the government. Performance Standard 1 provides that:

In the event of risks and impacts in the project's area of influence resulting from a third party's actions, the client will address those risks and impacts in a manner commensurate with the client's control and influence over the third parties, and with due regard to conflict of interest.⁵³

Although the Companies are not able to issue title deeds or prevent illegal land grabs, they are uniquely positioned to work with community members and the Kenyan Government to ensure that title deeds are issued before they undertake any operations. As explained further below, economic displacement has already occurred and violations of Performance Standard 5 have already taken place. So long as exploration operations continue, without properly consulting and compensating families that hold informal land interests, the IFC and its client will further violate IFC Performance Standard 5.

iv. Informed Consultation and Participation

Performance Standard 1 requires IFC clients to "undertake a process of consultation in a manner that provides the Affected Communities with opportunities to express their views on project risks, impacts and mitigation measures."⁵⁴ The client is required to "tailor its consultation process to the language preferences of the Affected Communities, their decision-making process, and the needs of disadvantaged or vulnerable groups."⁵⁵ This Performance Standard recognizes that "[e]ffective consultation is a two-way process."⁵⁶

Where a project will have "potentially significant adverse impacts on Affected Communities"

⁵¹ *Ibid.*, p. 700.

⁵² IFC, *supra*, note 10, Performance Standard 5, s. 5.

⁵³ IFC, *supra*, note 10, Performance Standard 1, s. 9.

⁵⁴ *Ibid.*, s.30.

⁵⁵ *Ibid.*, Performance Standard 1, s.30.

⁵⁶ *Ibid.*

the client is also required to carry out an “an Informed Consultation and Participation (ICP) process.”⁵⁷ The exploration for oil and gas in Block 12A in the Kerio Valley, as a project that would have significant adverse impacts on the communities, meets this threshold.

Performance Standard 1 defines an ICP process as an:

In-depth exchange of views and information, and an organized and iterative consultation, leading to the client’s incorporating into their decision-making process the views of the Affected Communities on matters that affect them directly, such as the proposed mitigation measures, the sharing of development benefits and opportunities, and implementation issues.⁵⁸

Kenyan law similarly recognizes and has enshrined these principles. On June 26, 2019, the National Environmental Tribunal ruled that NEMA had breached the law for approving the construction of a coal power plant in Lamu Kenya without a proper ESIA.⁵⁹ The decision was based on a lack of public participation in respect of the ESIA, with the Tribunal stating “In the absence of public participation, the EIA study process is a still-born and deprived of life, no matter how voluminous or impressive the presentation and literal content of the EIA study report is.”⁶⁰

The tribunal found that the ESIA stakeholder meetings that were held in this case were “introductory in nature but not structured to share information on the possible effects and impacts of the project on the population and the proposed mitigation measures...”⁶¹ and that “information contained in the study report had not been made available in good time to members of the public, or at all, nor had there been an effort to undertake the same level of engagement with the public after the EIA study had been conducted and report published.”⁶²

In this case, consultation carried out by the Companies in respect of its 2011 ESIA and 2015 ESIA fall short of the requirements in the Performance Standards. As community members have advised, consultations consisted primarily of presentations by the Companies without corresponding opportunities for the Complainants to respond, ask questions or provide input. It is also questionable whether some of the consultations which were purported to have taken place actually did take place. For example, in Salawa, some residents told JCAP in 2015 that Tullow Oil did not begin to consult them until after it had already begun exploration.

The 2017 SSA does not document any consultation with the Communities other than consultation with community members as location guides.⁶³ The 2017 SSA includes no reference to the Companies having attended village-level meetings, provided explanatory documents in local languages, or presented the draft SSA to the Communities for review and comment.

⁵⁷ *Ibid.*, Performance Standard 1, s.31.

⁵⁸ *Ibid.*, Performance Standard 1, s.31.

⁵⁹ National Environmental Tribunal, Kenya, Tribunal Appeal number: 196/2016 (26 June 2019) online: https://naturaljustice.org/wp-content/uploads/2019/06/26-June-2019-Judgment_NET_Save-Lamu.pdf.

⁶⁰ *Ibid.*, para 73.

⁶¹ *Ibid.*, para 45.

⁶² *Ibid.*, para 69.

⁶³ *Delonex*, 2017 Site Specific Assessment, online: <https://www.delonexenergy.com/download/1639/>, p. 13.

The failure to meaningfully engage with respect to the 2015 ESIA is reflected in the document itself. The 2015 ESIA does not appear to incorporate any of the feedback it received from its community consultations. Despite issues such as title, revenue sharing, and distrust of Chiefs being repeatedly raised, none of these issues appear in the 2015 ESIA. The 2015 ESIA contains a section entitled “How the Results of the Engagement Have been incorporated into the ESIA,” but fails to identify any concrete examples of how this was achieved.⁶⁴

On November 18, 2016, KVCO sent a letter to Tullow Kenya confirming that during a meeting in November 2016, Tullow Kenya agreed in principle to share information with KVCO regarding oil exploration and anticipated new activities, and to provide sufficient time for stakeholders to meaningfully participate and to provide timely responses to questions and/or concerns raised by the Communities.⁶⁵ To date, Tullow Kenya has failed to confirm this understanding or take meaningful steps towards implementing the measures discussed at the November 2016 meeting.

The Companies were required to consult with the Complainants in accordance with the Performance Standards, including by fulfilling the enhanced consultation requirements for projects with the potential for significant adverse effects. The Companies failed to meet these requirements, and as such have breached Performance Standard 1. For its part, the IFC again failed to properly review, monitor and supervise the Companies to ensure compliance with these obligations.

b. Performance Standard 3 – Resource Efficiency and Pollution Prevention

Performance Standard 3 addresses issues related to resource efficiency (i.e. managing greenhouse gases and water consumption) and pollution prevention (i.e. managing wastes, hazardous materials management, pesticide use and management).⁶⁶ There are three significant concerns with the Companies’ compliance with this Performance Standard.

First, Performance Standard 3 obliges clients to minimize and mitigate any pollution or contamination.⁶⁷ It further requires clients to use management methods that “prevent economically significant pest damage and/or disease transmission to humans and animals.”⁶⁸

Community members have reported that pollution caused by the Companies’ activities in the area have led to: (i) the contamination of wells; and (ii) death of bees and livestock. This has a significant impact on the community as they rely on beekeeping and livestock for their livelihood.⁶⁹

In addition, the Companies’ failure to restore the land after conducting seismic surveys, has led to soil erosion and the destruction of farm land. These complaints strongly indicate that the Companies are not in compliance with Performance Standard 3.

⁶⁴ 2015 ESIA, *supra*, note 21, p. 699.

⁶⁵ *Ibid.*

⁶⁶ IFC, *supra*, note 10, Performance Standard 3, pp. 2-5.

⁶⁷ *Ibid.*, Performance Standard 3, s. 10.

⁶⁸ *Ibid.*, Performance Standard 3, s. 14.

⁶⁹ 2015 ESIA, *supra*, note 21, p. 113.

Second, it is unclear whether the Companies' operations pose a risk to the Communities' water supply. Performance Standard 3 requires companies to adopt measures that do not have a significant impact on the communities' water supply:

When the project is a potentially significant consumer of water...the client shall adopt measures that avoid or reduce water usage so that the project's water consumption does not have significant adverse impacts on others.

The 2015 ESIA states that during the construction phase of the project, significant amounts of water will be required:⁷⁰

Sources of water may include drilling boreholes, abstracting from permanent rivers, etc. However, some of the disadvantages with these sources are quality of water and conflict with the community, hence the need for constant consultation with the community.⁷¹

The 2015 ESIA further states that "spring sources could be tapped," but goes on to note that "[t]hese are community water sources and both the Water Resources Management Authority and the water user community will have to be engaged in the use of these resources."⁷²

Despite these comments, water is not listed as a concern at the construction stage of the 2015 ESIA. Water resources is listed as only a "negligible" concern at the Operation Phase, on account of the fact the water demand "volume of 150 m³/day is a small fraction of the annual renewable groundwater volume thus imposing no particular risk of over-abstraction."⁷³ However, the ESIA does not indicate the amount of annual renewable groundwater.

Without further information, it is impossible to confirm that the Companies are in compliance with Performance Standard 3 as it relates to water usage.

Third, the IFC requires clients to use efficient methods to reduce or prevent pollution for continuous improvement related to an IFC-funded Project. Given the limited information shared and consultation with the community, the Companies and the IFC have failed to safeguard against violations of Performance Standard 3.

c. Performance Standard 4 – Community Health, Safety and Security

Performance Standard 4 is intended:

To anticipate and avoid adverse impacts on the health and safety of the Affected Community during the project life from both routine and non-routine circumstances; and to ensure that the safeguarding of personnel and property is carried out in accordance with relevant human rights principles and in a manner that avoids or minimizes risk to the Affected Communities.⁷⁴

⁷⁰ *Ibid.*, p. 38.

⁷¹ *Ibid.*

⁷² *Ibid.*, p.151.

⁷³ *Ibid.*

⁷⁴ IFC, *supra*, note 10, Performance Standard 4.

There are two concerns with respect to the Companies' compliance with this Standard. First, at the 2018 JCAP and KVCO community meetings, participants complained about dangerous explosives being left behind by the Companies in the grazing lands which has endangered the lives of the people and in explosives having cause some buildings near the seismic sites to crack. Failing to properly dispose of explosives poses a serious risk to the safety of community members.

Second, given the Companies' failure to engage with the Complainants as required pursuant to Performance Standard 1, the Companies have not compiled the information necessary to appropriately safeguard and avoid risks to community health and safety. As a result, violations of Performance Standard 4 are inevitable. The IFC has failed in its obligations to ensure that its clients are carrying out operations in compliance with the Performance Standards.

d. Performance Standard 5 – Land Acquisition and Involuntary Resettlement

This standard recognizes that “project-related acquisition and restrictions on land use can have adverse impacts on communities and persons that use this land.”⁷⁵

The objectives of this Performance Standard are to:

- avoid, and when avoidance is not possible, minimize, displacement by exploring alternative project designs;
- avoid forced eviction;
- anticipate and avoid, or where avoidance is not possible, minimize, adverse social and economic impacts from land acquisition or restrictions on land use by:
 - (i) providing compensation for loss of assets at replacement cost; and
 - (ii) ensuring that resettlement activities are implemented with appropriate disclosure of information, consultation and the informed participation of those affected;
- improve, or restore, the livelihoods and standards of living of displaced persons; and
- improve living conditions among physically displaced persons through the provision of adequate housing with security of tenure at resettlement sites.³⁷

i. Community Engagement

It is important for extractive companies to understand the impact of their activities on the communities in the areas in which they operate, especially in the context of land acquisition and resettlement. Although the Companies have not been accused of relocating the people of the Kerio Valley, community members have reported damage to their lands and property as a result of the work being undertaken by the Companies, including:

1. Tullow filling one member's land with rocks, resulting in their loss of use of the land;

⁷⁵ *Ibid.*, Performance Standard 5, p. 1.

2. the digging up of another member's gardens by heavy machinery employed by the Companies, resulting in the destruction of their farm land;
3. deep gulleys developing in a member's land after seismic survey blasts by the Companies, rendering the land unusable for farming;
4. the destruction of trees during seismic surveying by Delonex Energy;
5. the destruction on various occasions of grazing fields, wetlands and a fence by Tullow.

Such activities constitute "economic displacement", for the purpose of Performance Standard 5.⁷⁶ In each of the above cases, the Companies did not consult with community members in advance of commencing their work. Nor did the Companies repair the resulting damage or offer any compensation to the impacted community members.

Ongoing engagement with impacted communities is necessary to ensure the community members are properly informed and meaningfully consulted about the Companies' activities and their potential effects and that potential mitigation and accommodation measures are adequately considered. Such engagement will also help the Companies better understand community concerns over land titling and acquisition as the Project moves through subsequent phases. It is important for all parties to understand the impact the extractive activities will have on the land rights of the stakeholders. Given the limited information shared and consultation with the community, the Companies and the IFC have failed to safeguard against violations of Performance Standard 5.

ii. Grievance Mechanism

This component is related to Performance Standard 1, as a grievance mechanism is a requirement of projects supported by IFC loans. Under Performance Standard 5, a grievance mechanism must allow impacted communities to present concerns about "compensation and relocation raised by displaced persons or members of host communities in a timely fashion, including a recourse mechanism designed to resolve disputes in an impartial manner."⁷⁷ Again, given the lack of accessibility to the current Tullow grievance mechanism, it is unclear that the grievance mechanism would meet this standard where it was required to address the concerns of displaced people.

iii. Economic Displacement

This component of Performance Standard 5 relates to the "loss of assets and/or means of livelihood, regardless of whether or not the affected people are physically displaced."⁷⁸ Under this Performance Standard, if there is economic displacement, Delonex Energy will be required to compensate the impacted communities and/or "improve, or at least restore, their means of income-earning capacity, production levels

⁷⁶ *Ibid.*

⁷⁷ *Ibid.*

⁷⁸ *Ibid.*, Performance Standard 5, p. 6.

and standards of living.¹⁷⁹ The damage reported to date by community members, as summarized above, has resulted in the loss of assets and / or livelihoods for the individual members. However, in violation of this Performance Standard, the Companies have not compensated the impacted community members for the economic loss resulting from the impacts of the Project on the land and natural resources. The IFC should have identified this risk of economic displacement – inherent in the nature of extractive activities – and worked with its client to ensure that the requirements of Performance Standard 5 were satisfied.

IV. Conclusion

In light of the concerns set out above, the Complainants submit that the Companies and the IFC have failed to fulfil the IFC's Performance Standards in relation to this Project. As such, the Complainants request that the CAO investigate the IFC's and the Companies' conduct on an immediate basis and carry out appropriate remedial measures to ensure compliance with the Performance Standards.

In order to avoid ongoing and additional breaches of the Performance Standards, we further request that the CAO provide facilitative problem-solving by recommending that IFC work with the Complainants and the Companies in developing and implementing a process of engagement which requires the Companies to consult with the Communities and address concerns related to the Project, consistent with the Performance Standards.

If you require any further information regarding this complaint, please do not hesitate to contact us.

