Stakeholder Engagement in Kenya's Extractive Sector:

Principles & Pointers

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Contents

1. Background

The extractive industry has significant potential to lift people out of poverty and contribute to sustainable development, generating considerable revenues to governments for infrastructure development and delivery of social services.[1] At the same time, the sector has been associated with extensive adverse social, economic and environmental impacts on local communities, workers and even nationally, prompting demand for greater stakeholder engagement to explain and involve stakeholders in managing negative impacts where they occur.

These challenges were discussed at the Kenya Extractive Sector Forum (ESF) meeting in April 2016.[2] The Stakeholder Engagement Principles and the accompanying pointers below were developed by IHRB and ILEG based on existing standards and good practice and draw from the discussions at the April 2016 ESF meeting[3] and subsequent input from ESF participants. They are intended to help support both companies and communities in improving their engagement around extractive sector issues and projects in Kenya.

2. Introduction

Defining Stakeholder Engagement

A Broad Definition

Fundamentally, stakeholder engagement is about building on-going relationships that cover a broad spectrum of time and interactions. It is not a one-off event, such as a consultation held as a compliance step in the environmental impact assessment (EIA) process. Rather, it is a continuous process that evolves, just as projects evolve into new phases as new decisions are made. Successful stakeholder engagement of this kind indicates that a broader definition of stakeholders has been important in achieving positive results.[4] This is because using a broader definition of stakeholders allows a more detailed examination of different groups and their interest, influence and power, as well as a more targeted approach to meeting their concerns. Stakeholder engagement is emerging as a means of describing a broader, more inclusive relationship building process.[5]

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[1] World Bank, " Extractive Industries Value Chain" (May 2009); UNDP et al, "Mapping Mining to the Sustainable Development Goals: A Preliminary Atlas" (January 2016).

[2] See information on the Extractive Sector Forum.

[3] See IHRB, "Stakeholder Engagement in Kenya's Extractive Sector – Getting it Right" (14 Sept. 2016).

[4] Wayne Dunn, "From Pariah to Exemplar: Applying the six best practices in stakeholder engagement" (date unknown).

[5] See for example IFC, Stakeholder Engagement: A Good Practice Handbook for Companies Doing Business in Emerging Markets" (May 2007).

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Distinguishing Consultations from Engagement

Consultations with potentially affected stakeholders, around a specific project or a specific phase of a project is also important – and is in some cases required under Kenyan law, for example as part of the EIA process. Stakeholder consultation is also a core part of the UN Guiding Principles on Business and Human Rights, which call upon businesses to conduct human rights due diligence to identify, prevent, mitigate and account for how they address their adverse human rights impacts.[6] This process should involve meaningful consultation with potentially affected groups and other relevant stakeholders, as appropriate to the size of the business enterprise and the nature and context of its operations to understand the potential or actual impacts on them.[7] These time- and context-specific steps of consulting potentially affected stakeholders can be a core part of building longer-term relationships with those who are often the most interested and affected by a company's operations. The identity and location of those engaged as part of wider stakeholder engagement may be far wider than those typically consulted around a particular project or activity.

Why Stakeholder Engagement Matters

Whether stakeholder engagement matters or not depends on what the stakeholders – companies, civil society organizations and communities among other stakeholder – seek to achieve. This is informed by what all stakeholders need and want to know as they engage. For businesses, engaging stakeholders can make good business sense.[8] The engagement process helps companies understand the evolving interests, issues and concerns of those impacted by business-related activities over the life of the project[9] but also, importantly, builds confidence of stakeholders as they see their rights and interests met. Communities benefit by having their concerns and interests taken on board and addressed as companies make decisions. This can best be achieved when stakeholder engagement is integrated as a core part of business planning, strategy and operations at the corporate and asset level and measured in terms of its effectiveness in building constructive working relationships.[10]

Building Relationships

Systematic and ongoing stakeholder engagement is about building a two-way relationship which helps build trust between both sides. The two-way communication enables vital feedback and can contribute to improving relationships and creating more transparent, cooperative, and productive conversations.[11] Perceptions are better understood when there is an ongoing and open engagement process with clear

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[6] United Nations Human Rights Office of the High Commissioner, "Guiding Principles on Business and Human Rights" (2011).

[7] Ibid, Principle 17.

[8] OECD, "OECD Due Diligence Guidance for Responsible business conduct: Meaningful Stakeholder Engagement in the Extractive Sector"(2016)

[9] Jonathan Ballantine, "Rebuilding trust through stakeholder engagement: Part One - Why stakeholder engagement matters?" (March 2009)

[10] IFC, Stakeholder Engagement: A Good Practice Handbook for Companies Doing Business in Emerging Markets" (May 2007)

[11] Alberta Energy Regulator, "Alberta Energy Regulator Stakeholder Engagement Framework." (July 2015)

outcomes. Companies are strategically able to change their attitudes towards their stakeholders when they understand their concerns and vice-versa.

Meeting Legal Obligations and International Standards

Extractive activities are carried out in the context of laws and regulations as well as international standards that place responsibilities on companies and give rights to other stakeholders. [12] In Kenya, public participation is entrenched in the Constitution. [13] Participation of the people is considered a national value and principle under the Constitution as well as being an expression of sovereignty of the people, empowering them to determine their destiny. [14] The Constitution further provides for public participation in the management, protection and conservation of the environment.[15] Relevant international standards including the 2011 UN Guiding Principles on Business and Human Rights and the 1998 Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters[16] call for consultations with stakeholders.

Building Opportunities for Collaboration

Quality stakeholder engagement can bring diverse perspectives together for collaborative problem solving and to identify opportunities for collaborative action.

Avoiding or Limiting Costs of Conflicts with Stakeholders

Stakeholder-related risks to a company can be significant, especially in situations where engagement is defensive or reactionary. The cost implications can be high, from the time costs as a result of delays or closures to reputational risks that may negatively affect funding of projects. Another critical cost implication is staff time spent in resolving conflicts which would otherwise have been avoided if there was proactive and sustained engagement.[17]

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[12] OECD, "OECD Due Diligence Guidance for Responsible business conduct: Meaningful Stakeholder Engagement in the Extractive Sector"(2016)

[13] Articles 10(2) (a) includes participation of the people as part of the national values and principles of governance.

[14] Commission for the Implementation of the Constitution, "Effective citizens' participation: Broadening Citizens Opportunities under the Constitution of Kenya 2010." (December 2015)

[15] Article 69(1)d- on environment and natural resources

[16] UNECE, "Convention On Access To Information, Public Participation In Decision-Making And Access To Justice In Environmental Matters" (25 June 1998).

[17] Rachel Davis and Daniel M. Franks, "Costs of Company-Community Conflict in the Extractive Sector", *Corporate Social Responsibility Initiative Report No. 66. Cambridge, MA: Harvard Kennedy School* (2014).

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3. Principles for Stakeholder Engagement

ESF Stakeholder Engagement Principles

- **Be Inclusive**
- **Start Early**
- **Engage for the Long-Term**
- **Engage in Good Faith, with Honesty and Openness**
- **Be Transparent**
- **Be Specific**

- **Make it Two-Way**
- **Be Accountable**
- **Be Fit for Purpose**
- **Be Adaptable**
- **Commit to the Process**
- **Strive for Mutual Benefit**

Be Inclusive

Companies should take a broad view of stakeholders. How stakeholders are defined is critical for a successful stakeholder engagement strategy. Generally the term is used to include individuals or groups and organisations that are positively and negatively impacted by decisions and actions (potentially affected stakeholders) as well as those that have an interest in the decisions a company makes and products and services it delivers.[18] It should include those on whom the company has a direct impact, but also those on whom it has an indirect impact.[19] Companies should seek to determine who is missing and where in the process they need to be engaged – going beyond a narrow approach, such as considering only directly affected communities. Identifying other groups and organisations that may have a shared interest in the outcome helps to achieve success.[20] Missing out on hearing key groups' perspectives, such as women, youth, older persons as well as the international development community, may raise the chances of missed opportunities to understand different views, gain insights into core risks and concerns, as well as solicit new and locally-tuned ideas for preventing and mitigating risks.[21] Companies should strive to be flexible as interests change and new groups emerge over the lifespan of a project.

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[18] There are many definitions of stakeholders, see for example, MIT, "Stakeholder engagement - A Kellogg's case study" (2014).

[19] Earlier extensive work on addressing impacts of large-scale dam projects usefully framed the concept of voluntary risk takers (private companies who manage their increased exposure to risk by requiring higher financial rates of return and using highly developed risk management approaches including contractual agreements, insurance and third party recourse and arbitration mechanisms) and involuntary risk bearers (local communities who have no choice about bearing risks of a project). See World Commission on Dams, "Final Report" (2000), p. 206.

[20] Wayne Dunn, "From Pariah to Exemplar: Applying the six best practices in stakeholder engagement" (date unknown).

[21] See for example the five common mistakes companies make when engaging stakeholders: Wayne Dunn, "Stakeholder Engagement: Five common mistakes" (date unknown).

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Start Early

Stakeholder engagement should begin early, with a long-term view, because relationships and trust take time to build. This means companies should engage with stakeholders starting from the exploration stage, when first impressions and first contacts are made. Starting early will also help in understanding the context and tailoring engagement plans to the context.[22] Lack of early engagement may create a vacuum filled by rumours, false information and suspicion.

Engage for the Long-Term

Thinking for the long-term means considering that some projects and local communities will be neigbours for many years. So getting started on the right foot is important. Long-term engagement also means adjusting to the changing expectations and interests of stakeholders as projects progress and advance into new phases or are phased out, though closure and decommissioning. Other scenarios should be considered as well, such as cases when operations are halted unexpectedly or where ongoing commitments may need to be re-negotiated in light of unanticipated circumstances. This can help companies justify different types of decisions if they have a long-time view of the entire engagement process.[23] Engagement should therefore not be seen as a short-term way of negotiating the lowest compensation rates. It should be seen as strategic rather than adhoc, and as a means of gaining and maintaining a broader social license to operate in the area over the long-term.[24]

Engage in Good Faith, with Honesty and Openness

All parties should engage with the genuine intention to understand how stakeholders are affected by the company's activities. The company should be prepared to address its adverse impacts and stakeholders should honestly represent their interests, intentions, concerns and constituencies. Information from all parties should not be distorted or merely promotional, instead providing a full, accurate and honest approach to the issues. Each of the stakeholders in the engagement process should make an effort to learn more about the other actors involved – knowing who is across the table. All stakeholders should strive to exchange information about themselves that is pertinent to the engagement process and to update this whenever there is a material change – this will include information such as when key negotiating representatives change, forewarnings of major changes in projects or relevant political or regulatory changes.

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[22] International Institute for Environment and Development, "Meaningful community engagement in the extractive industries: Stakeholder perspectives and research priorities" (2016).

[23] IFC, Stakeholder Engagement: A Good Practice Handbook for Companies Doing Business in Emerging Markets" (May 2007)

[24] Neil Jeffrey, "Stakeholder Engagement: A Road Map to Meaningful Engagement" (July 2009).

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Be Transparent

Communication processes should strive to ensure access to timely, understandable and reliable information, and cater for different levels of knowledge and expertise. Effective communication involves the full and accurate disclosure of pertinent information concerning proposed developments in a form accessible and understandable to the affected people. When determining how to present information, it is essential to consider the level of technical detail, local language and dialects as well as cultural sensitivities and literacy levels. Companies should be aware of and seek to utilise local methods of disseminating information, including the use of oral explanation where appropriate.[25]

Be Specific

All stakeholders should provide specific information about potential and actual project impacts – both from the side of companies and other stakeholders – rather than generalised information. Communication of information must be adapted to the intended audience (see above), but that does not mean it cannot be specific. For example, disclosing and discussing EIA and other impact assessment reports, including those conducted by independent parties, as well as the related action plans and other relevant documentation about one or more projects is relevant information, particularly for potentially affected stakeholders. Finding ways to jointly develop specific information about project impacts, such as through joint monitoring, can build trust and acceptance of information.

Make it Two-Way

Starting with early outreach activities, companies should incorporate a variety of techniques to create multiple entry points for engagement and regular updates. Such a process should aim at building relationships, not just passing information about decisions already made. As such, the engagement process should include feedback mechanisms that empower potentially affected stakeholders and provide possibilities for their input into decisions regarding the project before the decisions are final. This should include receiving feedback on why and how their views were or were not taken into account.

Be Accountable

All stakeholders should take responsibility for their actions, omissions, decisions and commitments. As stakeholder engagement is about building trust, being reliable when called upon to honour commitments made is a core part of the process. Developing transparent commitment registers or agreements can be a useful means of enabling this practice.

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[25] Network for Business Sustainability, "Community engagement: A Getting Started Toolkit for Exploration and Development Companies" (2014).

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Ensure it is Fit for Purpose

Stakeholder engagement should be grounded in respect, allowing for different forms of engagement and expression by the various stakeholders. The engagement should be contextualised and adapted to the specific socio-economic, political, cultural and geographical contexts of a project. Such contextualisation acknowledges the diversity of and within communities and other stakeholder groups, helping to adapt communication across all groups. In Kenya, extractive sector operations are situated in regions with unique cultures and ways of life and are influenced by the domestic social and political circumstances. Businesses should thus tailor their strategies relative to the risks and impacts their projects are likely to create to ensure that engagement is respectful and productive.[26]

Be Adaptable

Companies should strive to have a process that easily accommodates change. Changes in circumstances that may not even be connected to the project may prompt stakeholders to identify urgent needs to be addressed. Likewise, communities should also ensure their expectations and understandings, particularly of expected benefits, are adapted as operational circumstances change. Adaptability of all parties will also be dependent on the level and extent of communicating those changes as they take place.

Commit to the Process

Stakeholder engagement processes have to be well-planned with adequate resources set aside for their implementation. All parties need to recognise that such engagement is a skill that may need to be built over time. A commitment by all stakeholders to use the process in good faith in the first instance to resolve disputes or differences that may arise and to seek to agree effective solutions is crucial. It should also be clear that such a process may not solve all issues, so it is important to respect other grievance resolution avenues that may be available to the parties. Company-developed or jointly-developed operational grievance mechanisms are important. However, stakeholders should be free to pursue other avenues that they consider appropriate and credible. Importantly, localised avenues such as customary and other community-sanctioned structures should be respected as critical avenues for dispute resolution.

Strive for Mutual Benefit

There will be no point in engaging if parties do not see the benefits of the process – or benefits for only one side. Stakeholders need to establish the opportunities available as they engage. This may concern particular defined actions, such as those set out in a community development agreement, but there are likely to be other intangible benefits that are equally as important, such as building trust and reliability.

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[26] IFC, Stakeholder Engagement: A Good Practice Handbook for Companies Doing Business in Emerging Markets" (May 2007).

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4. Pointers for Developing an Effective Engagement Strategy

Further Considerations for Companies

Companies should consider the following additional pointers in designing their stakeholder engagement strategy.

Understand that Engagement is more than Managing Expectations

There is a need for both the government and companies to provide clear and factually correct information about the sector and its expected impacts on stakeholders. It is equally important that companies and government understand that stakeholders have interests as well as expectations. Many of these interests are protected or guided by law and international standards. So while the engagement process is important in managing expectations, it is also a crucial part of appropriately identifying and addressing stakeholders' rights and interests.

Recognise that Conducting Stakeholder Consultation is a Skill

Conducting consultations and engaging with affected stakeholders requires specific skills. It also requires sensitivity to potential barriers (linguistic, gender, cultural) and to perceived power imbalances – both between the company and affected stakeholders, and among stakeholders themselves. Companies will want to ensure that the staff leading on such consultations and engagement have the skills and experience necessary.[27]

Use Appropriate and Diverse Methods of Engagement

In some contexts community reference groups have been used and shown to be successful because they create an ongoing two-way communication process, acting as a conduit between the community and project developer and assisting with early identification of emerging issues.[28] Such groups should have credibility in the community and should meet frequently in the early days of the project. Through the group, the company can receive, listen and provide feedback on stakeholders' concerns. However, relying on only one conduit for engagement can create risks – a more robust approach would be to employ a number of different methods. As stakeholders are regularly engaged, new issues may emerge that require new or innovative approaches. These may be aided by the use of community liaison officers, open days, and regular

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[27] See further, European Commission, "Oil & Gas Sector Guide on Implementing the UN Guiding Principles" (2012), section 3.II.
[28] WRI, "ccs and Community Engagement Case Studies" (2010).

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walk throughs in the community to help communicate regular information sharing and stimulate engagement.

Include Internal Stakeholders

It is also important to engage a range of colleagues, departments, business units and other parts of the company that have a role to play in successfully implementing engagement processes. Without this, stakeholder engagement can end up without the necessary internal support and potentially seen as an additional cost to the operation rather than as a critical support function. This can be done by identifying and empowering a core group of internal 'champions' that recognise the value of ongoing, strategic, and systematic stakeholder engagement. Support can be built through identifying common interests and shared value as well as creating alignment with their specific interests. Internal stakeholders also have to be systematically and continuously engaged to secure the needed goodwill and long-term support over the life of a project.

Build Partnerships

Information asymmetry is a real barrier to stakeholder engagement, particularly for affected communities. Moreover, communities tend to trust CSOs more than governments or companies. Thus companies should consider establishing relationships with CSOs through which information from and about the company and community can flow. Local CSOs can also help companies navigate and understand community structures, helping the stakeholder engagement to be more inclusive. Partnership building can also be helpful by compensating in certain areas where a company may lack of capacity. Such partners may for example include humanitarian organisations that have stronger contacts, influence or expertise on local or specific issues that can assist the company to build stronger relationships.[29]

Understand the Political Economy of the Process

As companies develop their engagement strategies in specific contexts they have to be alive to power dynamics that may exist to ensure they are engaging legitimate stakeholders or representatives of such stakeholders. Such contexts are understood in part by being sensitive to issues of culture, gender and political balance.[30] Understanding these dynamics is critical to avoiding elite capture and engaging those viewed as legitimate stakeholders and groups that are most marginalised. Consulting a wide range of stakeholders helps to ensure understanding and avoiding the risk of elite capture.

[29] Wayne Dunn, "From Pariah to Exemplar: Applying the six best practices in stakeholder engagement" (date unknown).
[30] GIIRS,"Emerging Market Assessment Resource Guide: Stakeholder Engagement"(date unknown).

Further Considerations for Communities

Local communities are a key stakeholder for the extractive sector due to their proximity to projects. They are often directly and indirectly impacted by the projects. The need to consult communities has increasingly been framed as a human rights issue, influencing lenders and government actions[31]. Communities also need to carefully consider how they engage, including the following additional pointers.

Define Process and Goals for Engagement

As communities plan to engage companies, they must be clear what they want to achieve or at least develop clear processes about how they will jointly develop their goals. Systematic networking and learning from other communities who may have been affected by similar projects is a key tool in this regard.[32]

Community Solidarity and Representation

How communities organise is critical to effective engagement. Success is often achieved through collective community action, which can be stronger than individuals acting separately, to try to change a situation with a coordinated approach.[33] Community representatives are central to organising and facilitating community meetings to discuss shared concerns and develop a common message and engagement strategy. Companies can work well with organised communities as there is a clear channel of communication and the concerns raised are those that have been agreed collectively. As a critical step, communities should be proactive in appointing their own legitimate representatives, rather than leaving it to companies to choose who will represent the community. Developing a process to appoint or elect their own representatives to engage with companies helps ensure that communities do not suffer from elite capture. [34] Representatives should be committed to acting in the best interest of the community and defend community interests, including different groups within the community. Communities, like companies, must be prepared to address conflicts of interest amongst themselves or their representatives, as well as avoiding political capture of representative's interests. While consistency of representation is important, it is also helpful to consider a process for rotating representatives to prevent specific individuals from becoming the sole gateway for conversations.

Inclusiveness

The engagement process should be inclusive of all groups in the community. Different groups that tend to be left out, such as women, youth and older persons, should be consulted. Community messages and demands should incorporate all of the different interests within the community. This is best achieved through ensuring that specific groups within the community who may be less engaged in the process are given an opportunity to ask questions and express their ideas. Separate meetings

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[31] Chatham House, "Revisiting Approaches to Community Relations in Extractive Industries: Old Problems, New Avenues?" (4 June 2013).

[32] Chatham House, "Revisiting Approaches to Community Relations in Extractive Industries: Old Problems, New Avenues?" (4 June 2013).

[33] IIED, Inclusive Development International, "Following the money: an advocates guide to securing accountability in agricultural investments" (2015).

[34] OECD, "OECD Due Diligence Guidance for Responsible business conduct: Meaningful Stakeholder Engagement in the Extractive Sector"(2016).

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for these groups can be useful in establishing their concerns and interests, but should also ensure that in doing so such groups are not left out or excluded from the wider community's discussions and decisions.

Evidence-Based Engagement

Engaging with companies based on allegations of wrong doing often fails to result in meaningful outcomes. Collecting evidence and accurately reporting about the harms, or anticipated harms, as well as the benefits and the potential benefits of a project, is important.[35] Such an approach also gives credibility to communities' engagement and ensures that claims are neither exaggerated nor understated.

Developing Negotiating Capacity and Technical Expertise

Due to the complexity of extractives projects, communities should seek to understand how the industry is organised. This also helps in aligning their interests to the industry value chain and over time building their internal capacity to raise legitimate concerns. Such capacity is central in situations where communities negotiate, for instance community development agreements[36].

Realistic Demands

Communities often grapple with balancing expectations and being realistic in their demands. There is no point in sending a list of demands that will be impossible to achieve. Addressing already high expectations is assisted by understanding the sector and the potential impacts on and benefits to the community, as well as the constraints on the company at different points in the project cycle. It is important for community members and their representatives to think about what they want and what their rights are, as well as what they think could be a practical outcome.[37] Additionally, communities should in as far as possible separate their expectations from the natural resources within their areas. Expectations which related to basic rights should be met irrespective of the presence of the natural resource wealth in their community.

The Role of Civil Society Organisations

Civil society organisations (CSO) are present in many communities well before the arrival of extractives companies. However, the arrival of these companies often creates concerns among the communities they work with, in turn often focusing the attention of such CSOs to the sector. At an international level, there are CSOs that focus on the extractives sector and that follow extractives companies' activities globally, often through partnerships with local organisations. As such, it can be helpful for local CSOs to engage international CSOs, and vice-versa, as synergies can be created that can be useful in helping each organisation build knowledge and amplify the voice of local communities at different fora.

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[35]IIED, Inclusive Development International, "Following the money: an advocates guide to securing accountability in agricultural investments" (2015).

[36] World Bank, "Mining Community Development Agreements Source Book"(March 2012)

[37] IIED, Inclusive Development International, "Following the money: an advocates guide to securing accountability in agricultural investments" (2015).

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V. Useful Resources and Tools

- Chatham House, "Revisiting Approaches to Community Relations in Extractive Industries: Old Problems, New Avenues?" (4 June 2013).

- Commission for the Implementation of the Constitution, "Effective citizens' participation: Broadening Citizens Opportunities under the Constitution of Kenya 2010" (December 2015).

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