

Independent Reporting Mechanism (IRM): Kenya End-of-Term Report 2016-2018

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Overview: Kenya

Independent Reporting Mechanism (IRM) End-of-Term Report (2016-2018)

Kenya's second national action plan addressed priority policy areas for reform, such as beneficial ownership, extractives, open contracting, and open budgets. By the end of term, the commitment on beneficial ownership was fully implemented, while the commitments on climate change, legislative openness, and right to information were substantially completed and contributed to open government by changing the current government practice. The next national action plan should focus on fewer, more defined goals for each commitment, ensuring clear identification of the implementing officials and the available resources.

The Open Government Partnership (OGP) is a voluntary international initiative that aims to secure commitments from governments to their citizenry to promote transparency, empower citizens, fight corruption, and harness new technologies to strengthen governance. The Independent Reporting Mechanism (IRM) carries out a review of the activities of each OGP-participating country. This report summarizes the results of the period July 2016 to June 2018 and includes some relevant developments up to September 2018.

The OGP process in Kenya was cochaired between the Office of the Deputy President (ODP) and the Information and Communications Technology (ICT) Authority, an agency within the Ministry of ICT under the executive branch. The Office of the Deputy President was designated a cochair because the presidency has the legal power to enforce policy changes on other agencies within the government. As a result of this mandate, and broader involvement of stakeholders, the second action plan is more diverse, and the commitments cover a broader spectrum of issues relevant to OGP, implemented by different Ministries, Departments, and Agencies (MDAs).

The second national action plan had two starred commitments. They resulted in increased transparency by introducing beneficial ownership regulations and disclosure policies and transformation of Kenya's record management and transparency through seven steps, including passing Right to Information (RTI) legislation and establishing a central digital repository for government records of public interest. The substantially completed commitments increased citizen involvement in climate change policy, increased access to environmental information to citizens, and increased citizen involvement in law making.

The government did not publish a self-assessment report.

Table 1: At a Glance

	Mid-term	End of term
Number of Commitments	8	8
Level of Completion		
Completed	0	1
Substantial	4	3
Limited	2	2
Not Started	2	2
Number of Commitments with...		
Clear Relevance to OGP Values	8	8
Transformative Potential Impact	3	3
Substantial or Complete Implementation	4	4
All Three (★)	2	2
Did It Open government?		
Major	2	
Outstanding	0	
Moving Forward		
Number of Commitments Carried Over to Next Action Plan	3	

At the time of writing this report, the Office of the Deputy President had published Kenya's third national action plan for public comment. The draft action plan includes five overarching commitments, three of which address issues carried forward from the second plan (beneficial ownership, open contracting, and public participation). The third action plan addresses open geospatial data for development and building open government resiliency. However, several key stakeholder priority areas are not included, such as climate change, legislative openness, right to information, and anti-corruption measures. One government respondent indicated that the third action plan was drafted in line with Kenya's development blueprint for the next five years, the Big Four Agenda: food security, affordable housing, manufacturing, and affordable healthcare for all.¹

¹ On 12 December 2017, His Excellency President Uhuru Kenyatta announced his new plan, the 'Big Four,' which will guide the development agenda of the country in the period 2018–2022. It focuses on key basic needs that are critical in uplifting the standard of living of Kenyans on the path to becoming an upper middle-income country by 2030. Prioritized is affordable and decent housing, affordable healthcare, food and nutritional security, and employment creation through manufacturing. For more information, see HIGHLIGHTS OF THE BIG-FOUR AGENDA OF H.E. PRESIDENT UHURU KENYATTA," Kenya Private Sector Alliance, 12 Dec. 2017, <https://bit.ly/34lxXkw>.

Consultation with Civil Society during Implementation

Countries participating in OGP follow a process for consultation during development and implementation of their action plan.

The government of Kenya formed a steering committee to spearhead the development and oversee the implementation of the second action plan. The committee was cochaired by the Office of the Deputy President and the Ministry of ICT, and is comprised of government agencies, four civil society organizations (CSOs), and one private-sector entity. This committee served as Kenya’s multistakeholder forum.

During implementation, members of the steering committee organized themselves into thematic clusters around the specific commitments and their areas of interest, including: climate change, transparency and accountability, legislative openness, anti-corruption, extractives, open contracting, budget transparency, and access to information. The steering committee held regular meetings to take stock of progress with the creation of clear workplans with timelines to track implementation.

The Office of the Deputy President, Article 19, Hivos, and the Constitution and Reform Education Consortium (CRECO) convened a total of eight meetings¹ during the two-year implementation period (from January 2018 to August 2018) in Nairobi and Nakuru. These meetings aimed to discuss the progress, implementation needs, and working area commitments of Kenya’s second action plan, as well as consolidating gains and tracking progress of commitment implementation. In general, the meetings featured updates from government representatives on all the commitments and were open to questions and comments from civil society representatives and members of the public. The meetings were interactive and allowed everyone to share their viewpoints. The meetings’ agendas had enough time for questions and answers, and civil society had opportunities to offer feedback on the progress. The invitations, agendas, and minutes for these meetings were circulated via email to selected participants.

Table 2: Consultation during Implementation

Regular Multi-stakeholder Forum	Midterm	End of Term
1. Did a forum exist?	Yes	Yes
2. Did it meet regularly?	Yes	Yes

Table 3: Level of Public Influence during Implementation

The IRM has adapted the International Association for Public Participation (IAP2) “Spectrum of Participation” to apply to OGP.² This spectrum shows the potential level of public influence on the contents of the action plan. In the spirit of OGP, most countries should aspire for “collaborative.”

Level of Public Influence during Implementation of Action Plan		Midterm	End of Term
Empower	The government handed decision-making power to members of the public.		
Collaborate	There was iterative dialogue AND the public helped set the agenda.		
Involve	The government gave feedback on how public inputs were considered.		
Consult	The public could give inputs.		✓
Inform	The government provided the public with information on the action plan.	✓	
No Consultation	No consultation		

¹ The dates of the eight meetings were: 19 Jan. 2017, 22 Feb. 2017, 23 May 2017, 24 Mar. 2017, 21 Jul. 2017, 10-11 Oct. 2017, 27 Feb. 2018, and 23 Aug. 2018. The IRM researcher attended all eight meetings as an observer.

² For more information on the IAP2 spectrum, see: "IAP2's Public Participation Spectrum," International Association for Public Participation, 2014, http://c.ymcdn.com/sites/www.iap2.org/resource/resmgr/foundations_course/IAP2_P2_Spectrum_FINAL.pdf.

About the Assessment

The indicators and method used in the IRM research can be found in the IRM Procedures Manual.¹ One measure, the “starred commitment” (★), deserves further explanation due to its particular interest to readers and usefulness for encouraging a race to the top among OGP-participating countries. Starred commitments are considered exemplary OGP commitments. To receive a star, a commitment must meet several criteria:

- Starred commitments will have “medium” or “high” specificity. A commitment must lay out clearly defined activities and steps to make a judgment about its potential impact.
- The commitment’s language should make clear its relevance to opening government. Specifically, it must relate to at least one of the OGP values of Access to Information, Civic Participation, or Public Accountability.
- The commitment would have a “transformative” potential impact if completely implemented.²
- The government must make significant progress on this commitment during the action plan implementation period, receiving an assessment of “substantial” or “complete” implementation.

Starred commitments can lose their starred status if their completion falls short of substantial or full completion at the end of the action plan implementation period.

At the end of term, Kenya’s action plan contained two starred commitments:

- Commitment 5: Transparency Around Bids and Contracts by Individuals
- Commitment 8: Right to Information and Records Management

Finally, the tables in this section present an excerpt of the wealth of data the IRM collects during its reporting process. For the full dataset for Kenya see the OGP Explorer at www.opengovpartnership.org/explorer.

About “Did It Open Government?”

To capture changes in government practice, the IRM introduced a new variable “Did It Open Government?” in end-of-term reports. This variable attempt to move beyond measuring outputs and deliverables to looking at how the government practice has changed as a result of the commitment’s implementation.

As written, some OGP commitments are vague and/or not clearly relevant to OGP values but achieve significant policy reforms. In other cases, commitments as written appear relevant and ambitious, but fail to open government as implemented. The “Did It Open Government” variable attempts to captures these subtleties.

The “Did It Open Government?” variable assesses changes in government practice using the following spectrum:

- Worsened: Government openness worsens as a result of the commitment.
- Did not change: No changes in government practice.
- Marginal: Some change, but minor in terms of its effect on level of openness.
- Major: A step forward for government openness in the relevant policy area but remains limited in scope or scale.
- Outstanding: A reform that has transformed “business as usual” in the relevant policy area by opening government.

To assess this variable, researchers establish the status quo at the outset of the action plan. They then assess outcomes as *implemented* for changes in government openness.

Readers should keep in mind limitations. IRM end-of-term reports are prepared only a few months after the implementation cycle is completed. The variable focuses on outcomes that can be observed in government openness practices at the end of the two-year

implementation period. The report and the variable do not intend to assess impact because of the complex methodological implications and the time frame of the report.

¹ IRM Procedures Manual, <http://www.opengovpartnership.org/about/about-irm>.

² The International Experts Panel changed this criterion in 2015. For more information, visit <http://www.opengovpartnership.org/node/5919>.

Commitment Implementation

General Overview of Commitments

As part of OGP, countries are required to make commitments in a two-year action plan. The tables below summarize the completion level at the end of term and progress on the “Did It Open Government?” metric. For commitments that were complete at the midterm, the report will provide a summary of the progress report findings but focus on analysis of the ‘Did It Open Government?’ variable. For further details on these commitments, please see the Kenya IRM progress report 2016–2018.

Kenya’s second action plan included eight commitments representing areas such as anti-corruption, climate change, extractives transparency, beneficial ownership, records management, and access to information. Most milestones correspond to ongoing high-level government policy plans, such as the Vision 2030 plan, the National Climate Change Framework, and the anti-corruption agenda.

Table 4: Assessment of Progress by Commitment

Commitment Overview	Specificity				OGP Value Relevance (as written)				Potential Impact				Completion		Midterm		Did It Open Government?					
	None	Low	Medium	High	Access to Information	Civic Participation	Public Accountability	Technology & Innovation for Transparency & Accountability	None	Minor	Moderate	Transformative	Not Started	Limited	Substantial	Completed	Worsened	Did Not Change	Marginal	Major	Outstanding	
1. Transparent and participatory climate policies			✓		✓	✓		✓			✓				✓					✓		
2. Preventive and punitive mechanisms against corruption		✓				✓	✓			✓				✓						✓		
3. Legislative transparency in Parliament and County assemblies			✓		✓	✓		✓			✓				✓					✓		
				✓	✓	✓					✓		✓					✓				

4. Publication of oil and gas contracts														✓						
♻️5. Transparency around bids and contracts by individuals			✓		✓	✓		✓			✓					✓				✓
6. Transparent public procurement process		✓			✓			✓			✓		✓				✓			
7. Access to government budget information and inclusive public participation					✓	✓	✓	✓			✓		✓				✓			
♻️8. Right to information and records management					✓	✓					✓					✓				✓

1. Transparent and Participatory Climate Policies

Commitment Text:

Title: 1. More transparent and participatory development of climate policies at the national and subnational level

Status quo or problem addressed by the commitment: Kenya, as many Countries in the world acceded to the Paris Agreement in December 2015 that provides a framework for multilateral cooperation on Climate Change. The agreement speaks to the need to strengthen transparency and accountability mechanisms that ensure countries make progress on achieving their national determined contributions and other commitments. The SDGs adopted in September 2015 also sets ambitious targets that require creativity and innovation in their measurement and achievement.

Main objective:

- *Create transparent and responsive institutions that manage and develop climate policies in Kenya.*

Brief description of commitment

- *Commitment seeks to create a transparent and participatory environment for the implementation of sound climate policies as per the Climate Change Act 2016.*

Milestones:

1. *Develop robust transparent multi-stakeholder consultative process to operationalize the Climate Change Act*
2. *Establishment of the multi-stakeholder Climate Change Council and Climate Change Directorate*
3. *Open Up Forestry Datasets, encouraging its reuse and the development of user-friendly data-driven apps and services by civil society organizations and the private sector*
4. *Ratification of the Paris Climate treaty by Kenyan Parliament*
5. *Development and approval of the climate change policy*

Responsible institutions: Ministry of Environment and Natural Resources

Supporting institutions: Office of the Deputy President; Ministry of Environment and Natural Resources; Kenya Forestry Service (KFS); Ministry of Foreign Affairs; ICT Authority - Kenya Open Data Initiative (KODI); African Centre for Technology Studies (ACTS); SIFA Kenya; INFONET; Africa Greenbelt Movement; Transparency International (TI); Kenya Association of Manufacturers (KAM); TOTAL KENYA; and Food and Agriculture Organization (FAO)

Start date: 1 August 2016

End date: 30 May 2018

Commitment Overview	Specificity				OGP Value Relevance (as written)				Potential Impact				Comple tion		Midterm		Did It Open Government?				
	None	Low	Medium	High	Access to Information	Civic Participation	Public Accountability	Technology & Innovation for Transparency & Accountability	None	Minor	Moderate	Transformative	Not Started	Limited	Substantial	Completed	Worsened	Did Not Change	Marginal	Major	Outstanding
1. Overall			✓		✓	✓		✓			✓				✓				✓		
1.1. Multi-stakeholder consultative process for Climate Change Act			✓			✓					✓				✓						
1.2. Climate Change Council and Climate Change Directorate				✓		✓					✓				✓						
1.3. Open Up Forestry Datasets				✓	✓			✓			✓		✓								
1.4. Ratification of Paris Agreement				✓	✓	✓					✓				✓						
1.5. Climate change policy			✓		Unclear					✓						✓					

Commitment Aim

This commitment aimed to increase citizen involvement in environmental policy and make more information available to citizens, as per Kenya's 2016 Climate Change Act (CCA). More specifically, it envisioned a robust, transparent, and multistakeholder process for operationalizing the Climate Change Act; establishing a multistakeholder National Climate Change Council (NCCC) and Climate Change Directorate; publishing forestry datasets; ratifying the 2015 Paris Agreement; and developing and approving the climate change policy.

Status

Midterm: Substantial

Overall, this commitment saw substantial progress by the midterm. The CCA was passed and came into effect in May 2016.¹ By the midterm, a multistakeholder consultative process had been initiated through a number of climate hearing forums held at the local level² (Milestone 1.1).

The Climate Change Directorate (CCD)³ was established by the midterm (Milestone 1.2), but a legal conflict over civil society representation on the NCCC delayed operationalization of the NCCC. The NCCC comprises nine members drawn from the public and private sectors, including a civil society member “nominated by the most representative registered national umbrella association of civil societies working on climate change” and a civil society member representative of a “marginalized community” (as defined in Section 260 of the Kenyan Constitution).⁴ The Kenyan Parliament must approve these civil society appointments, but the nomination procedure is not otherwise prescribed by law.⁵

In July and August 2016, CSOs held consultative and participative meetings to nominate individuals to the NCCC. An eleven-member committee was constituted to develop selection criteria and spearhead the nomination process, given the paucity of guidance in the CCA. The Cabinet Secretary of Parliament was given advance notice of the CSO nomination process. The Civil Society Working Group on Climate Change (CSWGCC) mapped organizations working on climate change issues eligible to participate in the nomination process. The CSWGCC finalized the CSO nominees to the NCCC⁶ and notified the Ministry of Environment and Natural Resources of the process followed and the nominees in early August 2016.⁷

In October and November 2016, the president appointed members to the NCCC contrary to the provisions of Section 7 of the CCA.⁸ The two presidential appointees to represent civil society and marginalized communities did not include the individuals nominated by the CSO process.

However, a nomination process in line with the CCA’s provisions (nomination to and approval by Parliament) subsequently unfolded in December 2016. The President submitted his NCCC nominations to the National Assembly on 29 November 2016. His list included the CSO nominee for marginalized communities, and the chairman of the Kenya Climate Change Working Group (KCCWG), Mr John Kioli, as the representative of the “umbrella organization,” representing civil society organizations working on climate change in Kenya.⁹ On 20 December 2016, the National Assembly rejected the CSO nominee for marginalized communities and approved the appointment of Mr Kioli.¹⁰

Three civil society organizations¹¹ subsequently challenged the NCCC nomination process in the High Court of Kenya. They argued that the civil society representative was not nominated from the true national umbrella association of civil societies, and that the rejection of the CSO nominee for marginalized communities fell afoul of the prescriptions regarding gender representation on the NCCC.¹² Their application for staying the nominations was unsuccessful, but a hearing on the merits of the nomination process was nevertheless set down for a later stage. On 28 February 2017, the Senate approved the disputed representatives for the civil society positions on the NCCC.¹³

The Ministry of Environment and Natural Resources, in coordination with the Kenya Forest Service, held meetings to discuss which forestry datasets would be opened up to the public, such as forest maps. However, apart from these preliminary meetings, no additional activities for Milestone 1.3 took place.

The Kenyan Parliament ratified the Paris Agreement, 2015 on 28 December 2016 (Milestone 1.4).¹⁴ The Paris Agreement requires contracting parties to submit nationally-determined contributions (NDC) to the global response to climate change. Parties to the agreement have affirmed the importance of public participation and public access to information and

cooperation at all levels on the matters addressed in the agreement.¹⁵ For example, parties must account for their NDCs in a manner that promotes transparency,¹⁶ and state parties must promote public and private sector participation in the implementation of NDCs.¹⁷ The CCA has extensive provisions on transparency and civic participation.¹⁸

Kenya adopted a *National Climate Change Action Plan (NCCAP) 2013–2017* in 2013.¹⁹ The action plan acknowledged the need for a “sound and enabling policy, legislative and institutional framework,”²⁰ and stated that the process to develop a Climate Change Policy and to mainstream climate change into Vision 2030 was ‘ongoing.’²¹ It also set out the envisaged content of the Climate Change Policy, and advised that the policy would be a ‘necessary and critical precursor’ to a new stand-alone climate change law.²² By the midterm, a dedicated Climate Change Policy had not been published or approved by Cabinet (Milestone 1.5). However, since the CCA has since been enacted, one assumption could be that the policy framework was developed as part of the process of formulating the law, but this is not confirmed.

For more information, please see the IRM’s Kenya Progress Report 2016–2017.²³

End of term: Substantial

The commitment remained substantially complete by the end of term.

In *Republic v National Assembly & 2 others Ex-parte Green Belt Movement & five others*, CSOs working in the area of climate change challenged the merits of the NCCC-nomination process in the Kenyan High Court (Milestone 1.2).²⁴ In a judgment handed down in September 2018, the court found that while the procedure for nomination, approval, and appointment of the NCCC members had been violated by the President and Parliament, it could not find any constitutional or statutory duty compelling the Kenyan Parliament to accept the nominations put forward by CSOs.²⁵

Milestone 1.3 (publishing forestry datasets) remained incomplete. Apart from the preliminary meetings between the Ministry of Environment and Natural Resources and the Kenya Forest Service, no additional activities took place.

While the climate change policy (Milestone 1.5) still dates from 2013, a second National Climate Change Action Plan had been substantially formulated by the end of term.²⁶

Did It Open Government?

Access to Information: Marginal

Civic Participation: Marginal

Prior to the development of the action plan, climate change policy and law in Kenya lacked sufficient mechanisms to ensure transparency, public participation, and accountability as required in the Paris Agreement. According to one civil society respondent to the IRM researcher’s stakeholder questionnaire, prior to the action plan, citizens were not involved in the strategic decision-making on climate policies, and issues of climate change were left to elites in Nairobi to handle, due to their perceived technical nature.

The milestones included in this commitment aimed to increase citizen involvement in environmental policy and make more information available to citizens. The commitment made a marginal improvement to access to climate change-related information. Ratification of the Paris Agreement and enactment of the CCA compel the Kenyan government to act openly and transparently on climate change issues. There is some evidence for increased access to information on climate change matters during the commitment period. For example, the CCD established a National Climate Change Registry of mitigation, adaptation and enabling actions to enable government and nongovernment actors to better understand climate change actions in Kenya. The information on this online registry, however, is only

updated to May 2017.²⁷ At present, there is also no online information on the NCCC and its workings. According to interviewed government and civil society representatives who work on climate change, failure to open up the forestry datasets also hampered this commitment's contribution to access to information.²⁸

The commitment only marginally improved civic participation. The provisions of the CCA on civic participation are potentially far-reaching. They not only provide for public consultation, but require that the public contribution to climate change matters must make an impact on the *threshold* of decision making.²⁹ The NCCC must also publish regulations dealing with the efficacy of public consultation to ensure that the requisite impact on the "threshold of decision-making" is achieved.³⁰ The NCCC must have civil society representatives and all state actors are required to ensure participation and consultation when discharging their functions. However, the legal wrangling that has ensued between the Kenyan government and civil society organizations over CSO nominees to the NCCC does not augur well for NCCC-initiated civic participation in the future, particularly where CSOs organized amongst themselves to ensure a transparent nomination process.

Carried Forward?

This commitment has not been carried forward to Kenya's next action plan.

¹ Climate Change Act (CCA), 13 May 2016, http://www.environment.go.ke/wp-content/uploads/2018/08/The_Kenya_Climate_Change_Act_2016.pdf.

² See "Climate Change Law to be operationalized," Ministry of Environment and Forestry (Kenya), <http://www.environment.go.ke/?p=3136>, which reports on a "series of meetings" to be held with stakeholders on the operationalization of the Climate Change Act. The first such meeting took place in Nakuru.

³ The NCCC is established by Section 5 of the CCA and serves as the overarching national climate change coordination mechanism. The CCD is established by s 9 of the CCA as the lead agency on national climate change plans and actions to deliver operational coordination.

⁴ Ibid, CCA, Section 7(2)(g) and (h).

⁵ Idem, Section 7(4).

⁶ The representatives are Charles Mwangi from the Green Belt Movement for civil society, in accordance with Section 7(2)(g) of the CCA, and Cynthia Wechabe from the Indigenous Information Network (IIN) for marginalized communities, in accordance with Section 7(2)(h) of the CCA.

⁷ See "Republic v National Assembly & 2 others Ex-parte Green Belt Movement & five others," High Court of Kenya at Nairobi, 13 February 2017, paragraphs 6 and 7, <http://kenyalaw.org/caselaw/cases/view/159741/>.

⁸ The President's purported appointees to the NCCC were published as Gazette Notice 9227 of 3 October 2016, *Kenya Gazette*, 7 Nov. 2016.

⁹ Message from the President (No. 9 of 2016) "On the appointment of members of the National Climate Change Council," 29 Nov. 2016, http://www.parliament.go.ke/sites/default/files/2017-05/29.11.2016_2.pdf. The person nominated to represent civil society was Mr John Kioli of the Kenya Climate Change Working Group, and the person nominated to represent marginalized communities was Ms Cynthia Wachebe.

¹⁰ See "Miscellaneous Application No. 11 of 2017," High Court of Kenya, 13 Feb. 2017, <http://kenyalaw.org/caselaw/cases/view/131918/>.

¹¹ The organizations were the Greenbelt Movement, the PanAfrican Climate Change Justice Alliance, and Transparency International respectively.

¹² Ibid, "Miscellaneous Application No. 11 of 2017."

¹³ Message from the Senate (No. 001 of 2017) "Decision of the Senate on the vetting of nominees for appointment to the National Climate Change Council," 28 Feb. 2017, <https://bit.ly/2s9gEF5>. The Senate-approved nominations for the civil society positions were Mr John Kioli and Mr Patel Suresh respectively.

¹⁴ Status of ratification of the Paris Agreement, United Nations Treaty Collection, see https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVII-7-d&chapter=27&clang=en.

¹⁵ See the Preamble; "Paris Agreement," United Nations, 12 Dec. 2015, https://unfccc.int/sites/default/files/english_paris_agreement.pdf.

¹⁶ Idem, article 4(3).

¹⁷ Idem, article 6(8)(b).

¹⁸ Regarding public participation, the guiding values and principles of the CCA require state actors to 'ensure integrity and transparency' and 'ensure participation and consultation with stakeholders' when discharging their functions (section 4(2)(e), (f)); public entities at each level of government *must* conduct public consultations when developing laws, strategies and policies relating to climate change (section 24(1)); and public consultations must be undertaken in a manner 'that ensures the public contribution makes an impact on the threshold of decision-making' (section 24(2)). The NCCC is mandated to publish regulations dealing with the efficacy of public consultation to ensure that the requisite impact on the 'threshold of decision-making is achieved' (section 24(4)).

In the case of access to information, the law requires the NCCC and the Directorate to ‘publish and publicize all important information within their mandate’ (section 24(4)); affirms the right of ‘any person’ to request information from the NCCC or the Directorate, and outlines the reasons why requests for information can be declined (section 24(5), (6)). On an annual basis, the NCCC is also required to develop a ‘public engagement strategy’, setting forth the steps it intends taking to inform the public about climate change action plans, and encouraging the public to contribute to the achievement of the objectives of such plans (section 31).

¹⁹ See “National Climate Change Action Plan 2013 – 2017,” Republic of Kenya, Vision 2030, 27 Mar. 2013, <https://cdkn.org/wp-content/uploads/2013/03/Kenya-National-Climate-Change-Action-Plan.pdf>.

²⁰ *Idem*, p. 95.

²¹ *Idem*, p. 96.

²² *Idem*, pp. 98–99.

²³ “Kenya Progress Report 2016-2018,” Independent Reporting Mechanism, 6 Jun. 2018, pp. 24-25, https://www.opengovpartnership.org/sites/default/files/Kenya_MidTerm-Report_2016-2018.pdf.

²⁴ *Ibid*, “Republic v National Assembly & 2 others Ex-parte Green Belt Movement & five others.”

²⁵ *Idem*, paragraphs 73 and 76.

²⁶ “NCCAP 2018-2022,” Kenya Climate Change Knowledge Portal, <http://www.kcckp.go.ke/nccap-2018-2022/>.

²⁷ “National Climate Change Registry,” Ministry of Environment and Natural Resources, Government of Kenya, <http://kenyaclimateregistry.info/usrlgn.aspx>.

²⁸ Pacifica, Climate Change Directorate, interview by IRM researcher on 18 Jun. 2018.

²⁹ *Ibid*, CCA, Section 24(2).

³⁰ *Idem*, Section 24(4).

2. Preventative and Punitive Mechanism Against Corruption

Commitment Text:

Title: 2. Enhancing preventive and punitive mechanisms in the fight against corruption and unethical practices

Status quo or problem addressed by the commitment: Despite there being a number of initiatives to fight corruption going back ten years, corruption in Kenya remains pervasive and endemic. It's one of the biggest challenges facing Kenya today. It undermines our security, accountability systems, access to services among others. Tackling both the supply and demand side of corruption is a necessary imperative to further accountability for corruption cases.

Main objective: To minimize corruption and wastage for better service delivery to the citizen in order to achieve national aspirations as contained in the Kenya national vision 2030.

Milestones:

Anti-corruption and Ethics Regulatory Reforms

Milestone 2.3. Legal reforms to enhance the effectiveness of the Ethics and Anti-Corruption Act and Leadership and Integrity ACTs, Economic Crimes ACT etc

Milestone 2.6. Finalize and adopt the National Policy Framework on Ethics and Anti-Corruption.

Legislate Whistleblower Protection

Milestone 2.4. Enact a Whistle Blower Protection, Anti-Bribery Bill and False Claims legislation.

Anti-Corruption Partnerships

Milestone 2.1. Establish a public-private partnership for information sharing that brings together governments, civil society and private sector to detect, prevent and disrupt corruption

Milestone 2.7. Mount and Sustain a values/ethics campaigns by civil society, government and private sector on anti- corruption

Increase corruption monitoring

Milestone 2.2. Develop with civil society and private sector, a technology driven project monitoring portal for citizens to participate in project identification, evaluation, report and provide feedback to enhance accountability in government initiatives.

Implement and enforce anti-corruption regulations

Milestone 2.5. Enforcing the Code of ethics for suppliers undertaking public procurement, including professional enablers (lawyers and accountants)

Milestone 2.8. Enforce adherence to provisions of Executive Order No. 6 on Ethics and Integrity in the Public Service

Improve preventive and punitive anti-corruption measures

Milestone 2.9. Enhance structured coordinated multi-agency effort in tackling corruption.

Editorial Note: Milestone 2.10, "Improve Corruption Perception Index (CPI) ranking," will not be assessed, as this is an aspirational activity that does not have measurable or verifiable

steps for implementation. The CPI is a tool developed by Transparency International to annually rank countries by their perceived levels of corruption, as determined by expert assessments and opinion surveys.

Note Also: The milestones for this commitment have been clustered by six thematic groupings. The original milestones have been reorganized under these themes but retain the same numbers as in the action plan.

Responsible institutions: Office of Attorney General & Department of Justice; Ministry of Public Service, Youth and Gender; The Presidency; Office of the Director of Public Prosecutions; Ethics & Anti-Corruption Commission; Parliament and Senate; Business Against Corruption Kenya (BACK); TI Kenya; and Society for International Development (SID) International Commission of Jurists; Kenya Private Sector Alliance (KEPSA); Kenya Association of Manufacturers (KAM); Katiba Institute; AfriCog; Ushahidi

Start date: January 2016

End date: June 2017

Commitment Overview	Specificity				OGP Value Relevance (as written)				Potential Impact				Completion		Midterm		Did It Open Government?									
	None	Low	Medium	High	Access to Information	Civic Participation	Public Accountability	Technology & Innovation for Transparency & Accountability	None	Minor	Moderate	Transformative	Not Started	Limited	Substantial	Completed	Worsened	Did Not Change	Marginal	Major	Outstanding					
2. Overall		✓				✓	✓			✓				✓					✓							
Anti-Corruption and Ethics Regularity Reforms																										
2.3. Reforms to the Ethics and Anti-Leadership and Integrity Act, and Economic Crimes Act		✓			Unclear					✓			✓													
												✓														
2.6. National policy framework on ethics and			✓		Unclear					✓			✓													

anti-corruption												
New Anti-Corruption Legislation												
2.4. Whistleblower protection, Anti-Bribery Bill, and false claims legislation	✓				✓				✓		✓	
Anti-Corruption Partnerships												
2.1. Public private partnership	✓				Unclear				✓			
2.7. Values/ethics campaigns	✓				Unclear				✓			
Increase Corruption Monitoring												
2.2. Citizen project-monitoring portal	✓				✓				✓		✓	
Implement and Enforce Anti-Corruption Regulations												
2.5. Code of Ethics for public procurement suppliers	✓			✓	Unclear				✓		✓	
2.8. Enforce Executive Order No. 6 on Ethics and Integrity in Public Service	✓				Unclear				✓		✓	
Improve Preventative and Punitive Anti-Corruption Measures												
2.9. Coordinated multiagency effort in tackling corruption	✓				Unclear				✓		✓	

Commitment Aim

This commitment included a number of activities to improve national anti-corruption policies. Milestone 2.4, in particular, aimed to propose, draft, and enact legislation concerning whistleblower protection, anti-bribery, and false claims. It should be noted, however, that most of the activities lacked specific steps for marking progress towards enacting anti-

corruption legislation and tools. Additionally, the milestones were based on ongoing initiatives under broader anti-corruption policy.

Status

Midterm: Limited

Only Milestone 2.4 saw progress by the midterm. The Anti-Bribery Bill was enacted into law in December 2016, while the false claims and whistleblower protection bills were drafted, but not enacted. The remaining eight activities were not started.

End of term: Limited

According to surveyed civil society representatives such as Transparency International (TI) Kenya, the Society for International Development (SID), the International Commission of Jurists, the Kenya Association of Manufacturers (KAM), and Ushahidi, as well as an interviewed representative from the Ministry of Justice in the Office of the Attorney General, there was no evidence that the government undertook additional activities towards implementing the milestones during the second year.

Currently, the Whistle-blowing Protection Bill that was previously developed in 2016 is under consideration for adoption.¹ While the Anti-Bribery Act requires companies listed in the Nairobi Securities Exchange to have whistleblower protection policies in place, there is limited information on implementation by firms with delayed enforcement on provisions prohibiting passive and active commercial bribery, such as inducements to secure tenders.

Did It Open Government?

Civic Participation: Did Not Change

Public Accountability: Marginal

The passing of the 2016 Anti-Bribery Act is a positive step towards addressing corruption and bribery in Kenya. The Act has far reaching implications on Kenyan businesses as well as foreign organizations doing business in Kenya. It provides for specific requirements that private entities must have in place in the prevention of bribery. The Act also provides for an effective coordination and accountability framework in the prevention, investigation, and prosecution of acts of bribery. The Act creates a legal obligation on a person of authority in a private entity² who becomes aware of an act of bribery to report the matter to the Ethics and Anti-Corruption Commission within 24 hours.

While a specific whistleblower protection bill was not passed, the Anti-Bribery Act also provides protection for whistleblowers and witnesses. Section 21 imposes a fine not exceeding Sh1 million or imprisonment for a term not exceeding one years on anyone who demotes, admonishes, dismisses from employment, transfers to unfavorable working areas, or otherwise harasses and intimidates a whistle blower or a witness.³

In the Jubilee Coalition's 2013 manifesto, the Kenyan government promised zero tolerance for corruption and abuse for personal gain, in addition to a commitment to remove parliamentary immunity to corruption charges.⁴ Despite these pledges, key anti-corruption agencies have failed to reduce the theft of public goods,⁵ recover stolen assets, or convict those who have stolen or abetted the misuse of public resources.⁶ According to an audit by the Ethics and Anti-Corruption Commission, Kenya loses one-third of its national budget, about Sh666 billion, to theft and mismanagement every year.⁷ An analysis of the Auditor General Report by civil society shows that only Sh590 billions of government expenditure has been properly accounted for, representing 13 percent of total expenditure. Sh4.2 trillion, some 87 percent, was either lost, not spent properly, or not accounted for, showing that

Sh368 billion of the Sh1 trillion is spent without any accountability. Major corruption scandals remain unsolved, including the Kenya Pipeline Company (KPC), the National Hospital Insurance Fund (NHIF), the National Youth Service (NYS), “Chicken Gate,” and the misappropriation of devolved funds.⁸

Carried Forward?

This commitment has not been carried forward to Kenya’s next action plan. However, the third action plan notes that in order to realize the commitments contained therein, which are in line with the governments Big Four Agenda,⁹ anti-corruption measures must be a cross cutting theme.¹⁰

¹ Regional Workshop/Conference to Fast-tracking the Implementation of UNCAC, Presented by Sheryl Steckler, International expert on Whistleblower Protection (UNODC Consultant/PICS) & Constanze von Soehnen, Crime Prevention and Criminal Justice Officer (UNODC), March 2018, https://www.unodc.org/images/ngos/Corruption/March_2018_Workshop_East_Africa_presentation_draft_final.pptx.

² A private entity includes every person or organization that is not a public entity e.g. companies incorporated in Kenya which conducts business in Kenya or outside Kenya, foreign companies which carry on business wholly or partly in Kenya, partnerships or charities which have a connection with Kenya etc.

³ “The Bribery Act, 2016,” *Kenya Gazette Supplement* (no. 197), Republic of Kenya, 30 Dec. 2016, <http://www.bowmanslaw.com/wp-content/uploads/2017/02/Bribery-Act-47-of-2016.pdf>.

⁴ Jubilee Manifesto 2017, Deputy President’s Office, 2017, <http://deputypresident.go.ke/images/jpmanifesto2017.pdf>.

⁵ “Sh1 trillion - Shocking numbers in the plunder of a nation,” Standard Digital, 9 Dec. 2018, <https://bit.ly/37Ezzlj>.

⁶ “Public Action Against Mindless Theft and waste of state resources,” Kenya Human Rights Commission, 1 Nov. 2016, <https://bit.ly/37DiSgh>.

⁷ Brian Ngugi, “Experts: Theft, waste likely to silence calls for austerity,” Daily Nation, 11 Mar. 2018, <https://bit.ly/2DgZjfE>.

⁸ Auditor General’s Audit Reports and Controller of Budget’s Budget Implementation reports

⁹ The “Big Four Agenda” refers to policy areas to which the Kenyan government plans to dedicate major energy and resources over the next five years, namely: food security, affordable housing, manufacturing and universal healthcare for accelerated social-economic transformation, increased job creation and improved quality of life for all Kenyans. For more information, see HIGHLIGHTS OF THE BIG-FOUR AGENDA OF H.E. PRESIDENT UHURU KENYATTA,” Kenya Private Sector Alliance, 12 Dec. 2017, <https://bit.ly/34lxXkw>.

¹⁰ “Eye on the ‘Big Four’: Budget Watch 2018/19 and the Medium Term,” Parliamentary Budget Office, Republic of Kenya, Aug. 2018, <http://www.parliament.go.ke/sites/default/files/2018-09/Budget%20Watch%202018.pdf>.

3. Legislative Transparency in Parliament and County Assemblies

Commitment Text:

Title: 3. Enhance transparency in the legislative process in Parliament and County Assembly.

It is challenging for the public to access bills tabled in Parliament. Further, the notice given by the relevant Parliamentary committees for input by the public is not sufficient. In addition, public access to Parliament buildings is highly regulated due to security concerns.

Parliamentary calls for memoranda and invitations to public hearings are only published in newspapers as advertisements, which only about 2% of the Kenyan population have access to. It would be more effective if other media such as radio and mobile phone, which 80% of Kenyans can access, were used. There is need for improved tracking of bills including the realtime changes made at various stages of the legislative process. Currently you can only track the process of the bill as opposed to the content.

Brief Description of Commitment

Enact public participation policy and law to prescribe citizen engagement avenues, thresholds, timelines and formats in which Parliamentary information should be availed. By availing information through technology - websites, SMS short-codes, radio and social media platforms - legislators facilitate more inclusiveness in decision-making and provide avenues for feedback.

Milestones:

- 1. Enact Public Participation legislation and policy to prescribe avenues, timelines and threshold necessary*
- 2. Provide tracked copies of bills in every stage of discussion in Parliament*
- 3. Adopt open-source platforms to enhance internal parliamentary and county assembly communication and also facilitate information sharing with the public*
- 4. Publish weekly Senate, National Assembly, County Assembly plenary and committees proceedings*
- 5. Facilitate citizen engagement with Parliament and County Assembly via alternative media*
- 6. Increase Parliament's participation in the Legislative Openness working group*

Responsible Institutions: Parliament Service Commission; County Assemblies; Department of Justice; Legislative & Intergovernmental Liaison Office (LILO); and National Council for Law Reporting

Supporting Institutions: County Governments, Presidency Mzalendo Trust, Parliamentary Initiatives Network, Kenya – Network of CSOs. Ushahidi

Start Date: 1 July 2016

End Date: 30 June 2018

Editorial Note: This commitment text has been abridged for brevity. For full text, see national action plan 2016–18:

https://www.opengovpartnership.org/sites/default/files/Kenya_AP2_2016_0.pdf.

Commitment Overview	Specificity				OGP Value Relevance (as written)				Potential Impact				Completion		Midterm End of Term		Did It Open Government?								
	None	Low	Medium	High	Access to Information	Civic Participation	Public Accountability	Technology & Innovation for Transparency &	None	Minor	Moderate	Transformative	Not Started	Limited	Substantial	Completed	Worsened	Did Not Change	Marginal	Major	Outstanding				
3. Overall			✓		✓	✓	✓			✓					✓				✓						
3.1. Public participation legislation and policy		✓				✓			✓				✓												
3.2. Track bills in every stage of discussion in Parliament			✓		✓						✓			✓											
3.3. Adopt open source platforms		✓			✓				✓				✓												
3.4. Weekly Senate, National Assembly, County Assembly, plenary and committees proceedings				✓	✓			✓						✓											
3.5. Citizen engagement with Parliament and County Assembly via alternative media		✓			✓		✓		✓							✓									
3.6. Parliamentary participation in the Legislative Openness Working Group		✓			Unclear					✓				✓											
													✓												

Commitment Aim

Article 118 (b) of the Kenyan Constitution requires public participation and involvement in all areas of governance.¹ This commitment aimed to provide citizens with more opportunities to review draft legislation and to provide input on development and implementation of public policy.

Status

Midterm: Substantial

By the midterm, the overall status of completion of this commitment was substantial. It remained unclear whether Milestone 3.1 required the better implementation of existing laws on public participation or the development and enactment of new policies and laws. At the start of the commitment period, the Ministry of Devolution and Planning & Council of Governors had already published *County Public Participation Guidelines*.² While various initiatives were started (e.g. a Senate reading on a new public participation bill in November 2016 and a stakeholder consultation on the Nairobi County Proposed Participation Policy), none were completed by the midterm.

Building on collaboration with a member of the Kenyan Parliament that had resulted in successful civic participation on the National Youth Employment Authority Bill,³ the parliamentary-watchdog CSO Mzalendo launched the Dokeza platform in April 2017.⁴ This CSO-led initiative is relevant to Milestones 3.2, 3.3, and 3.5, as it enables any person to access bills before the Senate and the National Assembly, indicates when bills are “open for memoranda” (i.e. for public comment), allows for registered users to post comments, and provides explanatory notes on bills, where deemed necessary.⁵ Ms. Jessica Musila, Chief Director of Mzalendo, affirmed that the CSO procured the opinion of a variety of government stakeholders in developing Dokeza, and that it was supported by both Houses of Parliament.⁶ The civic participation element of the Dokeza platform also relies on an SMS-service called “Bonga-na-Mzalendo,” which entails forwarding a simple question distilled from current legislative reforms to a database of users who can respond via SMS,⁷ and dissemination of information via Twitter. However, a similar platform was not developed for County Assemblies.

The Senate and National Assembly continued publishing their weekly Hansard (the official report and minutes of parliamentary proceedings) on the Parliament website (Milestone 3.4), but government-based open source platforms (Milestone 3.3) were not adopted at either the national or county levels. Parliament continued using social media like Facebook and Twitter to engage the public (Milestone 3.5) and participated in some meetings for the legislative openness working group (Milestone 3.6). For more information, please see the 2016–2018 IRM progress report.⁸

End of Term: Substantial

By the end term, this commitment remained substantially implemented. A new Senate Public Participation Bill was published on 5 March 2018 (Milestone 3.1).⁹ The Bill aims to provide a general framework for public participation to give effect to the principles of democracy and participation in the Kenyan Constitution. The Bill enshrines general principles of public participation¹⁰ and further envisages that a range of responsible authorities will develop more detailed guidelines on public participation for their respective institutions.¹¹ The general principles, for example, include guarantees of equitable access to information; and the right of the public, communities and organizations affected by a decision to be consulted and involved in the decision-making process. Until a responsible authority has developed more specific public participation guidelines for the respective public sector institution, the general guidelines set out in the Bill apply.¹² The Bill envisages that each responsible authority will prepare and publish an annual report on public participation activities and outcomes.¹³ By the close of the commitment period, the Bill had made no further progress in the Kenyan Parliament beyond its introduction in the Senate.

Although affected by the lull in legislative activity that ensued during and after Kenya's protracted and problematic 2017 elections,¹⁴ the Dokeza site remained functional in the latter half of the commitment period (Milestones 3.2, 3.3, and 3.5). A total of 24 Senate and National Assembly bills dating from 2018 and 2019 were published on the site for public access and comment.¹⁵ The same bills were published on the website of the Parliament of Kenya, with a functionality to submit comments.¹⁶ The bill-tracking functions on both platforms, however, are not operational. The modes of civic engagement around the Dokeza platform (publication of bills, Youtube videos, SMS service, and Twitter handles) aim to promote civic participation. For example, the Mental Health (Amendment) Bill, 2018 was published on the Dokeza platform and received 11 online comments.¹⁷ A video of the Senator speaking on the Bill posted on Youtube received 100 likes; 168 people responded via SMS to a question relating to the Bill; and two twitter hashtags on the Bill achieved about 86,000 and 18,000 impressions, respectively.¹⁸

No further progress was made in respect of Milestones 3.4 and 3.6.

Did It Open Government?

Access to Information: Marginal

Civic Participation: Marginal

In Kenya, public participation is already constitutionally-enshrined and requires compliance even in the absence of enabling legislation. This commitment sought to enhance transparency in both parliamentary and county legislative processes. It is relevant to the OGP values of access to information and public participation. Prior to the commitment, Kenyans had to purchase bills from the Government Printer and could not access them before the government made them available. The periods given for public comment were very short, and the public did not know when the period for commentary was open.¹⁹

Progress on the milestones under this commitment have led to a marginal improvement in both access to information and civic participation. Some activities were completed before the start of the action plan (such as Milestone 3.5), but others have shown progress. Although a general-enabling public participation law has yet to be enacted, a new Public Participation Bill was introduced in the Senate. Bills are also accessible on the site of both the Kenyan Parliament and through the Dokeza platform. The Dokeza platform more clearly indicates when a bill is "open for memoranda," and its integrated modes of stimulating civic participation on legislative processes have had some positive results.

However, although a legal framework for participation at the county level exists, there are insufficient resources and incentives for county officials to ensure meaningful participation. Therefore, counties could set aside funds to ensure an adequate budget for maintaining the bill-tracking annotation tool. Also, participatory frameworks could address gaps that still exist at the county level, in particular, strengthening existing formal regulations (e.g. penalizing counties that do not comply) or finding other ways to incentivize and support these participatory spaces.

Carried Forward?

This commitment has not been carried forward to Kenya's next action plan.

¹ "The Constitution of Kenya," National Council for Law Reporting with the Authority of the Attorney-General, <http://extwprlegs1.fao.org/docs/pdf/ken127322.pdf>.

² "County Public Participation Guidelines," Ministry of Devolution and Planning & Council of Governors, January 2016, <http://www.hakijamii.com/wp-content/uploads/2016/05/County-Public-Participation.pdf>.

³ According to Ms. Jessica Musila, Chief Director of Mzalendo, the MP reached out to Mzalendo, who facilitated public participation by developing a Youtube video on the Bill and drafting a survey. Within a week, they received responses from 17,000 people. These responses informed the MP's notes for Parliament and were taken into account in the passage of the National Employment Authority Act, 2016. Ms. Jessica Musila, Mzalendo, interview with IRM Researcher, 8 Apr. 2019.

⁴ “Dokeza,” Mzalendo, <https://dokeza.mzalendo.com>.

⁵ See, for example, the “National Assembly Bills” on the Dokeza platform at <https://dokeza.mzalendo.com/bills/assembly/>.

⁶ Ibid, Ms Jessica Musila.

⁷ See Mzalendo, <http://info.mzalendo.com>.

⁸ “Kenya Progress Report 2016-2018,” Independent Reporting Mechanism, 6 Jun. 2018, pp. 36-37, https://www.opengovpartnership.org/sites/default/files/Kenya_MidTerm-Report_2016-2018.pdf.

⁹ See *Kenya Gazette Supplement* No. 17 (Senate Bills No. 4), 5 Mar. 2018,

http://kenyalaw.org/kl/fileadmin/pdfdownloads/bills/2018/PublicParticipationBill_2018.pdf.

¹⁰ Ibid, Public Participation Bill, Section 4.

¹¹ Idem, Section 5. Cabinet Secretaries, for example, are responsible for developing more specific guidelines for government ministries.

¹² Idem, Section 6(3).

¹³ Idem, Section 8.

¹⁴ Ibid, Ms Jessica Musila.

¹⁵ See, for example, “National Assembly Bills,” Dokeza, Mzalendo, <https://dokeza.mzalendo.com/bills/assembly/>.

¹⁶ See, for example, “Bills,” National Assembly of the Republic of Kenya, <http://www.parliament.go.ke/the-national-assembly/house-business/bills>.

¹⁷ See “Mental health (Amendment) Bill,” Dokeza, Mzalendo, updated 1 Feb. 2019,

<https://dokeza.mzalendo.com/bills/bill-act-parliament-amend-mental-health-act-and-co/>.

¹⁸ Ibid, Ms Jessica Musila.

¹⁹ Idem.

4. Publication of Oil and Gas Contracts

Commitment Text:

Title: 4. Publish Oil and Gas Contracts, including revenue information to ensure transparency and accountability of the extractive sector.

Status quo or problem: Companies engaged in extractives (largely foreign) have had a tendency of nondisclosure of prospecting information and revenues, seemingly accountable only to their shareholders. Since natural resources need to benefit entire ecosystems and value chain, new partnerships are required between government and natural resources industry to ensure that taxpayers receive every shilling they are due from the extraction of our natural resources. Such compliance will also ensure equitable distribution of proceeds from extractives and reduction of potential conflicts. Pro-active disclosure of information to local governments and citizens is also required to ensure better natural resource management.

Main objective: Improve natural resource governance systems to ensure transparency and accountability of the extractive sector.

Brief description of commitment: Disclose contractual information and revenues derived from the Oil and Gas Industry.

Milestones:

- 1. Adopt and implement a progressive and transparent policy and legislative framework for upstream, mid-stream, and downstream extractive activities: specifically publication of contracts within the Oil and Gas Industry*
- 2. Make information on decision-making and financial flows related to the extractive industries publicly accessible and usable.*
- 3. Hold regular meetings with civil society, private sector and County Governments to strengthen their understanding of EITI.*
- 4. Hold quarterly reviews local and with other leading EITI champions to review progress and preparedness towards signing of EITI*

Responsible Institution: Ministry of Mining

Supporting Institutions: Ministry of Mining; Office of the Attorney General & State Department of Justice; Transparency International (TI - Kenya); Society for International Development (SID); Kenya Oil & Gas Coalition; Hivos Foundation; and Institute for Law and Environmental Governance (ILEG)

Start Date: 30 June 2016

End Date: 30 May 2018

Commitment Overview	Specificity				OGP Value Relevance (as written)				Potential Impact				Comple tion		Midterm End of Term		Did It Open Government?				
	None	Low	Medium	High	Access to Information	Civic Participation	Public Accountability	Technology & Innovation for Transparency & Accountability	None	Minor	Moderate	Transformative	Not Started	Limited	Substantial	Completed	Worsened	Did Not Change	Marginal	Major	Outstanding
4. Overall				✓	✓	✓						✓		✓				✓			
4.1. Policy and legislative framework for oil and gas contract publication				✓	✓							✓		✓							
4.2. Open information on extractive industries' decision-making and financial flows			✓		✓	✓					✓		✓								
4.3. EITI meetings with civil society, private sector, and county governments			✓			✓				✓			✓								
4.4. Quarterly reviews of progress and preparedness towards signing of EITI			✓			✓				✓			✓								

Commitment Aim

Kenya is a resource-rich country, and the recent discovery of crude oil and natural gas increases the urgency for developing a transparent extractives policy. This commitment

aimed to create the necessary legal framework for disclosing contract information and revenues derived from the oil and gas industry.

Status

Midterm: Limited

By the midterm, this commitment saw limited progress on Milestone 4.1. This was attributed to the transition of personnel within the Ministry of Mining, where the key OGP point of contact was moved to another ministry. The Petroleum Bill did not advance and was withdrawn based on disagreement and errors in the draft related to revenue-sharing percentages. A new draft with revised revenue structures was republished and reintroduced to the National Assembly on 6 December 2017, and a first reading was scheduled for February 2018. Milestone 4.2 was also incomplete by the midterm, as the Ministry of Mining made no progress on releasing data, contracts, or financial information. At that time, the government needed to establish the appropriate system to publish revenue information and ensure that contract information is made public and meets.

Milestones 4.3 and 4.4 were not started by the midterm. The government did not assign an agency to organize regular meetings with civil society, private sector and county governments regarding the Extractives Industry Transparency Initiative (EITI), and there is no publicly available evidence that quarterly reviews for Kenya's preparedness towards EITI have taken place. For more information, please see the 2016–2018 IRM progress report.¹

End of term: Limited

Implementation remained limited by the end of term. For Milestone 4.1, the Petroleum (Exploration, Production & Development) Bill, 2017 was tabled in January 2018 before the National Assembly. The Departmental Committee on Energy held public hearings and accepted memoranda from the public in March 2018. The National Assembly passed the Bill in July 2018, and it proceeded to the Senate in August 2018. However, the Bill was delayed in the Senate due to ongoing negotiations between the President and the Turkana County Governor on the issue of revenue allocation. On 19 May 2018, an agreement was reached where the national government would take 75 percent of the revenue, while the county government would take 20 percent, and the local community would take 5 percent. The agreement removed the previously contentious caps in the 2015 Bill that would have limited the county and community allocations based on the amounts received from the national government in the fiscal year. At the Senate, the Petroleum Bill proceeded to the committee stage in August 2018, and the Committee on Energy held a public hearing and called for memoranda between 21 and 22 August 2018.²

The Petroleum Act was subsequently passed and received the President's assent on 12 March 2019.³ The Act addresses petroleum agreements in sections 17, 18, and 19. Although the law makes some provision for transparency (e.g. where the Cabinet Secretary intends to negotiate directly with a contractor, he must publish a notice of this intention in the *Gazette* and invite objections⁴), it does not require that oil and gas contracts must be published.

According to the Chief Executive Officer of Upstream Oil & Gas Ltd, the 2018 Local Content Bills⁵ could also provide a legislative framework to facilitate the local ownership, control, and financing of activities connected to the exploitation of gas, oil, and other petroleum resources, in line with Milestone 4.1.⁶ This bill introduces several rules and guidelines into Kenya's upstream oil and gas industry as a means of protecting and promoting local growth. These include:

- Enhancing the participation of local persons in extractive industry value chain,
- Facilitating the development of a competitive, capable, and sustainable labor force within the extractive industry,
- Enhancing local ownership and use of local assets and services in the extractive industry, and

- Maximizing value addition through local content development and local participation in extractive industry operations.

Milestones 4.3 and 4.4 on EITI remained not started at the end of term.

Did It Open Government?

Access to Information: Did not change

Civic Participation: Did not change

Prior to the action plan, the government implemented a comprehensive legal framework to govern the oil and gas industry. The upstream oil and gas sector were governed by laws such as the Constitution of Kenya, the Petroleum (Exploration and Production) Act regulations made under the Petroleum Act, and the Ninth Schedule to the Income Tax Act. However, legislative gaps existed in these laws regarding the publication of public contracts with the oil and gas industry. The passage of the Constitution of Kenya, 2010 ushered in a new era of natural resource governance and management in Kenya. Hydrocarbons and crude oil, which had previously been the property of the state, are now the property of the people of Kenya (managed for them by the State). To effect the Constitutional change relating to natural resources, the National Assembly in 2013 first introduced the Petroleum Bill, 2013. The 2013 Petroleum Bill, 2013 sought to repeal the Petroleum (Exploration and Production) Act that commenced in 1984. Since 2013, there have been four legislative attempts to obtain a new oil and gas legal regime in Kenya. The latest attempt was in January 2018.

Milestone 4.1 has not led to improvements in access to information or civic participation because the Petroleum Bill, 2017 is yet to be passed. The objective of the Petroleum Bill is to regulate the negotiation and conclusion of petroleum agreements by the government relating to the petroleum operations. However, when passed, the law could provide for public participation and involvement framework, especially for the local communities and in revenue sharing, and would also enhance revenue management from the extractives sector.

Carried Forward?

This commitment has not been carried forward to Kenya's next action plan. It is recommended to carry this commitment forward into the next action plan with steps taken to publish information on oil and gas, particularly given how important these are now in Kenya.

¹ "Kenya Progress Report 2016-2018," Independent Reporting Mechanism, 6 Jun. 2018, pp. 40-41, https://www.opengovpartnership.org/sites/default/files/Kenya_MidTerm-Report_2016-2018.pdf.

² "Update: Petroleum Act, 2019," Kenya Civil Society Platform on Oil and Gas, 4 Apr. 2019, <http://kcspog.org/update-petroleum-act-2019/>. Kenya Civil Society Platform on Oil and Gas 'Update: Petroleum Act, 2019',

³ Idem

⁴ Idem, Section 18(4).

⁵ This is a proposed bill that will regulate local ownership, control and financing of gas, oil and natural resources.

⁶ Joe Watson Gakuo, "Oil and gas has huge potential in 2018," The Star, 12 Jan. 2018, <https://www.the-star.co.ke/counties/2018-01-11-oil-and-gas-has-huge-potential-in-2018/>.

★5. Transparency Around Bids and Contracts by Individuals

Commitment Text:

Title: 5. Ensure greater transparency around bids and contracts by individuals and companies in Kenya

Status quo or problem addressed by the commitment: Systems within Government and Private Sector have long tolerated those who have been suspect to benefit from illicit gain, money laundering, manipulating of public tenders and contracts. This ability circumvents checks and balances within our systems and have normalized the abnormal. Furthermore, we have not ensured full disclosure of information of such activities. According to the Global Finance Integrity Report, more than US\$13.5 billion flowed illegally into or out of Kenya from 2002 through 2010 through the mis-invoicing of trade transactions, fueling crime and costing the Kenyan government at least US\$3.92 billion in lost tax revenue.

Main objective: Publish information on beneficiaries of contracts by individuals and companies in Kenya.

Brief description of commitment: Create an open, usable and publicly accessible beneficial ownership register, including information of the 'actual owners' and 'beneficiaries' of Companies.

Milestones:

- 1. Initiate an open and transparent multi-stakeholder consultation on the state, perception and legislation on Beneficial Ownership in Kenya.*
- 2. Prepare legislation and submit legislation to the National Assembly*
- 3. Develop an Open, accessible and usable Beneficial Ownership Registry*

Responsible Institution: Office of the Attorney General

Supporting Institutions: State Department of Justice & Office of the Attorney General; Kenya Revenue Authority; Article 19; Tax Justice Network (TJN-A); International Budget Partnership (IBP); Infonet Africa; and Ushahidi

Start Date: 30 June 2016

End Date: 30 May 2018

Commitment Overview	Specificity				OGP Value Relevance (as written)				Potential Impact				Completion		Midterm		Did It Open Government?					
	None	Low	Medium	High	Access to Information	Civic Participation	Public Accountability	Technology & Innovation for Transparency & Accountability	None	Minor	Moderate	Transformative	Not Started	Limited	Substantial	Completed	Worsened	Did Not Change	Marginal	Major	Outstanding	
★5. Overall			✓		✓	✓		✓				✓			✓						✓	

													✓					
5.1. Multi-stakeholder consultation on Beneficial Ownership			✓		✓	✓						✓						
5.2. Prepare and submit BO legislation to the National Assembly			✓		✓								✓					
5.3. Develop Beneficial Ownership Registry			✓		✓								✓					

Commitment Aim

This commitment aimed to improve transparency in the public procurement process by introducing beneficial ownership regulations and disclosure policies, and by developing a beneficial ownership registry for Kenya.

Status

Midterm: Substantial

This commitment saw substantial implementation by the midterm. In August 2015, the government organized a meeting in collaboration with Transparency International (TI) Kenya to discuss the current legal provisions on beneficial ownership disclosure and how to align Kenya’s laws with international best practices (Milestone 5.1).¹

For Milestone 5.2, President Kenyatta signed the Companies (Amendment) Act on 21 July 2017, which came into force on 3 August 2017. The Companies (Amendment) Act defines beneficial ownership,² requires companies to keep a register of its members, including information relating to beneficial ownership (name and address only),³ and to submit a copy of such to the national Registrar of Companies.⁴ The law requires beneficial ownership information maintained by the Registrar of Companies to be open to inspection by the public. By the midterm, different arrangements were applied to companies registered under the Companies Act, 2015 and companies registered under the older Companies Act, 1947 (Cap 486). For the former, any person could conduct an online search for beneficial ownership information using the e-Citizen platform.⁵ (This service, however, is only available to Kenyan citizens, foreign residents, and business owners.) For companies registered under the older Companies Act, one would need to lodge an application for the information with the Registrar of Companies. By the midterm, InfoNET Africa was reportedly establishing an open beneficial ownership register in partnership with the government and other stakeholders (the Usajili project).⁶ For more information, please see the 2016–2018 IRM progress report.

End of term: Substantial

The commitment remained substantially implemented by the end of term.

The legislative framework for beneficial ownership (Milestone 5.2) was supplemented by Executive Order No. 2 of 2018 (effective 1 July 2018), which sets out disclosure requirements for government tenders.⁷ The Executive Order requires all procuring entities to maintain and continuously update and publicize complete information on all tenders awarded, including “full particulars” of the awarded bidder, supplier, contractor, or

consultant.⁸ Such “full particulars” must include a list of directors, shareholders, and beneficial owners (in the case of a company).⁹ According to the Executive Order, this information must be publicized through the website of the Procuring Entity, e-Citizen, Public Procurement Regulatory Authority platforms, public notice boards, and official government publications.¹⁰ These stipulations also apply to ongoing contracts entered into by procuring entities.¹¹ In June 2018, President Kenyatta further declared that from 1 January 2019, all public procurement has to be undertaken through the electronic platform of the Integrated Financial Management Information System (IFMIS).¹²

Progress in establishing an open, accessible, and usable beneficial ownership registry was substantial but not complete (Milestone 5.3). In pursuance of the directives of Executive Order No. 2 of 2018, the Kenyan government launched the Public Procurement Information Portal (PPIM), which serves as an online platform for publication of contract awards and tender notices by procuring entities.¹³ The PPIM sets out lists and aggregate information on tenders, contracts, suppliers, and contract values. The lists of suppliers currently include the supplier or company name; company registration number, business number, and registration date; and county of operation. Further details on the supplier or company include the entity’s physical address and the names of directors.¹⁴ However, beneficial ownership information has not yet been fully incorporated; no detail on shareholders has been provided, and one cannot assume that the directors of a company are necessarily its shareholders. For example, the PPIM entry for Advanta Africa Limited, a private company holding a contract with the National Construction Company to the value of Ks200,000 lists four “directors,” one of which is a local company (True Brands Limited). The shareholding of the local company is not disclosed. According to Mr. John Kipchumbah, Managing Director of the InfoNET group, the Usajili project currently being undertaken by InfoNET will be incorporating beneficial ownership information into the PPIM.¹⁵

Did It Open Government?

Access to Information: Major

Civic Participation: Marginal

Prior to the action plan, the true beneficiaries of public sector contracts in Kenya were unknown. The absence of transparency checks fueled suspicions that public procurement processes were abetting corruption¹⁶ and illicit financial flows out of Kenya—estimated at US\$13.5 billion—between 2002 and 2010 by the Global Financial Integrity Report.¹⁷ This situation motivated Commitment 5’s call for greater transparency around bids and contracts by individuals and companies, and in particular, the disclosure of beneficial ownership information in an open, accessible, and usable manner. Building on efforts to tighten regulation on suspicious financial activity and illicit transactions¹⁸ and to digitize the public procurement process,¹⁹ Kenya publicly committed to sharing data on the ultimate beneficial owners of companies at the 2016 Anti-Corruption Summit.²⁰

The commitment, as implemented, has laid the basis for a major change in access to information on bids and contracts in public procurement and ultimate beneficial owners. The legislative framework—as set out in amendments to the Companies Act, 2015 and Executive Order no. 2, 2018—requires the disclosure of supplier or company information, including beneficial ownership, which is open to public scrutiny. It remains a weakness of the legislative framework that information on beneficial ownership is limited (no information, for example, on the beneficial owner’s nationality, country of residence, or form of control), and no provision is made for verification.²¹ Access to information has also been enhanced by the launch of the PPIM, which includes details on public tenders, contracts, suppliers, and values, thus advancing the commitment aim of ensuring greater transparency around bids and contracts through an open, accessible, and usable registry. Although work appears to be in progress, the PPIM is limited by the failure to include shareholder information, which would allow for identification of the ultimate beneficiaries of contracts.

The commitment's impact on civic participation has been marginal, as civil society's involvement in the development of the legislative framework and PPIM appears to have been limited to a single stakeholder meeting.

Carried Forward?

This commitment has been carried forward to Kenya's next action plan. Commitment 1 from the third action plan aims to publish the collected information in an open, centrally-accessible, and machine-readable format.

¹ The meeting was attended by representatives from the Office of the Attorney General, the Kenya Revenue Authority, the Capital Markets Authority, the Financial Reporting Centre, the Kenya Human Rights Commission, FIDA Kenya, the Kenya Association of Manufacturers, the Kenya Private Sector Alliance, the International Commission of Jurists and the Companies Registry, amongst others.

² Section 3, Companies Act, 15 Sep. 2015,

http://kenyalaw.org/kl/fileadmin/pdfdownloads/Acts/TheCompaniesAct_No17of2015_RevisedCompressed.pdf.

³ Idem, Section 93(1).

⁴ Idem, Section 93(8).

⁵ See "Services and Information," e-Citizen (Kenya), <https://www.ecitizen.go.ke/ecitizen-services.html>.

⁶ The coalition of international organizations included Global Witness, the Open Contracting Partnership, OpenCorporates, the B Team, the Web Foundation, Transparency International, and ONE.

⁷ "Executive Order No. 2 of 2018 – Procurement of Public Goods, Works and Services by Public Entities," Executive Office of the President Head of the Public Service, 28 Jun. 2018, <https://openinstitute.com/wp-content/uploads/2018/07/Executive-Order-No.-2-of-2018-Procurement.pdf>.

⁸ Idem, Section 1A.

⁹ Idem, Section C.

¹⁰ Idem, Section 1.

¹¹ Idem, Section F.

¹² Benjamin Muriuki, "War on Corruption: President Uhuru announces Changes in Government Procurement System," Citizen Digital, 13 Jun. 2018, <https://bit.ly/34pNRdD>.

¹³ "Public Procurement Information Portal," Public Procurement Regulatory Authority, <https://tenders.go.ke/website>.

¹⁴ See "Supplier Details," Public Procurement Regulatory Authority, <https://tenders.go.ke/website/Suppliers/SupplierDetails/351>.

¹⁵ LinkedIn communication with IRM Researcher, 14 Apr. 2019; see also "Beneficial Ownership in Kenya," InfoNET, <http://infonet.global/infonet/beneficial-ownership-in-kenya/>.

¹⁶ A Visual History of Corruption Scandals in Kenya 2013–2018: Odipo Dev, Twitter post, 3 Jun. 2018, <https://twitter.com/OdipoDev/status/1003260422819065856>; Jacob Onyango, "15 mega corruption scandals in Kenya which have never been solved," Tuko, 22 May 2018, <https://www.tuko.co.ke/274539-15-mega-corruption-scandals-kenya-resolved.html#274539>.

¹⁷ Dev Kar & Brian LeBlanc, "Illicit Financial Flows from Developing Countries: 2002–2011," Global Financial Integrity, 11 Dec. 2013, <https://gfintegrity.org/report/2013-global-report-illicit-financial-flows-from-developing-countries-2002-2011/>.

¹⁸ In 2014, Kenya was removed from the Financial Action Task Force's (FATF) gray list, recognizing efforts made to introduce laws to identify and freeze terrorist financing, create a more effective financial intelligence unit, and penalize people who did not comply with anti-money-laundering rules.

¹⁹ In 2014, the Kenyan government also launched an e-procurement portal under the IFMIS platform as a monitoring tool to enhance accountability and efficiency and reduce paper work in public procurement.

²⁰ "Kenya attends anti-corruption summit in UK," Office of the Attorney General and State Department of Justice, 13 May 2016, <http://www.statelaw.go.ke/kenya-attends-anti-corruption-summit-in-uk/>.

²¹ Transparency International (Kenya), Towards Beneficial Ownership Transparency in Kenya: An Assessment of the Legal Framework, November 2017, p. 7, <https://tikenya.org/wp-content/uploads/2017/11/Beneficial-Ownership.pdf>.

6. Transparent Public Procurement Process

Commitment Text:

Title: 6. Create transparent public procurement process, public oversight of expenditure and ensure value-for money towards citizen priorities

Status quo or problem addressed by the commitment: Open contracting, the use of data, disclosure and engagement throughout the full procurement cycle, is an essential. The current portal <http://bit.ly/1MntBgK> by the National Treasury through the IFMIS Re-engineering Department does not conform to Open Contracting Standards. There are key datasets that speak to transparency that are not currently available in the portal. There are several companies that keep getting government contracts yet deliver bad services or constantly do not meet contractual obligations and have found a way to continuously get awarded contracts.

Main objective: Create transparent public procurement process, public oversight of expenditure and ensure value-for-money towards citizen priorities.

Brief description of commitment: Implement the Open Contracting Data Standards (OCDC) on Public Sector Procurement and tender process in Kenya, including a do-not-pay database for blacklisted contractors.

Milestones:

- 1. Mapping current disclosures and data collection against the Open Contracting Data Standard as part of the preparation for the development of an Open Data Policy for IFMIS.*
- 2. Re-design the Suppliers Portal of IFMIS according to Open Contracting Data Standards (OCDS)*

Responsible Institution: National Treasury

Supporting Institutions: National Treasury; Council of Governor; Intergovernmental Budget and Economic Council (IBEC); ICT Authority – Kenya; Open Data Initiative (KODI); Institute of Economic Affairs (IEA); Institute of Certified Public Accountants of Kenya (ICPAK); International Budget Partnership (IBP); and Article 19 East Africa

Start Date: 30 June 2016

End Date: 30 May 2018

Commitment Overview	Specificity				OGP Value Relevance (as written)				Potential Impact				Completion		Midterm End of Term		Did It Open Government?					
	None	Low	Medium	High	Access to Information	Civic Participation	Public Accountability	Technology & Innovation for Transparency & Accountability	None	Minor	Moderate	Transformative	Not Started	Limited	Substantial	Completed	Worsened	Did Not Change	Marginal	Major	Outstanding	
6. Overall		✓			✓			✓				✓						✓				
6.1. Mapping data for OCDS		✓			✓			✓			✓		✓									
6.2. Re-design the Suppliers Portal for OCDS		✓			✓			✓			✓		✓									

Commitment Aim

This commitment planned to create transparent public procurement process, public oversight of expenditure, and ensure value for money towards citizen priorities.

Status

Midterm: Not Started

This commitment was not started by the midterm. At that time, the point of contact at the National Treasury, the lead implementation agency, informed the IRM researcher that he was unaware of the commitment.

End of term: Not started

By the end of term, this commitment remained not started. The National Treasury point of contact's duties were reassigned, and the point of contact was appointed the new Principle Secretary for ICT and Innovation.

Did It Open Government?

Access to Information: Did Not Change

At the end of the action plan, this commitment's implementation had not started, and the point of contact at the National Treasury had been reassigned to a different agency. Therefore, it did not lead to any changes in government practice.

Carried Forward?

This commitment has been carried forward to Kenya's next action plan. Commitment 2 in the 2018–2020 action plan calls for implementing the Open Contracting Data Standards (OCDS) to improve transparency and reduce opportunities for corruption by enhancing openness and accessibility of the Public Procurement Information Portal.

7. Access to Government Budget Information and Inclusive Public Participation

Commitment Text:

Title: 7. Improving access to government budget information and creating wider and more inclusive structures for public participation

Status quo or problem/issue to be addressed: Poor public access to budget information within set timelines and standard formats insufficient public participation throughout the budget cycle Loss of public resources due to fiscal malfeasance.

Brief Description of Commitment: To improve access to government spending information and implement wider and more inclusive public participation structures with the target improving Kenya's Open Budget Index from a score of 48 to 60 points by December 2017.

OGP challenge addressed by the commitment: Increasing public integrity: transparent public spending will increase the government's accountability to the public. More democratic processes in the formulation, adoption and application of the budget will also increase public integrity. More effectively managing public resources: a transparent budget submitted to legislative oversight will reduce the risk of mismanagement of public funds and corruption, which will increase the efficiency of public resources.

Milestones:

- 1. Create one central online platform to publish budget documents*
- 2. Set and follow common standards in the preparation and presentation of all budget documents*
- 3. Public participation by the national government will be more open and inclusive and progressively.*
- 4. Budget implementation will be more open to the public and Parliament should work with local communities to monitor project implementation.*

Editorial note: The commitment text has been abridged for brevity. For full text, please see the National Action Plan 2016–18:

https://www.opengovpartnership.org/sites/default/files/Kenya_AP2_2016_0.pdf.

Responsible Institution: National Treasury

Supporting Institutions: Controller of Budget and the Auditor General; National Sector Working Groups; Ministry of Devolution and Planning; Kenya School of Government; National Assembly; International Budget Partnership (Kenya); Institute of Economic Affairs (IEA); ICJ; Council of Governors; and Ushahidi

Start Date: 1 July 2016

End Date: 30 June 2018

Commitment Overview	Specificity				OGP Value Relevance (as written)				Potential Impact				Completion		Midterm End of Term		Did It Open Government?																			
	None	Low	Medium	High	Access to Information	Civic Participation	Public Accountability	Technology & Innovation for Transparency & Accountability	None	Minor	Moderate	Transformative	Not Started	Limited	Substantial	Completed	Worsened	Did Not Change	Marginal	Major	Outstanding															
7. Overall				✓	✓	✓	✓				✓	✓						✓																		
7.1. Central online platform for budget documents				✓	✓						✓	✓																								
7.2. Standards for all budget documents			✓		✓						✓	✓																								
7.3. Public participation by the national government	✓				✓					✓		✓																								
7.4. Open budget implementation and monitoring with Parliament and local communities		✓			✓	✓				✓		✓																								

Commitment Aim

This commitment aimed to improve budget transparency. It called for the creation of an online platform to publish budget documents and increasing participation in the budgetary process. The commitment also had the objective of improving Kenya's International Budget Partnership (IBP) Open Budget Index score from 48 to 60 points by December 2017.

Status

Midterm: Not Started

Implementation of this commitment had not started during the first year of the action plan. The National Treasury did not create the central online platform for publishing budget documents (Milestone 7.1) and did not publish the budget documents standards in program-based format (Milestone 7.2). The IRM researcher did not find any evidence of parliament-led citizen monitoring projects (Milestone 7.4), despite a number of CSO-led initiatives on project monitoring.

The milestone on public participation by the national government being more open and inclusive (7.3) was also not implemented. The Controller of Budget continued holding discussions with organizations to create one space where all county and national budgets are available under the World Bank Boost project,¹ which is linked to the Kenya open data portal. However, these discussions began prior to the start of the action plan.

End of term: Not started

The implementation of this commitment remained not started at the end of term. The central online platform for publishing budget documents has not been created, and subsequently, budget documents in program-based format have not been published. The IRM researcher also did not find any evidence of parliament-led citizen monitoring projects.

However, there are a number of CSO-led initiatives on project monitoring, including citizen report cards, social audits, and community monitoring scorecards by CSOs such as National Taxpayers Association, the Institute for Social Accountability, and the Society for International Development, among others.

Did It Open Government?

Access to Information: Did not change

Civic Participation: Did not change

Public Accountability: Did not change

Due to the lack of implementation, this commitment did not lead to changes in government practice. The commitment emphasizes the constitutional provisions² on public participation, and if fully implemented, could have contributed to enhancing civic participation.

In the 2015 IBP Open Budget Index, Kenya scored 48 in budget transparency, 33 in public participation, and 58 in budget oversight out of 100 for each indicator. In the 2017 Index,³ Kenya scored 48⁴ points in budget transparency, 46 in budget transparency, 15 in public participation, and 50 in budget oversight, thus falling short of the stated objective of 60 points.⁵

Carried Forward?

This commitment was not directly carried forward to Kenya's next action plan. However, Commitment 4 in the next plan emphasizes making public participation in the budget sector hearings by the national and county levels more open and inclusive.

¹ "Open Budgets Portal – Kenya," World Bank Boost project, <http://boost.worldbank.org/country/kenya>.

² Constitution of Kenya Articles 1(2), 10(2), 35, 69(1)(d), 118, 174(c) and (d), 184(1)(c), 196, 201(a) and 232(1)(d), <http://kenyalaw.org/kl/index.php?id=398>.

³ Budget transparency: the amount, level of detail, and timeliness of budget information governments are making publicly available. Each country is given a score between 0 and 100 that determines its ranking on the Open Budget Index.

Budget participation: the opportunities governments are providing to civil society and the general public to engage in decisions about how public resources are raised and spent.

Budget oversight: the capacity and authority of formal institutions (such as legislatures and supreme audit institutions) to understand and influence how public resources are being raised and spent.

⁴ IBP considers countries that score above 60 on the Open Budget Index as providing sufficient budget information to enable the public to engage in budget discussions in an informed manner. IBP considers countries scoring above 60 on participation and oversight as providing adequate opportunities for the public to participate in the budget process and providing adequate oversight practices, respectively.

⁵ "Kenya: Open Budget Survey Report," International Budget Partnership, 2017, <https://bit.ly/34tHoP8>.

✪8. Right to Information and Records Management

Commitment Text:

Status quo or problem/issue to be addressed: The backbone of a transparent and accountable government is strong records management. Modernization of records management improves performance and promotes openness and accountability by better documenting the actions and decisions of the government. The transition to digital information creates new opportunities for records management, but much of government still relies on outdated systems and policies.

Main Objective: Improve the quality and storage of records created across the public service with a view of improving service delivery to the citizens.

Brief Description of Commitment: Improve management of public records by developing and implementing comprehensive policies, procedures and systems that will ensure creation of complete, accessible and authentic records

Milestones:

1. Pass Access to Information Legislation
2. Review of Public Archives and Documentation Service Act & Record Disposal Act
3. Develop and implement comprehensive records management policies, procedures and guidelines
4. Develop minimum technical requirements for implementation of Electronic Document & Records Management System (EDRMS)
5. Strengthen the capacity of records management professionals and public officials
6. Establish a programme of public education for citizens and public officials about the right to protect, preserve and access information
7. Establish a central digital repository for government records and data and all information of public interest

Responsible Institution: Ministry of Sports, Culture and the Arts

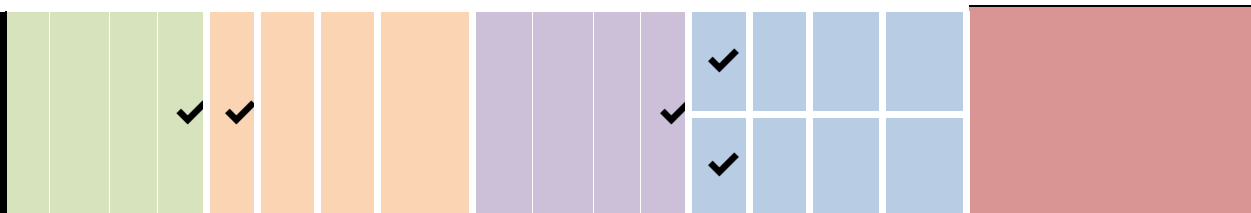
Supporting Institutions: Ministry of ICT; ICT Authority; Commission for Administrative Justice; all public entities; ICJ – Kenya; Article 19 Eastern Africa; Transparency International – Kenya; and Freedom of Information Network

Start Date: 1 July 2016

End Date: 30 June 2018

Commitment Overview	Specificity				OGP Value Relevance (as written)				Potential Impact				Completion		Midterm End of Term		Did It Open Government?				
	None	Low	Medium	High	Access to Information	Civic Participation	Public Accountability	Technology & Innovation for Transparency & Accountability	None	Minor	Moderate	Transformative	Not Started	Limited	Substantial	Completed	Worsened	Did Not Change	Marginal	Major	Outstanding
★8. Overall				✓	✓							✓			✓						✓
8.1. Access to information legislation				✓	✓							✓				✓					
8.2. Review public archives, Documentation Service Act, & Record Disposal Act				✓	✓						✓				✓						
8.3. Records management				✓	✓						✓				✓						
8.4. Technical requirements for EDRMS implementation			✓		✓						✓					✓					
8.5. Capacity strengthening of records management professionals and public officials			✓		✓						✓					✓					
8.6. Access to information education for citizens and public officials			✓		✓						✓					✓					

8.7. Central e-repository for government records, data and information of public interest



Editorial note: This commitment is clearly relevant to OGP values as written, has transformative potential impact, and is substantially or completely implemented and therefore qualifies as a starred commitment.

Commitment Aim

The commitment sought to improve Kenya’s records management by passing the Access to Information (ATI) Act. It also called for a number of initiatives to facilitate access to information, such as developing comprehensive records management policies, carrying out access to information education for citizens and public officials, and establishing a central digital repository for government records and data, among others.

Status

Midterm: Substantial

By the midterm, this commitment was substantially completed. Notably, Parliament passed the ATI Act, and it came into effect on 21 September 2016 (Milestone 8.1). The ATI Act establishes every Kenyan citizen’s right to access information held by the State and by private bodies, where that information is required for the exercise or protection of any right or fundamental freedom.¹ The Commission on Administrative Justice (CAJ) has oversight and enforcement powers and functions, which include handling complaints relating to access to information and considering reports from public bodies on the Act’s implementation.²

The ATI Act does not override the Official Secrets Act (1970), a law was passed to limit citizen access to information that the government believes would compromise its internal security. The National Security Intelligence Service Act, No. 11 of 1998, buttressed this position. The ATI Act amended Section 3(8) of the Official Secrets Act to state that the secrecy law applies subject to Article 35 of the Constitution “and the law relating to access to information.” However, the ATI Act itself contains broad provisions on secrecy that could be used to limit access to information based on the ground of national security. For example, the right of access to information may be limited where this will “undermine the national security of Kenya.”³ The ATI Act outlines the kinds of information that relates to national security in Section 6(2), and the list includes the following broad catch-all provision: “any other information whose unauthorized disclosure would prejudice national security.”⁴

The ATI Act establishes the link between access to information and records management (the key focus of the commitment) in Section 17, which provides that every public entity must keep and maintain records (written or electronic) that are accurate, authentic, usable, and have integrity, and in a manner that facilitates the right of access to information. In particular, every public entity must digitize its records and information management systems three years from the date when the ATI Act is first applied.⁵

The legal and institutional framework for records management, and for electronic records management in particular, nevertheless remained somewhat fragmented and outdated by the midterm.⁶ A few meetings took place to review the Public Archives and Documentation Service Act, 1990 (PADSA) and the Record Disposal Act, 1962 (Milestone 8.2), but no substantive reforms were put forward beyond amendments already effected by the ATI Act. The PADSA vests responsibility for managing public records and archives in the Kenyan National Archives and Documentation Service (KNADS)—a situation commentators considered needed change so as to vest greater responsibility in the creators of records for management of their records along the entire cycle.⁷

By the midterm, failure to pass the ATI regulations perpetuated a lack of standardized practices and procedures for records management (Milestone 8.3). However, to respect the minimum technical requirements for implementation of an Electronic Document and Records Management System (EDRMS) (Milestone 8.4), the ICT Authority's Electronic Records and Data Management Standard was approved in August 2016, and it came into effect in January 2017.⁸

Capacity building and public education initiatives on access to information and records management were undertaken by KNADs (Milestones 8.5 and 8.6). However, a central digital registry for government records and data was not yet established (Milestone 8.7).

End of term: Substantial

The commitment remained substantially completed by the end of the commitment period. According to the Director of the National Archives and Documentation Service, there is an urgent need to adopt the ATI regulations (Milestone 8.3) to prescribe the different publication schemes of public entities and fees applicable for access to information. On 10 September 2018, the Chairperson of the CAJ launched a taskforce to develop these regulations.⁹ The taskforce draws membership from CAJ, Kenya Law Reform Commission, and the National Communications Secretariat under the Ministry of ICT.

The CAJ has mainstreamed access to information training for public officials through the performance contracting system, and it has sensitized a number of public bodies on their duties and obligations (Milestones 8.5 and 8.6). The CAJ's public education outreach (Milestone 8.6) has included publishing information on the Act in print media, initiating a translation of a simplified version of the ATI Act into KiSwahili, sensitizing civil society actors, engaging through social media,¹⁰ and attending events at the county level. For example, in April 2019 the CAJ hosted a stand at the Kisumu County ICT Consumer Forum where members of the public could obtain more information on the realization of the ATI Act.¹¹

The government of Kenya has established an online centralized mechanism through the commission on administrative justice for the submission of access to information requests.¹² The portal enables details of the applicant and the application request to be captured. Requesters are nevertheless still encouraged to print, sign, and personally deliver their information request to the entity concerned. By the end-of-term report, there was no evidence on progress in developing a central digital registry of public records (Milestone 8.7).

No further progress had been made in reviewing the PADSA and Record Disposal Act (Milestone 8.2). Recent research also suggests that while the use of e-government in Kenya has grown significantly, the general status of e-records management is inadequately positioned to support e-government.¹³

Did It Open Government?

Access to Information: Major

The aim of the commitment was two-fold: seeking to pass access to information legislation, and bringing official record management up to standard, to enable officials to locate and disclose information requested through a new Freedom of Information (FOI) system.

The passage of the ATI Act represents the culmination of years of advocacy by civil society for a law to enforce constitutional provisions guaranteeing the public's right to information. This first leg of the commitment is a major positive step forward, although it still remains limited in scale and scope. Prior to the commitment, an enforceable statutory right of access to information was neither entrenched nor exercised. The ATI Act is now in place, and citizens are beginning to exercise this right. Reports submitted to the CAJ show that during the 2017/2018 year, public entities received 2,664 requests, of which 2,440 (91 percent) led to information being disclosed.¹⁴ The CAJ is also exercising its oversight and enforcement powers. During the first nine months of the ATI Act's implementation, it handled 32

applications for review of public and private decisions on the right of access to information, of which 28 related to denials of access.¹⁵

Citizens are seeking access to information on broader governance issues and on matters that affect their lives. For example, one recent case from the Katiba Institute's¹⁶ archives involved asking how much money was spent during the election campaign period by the President's Delivery Unit, essentially advertising the government's achievements. The information was not forthcoming, but the court has ruled that it should be provided. This would not have been possible in the absence of an ATI law. However, in a case in which a lawyer sought information from utility Kenya Power to remedy inaccurate customer billing, a media report suggests that access to information is still an uphill battle in Kenya. Failure to finalize the ATI regulations, citizen awareness and education, and the pending passage of the Data Protection Bill¹⁷ were cited as impediments.¹⁸ The broad provisions in the ATI on national security are also a cause for concern.

The second leg of the commitment, standardizing and improving official record management, has not progressed as well. Technical standards for an EDRMS are in existence; these include the ICT Authority's ICT Electronic Records and Data Management Standard of August 2016 and older standards developed by the Kenya Bureau of Standards.¹⁹ Kenya has embraced e-government and a considerable volume of electronic records are being generated.²⁰ However, the institutional and legal framework for e-records management is still fragmented and unwieldy, split among individual ministries, the KNADS and the legislative authority of the PADSA, the Record Disposal Act, and the ATI Act. Failure to establish a centralized digital repository for government records and data may therefore inhibit the impact of FOI in Kenya in the future.

Carried Forward?

This commitment has not been carried forward to Kenya's next action plan.

¹ Section 4, Access to Information Act 31 of 2016, 7 Sep. 2016,

<http://kenyalaw.org/kl/fileadmin/pdfdownloads/Acts/AccessToInformationActNo31of2016.pdf>.

² *Idem*, Parts IV and V.

³ *Idem*, Section 6(1).

⁴ *Idem*, Section 6(2)(l).

⁵ *Idem*, Section 17(3)(c).

⁶ For a SWOT analysis of the Public Archives and Documentation Service Act, see Henry Nyabuto Kemoni & Patrick Ngulube, "Records and archives legislation in Kenya and management of public sector records: A SWOT analysis approach," (2007) 17(2) *African Journal of Library, Archives and Information Science*, p. 89.

⁷ *Idem*, pp 89, 90.

⁸ "ICT Standards," ICT Authority, <http://icta.go.ke/standards/electronic-records-management-standard/>. As the Data Management Standard dates from 2016, this evidence suggests that Milestone 8.4 had been already completed by the time the Kenya 2016–2018 progress report was written.

⁹ "Access to Information (ATI) Act," Commission on Administrative Justice, <http://www.ombudsman.go.ke/index.php/access-to-information>.

¹⁰ Commission on Administrative Justice, *Annual Report 2016/17*, p. 37. The CAJ's twitter account shows numerous responses to tweets relating to access to information requests of concerns.

¹¹ See the Twitter Account of the Ombudsman Kenya, tweet posted on 16 Apr. 2019.

¹² See <https://www.ombudsman.go.ke/>.

¹³ Cleophas Mutundu Ambira, Henry Nyabuto Kemoni & Patrick Ngulube "A framework for electronic records management in support of e-government in Kenya" (2019), *Records Management Journal*.

¹⁴ "Access to public information an uphill struggle in Kenya despite law," Business Daily, 27 Feb. 2019, <https://bit.ly/2KZoPu6>.

¹⁵ Commission on Administrative Justice, *Annual Report 2016/17*, pp. 34–35.

¹⁶ "Handbook on the Access to Information Act, 2016," KATIBA Institute, Feb. 2018, <http://www.katibainstitute.org/wp-content/uploads/2018/02/Katiba-booklet-31.01.2018-1.pdf>.

¹⁷ The Data Protection Bill also falls under the auspices of the CAJ and aims to protect personal data.

¹⁸ *Ibid*, "Access to public information an uphill struggle in Kenya despite law."

¹⁹ Ambira et al report on these as follows: KS2229: 2010 Electronic records management systems – functional requirements; KS2374: 2012 Electronic records management systems: Implementation guide; and KS 2391: 2013 electronic signatures (metadata requirements). *Ibid*, Cleophas Mutundu Ambira, Henry Nyabuto Kemoni & Patrick Ngulube.

²⁰ *Idem*.

Methodological Note

The end-of-term report is based on desk research and interviews with governmental and nongovernmental stakeholders. The IRM report builds on the findings of the government's self-assessment report; other assessments of progress put out by civil society, the private sector, or international organizations; and the previous IRM progress report.

Primary information for this report was obtained through one stakeholder meeting, individual interviews, and questionnaires when interviews were not possible. The IRM researcher (Caroline Othim) also interacted with the online OGP community in Kenya through the WhatsApp group "OGP Kenya Group."

The IRM researcher (Caroline Othim) participated in two stakeholder meetings that were held in Nairobi, organized by the Office of the Deputy President, Hivos, and Article 19 on 23 August 2018 and 27 February by the Constitution and Reform Education Consortium (CRECO). The objective of the meetings was to take stock of second action plan, to develop a road map for the development of the third action plan, and to begin identifying priorities that will form commitments within the third action plan. The 23 August meeting also served to update on action points identified during the OGP Summit in Tbilisi, Georgia in July 2018. The meeting was a precursor to a multistakeholder forum to be held later that will launch the third action plan. Respondents were kept anonymous, as this is necessary for freedom of expression.

Tracy-Lynn Humby conducted supplementary interviews and desk research, and provided valuable information for most commitments, as suggested by the IRM and the Independent Experts Panel (IEP).

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The Open Government Partnership (OGP) aims to secure concrete commitments from governments to promote transparency, to empower citizens, to fight corruption, and to harness new technologies to strengthen governance. OGP's Independent Reporting Mechanism assesses development and implementation of national action plans to foster dialogue among stakeholders and to improve accountability.

