



LEGAL ASSISTANCE CENTRE
Fighting for human rights in Namibia since 1988



Pro Bono

INFORMATION ABOUT NAMIBIA'S LAW

Free, Prior and Informed Consent:

What is it and how does it apply to the protection of Namibia's indigenous peoples' rights over their land and natural resources?

In one of our previous articles, we looked at how the Namibian Government's ongoing support of the Canadian-led oil exploration venture in the Kavango Region is challenging its constitutional obligations to protect the environment and to honour its international agreements.

In this article we take a closer look at a related issue: the free, prior and informed consent principle, and how it relates to the protection of Namibia's indigenous peoples' rights over their land and natural resources.

Who are Indigenous peoples?

The African Commission on Human and Peoples' Rights has set out several key characteristics that help identify indigenous peoples in Africa.

One is self-identification. Another is the existence of a special attachment to traditional land that has a fundamental importance for the group's collective, physical and cultural survival. A third is marginalization, exclusion, dispossession, exclusion, or discrimination against a group with a culture or a way of life that differs from the dominant model.

By these measures, many of Namibia's communities could be regarded as indigenous peoples.

The right to free, prior and informed consent (FPIC)

Over the years, the right to free, prior and informed consent (FPIC), has become a well-established principle under international law, and it is increasingly recognised in domestic laws and jurisprudence across the world.

This principle is especially important to indigenous peoples because it provides some legal protection against harmful mining activities on their traditional lands. The law relating to FPIC, has developed in such a way that indigenous peoples have the right to

give or withhold their consent over what mining companies and the government can do on their land.

In short, FPIC means that the consensus and consent of indigenous peoples must be determined in accordance with their customary laws and practices.

FPIC under International Law

Namibia was one of the 144 States that voted in favour of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) in 2007.

Article 10 of UNDRIP states that indigenous peoples must not be forcibly removed from their lands or territories, or relocated without their free, prior and informed consent. In addition, there must be an agreement on just and fair compensation for any relocation and, where possible, the option of return.

Article 26 confirms the rights of indigenous peoples to the lands, territories and resources which they have traditionally owned, occupied or used. They also have the right to own, use, develop and control the lands, territories and resources that they possess. This provision requires UNDRIP member states such as Namibia to give legal recognition and protection to the lands, territories and resources of indigenous peoples, and to respect their customs, traditions and land tenure systems.

Article 27 encourages States, in consultation with the relevant indigenous peoples, to establish a fair, independent, impartial and transparent process to recognize and adjudicate the rights of indigenous peoples, while giving due recognition to their laws, traditions, customs and land tenure systems.

Article 28 gives indigenous peoples the right to just, fair and equitable compensation for the lands, territories and resources they have traditionally owned, occupied or used, where these have been confiscated, taken, occupied, used or damaged without their free, prior and informed consent.

In view of the rights set out in UNDRIP, it is clear that the Namibian government must engage with its indigenous peoples on a FPIC basis.

The elements of FPIC

To understand what the FPIC principle requires, it is useful to unpack the concept and consider each of its components.

Free: A general principle under Namibian law is that no consent is valid if it is obtained through coercion or manipulation. It is therefore important to verify that consent to development projects has been freely obtained. One way of doing this is to ensure that the project developer is not the sole entity responsible for obtaining consent from the State. The indigenous community must share this responsibility, and they must have sufficient access to judicial remedies to protect them against possible harms.

Prior: Informed consent should be done in advance of any final authorisation by the State that could potentially affect the rights of indigenous peoples and their lands,

territories and resources. The consent process should allow affected communities enough time to understand the information received. For example, Australia has legislated a minimum 12-month period. The time required may vary depending on the number of affected persons, communities or peoples, the complexity of the proposed activity, and the amount of information provided or requested.

Informed: Any FPIC procedure must involve consultation and participation by the affected communities. This requires the full and accurate disclosure of information about the proposed developments in a form that is accessible and understandable to them. According to the Convention on Biological Diversity's Working Group, the disclosures in a FPIC process should include the nature, size and scope of the proposed development or activity, its purpose, its duration (including any construction phase) and the location of all affected areas.

Communities should also be provided with a preliminary assessment of the likely impact of the development, and information about personnel likely to be involved in both the construction and operational phases (including local people, research institutes, sponsors, commercial interests, and partners). There should also be full disclosure of all potential risks, such as entry into sacred areas, environmental pollution, partial destruction of a significant site or disturbance of a breeding ground, as well as realistic information on all the foreseeable implications of the project.

Consent: Consent requires consultation and meaningful participation in all aspects of the project, from initial assessment and planning to monitoring and closure. The consent process may also involve negotiation in an attempt to reach agreement on the proposal as a whole or on certain components of it, or on conditions that may be attached to the granting of consent.

Throughout this process, indigenous peoples must have the right to participate through their own freely chosen representatives and to identify any special measures required for effective participation by all relevant persons. They also have the right to secure and use the services of any advisors they may require, including legal representation of their choice.

Conclusion

FPIC is both an internationally recognised right of indigenous peoples and an instrument to ensure that their rights and interests will be respected during and after consultations. It is an important guarantee for indigenous peoples in connection with mining activities, given the devastating impact that such operations could have on their lands and well-being.

FPIC is also increasingly being incorporated into development-related policies and standards because it is recognised as an important part of development efficiency that is necessary to ensure long-term sustainability and profitability of investments.

The socio-economic empowerment of communities starts with the recognition of their rights over their land and natural resources.

*This column was produced with support from
Bread for the World and the Hanns Seidel Foundation.*