Land, Environment and Development Project
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CASE STUDY

Extractive Industries: Enforcement of the Free Prior and Informed Consent (FPIC) Principle

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INTRODUCTION

Oil, gas and mining development has historically led to the loss of lands, livelihoods and community cohesion for indigenous and local communities living close to the respective industrial activities. At the same time, these industries have contributed to **local socio-economic development in the applicable regions**. For example, the tin mine (Andrada Mining Limited) located in Uis, Erongo Region, has helped to resuscitate the town, which has been in decline. The mine employs more than 200 locals and has contributed to reviving activities such as educational competitions and tournaments for the Uis community.[1] Hence, although indigenous communities, due to their close relationships with the land, water and resources therein, and their marginalised social and economic positions, are particularly vulnerable to mining impacts, there is potential for them to benefit from opportunities that the mines create.

The effectiveness and sustainability of local development in the context of such projects depends on the extent to which local expectations are satisfied, the minimisation and mitigation of negative environmental and social impacts, the equitable distribution of project benefits, and the opportunities for meaningful participation of local communities in decision-making. Public involvement can be hampered by the people's lack of awareness of their rights to participate in the development processes.

Responses to increased investment in the extractive industries at the community level have elicited a range of reactions, including resistance and refusal; compliance, with calls for improved labour conditions and community benefits; and in some instances, complete acceptance, in the hope of obtaining employment opportunities, and with expectations of 'modernisation'.[2]

Mining has a long history of human rights violations, including property-grabbing, displacement of indigenous communities, environmental contamination and poor working conditions. For example, mining activities have led to severe health impacts in communities due to exposure to toxic substances.[3] Human rights include civil, political, economic, social and cultural rights, and also include property, development, health and safety and environmental issues.[4]

This paper discusses how the extraction of natural resources has the potential to exploit local host communities, and the issue of notoriously non-compliant "public consultations" and the State's lack of enforcement of the principles of public consultation. Firstly, the paper states the current legal position on public participation and consultations; and secondly, it discusses issues around the enforceability of the law, with reference to the Reconnaissance Energy Africa Ltd ("RECON") case, *inter alia*.

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1 Andrada Mining, *Company Fact Sheet 2023* (https://andradamining.com/company-documents/Fact-Sheet-Aug-2023-Final-Online.pdf).

2 Gavin Bridge, "Global production networks and the extractive sector: Governing resource-based development", *Journal of Economic Geography*, 8(3), April 2008: 389-419.

3 Gracelin Baskaran, "Why Responsible Mining is a Human Rights Imperative", Centre for Strategic and International Studies, November 2023 (https://www.csis.org/analysis/why-responsible-mining-human-rights-imperative).

4 Roy Maconachie and Gavin Hilson, "Editorial introduction: the extractive industries, community development and livelihood change in developing countries", *Community Development Journal*, 48(3), June 2013: 347-359.

THE CURRENT LEGAL POSITION

All human beings depend on the environment, and human rights are intertwined with the environment to the extent that without clean air and water, food and other natural resources, human life would not be possible.[5] According to the United Nations Environment Programme (UNEP), environmental rights are *"'any proclamation of a human right to environmental conditions of a specified quality' that falls within a range of classifications: 'safe, healthy, ecologically sound, adequate for development, sound, etc.'"*[6]

The "Declaration of the UN Conference on the Human Environment"[7] made at the UN Conference on the Human Environment in Stockholm in 1972 is the legal foundation of international environmental protection. Part I proclaims that *"The protection and improvement of the human environment is a major issue which affects the well-being of peoples and economic development throughout the world."* The Declaration recognises that the natural elements and man-made things are essential to human well-being and to the full enjoyment of human rights including the right to life.[8]

Namibian laws provide a legal framework for protecting the environment and consulting local communities. The Environmental Management Act, 2007 (Act No. 7 of 2007) ("the EMA") makes provision for the State to consult organs of state or interested or affected persons. Section 44 of the EMA specifically states:

> *(1) When in terms of this Act the Minister or the Environmental Commissioner is required to consult, the Minister or the Environmental Commissioner, as the case may be –*
>
> *(a) must consult the organ of state whose area of responsibility may be affected by the performance of the function or duty or the exercise of the power; and*
>
> *(b) may, where appropriate, consult any other interested or affected person.*
>
> *(2) When in terms of this Act the Minister or the Environmental Commissioner is required to consult any person or organ of state, such consultation is regarded as having been satisfied if a written notification of intention to act has been made to that person or organ of state and no response has been received within a reasonable time.*

Additionally, section 21 of the EMA Regulations of 2012 requires the person conducting a public consultation process to give notice to all potential interested and affected parties, by fixing a notice board at the boundary or on the fence of the site where the activity to which the application relates is to be undertaken. Furthermore, it requires that a written notice be given to the owners and occupiers

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5 United Nations Development Group, *Human Rights and the Environment: Excerpt from the UNDG Guidance Note on Human Rights for Resident Coordinators and UN Country Teams*, 2017 (https://unsdg.un.org/sites/default/files/2020-03/Human-Rights-and-the-Environment.pdf).

6 UNEP, *Environme12.8ntal Rule of Law: First Global Report*, Nairobi, 2019, p. 140.

7 United Nations, "Chapter 1", in *Report of the United Nations Conference on the Human Environment, Stockholm, 5-16 June 1972*, UN, New York, 1973 (https://undocs.org/en/A/CONF.48/14/Rev.1).

8 Ibid., p. 3.

of land adjacent to the site of the planned activity, and that the application notice be advertised once a week for two consecutive weeks in at least two newspapers circulated widely in Namibia. The right to free, prior and informed consent (FPIC) has become a well-established principle under international law, and is increasingly recognised in domestic laws and jurisprudence across the world. The right to FPIC is a key principle of international human rights law. FPIC is a specific right that pertains to indigenous peoples and is recognised by the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP),[9] the Convention on Biological Diversity, and ILO Convention 169, which are the most comprehensive and most powerful international instruments recognising the plight of indigenous peoples and defending their rights.

In brief, the FPIC entails the following:

- **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.[10]

- **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.[11] 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.[12]

- **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.[13]

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9 United Nations General Assembly, *Universal Declaration of Human Rights*, New York, 1948.

10 Tara Ward, "The Right to Free, Prior, and Informed Consent: Indigenous Peoples' Participation Rights within International Law", *Journal of Human Rights*, 10(2), 2011: 54-84.

11 Legal Assistance Centre (LAC), *Pro Bono*, "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?" (https://www.lac.org.na/news/probono/ProBono_66-FREE_PRIOR_AND_INFORMED_CONSENT.pdf).

12 Ibid.

13 Ibid.

- **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.

Ultimately, the FPIC principle allows indigenous peoples to give or withhold consent to a project that may affect them or their territories. Once they have given their consent, they can withdraw it at any stage. Hence, FPIC enables indigenous peoples to negotiate the conditions under which the project will be designed, implemented, monitored and evaluated.

Thus, the FPIC ought to be a prerequisite for any activity that affects indigenous peoples' ancestral lands, territories and natural resources, and also before initiating or starting a project. However, the FPIC is not a legally binding principle in Namibia, thus, although the FPIC reflects the spirit of the law, it has not been enforced effectively.

The enforceability of the law: A consideration of the RECON case[14]

Summary

In this case, the affected and interested members of the public, namely the Ncumcara Community Forest Management Committee and Others ("the Applicants"), approached the High Court of Namibia on an urgent basis, seeking the staying of the implementation of a decision by the Environmental Commissioner issued in favour of the seventh Respondent ("RECON"). In terms of that decision, RECON was granted an application amending the wells that they could drill. The Applicants cried foul because they had not received any notice of the proposed amendment. They alleged that they had filed an appeal against the decision in question, and had further applied to the Minister, in terms of section 50(6) of the EMA, to stay the implementation of the decision, but the Minister had not, despite being put to terms, decided in that regard. It was on that basis that the Court was asked to grant an interim interdict pending the Minister's determination of their appeal.

The Court dismissed the application on the ground that it did not have jurisdiction in the narrower sense to entertain the application for a stay, when the Minister has power in terms of the law to grant the relief sought.

After numerous correspondences and two separate postponements, the Minister heard the matter on 24 April 2023.

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[14] *Ncumcara Community Forest Management Committee vs Environmental Commissioner, Ministry of Environment, Forestry and Tourism*, HC-MD-CIV-MOT-GEN-2022/00289.

Overview of Issues and Submissions

The primary objection to the Environmental Commissioner's (EC's) decision to grant an amendment focused on the law that requires the listed activities proposed by Reconnaisance Energy Namibia (REN) to be authorised and approved by the EC. As is required when considering an amendment, the EC should have gone through the entire process that he went through for the initial application, including community or public engagement and input.

This means that the amendment application cannot be used to circumvent the requirements of the EMA. While a notice was sent out to the public and stakeholders, only previously registered members were allowed to make comments. The limited public participation surely amounts to a discriminatory action and limitation of the democratic right to participate.

When the EC requires an application to be made for an amendment of an Environmental Clearance Certificate (ECC) under section 39 of the EMA, in considering such application for amendment, the EC should take into consideration the same aspects that he took into consideration of the initial application. While a notice of such request to amend was published, it allowed for only the previously registered interested parties to make comments, despite the amendment seeking authority to conduct activities beyond those identified under the existing ECC (i.e. ECC 0091), and despite the amendment affecting more community members.

Despite submissions made, in particular around the lack of public consultation and the inadequacies of the environmental impact assessment undertaken in the first application, the EC failed to consider such, and granted the amendment of ECC 0091.

In addition, the Appellants made submissions concerning the inadequacies of the Environmental Impact Assessment (EIA), particularly as to how it addressed and mitigated potential environmental impacts and their exclusion from participation in the decision-making processes. However, since REN has already carried out exploration activities that could cause these impacts, the issues related to environmental management are now considered to be a 'theoretical exercise' because the damage is already done.

In opposition, REN argued that the EC, when amending the ECC, acted under section 39 of the EMA and in line with the general powers conferred to him. The Respondents are of the view that the EC's decision may be wrong in law, but on the facts before the Minister, there is no basis for dismissal of the decision.

The High Court denied the application on the basis that the Court did not have the jurisdiction to make such order, and that the application should rather have requested the Court to compel the Minister to make a decision in terms of the stay. As a result:

- the request to stay the activities authorised under the appeal was unsuccessful;
- the appeal of the decision to grant an amendment after a full year of lodging is still pending;
- the clearing of land to continue the exploration activities under the amended ECC continues; and
- the communities' opportunity to exercise their rights to be heard timeously has been denied.

RECOMMENDATIONS

There are numerous ways in which companies claim to have obtained "consent" from persons affected by their activities, or to have conducted "proper consultations" with such persons, while actually having poor FPIC processes on the ground. The following are some recommendations for the application of the FPIC principle:

1. **Regard community members as core stakeholders in all law-making, policy-making and decision-making processes:**

   Viewing FPIC as a type of core-stakeholder consultation diminishes the autonomy of indigenous people over their lives and territories, relegating them to a secondary-stakeholder status. This undermines their capacity to participate as independent decision-makers and has the potential to foster distrust and project disruption.

2. **Let people, not the Government, have the final say:**

   In some cases an indigenous community might reject a project that affects their lands, while the Government of the State insists that economic development or renewable energy initiatives take precedence over indigenous rights. In these instances it is crucial that the business to which the State grants a permit still participates in genuine FPIC processes and avoids violating the indigenous community's rights to self-determination.

3. **Do not ignore indigenous participation once the project has commenced:**

   When consent is given to start an activity, FPIC does not come to an end. Monitoring and evaluating a project in indigenous territories must involve the leadership and participation of communities in an ongoing manner. It is crucial to establish conditions early on for re-initiating and renegotiating the consent process.

4. **Consultations should not be treated as an end goal rather than a complex integrated process:**

   The process of seeking consent through consultation demands adequate time and attention. Hastening this process to secure consent can disrupt and undermine the decision-making processes of the communities. The affected groups in the project area and the border zones should be identified. Sensitivity should be exercised towards existing power dynamics and broader socio-economic connections in the communities. The governance institutions and administrative units within the communities should be understood, as should the local literacy levels, to ensure appropriate provision of information. Culturally informed communication, language and linguistic differences in the area should be comprehended. An environment that is culturally informed, fair, non-intimidating and encouraging should be established. Unconditional acceptance and respect for the community should be ensured. Ultimately, consultations should be conducted in a manner led by indigenous communities, following their timelines and respecting customary protocols.

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