AFRICAN COALITION FOR CORPORATE ACCOUNTABILITY (ACCA)

TERMS OF REFERENCE: FREE, PRIOR AND INFORMED CONSENT

Pretoria, September 2016
BACKGROUND

The African Coalition for Corporate Accountability (ACCA) is a coalition of 116 organisations from 31 African countries which supports African communities and individuals whose human rights are adversely impacted daily by the activities of corporations, both multi-national and domestic.

In the ACCA Declaration, the ACCA takes the following position on FPIC: “Free, Prior and Informed Consent (FPIC) is a non-negotiable threshold for every aspect of projects likely to affect communities. Communities must be able to participate in decisions affecting them and their livelihoods, including through the negotiation and life cycle of a project”.

For indigenous peoples, FPIC is established as a right under international law. Indigenous peoples’ rights under international law reflect their standing as distinct, self-determining peoples with their own distinct decision-making processes, laws, practices and institutions, and collective territorial, self-governance, and cultural rights. There is a difference between ‘indigenous peoples’ and local communities, hence ACCA is pushing for this right to be extended beyond a narrow interpretation of indigenous persons. FPIC is also a requirement of customary law.

Members of ACCA Working Group on FPIC consider FPIC as the participation of local communities in the implementation of investment projects which affect their living conditions. The members of the Working Group accept the following definitions of FPIC as defined by [INSERT LRC DEFINITION] and [INSERT NATURAL JUSTICE DEFINITION].

Convention 169 of the International Labour Organisation (ILO) concerning Indigenous and Tribal peoples outlines the principles for a good consultation. A consultation should include specificities, in particular: the recognition of cultural specificities of the populations in fighting against discrimination towards them. The convention demands their consultation for the action that affects them and demands that specific measures be taken for their protection and ensuring equality of all before the law.

It is important to note that the right to development is enshrined in the African Charter on Human and People’s Rights in article 22:

1. All peoples shall have the right to their economic, social and cultural development with due regard to their freedom and identity and in the equal enjoyment of the common heritage of mankind.

---

2 http://www.achpr.org/en/instruments/achpr/
2. States shall have the duty, individually or collectively, to ensure the exercise of the right to development.

In the judgement on the Endorois case in Kenya, the African Commission was of the view that, “in any development or investment projects that would have a major impact within the Endorois territory, the state has a duty not only to consult with the community, but also to obtain their free, prior and informed consent, according to their customs and traditions”\(^3\). It is noteworthy that the strongest obligation created by the African Charter and the African Commission on Human and People’s Rights interpretation of the right to development in Endorois as including FPIC.

In addition, the African Commission on Human and Peoples’ Rights (ACHPR) has been rather active, and the work done on FPIC by the ACHPR culminated in the ACHPR’s 2012 Resolution 224 on a human rights based approach to natural resource governance that calls on states to “Confirm that all necessary measures [are] taken by the State to ensure participation, including the free, prior and informed consent of communities, in decision making related to natural resources governance”\(^4\). Other instruments in Africa such as the Africa Mining Vision, the Pan-African Parliament and the ECOWAS Mining Directive have also called on governments to adopt laws and policies to ensure the prioritisation of FPIC, especially in extractive projects. While few African countries have complied in varying degrees to this directive, most have not made concerted efforts to promote measures of FPIC in host communities of business activities.

**RESEARCH OBJECTIVE**

The objective of this research seeks to: (1) In addition to obligations inherent in international instruments which include: IFC performance standards, Convention 169 of the ILO, Resolution 226 of the African Commission of Human and Peoples’ Rights, the African Mining Vision, and the CSR guidelines on Chinese mining investments abroad, this research also seeks to identify FPIC requirements built into land, mining and other legislation in all regions of Sub-Saharan Africa, and to specific pre-determined countries within these regions. (2) Assess the level of implementation of those laws in Africa. (3) Based on the gap assessment, make recommendations for the prioritisation of FPIC in African countries with the end purpose of developing tools for community and civil society advocacy engagement on FPIC.

**ACTIVITIES:**

**Phase 1: Information gathering**

Once the terms of reference have been finalised by the ACCA Working Group, the ACCA Secretariat will send out a call for a research consultant. The research consultant will be tasked with developing a discussion document of between 30 – 40 pages on FPIC which will be presented to the general membership during the next ACCA General Assembly. The research will enable the thematic ACCA

\(^3\) [http://www.achpr.org/communications/decision/276.03/](http://www.achpr.org/communications/decision/276.03/)

\(^4\) [http://www.achpr.org/sessions/51st/resolutions/224/](http://www.achpr.org/sessions/51st/resolutions/224/)
working group to evaluate the efficiency of the domestic policies in place on FPIC, and to better understand its effectiveness. Through means of these mapping exercises, this research will determine the extent to which government and companies promote and respect FPIC. The research consultant will lead the research and liaise with regional experts from the Working Group who will validate the information gathered by the research consultant.

**Phase 2: Regional consultation**
The discussion document produced during the first phase of the project will be used as a basis for consultations that will aim to bring together civil society, grassroots organisations, and affected communities from across the different sub-regions of Africa. The consultations will mainly draw from the ACCA membership, and extended networks within the membership. The events will serve two purposes – firstly to consult the members on the findings of the desktop study and get further information, and secondly to validate the findings of the first phase of the study. The input gathered during the workshops will be incorporated into a final report.

**Phase 3: Finalisation of the report**
The findings of the validation meeting and workshop will be incorporated into a final document on FPIC that would form the basis of a report on the level of implementation of FPIC in select countries in Sub-Saharan Africa.

**Phase 4: Dissemination and advocacy**
Once the report has been finalised, the goal would be to transform the final report into a toolkit aimed at governments, communities, financial institutions, civil society and corporations to be taken up by members for advocacy. The report and toolkits may also be taken up for advocacy by members.

**RESEARCH QUESTION:**

The research questions for the purpose of this exercise include:

1. What are the laws, practice, institutions, and investment contract practices in selected African countries around FPIC?
2. What best practices provide for comparative analysis from around the world
3. Have these laws improved the implementation of FPIC in Africa?
4. What are the barriers to the implementation of FPIC in Africa?
5. What are the best practices around FPIC in Africa?

**OPPORTUNITIES AND EXPECTED RESULTS**

Based on the gathering and validation of information by the ACCA thematic Working Group, we hope to identify gaps in the implementation of FPIC in sub-Saharan Africa and, hopefully, come up with a model law on FPIC which could be adopted as the African Directive on FPIC to be implemented in key
countries in Sub-Saharan Africa.

**ESTIMATED TIME-FRAME**

- Preparation of the first draft on concept note: February - June 2016;
- Formation of Working Groups: July 2016;
- Finalisation of the Terms of Reference: September 2016;
- Call for applications for research consultant: September 2016;
- Hiring of a research consultant: February 2017;
- Research consultant produces a first draft of discussion document: April 2017;
- ACCA Steering Committee reviews 1st draft of the discussion document: April 2017;
- Research consultant finalises discussion document: May 2017;
- Sub-regional consultations (phase 2) June 2017;
- Finalisation of discussion document (phase 3) July 2017;
- Presentation of finalised ACCA discussion document at ACCA GA: October 2017;
- Presentation of adopted ACCA discussion document at UN Forum on BHR November 2017.