

OPERATIONALISING FREE PRIOR AND INFORMED CONSENT: THE CASE OF MINING COMMUNITIES: KEYNOTE ADDRESS BY HANNAH OWUSU-KORANTENG (MRS) AT THE ACCA GENERAL ASSEMBLY OCTOBER 2018 IN NAIROBI

Mineral endowed communities all over the world are confronted with various human rights abuses simply because community people have not been part of the governance mechanisms in natural resource extraction. There are overbearing evidence of loss of community lives and livelihoods stemming from polluted environment and loss of community right to economic preferences when minerals are discovered in communities. The concept of Free Prior and Informed Consent (FPIC) is seen as a panacea in addressing the social, economic, cultural, environmental and civil rights of host communities. In pursuance of minimising human rights violations and atrocities in mineral rich communities the global community adopted the FPIC as best practice in regulating mining operations including the oil and gas and also to create a platform for community participation in decisions around natural resource extraction.

The principle of FPIC does not have a universally accepted definition even though it is embedded in the legal framework of international laws. The principle requires that project-affected communities are adequately informed in a timely manner about development projects that have the potential to affect them. Such communities should be given the opportunity to approve (or reject) a project prior to the commencement of operations.

International laws establish FPIC as a basic right for indigenous people and it is derived from the rights to self-determination and participation in decision-making. The United Nations report (2011), on indigenous people and the right to participate in decision-making, stated the element of “Free” which implies no coercion, intimidation or manipulation. “Prior” which implies that consent is obtained in advance of the activity associated with the decision being made, includes the time necessary to allow indigenous peoples to undertake their own decision-making processes. “Informed” implies that indigenous peoples have been provided all information relating to the activity and the information is objective, accurate. Explicitly, the Economic Community of West African States (ECOWAS), the African Commission on Human and Peoples’ Rights (ACHPR), and the Pan-African Parliament call on states to respect the FPIC of local communities in the context of extractive industry projects. The ECOWAS *Directive on the Harmonisation of Guiding Principles and Policies in the Mining Sector* requires companies to secure FPIC from “local communities” prior to exploration and subsequent phases in the project life cycle (ECOWAS, 2009) which is applicable to mining inclusive of oil and gas and presented in a manner and form understandable to indigenous peoples. “Consent” implies that indigenous peoples have agreed to the activity that is the subject of the relevant decision.

As a requirement, FPIC provides the right for communities to give their consent before any activity likely to affect them is carried out. Such consent must be determined by communities in accordance with their customary laws and practices. Thus FPIC empowers and grants communities the authority to define their own goals and destiny and to have a meaningful say in their own development. Broadly speaking, community consent as a principle has hallmark of best practice in sustainable development for natural resource projects that potentially has

significant adverse effects local communities by reducing the social and environmental risks and conflicts throughout the life of the project for maximum benefits to all stakeholders.

Africa has given a new meaning to FPIC which focusses more on communities that are inclusive of indigenes as well as other people living in the natural resource areas. The African Union's African Convention on the Conservation of Nature and Natural Resources (revised 2003) broadly aims to promote environmental protection, conservation and sustainable use of natural resources, and to coordinate policies in these fields. With regard to the traditional rights of local communities and indigenous knowledge, the Convention calls on state parties to ensure the FPIC of communities for access to and use of indigenous knowledge. It also requires parties to take measures to facilitate, "active participation of the local communities in the processes of planning and management of natural resources upon which such communities depend, with a view of creating local incentives for the conservation and sustainable use of such resources". Although the Convention does not require project proponents to secure the FPIC of communities for natural resource development projects, it aims at ensuring levels of community engagement that moves beyond dialogue towards participation in decision-making on the use of natural resources.

The Africa Charter of Human and Peoples' Right (ACHPR) in 2012 expanded the application of FPIC to cover communities for natural resource governance decision-making on the effects of domestic and foreign direct investment on land, water and related natural resources. Again, the ACHPR in a resolution called on states to "ensure effective consultations with local communities and various people affected by investment projects and ensuring that any investment is approved through free, prior and informed consent of affected communities". Some other highlights of the (ACHPR) include the disproportionate impact of human rights abuses of rural communities in Africa that continue to struggle to assert their customary rights of access to and control of various resources, including land, minerals, forests, and fish. The ACHPR frames the challenge around access to natural resources within the context of rural communities throughout Africa, and does not limit the scope of the issue to effects on indigenous people in particular. The resolution specifically calls on states to, "ensure participation, including the free, prior and informed consent of communities, in decision making related to natural resources governance regardless of whether the community includes indigenous peoples.

The Africa Mining Vision (AMV, 2009) on the other hand looks at consent with the objective of encouraging tri-sector partnerships involving government, the private sector and local communities to improve the social and development outcomes of mining at local level. Participation within the context of AMV seeks public participation to secure consent for government and industry actions.

Pan-African Parliament (PAP) which is similar to the ACHPR, in its Sixth Ordinary Session held in Addis Ababa, Ethiopia from 16-20 January 2012, was concerned about the rise of large-scale land acquisitions. PAP identified the effects of domestic and foreign direct investment on land, water and related natural resources and called on states to "ensure effective consultations with local communities and various people affected by investment projects and ensure that any investment is approved through free, prior and informed consent of affected communities".

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International Financial Institutions (IFI) Safeguards

The extractives depend on IFI for the funding of their projects which means that for the operations of the industry to be beneficial to the Banks, the Banks have developed safeguards to protect their interests. A number of international financial institution (IFI) safeguards for investment projects require clients to consult with communities, and some even require community consent for projects affecting indigenous people in particular.

The position of the African Development Bank (AfDB) on FPIC is that affected population and host communities should be involved in the design of the resettlement plan. Such plans require that communities participate to ensure that compensation measures, relocation site development programmes, and service provision reflect needs, priorities, and development aspirations of the affected people and their hosts. It calls on all stakeholders, particularly the affected population, host communities and their representatives, to be fully informed, consulted and effectively involved in all stages of the project cycle and that special measures should be put in place to ensure full and effective participation of disadvantaged groups in such processes.

International Finance Corporation (IFC) in 2011, announced a new policy requiring clients to obtain the FPIC of indigenous communities that could be affected by their projects in certain circumstances. The IFC developed a Sustainability Framework which includes a standard that seeks to ensure the support of non-indigenous communities for high-risk projects prior to project approval for projects and FPIC for projects that are "likely to generate potential significant adverse effects on communities". Similar to the AfDB, the IFC's policy requires not only community consultation, but also informed community participation in decision making for certain projects.

Advocacy challenges

Africa has positioned itself for the take-off of FPIC in the numerous protocols and directives that our states are parties to. Implementation of such protocols by domesticating them into our state laws have been a challenge. When they are domesticated, the implementation and state monitoring of the laws are often relegated to the whims of some technocrats who may not be committed and when the commitment is there, the tools to work with may not be available. Awareness on the FPIC is low among NGOs, media, Parliamentarians, communities, security agencies, the Judiciary among others. Raising national awareness on FPIC is a huge advocacy challenge. The mining lobby is opposed to the empowerment of mining communities through the FPIC. The Minerals and Mining Act promotes mining and does not have adequate protection for the mining communities. The inclusion of FPIC in our mining laws should be part of the reason for mining law reforms.

Key recommendations

Africa should not be interested in depleting its rich natural resource stock at the potentially net losses, without building the capacity for society to be active participants in decisions on natural resource extraction. Clearly, safeguarding the interest of future generation makes it mandatory for African states to establish oil and/or mining no-go zones or excluded areas to minimise high and prohibitive social and/or environmental risks.

Obtaining community consent prior to the award of concession licenses, leases, or agreements and allowing for a “no-action” alternative should be seen as a responsibility of state and the industry. There should be clear commitment by governments and the respect of industry actors for the rights of communities’ for FPIC through decision to withhold consent. Thus participatory and gender-sensitive planning of format, timeline, and logistics for consultations should be outlined in business plans and contracts of industries.

It should be noted that FPIC is a process running through the implementation of each phase of project development throughout the project lifecycle. Community people could make critical decisions if they have capacities and understand their rights within the FPIC process. Building capacities require that communities have access to adequate technical and legal support.

Guarding against ‘elite capture’ of the negotiation process is important. It is not possible for communities to solely facilitate the whole process of FPIC and so including third-party facilitators and observers, documenting and validating agreements remove ambiguities in the process of monitoring. Such documentation creates the framework for continuing dialogue with communities, agreement monitoring, and facilitating early reporting of grievances.

Again, it is important for states to take immediate steps to commence the processes for the internalisation of the FPIC in the mining laws of our respective countries. Many states have signed on and ratified many protocols with FPIC embedded in them.

States should engage in comparative studies of the various protocols discussed and try to draw synergies to improve the lot of their countries. For instance, states in Africa can learn from the ECOWAS Directives on the Guiding Principles and Policies in the mining sector to streamline country specific laws on mining oil and gas exploration

Conclusion

The FPIC would create the countervailing power against the financial and lobbying power of the extractive companies and minimise the quest of extractivism. The public has an important role to play especially NGOs and CSO by getting the communities who are the real owners of natural resources to be aware and act in the best interest of society. Such awareness could be created by using research, visits, documented reports, videos to create awareness.

Thanks for your attention