THE USE OF COLLECTIVE CUSTOMARY RIGHTS TO PROTECT, PRESERVE AND MANAGE THE ENVIRONMENT – FIJI ANALYSIS

NANCY VOSA TIKOISUVA*

INTRODUCTION

Fiji is a Pacific Island country that is facing rapid development at the risk of permanent damage to the environment. The negative impacts of development are directly affecting landowners or resource owners including the generations to come. Protection, preservation and the management of the environment have been at the forefront of discussions for many years in Fiji in light of the Brundtland Report. This is more prevalent as increasing demand for development to meet social changes and changes in the needs and wants of societies has resulted in drastic impacts to the environment and threats to livelihoods for most Fijian communities. [1]

This paper examines the effectiveness of the use of collective customary rights by landowners and resource owners to protect, preserve and management their environment through legal mechanisms in Fiji, especially the Environmental Impact Assessment (EIA) regimes under the Environment Management Act of 2005 (as amended). Namosi Joint Venture is a mining company that has been battling with collective customary rights for over 40 years with no final outcome given by relevant authorities to mine copper in the province of Namosi. The involvement of the Tikina Namosi Lands Committee, a group made up of indigenous land owners in the Namosi Province, in the EIA process proved challenging for the Namosi Joint Venture Group. Tourism development in Malolo Island is a recent case detailing how undermining the power of collective customary rights can lead to irreversible damage to the environment.

Through an examination of legal sources, academic literature and reports from various civil society organisations concerned with environmental protection, the article will demonstrate that the most effective pro-active measure for the preservation and management of the environment is through a careful and considered use of collective customary rights by customary landowners by either refusing to consent to developments, effectively participating in all the legal processes under the EIA Regulation 2007 or by providing consent with pre-determined conditions for the consent to development that promotes the protection, preservation and management of the environment.

* Teaching Consultant, School of Law and Social Sciences, the University of the South Pacific.

[1] Ministry of Strategic Planning, National Development and Statistics, *" A Green Growth Framework for Fiji – Restoring the Balance in Development that is Sustainable for our Future"*, August 2014

COLLECTIVE CUSTOMARY RIGHTS IN FIJI (LEGISLATIVE FRAMEWORK)

In order to understand what is meant by 'collective customary rights' it is important to understand what 'customary rights' are, at least to the extent of what the legal instruments suggest it means. The words 'custom', 'customary', 'native' and 'traditional' are used interchangeably and can cause confusion. However, for the purposes of this paper, the words 'customary', 'native' and 'traditional' are limited to refer to the rights of indigenous people of Fiji to participate in the legal mechanisms that help protect, preserve and manage the environment.

Prior to colonial times, the Pacific has been largely governed by customary laws and practices which were predominantly unwritten. As such, people lived communally and their individual rights were tied to the community they lived in. This included rights to fish in particular areas and use of land to farm or build houses[2]. Further to this, custom and traditional practices in Fiji recognised specific clans within a community or village that had the responsibility of gathering fish for special events and those that were hunters and gatherers. Each clan or sub-clan were designated roles as either traditional fishermen or traditional hunters and gatherers, heralds or priests. The clan is recognised and traditionally called the '***Yavusa'*** and the sub-clan is called the '***Mataqali'*[3]**.

There are various written laws that prescribe and recognise customary rights in Fiji but this paper will be limited to discussions to those laws the recognise customary rights related to the protection, preservation and management of the environment.

Fisheries Act 1942

The Fisheries Act of Fiji 1942 is one of the oldest laws that has drawn controversy within the communities and various governments and one of the few laws in Fiji that has not been updated to reflect changing times[4]. Whilst traditional dictates and recognizes traditional fishing areas, which is also recognised under the Fisheries Act of Fiji 1942, the Constitution of Fiji 2013 does not recognize ownership of such traditional fishing grounds, only the right to access, manage and utilise the resources within those fishing grounds[5]. Since independence, the question of ownership of fishing grounds and the control of the resources has been linked to political unrests in Fiji. The most controversial aspect of this was the introduction of the *Qoliqoli Bill* of 2005, which could have passed all ownership, and full control of traditional fishing grounds to the indigenous owners[6]. The colonial times brought about many changes in the community and the introduction of a new/ alien system of living, which emphasised the recording of boundaries for the purposes of ownership[7]. This led to the establishment of a Commission of Inquiry[8] in the 1950s which in

[2] Ibid, 13

[3] iTaukei Lands Trust Board, *Land Ownership in Fiji,* Booklet, 4. https://www.tltb.com.fj/getattachment/Media/Brochures/Land-Ownership-in-Fiji-Booklet-(1).pdf.aspx?lang=en-US (Accessed 13 March 2019)

[4] James Sloan and Kevin Chand, *A Review of Near Shore Fisheries Law & Governance in Fiji*, January 2015, pg. 1

[5] Ibid.

[6] Ibid.

[7] Ibid, 5.

[8] Section 15 of the Fisheries Act 1942

turn paved the way for the recording of fishing boundaries under the Native Fisheries Commission[9] established under the Fisheries Act 1942. The Commission of Inquiry was birthed from a conflict between the two systems, that is, the traditional make-up of marine resources ownership and the British common law system that recognised ownership's relationship to actual title and private property rights. The British colonial powers did not have any such system to for ownership and title of marine resources. Hence, the registration of traditional fishing grounds and the recording of the same was the compromise between the dual systems[10].

The Fisheries Act 1942 recognises the traditional practices of communal living in its provisions by making it an offence to take fish or other sea creatures from a fishing area unless the person who takes it is a member of the clan or other division or sub-division registered with the Native Fisheries Commission in the Register of Native of Customary Fishing Rights[11].

However, the Rivers and Streams Act 1882[12] does not have special provisions for the recognition of the rights of the indigenous people. Instead, it contains a general provision for the rights of all members of the public to access specific areas under the Act. The State is recognised as the legal owner of the resources in and under the rivers and streams[13].

Land Tenure

In addition to the marking of boundaries for fishing, a similar exercise was done for the land in Fiji. The Deed of Session in 1874 provided the foundation for the modern day land tenure system in Fiji in Clause 4 is as follows[14]:

> "That the absolute proprietorship of all lands not shown to be alienated so as to become bona fide the property of Europeans or other foreigners or not in the actual use or occupation of some chief or tribe or not actually required for the probable future support and maintenance of some chief or tribe shall be and is hereby declared to be vested in her Majesty, her heirs and successors."

This paved the way during colonial times for the Lands Claim Commission to be established under the Land Claims Ordinance 1876 to investigate all land claims from 1876 onwards. [This investigative process?] was completed in 1881. The investigation led to the demarcation of the freehold lands and state lands and the circumstances in which native land were sold and converted[15].

---

[9] Section 14 of the Fisheries Act 1942

[10] James Sloan, *The evolution of fisheries law in Fiji - an overview of the law and governance systems as they apply to inshore fisheries,* Feb 28, 2017, http://www.sas.com.fj/ocean-law-bulletins/the-evolution-of-fisheries-law-in-fiji-an-overview-the-law-and-governance-systems-as-they-apply-to-inshore-fisheries, Accessed 30 October 2020.

[11] Section 13 of the Fisheries Act 1942.

[12] Revised in 1985

[13] Section 2 of the Rivers and Streams Act, 1882.

[14] iTLTB, n.3.

[15] iTLTB, n.3.

In 1905, the Native Lands Commission was established under the Native Lands Act of 1905. This Commission was responsible for ascertaining the boundaries of each province in Fiji as well as their rightful and hereditary owners. This included the boundaries for the customary social structures such as *Mataqali* and *Yavusa*[16].In addition, the Commission was tasked with the responsibility of identifying the titles, boundaries and those members of the communities claiming to have ownership of such lands[17]. Interestingly, with all the exercise done by both the Native Fisheries Commission and Native Lands Commission [to take customary rights into account ?], the resources in or under the sea and land were/ remained vested with the State[18].

About 89% of the land in Fiji is communally owned by indigenous Fijians[19] with very stringent processes in relation to its use for the purposes of development[20]. Therefore, developers and investors alike may find it difficult and costly to access native lands for the purposes of development. However, with changing times and the need to cater for developing society, the iTaukei Land Trust Board, who are custodians of all native land in Fiji, have been placed in a challenging situation of balancing the interests of indigenous landowners and the demands of the society (which consist of indigenous landowners also), to avail more land for development in the areas of access to health, education, infrastructure etc. This balancing exercise by iTaukei Land Trust Board is contributing to the political, social and economic problems in Fiji[21].

The words of the former Great Council of Chiefs (GCC) resonate in one of its meeting in the 1930's as follows:

> "This Council is in complete accord with the proposal to reserve in each Province sufficient lands for present and future needs of the iTaukei and to prohibit the leasing of such lands so reserved"[22].

In passing resolutions in 1933 and 1936, the GCC endorsed that "*it would be in our best interest if Native lands at present lying idle were put to use, that the amount of land needed for the proper development of the native owners be determined…that all lands not so required be handed over to the government to lease on our behalf*"[23].

The resolution was later reflected in the provisions of the Native Lands Trust Act, 1940 (now referred to as the iTaukei Land Trust Act of 1940) effectively recognizing iTaukei Land Trust Board as the legal owner and not the indigenous owners themselves[24].

---

[16] Section 4 of the Native Lands Act, 1905 (now iTaukei Lands Act)
[17] Ibid, s.6.
[18] Mining Act, Cap 146.
[19] iTLTB, n.3.
[20] Section 3 of the iTaukei Lands Act, Cap 133.
[21] Krishn Shah, (2004) 'Facilitating Property Developments in the Fiji Islands: The Legal Mechanisms' in (Conference Paper presented at the *Pacific Rim Real Estate Society – Tenth Annual Conference*, Thailand, 25-28 January).
[22] iTLTB, n.3
[23] iTLTB, n.3, 9
[24] iTLTB, n.3, 4

Recognition of collective customary rights under environmental laws

Key to environment protection are robust laws and mechanisms that help protect, preserve and manage the environment. Where developments are occurring in rapid succession across the Pacific, Fiji is most vulnerable to environmental degradation as it pursues better infrastructure, access to good housing, access to more educational institutions, tourism, mining and rural to urban drift movements[25].

The Environment Management Act, 2005 of Fiji provides for the protection of the natural resources and for the control and management of developments amongst other things. This legislation is the parent legislation to the Environment Impact Assessment (EIA) Regulation, 2007 which highlights the mandatory process that must be carried out in relation to any development project in Fiji.

The Environment Management Act, 2005 (EMA) recognises development activity or undertaking to development as,

> "…any activity or undertaking likely to alter the physical nature of the land in any way, and includes the construction of buildings or works, the deposit of wastes or other material from outfalls, vessels or by other means, the removal of sand, coral, shells, natural vegetation, sea grass or other substances, dredging, filling, land reclamation, mining or drilling for minerals, but does not include fishing"[26].

This broad definition suggests that any development in whatever form it takes, may trigger the processes under EMA especially the EIA process. The environment is also defined to include land, sea and the interaction of human and natural system[27]. Land includes dwellings or any fixtures or plants on land and minerals, foreshores, seabed or anything resting on the seabed[28].

Although the definition of land does not include landownership, EMA does make provision for the recognition of customary landowners as those including ".. the *mataqali* or other division or subdivision of Fijians having a customary right to occupy and use any native lands"[29]. At the heart of this legislation, one of the main purpose of EMA is ensure the preservation of the land, its heritage and cultural practices, including the way of life[30]. This is done in the following ways:

a) In the recognition of potential threats to cultural, traditional, natural, scientific or historic resource;
b) Recognizing traditional methods, practices and materials to enhance the occupation and use of the land granted through the customary land tenure system[31].

[25] Ministry of Strategic Planning, National Development and Statistics, above n.1., 30-31.
[26] Environment Management Act, 2005, s.2
[27] Ibid.
[28] Ibid.
[29] Ibid.
[30] Ibid, s.3
[31] Ibid. s.2

c) Ensuring that those who make decisions have regard to traditional owners or guardians of resources[32].

It is also important to note that EMA makes it a criminal offence for developments to be undertaken without an approved EIA report[33]. Those who commit an offence face imprisonment of up to 10 years or a maximum fine of $750,000.00 or to both the fine and imprisonment term[34]. Those who breach the conditions of the EIA Report also face criminal sanctions with only a third of the penalty imposed[35]. These provisions reflect Fiji's commitment to protect, preserve and manage the environment whilst also ensuring that development and infrastructural needs are met. However, the commitment to protect, and preserve the environment competes with the rapidly growing urban need for development to cater for rising demands for infrastructure, commerce, agriculture etc[36].

It has been a long journey for Fiji culminating in the current laws, especially since Fiji had been progressively moving to promote sustainable development for a long time with successive bills being tabled since 1996. This was Fiji's response to the Brundtland Report, also known as *Our Common Future.* Agenda 21 was the critical document of the Rio Earth Summit held in June 1992[37]. One of the key areas identified in Fiji by the National Council for Sustainable Development was to ensure that the environmental laws establish mechanisms for meaningful public participation in its processes[38]. This finding paved the way for the [EIA] mechanisms to be established under the EMA in 2005 and the EIA Regulations later in 2007.

PARTICIPATION OF CUSTOMARY RIGHTS OWNERS UNDER EIA PROCESS

The EIA Regulation 2007 makes provision for the participation and inclusion of customary rights owners to actively participate in the process [of ….] and influence decisions on the type of developments, extent of developments and whether developments is feasible or not.

The EIA Regulation 2007 establishes a detailed, 5-step process in order for an EIA Report to be considered for approval. The process involved may appear burdensome to some, however, in keeping with the purpose of the EMA 2005 and the need to protect the environment, it is a necessary tool that will allow customary rights owners to be involved and maintain their communal way of life. The 5-step process is described and analysed below.

[32] Ibid, s.3
[33] Ibid, s. 43(1)
[34] Ibid.
[35] Ibid, s. 43(3)
[36] Spike Bodell, 'Sustainable Urban Development: Pacific Dream or Reality? A Fiji Case Study', in *Fijian Studies; A Journal of Contemporary Fiji*, Vol.2 Issue 1, 2004, 35
[37] Ibid, 34.
[38] Ibid, 39.

Step 1 – Screening

This process is to address whether the proposed development will require an approved EIA Report and divides the process into various categories[39]. For any developer to undertake a project, the key question is whether the proposed project will alter the physical nature of the land in any way[40]. In addition to ensuring payment of the prescribed fee and use of the prescribed form, the application has to be submitted with other documents necessary to determine whether the EIA is required for the proposed project. There are as follows[41];

a) Details of the applicant (developer);

b) Documentary evidence of ownership of the land;

c) Consent of the landowner of consent for the proposed development to be undertaken;

d) In the case of native land, an indication of the views of the i-Taukei Land Trust Board to the proposed development;

e) An assessment of the environmental and resource impacts

f) An assessment of the impacts will be managed or mitigated

g) Evidence of any public consultations made with regards to the proposed development

h) Evidence of the views of the public as result of the public consultations.

It appears from this process that even prior to undertaking a proposed development, the developer would be actively engaging with landowners. In the case of native land owned collectively by the members of *Mataqali* or *Yavusa*, developers should already have an indication of consent to the development or at the very least, their views and the views of those who live around the area[42].

This is an important step process for customary landowners as it would provide an opportunity to think about the environmental and resource impacts to their communities[43]. At this stage, as it is still a proposed development, it requires customary landowners to exercise foresight and caution. Lack of awareness on this important step contributes to the disadvantage that many customary landowners have on this process. It would be an opportunity for customary landowners to exercise their collective rights to prevent development for the purposes of preservation or to think of ways

[39] Department of Environment, 'The EIA Guidelines 2008'. This is a useful tool for developers and investors as it provides a comprehensive list of all activities that may require an EIA Report.
[40] EIA Regulations, r.3
[41] EIA Regulations, r.4
[42] Ibid.
[43] James Sloan, 'Fiji's natural resources: governance and decision-making, the importance of participating', in *Oceans Law Bulletin*, 10 January 2018, http://www.sas.com.fj/ocean-law-bulletins/fijis-natural-resources-governance-and-decision-making-the-importance-of-participating (Accessed 20 March 2019)

in which they can influence the development without damaging their source of livelihood, which is the environment[44].

Some of the questions which customary landowners could anticipate and raise in the discussions with developers are the following:

a) How would the proposed development affect their source of livelihood, whether be it on land or sea?

b) What is the extent of the likely impact on the land and sea?

c) What are the economic returns for their consent to lease their land to developers?

d) How would the developers mitigate the expected impacts to the environment?

e) How can the community or village actively and effectively participate in this process?[45]

There are irreversible consequences to customary land and landowners if no consideration is made as in the case of the dredging of the Sigatoka River by Chinese Railway Group and Dome Gold mines from Australia[46]. Customary landowners in Fiji are often lured with money and wealth to consent to the developments and their lack of knowledge exploited as seen and experienced by those who live in Sigatoka where a Chinese company China Railway First Group dredged sand from the mouth of the Sigatoka River which caused sandy shoreline replaced with mud and the area now devoid of life. The landowners were misrepresented by the company where they were told that the dredging would address the flooding issues experienced in and around the area[47].

Upon receiving the application, the relevant approving authority[48] will assess whether the proposed development is likely to cause significant environmental or resource impact[49]. In doing so, the relevant approving authority will have to consider Section 27(2) of EMA[50] which emphasizes the questions raised above.

In this process, the i-Taukei Land Trust Board, as custodians of the native land in Fiji are guided by the *i-Taukei Land Trust Act*. There are restrictions on the alienation of the native land[51] and where such land is required to be leased, consent of native landowners is required and the Board is required to hold consultations with native landowners[52]. This is another way in which landowners can collectively influence decisions or have control over developments. However, the onus is on the i-Taukei Land Trust Board to hold meaningful consultations with landowners as

[44] Environmental impact assessment : guidelines for coastal tourism development in Pacific island countries and territories. Apia, Samoa : SPREP, 2018. pg 19-20 https://www.sprep.org/sites/default/files/documents/publications/eia-guidelines-tourism-development_0.pdf (Accessed 12 April 2019)
[45] Ibid.
[46] Kate Wheeling, *Why is Fiji selling out its Coastlines?* Pacific Standard Reports on Fiji for COP 23, 25 November 2017. https://psmag.com/environment/cop23-why-is-fiji-selling-out-its-coastlines (Accessed 20 March 2019)
[47] Ibid.
[48] This can be either the EIA Administrator, the Department of Environment or other authorized body.
[49] EIA Regulation, r.6
[50] Ibid.
[51] i-Taukei Land Trust Act, s.16.
[52] Ibid, s.16(3)

custodians of the land and because they have the advantage of training, information and experience in such matters.

Step 2 – Scoping

Once a determination is made on a proposed development activity that an EIA is necessary for the said development, the relevant authority may require additional actions that the developer must undertake. This is largely the process where the developer will be required to draw up a Terms of Reference for the EIA report[53].

In this process, the landowners, whose land is required to be leased for development have an opportunity to contribute to the Terms of Reference. This is done through public consultation in general or may be specific to the landowners themselves, especially where their feedback is necessary for a robust EIA Report[54]. The Terms of Reference is an important document for an EIA Report as it would have to clearly define the parameters of the study to be undertaken, the environmental and resource issues, consider an environmental management plan and if necessary, an opportunity for landowners to seek an environmental bond as security for any environmental damage that may arise as a result of the development[55].

The use of collective customary rights of landowners is important at this stage as any concern that a native landowner might have, can be registered in the Terms of Reference for further study and consideration. In the absence of meaningful participation, customary landowners lose out on a powerful opportunity to be part of setting the parameters for the EIA Report and raise important issues that should be addressed whilst undertaking the study.

Further to this process, the processing authority may require the developer to hold consultations near to or at the site of the proposed area of development[56], or a call for public participation to clarify impacts, better understand the magnitude of the impacts, consider community aspirations and needs, allay fears that communities might have over the proposed development, help communities with understanding the nature of the proposed project and provide information as much as possible[57].

The public participation process will also involve local community leaders and include opportunities for customary landowners to further discuss any issues and concerns that they might have over the project[58]. The regulation is not restricted as to how many times the consultation should occur, nor is there any restriction on communities and customary landowners to pro-actively request the consultations. If a call for public participation is required under this process, then it must be at a place and time convenient for those involved. The notification for the event

[53] EIA Regulation 2007, r.10
[54] Ibid, r.12
[55] Ibid, r.21
[56] Ibid, r.12(2)(d) and r.17
[57] Ibid, r.12(2)(e) and r.18
[58] Ibid, r.18

should be published in the radio or television common in the community in the indigenous language in the commonly used language or languages of the area. This also includes publication in the indigenous language of the area and costs of these, amongst other things, are to be borne by the developer[59].

After the consultation and participation process, the draft Terms of Reference will be drawn up and if necessary, the processing authority may require that the developer convene one or more meetings to discuss the contents of the Draft Terms of Reference and possibly obtain consensus on the contents before it is submitted for approval[60].

In addition to the participation mentioned in screening process, under this process, many opportunities arise for customary landowners to meaningfully and effectively participate and influence developments that will protect them and the environment. It is also an opportunity to make suggestions for changes in the proposed development project that will ensure that the environment is preserved or managed in a sustainable manner for their future. Unfortunately, many communities and customary landowners do not utilise this opportunity fully or at all, which often results in developments taking place to the detriment of those affected by it.

Step 3 – EIA Study/Report

This process involves the actual writing of the EIA Report by a registered EIA Consultant based on the Terms of Reference that has been drawn up and approved under the Step 2 - Scoping process[61]. The EIA Study/Report is expected to address the following matters (in addition to those outlined in the Terms of Reference)[62];

a) The various phases of the proposed project planning, its implementation and operation;

b) Consideration for alternatives to the proposed project or any of its phases;

c) Consider whether an environment management plan should be set as a condition to the proposed project.

In undertaking the study, the EIA Consultant is expected to make site visits, take samples and retain it for analysis and other fieldwork necessary and expected under the Terms of Reference[63]. Most importantly, under this process, the developer is expected to convene one or more public consultations during the actual study[64]. Again, this is an opportunity for customary landowners to keep the EIA Consultant accountable by checking on the progress of the study and ensuring that the Terms of Reference has been observed.

[59] Ibid, r.18(4)
[60] Ibid, r.20
[61] Environment Management Act, 2005, s. 28(4)
[62] EIA Regulation, 2007, r.22
[63] EIA Regulation, 2007, r.23
[64] Ibid.

Amongst other things as canvassed under regulation 25 of the EIA Regulation, 2007, the EIA report must also contain evidence of consultations held with interested parties and a summary of the results of the public consultations convened under this study. This requirement protects the interests of the parties affected by the proposed development and ensures that the credibility of the EIA Report.

The EIA report is required to be completed within 12 months of when the Terms of Reference was approved, otherwise, the report becomes invalid and a developer will have to make fresh applications for a new EIA report and it goes back to step 1 process. However, the developer may seek approval to extend the timeline from the processing authority[65].

Step 4 – EIA Review

Once the EIA report is completed, then the processing authority is required to make the report available to members of the community and inform the public about its availability and how they can participate in raising issues related to the report[66]. This is guaranteed as a right to access the report under section 26 of EMA, 2005.

However, legislative review indicates that the timelines provided for commentary on the EIA report is restrictive and does not consider language barriers, especially when the report is written and published in the English language. Further to this, is the cost of obtaining a report are borne by those interested in the report and this is a disadvantage to customary landowners who are mostly farmers or fishermen, compounded by the rigid 21 days for inspection and simultaneous 28 days for comments[67].

Even under these circumstances, another opportunity is accorded to customary landowners and members of the public to participate in the review of the EIA report undertaken by a review committee appointed by the processing authority[68]. This is to be undertaken within 21 days of submission of the EIA report[69], which again, does not offer sufficient time for members to make meaningful and effective objections or comments on the report. For those customary landowners who have not participated in any of the step process under the EIA Regulation 2007, this would be an obstacle as they would be unaware of the contents of the proposed project, nor would they have been aware of the TOR drawn up in order to gauge the extent of the EIA report. Sadly, this is the reality for many communities in Fiji as seen in dredging of the Sigatoka River[70].

[65] EIA Regulation, 2007, r.27(4)
[66] EIA Regulation, 2007, r.28
[67] Ibid, r.29
[68] Ibid, r.30
[69] Ibid, r.30(5)
[70] Wheeling, n.37

Step 5 – EIA Approval/Decision

The decision on the EIA report is required to be made within 35 days of the submission of the report, which is only 7 days after the time limit given for public comments[71]. The decisions that can be made with respect to the EIA report are as follows;

1) Approval of the report with conditions;
2) Approval of the report without conditions;
3) Report not approved; or
4) Additional studies to be undertaken[72].

If a developer has obtained all the necessary approvals for the proposed development and has commenced work, the proposal authority may conduct inspection to check on compliance of the developer with the EIA report and conditions approved as forming part of the report[73].

IMPACT OF PUBLIC PARTICIPATION

Having reviewed the legal mechanisms protecting the rights and opportunities of customary landowners to meaningfully and effectively participate in the EIA process, it is also important to note the impacts of participation when fully utilised.

The following case studies provides an overview of the proposed development in 2 different areas in Fiji, one being in the interior highlands of Viti Levu (the main island in Fiji) and the other being an island off Viti Levu in the Western Division. Both case studies will highlight how effective strong participation of customary landowners can impede development that will irreversibly damage the environment; and how the lack of participation can result in serious damage to the environment.

Case Study 1 – Mining by Namosi Joint Venture

Namosi is a province in Fiji situated approximately 30km West of Suva in the interior of Viti Levu and bordering Naitasiri Province. The first indication of the existence of mineral in this area was in 1857 with the discovery of pyrite at Wainisavu Creek. From 1935 to 1995, various explorations through different Special Prospecting Licenses were made to determine the extent of and viability of mining the minerals. From 2001 to date, the Special Prospecting License (SPL) No. 1420 has changed hands through different companies and extended continuously throughout the years[74]. The current company holding the license SPL No. 1420 is the Namosi Joint Venture (NJV) undertaking the mining titled the 'Waisoi Project'.

[71] Ibid, r.31
[72] Ibid.
[73] Ibid, r.34
[74] Namosi Joint Venture, 'Project History', (2016), in http://www.njv.com.fj/project-history/ (Accessed 12 April 2019)

Due to its close proximity to the Sovi Basin in Naitasiri, the Waisoi Project is suggested to threaten existing protected areas and attempts by NJV to extend the boundaries of the mining project proved challenging. This is especially where the non-governmental and conservation organization **Nature Fiji – Mareqeti Viti** has been actively trying to to block mining close to Sovi Basin, an area which has been leased by the landowners to protect it[75].

Active involvement of the collective landowners known as the Tikina Namosi Lands Committee (TNLC) also made it challenging for NJV to continue their work under SPL No. 1420. TNLC claimed that no consultation was held with the landowners on the extension of SPL No. 1420 and the villagers were experiencing the effects of the prospecting activities[76]. In a letter to the Minister of Lands, TNLC highlighted their strong objection to the manner in which Ministry handled the issues with NJV and clearly setting out the conditions to be met before it would engage with NJV. These conditions included a Compensation Agreement between NJV and TNLC, the list of government department that TNLC prefers to deal with and its objection to some etc.[77].

This then led to further requirements by the government of Fiji on NJV to conduct an Environmental and Social Impact Assessment (ESIA) and a further extension of the SPL No.1420 until 2020[78]. This is an example of how strong advocacy and collective participation of customary rights owners can effectively protect, preserve and manage the environment.

Case Study 2 – Malolo Levu Island Tourism Project

Malolo Levu is an island approximately 20km West of Nadi in Viti Levu largely populated by resorts. Recently in Fiji, there were controversies regarding the alleged degradation of marine life by the developers of a Tourist Resort and in breach of the terms of the EIA Report approved by the Department of Environment[79].

The matter came to light after reporters from the New Zealand news agency Newsroom, with the assistance of neighbouring landowners in Malolo Island, reported on the alleged illegal activities carried out by Freesoul Real Estate Development (Fiji) Pte Ltd (FREDL). The alleged illegal activities caused extensive damage to the marine life and coral reef just outside the proposed development site for the Tourist Resort. In a series of investigative articles, videos, photos and

[75] Fiji Nature Conservation Trust, 'Position Statement on the Namosi Mine, Viti Levu, Fiji', 19 June 2012, https://naturefiji.org/position-statement-on-the-namosi-mine-viti-levu-fiji/ (Accessed 11 March 2019)

[76] Kiji Vukikomoala, Stacy Jupiter, Elizabeth Erasito, and Kevin Chand, 'An Analysis of International Law, National Legislation, judgements, and institutions as they interrelate with territories and areas conserved by indigenous peoples and local communities ' in *Legal Review No. 19, Fiji* (September 2012) https://www.iccaconsortium.org/wp-content/uploads/2015/08/legal-review-19-fiji-2012-en.pdf (Accessed 4 May 2019)

[77] Joe Rauto Tauleka, TNLC Chairman Letter to the Minister of Lands dated 6 October 2015.

[78] Namosi Joint Venture, 'NJV to pursue further exploration and studies', 29 August 2015 http://www.njv.com.fj/njv-to-pursue-further-exploration-and-studies/ (Accessed 4 May 2019)

[79]Mark Jennings and Melanie Reid, 'When the villagers cried enough', 11 April 2019, https://www.newsroom.co.nz/@investigations/2019/04/11/531845/when-the-villagers-cried-enough (Accessed 8 May 2019)

interviews, the news agency Newsroom highlighted the extensive degradation of the coral reef by FREDL with thousands of tonnes of coral reefs being dug out covering sea areas and mangroves[80].

A review of the EIA Report approved by the Department of Environment to FREDL indicated 55 conditions for the company to adhere to whilst undertaking the proposed development[81]. Concerned members of the community including customary landowners raised the alarm with relevant authorities when FREDL were seem with heavy machinery digging coral reefs on which customary landowners rely on for their daily needs[82].

An interim-injunction was later issued by the High Court of Fiji against FREDL as the government departments react to the reports, resulting in criminal charges being laid against FREDL for undertaking development without a proper EIA Report, specifically on the damage done to the reef, and also a charge of failing to comply with a 'prohibition notice' which was issued against FREDL on 1 June 2018[83].

It is unclear at this stage whether proper and meaningful consultations were held with customary landowners before the EIA Report was made and the extent of any such consultations. However, it is clear from the media reports that those landowners adjacent to the proposed project were not consulted. This is an example of how the lack of meaningful and effective participation can result in severe degradation to the environment with irreversible consequences to those that rely on it.

CHALLENGES TO EFFECTIVE PARTICIPATION

Even if customary landowners utilise the opportunities to be involved in the decision making process under the EIA Regulation, there are still challenges to meaningful and effective participation.

Firstly, participation as required under the EIA Regulations appears to be more of a consultation process rather than a session where developers can directly assist with the discussions with members of the public (including customary landowners)[84]. This consultation process may not be sufficient to ensure the full and active participation of customary landowners in the decision-making process. Obstacles they will often face include: language disparity, not being able to access technical assistance to discuss their concerns, and reliance on developers to provide the answers to any concerns they have. In addition, members of the public who live in informal settlements are further disadvantaged due to socio-economic influences which force them to put environmental issues as the least of their priorities[85].

---

[80] Ibid.

[81] Sandeep Singh, 'Environment Impact Assessment Report Decision', Department of Environment, Fiji, 24 December 2018.

[82] Tim Murphy, ''That's why you need journalism', 13 April 2019, https://www.newsroom.co.nz/2019/04/13/535742/thats-why-you-need-journalism (Accessed 8 May 2019)

[83] A copy of the Charge was obtained by the writer from Toganivalu and Valenitabua Lawyers on 15 May 2019.

[84] Adrian Rajalingam, 'Sustainable Development Driven Environment & Resource Management (A Closer Look At The Impact Assessment Processes)', University of the South Pacific, April 2014. pg, 53 http://digilib.library.usp.ac.fj/gsdl/collect/usplibr1/index/assoc/HASH0179/3fc2d837.dir/doc.pdf (Accessed 15 May 2019)

[85] Ibid, 21

Secondly, gender bias exists within Fijian communities especially where the cultural norm demarcates the role of women and men unequally. Any consultation that occurs must also consider cultural norms and intentionally allow for participation of women, youths and children in communities that designate women and children to the kitchen and other roles. In these same communities, men are predominantly involved in discussions and thus women, youth and children risk being left out[86].

Thirdly, in order for meaningful participation of all relevant stakeholders to occur, the customary landowners should be able to know and understand what the project is about. If developers do not clearly explain the risks and potential benefits associated with the project, customary landowners and relevant stakeholders might not be able to contribute effectively to the discussions. The onus is on the developers to take the initiative to provide clear explanations on the proposed development and also provide useful information of how the proposed project might affect them and rights[87].

In its analysis and report, SPREP highlights four key objections for an effective stakeholder engagement as follows;

1. Being familiar with the project planning and approval process;
2. Get inputs from stakeholders on perceived or actual impacts of the proposed project impacts;
3. Feedback on project design and impact mitigation measures
4. Building and maintaining constructive relationships with all stakeholders[88] (including customary landowners)[89].

Finally, in order to achieve greater participation in decision-making on environmental matters, customary rights owners or landowners must acknowledge the need and importance of their participation. This can be achieved through a concerted effort on the part of the developer and the government institutions who are the decision makers and custodians of the processes. The efforts must be intentional as the excuse of lack of resources by both developers and government institutions can hinder this process.

WAY FORWARD

Having reviewed the legislative framework under the EMA 2005 and the EIA Regulation 2007, it is apparent that public participation is a key tool for protecting, preserving and managing the environment.

[86] SPREP, above n. 44, 24
[87] Ibid, 19
[88] Ibid, 20
[89] Ibid.

Customary rights owners and landowners, whose rights are recognised under the legislative framework play a vital role in sustainable development and ensuring the security and well-being of present and future generations who depend on land and marine ecosystems that may be adversely affected by development projects. To ensure this, customary rights owners must be armed with information, able to contribute to discussions and must also actively seek, as traditional custodians of the land, to be involved in decision making processes. As we have examined in the case of NJV in Namosi and Malolo Island, if customary landowners and members of the public do not act as gate keepers or hold institutions accountable to their decisions, there is real danger of continued environmental degradation by developers who seek to profit from the laxity of those who are legally entitled play to a meaningful role in the decision-making process.

Meaningful and effective participation must consider and be sensitive to cultural norms and protocols, disparities, biases and socio-economic influences of those impacted by the proposed development. Communities must also take the initiative to engage with those seeking development and be able to ask the right questions. This can be achieved through implementation of the recommendations by SPREP[90] as well as understanding the reasons for the legislative framework, that is, to ensure that "…development meets the needs of the present generation without compromising the ability of future generations to meet their own needs, and implies using resources to improve the quality of human life within their carrying capacity"[91].

[90] Ibid.

[91] Section 2 of Environment Management Act, 2005.