

Obtaining the consent of affected groups: the example of Kandadji in Niger



KEY POINTS

- Where a project involves expropriation of land belonging to a number of people, their 'collective' consent and agreement on compensatory measures must be sought and obtained.
- In collective negotiation situations, it is important to identify individuals who can legitimately and legally represent those affected and take decisions on the procedures to be adopted.
- The negotiation process must be inclusive: the largest possible number of individuals should take part in it (including women and vulnerable groups). Without this inclusivity, any agreement reached may not be widely accepted, and will therefore be open to challenge.

Large scale projects such as dams often involve displacing people. Obtaining the agreement and the collective consent of affected groups to compensation measures, in a written form which has legal authority, is not an easy undertaking. Recent experience with the Kandadji Programme, supported by the Global Water Initiative (GWI), shows how, at relatively low cost: (i) the consent of affected groups can be obtained through a collective process, and how (ii) this agreement can be embodied in a document which, in principle, is legally valid proof of the commitment.

Large scale development projects such as dams frequently involve displacing people, and these affected groups have to receive compensation. In addition, their consent and agreement must be sought and obtained before they are moved. This kind of approach is recommended in the ECOWAS guidelines¹ for water management infrastructure development, and in Appendix 1 of the Water Charter of the Niger Basin Authority.² The numbers of people affected by projects (PAP) can be in the thousands, and the process of establishing an agreement with them which will have legal validity – and therefore be less likely to be challenged – is a complex one to carry out at a relatively low cost.

The Kandadji Programme in Niger is a major irrigation development project (covering 45,000 ha alongside the Niger River) made possible by building the Kandadji dam. A process was put in place to obtain the free, prior informed consent (FPIC) (see Box 1) of the approximately 38,000 people who will be displaced and compensated by the project (Box 2).

When there are large numbers of PAP, and the land belongs to many different

people, it is not possible to obtain individual agreements from everyone beforehand. This means that there are at least four main challenges to overcome. According to the ECOWAS guidelines:

- legal and legitimate representatives of the PAP must be identified, who will be capable of reaching agreements in their name;
- these representatives must consult the PAP to obtain their consent;
- the PAP must have access to independent sources of information and advice;
- any agreement reached must have legal validity in the national courts.

Identification of legitimate representatives and collective PAP consultation in Kandadji

In Niger, village or tribal heads are legally the representatives of the population groups they preside over.³ In this capacity they have the authority to give the consent of the members of their respective villages, in the presence of the latter in a formal village meeting.

Box 1. Free, prior informed consent (FPIC)

The ECOWAS Guidelines explicitly or implicitly include a number of the key features of the concept of FPIC, such as the right of groups involved to take decisions for themselves or through representatives whom they have freely chosen, or through other institutions, and to give or to refuse to give their consent, before any project which may affect the land, territory or resources which they own, occupy or use in some way is approved by a government, industry or other third party.⁴

In terms of agreement by the PAP, the Guidelines (Theme 2) recommend the earliest possible identification of individuals who can represent them legitimately and legally, who are capable of conducting negotiations (with the specific involvement of women and vulnerable groups), determining the processes to be followed and signing 'demonstrable' agreements.⁵

FPIC is referred to in a number of international texts including the Final Report of the World Commission on Dams (2000), the United Nations Declaration on the Rights of Indigenous Peoples (2007), the Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security (2012) and the IFC Performance Standards on Environmental and Social Sustainability (2012).

The HCAVN (High Commission for the Development of the Niger Valley), which is managing the building of the Kandadji dam, has committed itself in the name of the Government of Niger to indemnifying those who will be displaced. Land is held privately by virtue of customary law, and it is proposed that the PAP, as compensation for their land which will be lost, will receive land in irrigation schemes which legally belongs to the State.

The Kandadji consultation process

A lease in perpetuity agreement (see Box 2) together with terms and conditions was drawn up and presented to the PAP. Between November and December 2013, consultation meetings were held involving a total of 31 villages, tribes and hamlets. The purpose of these meetings was two-fold: (i) to gather the opinions of the groups involved on the two documents and (ii) to obtain their consent concerning the signing of leases in perpetuity as compensation. The process was managed by the HCAVN with the support of the Global Water Initiative and in the presence of an independent legal expert. After each meeting, minutes were produced which provide the evidence that the consultations took place, and that the consent of those affected was, or was not, given.⁶

In order to facilitate the consultation process, a meeting was held in Niamey before the village meetings took place, with people originating from these villages and tribal groups (including

teachers, lawyers and civil servants). The HCAVN presented the lease format and the terms and conditions to the participants, and explained that in order to contribute to the consultation process they should attend the meeting to be held in their village or tribal group, to help in passing on and spreading awareness of the information contained in the documents. This meeting would be the only place in which the 'collective' opinion could be expressed.

As one example, a consultation meeting of people of the village of Kandadji took place in November 2013, attended by a representative of the HCAVN, the mayor of the Commune (representing the Commune Land Commission set up under the Rural Code, which has the duty of ensuring the security of the rural population's property rights), the chef du Canton and the Kandadji village head, who legally represents the population. Out of 121 heads of households affected by the land expropriation procedures, 66 attended the meeting.

Participants were able to ask for amendment or annulment of specific clauses, and were asked to decide if they (i) accepted the lease and the terms and conditions as proposed; (ii) accepted them with amendments, or (iii) rejected the lease and its terms and conditions.

The inhabitants of Kandadji chose the first option, to accept the lease with its conditions as proposed, while making some comments on the

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commitments by the State. The same procedure was followed in all the villages and hamlets affected by the project, giving rise to 31 sets of minutes kept on file by the HCAVN.

PAP opinions and concerns

The 31 meetings agreed to the draft lease, but at the same time raised a number of concerns, the main one being the State's respect for its commitments to them, in particular concerning payments for agricultural losses. If the State should fail to honour its commitments, it is likely that challenges to the consultation process will multiply. Other concerns were about inheritance of community land, compensation rates, revision and renewal of the contract and the procedures for signature, which led to overall improvements of the lease.

The minutes of village meetings are the first stage in the process of developing promises made by the State to the PAP into a form of legal contract, a process which will ultimately lead to the grant of leases in perpetuity. In case of legal challenge, these minutes will be evidence that PAP consent was indeed obtained to the offer of leases as a form of compensation. The minutes were drafted by the legal expert to record all the information required. The expert read out the minutes for the approval of all those present at the meeting, before their signature by the

HCAVN representative and the village head. Later in the process each person will sign an individual contract with the State to obtain the lease to his or her plot of irrigated land.

Access to independent sources of information and advice

For the PAP to be able to express an 'informed' opinion, it is important for them to have access to independent sources of information and advice. In Kandadji the legal expert presented the content of the standard contract and terms and conditions, article by article, in the local language.

To make it easier for the PAP, many of whom are illiterate and/or do not speak French, to understand the issues, the individuals originally from the area and who took part in the preparatory meeting in Niamey (teachers, lawyers and civil servants), read the documents aloud and gave their opinions on them to the local communities, in the local language where necessary.

Limitations of the 'collective' consultation process

The competent court (if a case is brought before it) will be able to pronounce on whether granting a lease in perpetuity is sufficient to fulfil the conditions for 'fair and prior' compensation envisaged in law. The main challenge will be the

Box 2. Just and prior compensation: a lease in perpetuity

In Niger, as in many other countries, people may not be deprived of their lands except on grounds of common public benefit, and only in return for 'just and prior' compensation.⁷

The PAP have full ownership rights to their land under customary law. Given that the State is not offering those who will be expropriated full ownership of new land in compensation, it is of crucial importance that they should be properly consulted, so that they understand what is proposed and are able to give their FPIC.

The 'Kandadji Programme' proposed that the PAP should receive land in irrigation schemes in exchange for land expropriated by the project. In order to give the PAP rights which are as closely related as possible to those they enjoyed previously, the government is proposing to offer them a lease in perpetuity on land which will continue to belong to the State. Such a lease enables the land to be transferred (in return for payment, i.e. sold, or free of charge), mortgaged and passed on to heirs, in the same way as fully owned fixed property. This lease proposal was the subject of the FPIC consultation.

Source: Gayakoye Sabi A. et al (2012) *Statut foncier des terres aménagées dans le cadre du programme Kandadji*
<http://www.gwiwestafrica.org/fr/statut-foncier-des-terres-amenagees-dans-le-cadre-du-programme-kandadji>

Saadou A. (2013) *Consultation locales des populations expropriées de la zone du barrage de Kandadji sur le projet de bail emphytéotique, à titre de juste compensation des terres de culture perdues, du 20 novembre au 5 décembre 2013*. GWI/UICN/IIED.
<http://www.gwiwestafrica.org/fr/consultations-kandadji-bail-emphyteotique>

scale of PAP participation. The minutes of the Kandadji village meeting show that only just over half of all the eligible household heads attended the meeting. Is this enough to establish the required consensus needed to show that a collective agreement exists? Only the appropriate court will be able to resolve this question definitively, but it will doubtless take into account the fact that all the household heads were informed about the date and time of the meeting and were invited to attend.

Whatever the case in this respect, the Kandadji Programme experience shows that it is quite possible to win the consent of several thousand people and to reach an agreement with them through a collective

process, at low cost, and to formalise this agreement in a written form which will in principle be legally valid in court. This innovative process should be continued and should serve as an example for similar projects in Niger and elsewhere.

Thierry Berger

Specialist in investment law and sustainable development

Aladoua Saadou

Lawyer, expert on land tenure and expropriation procedures (Niger)

GW WEST AFRICA

The Global Water Initiative in West Africa is an action-research and advocacy project. We work with family farmers and governments to shape policies and practices that support livelihoods and food security in the context of large multi-purpose dams. The project is funded by the Howard G. Buffett Foundation and implemented by IIED and IUCN.

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For more information about the Global Water Initiative in West Africa, please contact: **Jamie Skinner**
jamie.skinner@iied.org

Notes

For details of the consultations by HCAVN and supported by GWI in West Africa, see Saadou A. (2013) *Consultation locales des populations expropriées de la zone du barrage de Kandadji sur le projet de bail emphytéotique, à titre de juste compensation des terres de culture perdues, du 20 novembre au 5 décembre 2013*. GWI/IUCN/IIED.

<http://www.gwiwestafrica.org/en/consultation-local-communities-affected-kandadji-dam-issue-long-leases-compensate-land-loss>

1. http://hubrural.org/IMG/pdf/311012_ccre_cedeao_lignes_directrices_barrages_pdf.pdf ; <http://www.dialoguebarrages.net/fr/>
2. http://www.inbo-news.org/IMG/pdf/Annexe_N-1_Environnement_Franc_Fina2I_5_10_2011-2.pdf
3. Article 14 of the Ord. N° 93-028 of 30 March 1993 on the status of traditional chiefs in the Republic of Niger, modified and completed by Law n° 2008-22 of 23 June 2008: The traditional chief represents customary or traditional communities over which he presides in their relations with the government and with third parties. As such he supervises among other duties the defence of the interests of the citizens and communities in their dealings with the government and third parties.
4. Definition taken from the FAO guide (with modifications by the present authors) Respecting free, prior and informed consent. Practical guidance for governments, companies, NGOs, indigenous peoples and local communities in relation to land acquisition (<http://www.fao.org/docrep/019/i3496e/i3496e.pdf>).
5. GWI West Africa (2013) Improving the living conditions of communities affected by dam projects: proposals from West African stakeholders <http://www.gwiwestafrica.org/en/improving-living-conditions-communities-affected-dam-projects-proposals-west-african-stakeholders>.
6. Example of record of community consultation ('procès-verbal') on land tenure for people affected by Kandadji dam <http://gwiwestafrica.org/en/example-record-community-consultation-proces-verbal-land-tenure-people-affected-kandadji-dam>.
7. Niger Constitution, Art. 28. See also Art 1 of Law N°2008-37 of 10 July 2008, which modifies and completes Law N°61-37 of 24 November 1961 regulating : expropriation for public use ; and temporary occupation.