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The NGO Forum on Cambodia

គ្រឹះស្ថានមិនមែនរដ្ឋបាល
Working Together for Positive Change

FREE, PRIOR AND INFORMED CONSENT IN THE DEVELOPMENT PROCESS IN INDIGENOUS PEOPLES COMMUNITIES OF MONDULKIRI AND RATANAKIRI PROVINCE



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Phnom Penh, Cambodia
January 2012

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ACRONYMS

BCV	Building Community Voices
EIA	Environmental Impact Assessment
ELC	Economic Land Concession
EISEI	Extractive Industry Social Environmental Impact (network)
IEIA	Initial Environmental Impact Assessment
IFC	International Financial Corporation
ILO	International Labor Organisation
IP	Indigenous People
DoLA	Department of Local Administration
DPA	Development and Partnerships in Action
EWMI	East West Management Institute
FPIC	Free, Prior and Informed Consent
HA	Highlander Association
MAFF	Ministry of Agriculture, Fishing and Forestry
MIME	Ministry of Industry, Mining and Energy
MLUPC	Ministry of Land Management, Urban Planning and Construction
MoE	Ministry of Environment
MoI	Ministry of Interior
MoRD	Ministry of Rural Development
MVi	My Village
RGC	Royal Government of Cambodia
UNDRIP	UN Declaration on the Rights of Indigenous Peoples
UNOHCHR	UN Office of the High Commission on Human Rights

EXECUTIVE SUMMARY

Free, Prior and Informed Consent (FPIC) is an evolving concept that acknowledges Indigenous Peoples' legitimate decision-making authority to approve or disapprove of activities proposed by outsiders on the land to which their culture and identity is intrinsically bound. While there is not yet an agreed upon universal definition, FPIC is a clear concept and a useful way to ensure that the rights of Indigenous Peoples (IP) to make decisions about their land are respected.

In Cambodia there are numerous IP communities, particularly in the far northeast of the country, who are being affected by Economic Land Concessions (ELC) and mining licences. In the current research, four case studies with IP communities in Rattanakiri and Mondulakiri province are presented, capturing their experience of ELC or mining licences granted on their land. Using the FPIC framework, the case studies were analysed to identify opportunities to improve on the current practices in Cambodia. The research gathered the perspectives of IPs, local government, civil society and national government on consultation and FPIC practices. An analysis of international and Cambodian policies, laws and agreements related to the principles of FPIC is also presented. The fieldwork was conducted from the 9 – 18th of October 2011. The consultant team identified potential cases with civil society stakeholders, including the NGO Forum Research Unit.

All four case studies highlighted that although in some cases government representatives were aware, at the very grassroots community level, affected IP communities were not privy to any form of true consultation. In most cases they were completely unaware of the ELC on their land until land-clearing began. These findings are consistent with existing research in Cambodia despite the fact that the Cambodian Sub-Decree on ELCs requires consultation before an ELC can be granted. While consultation is documented by companies in the Environmental Impact Assessment (EIA) reports, there is currently no mechanism in place, nor adequate resources, for the government to check whether the companies have properly conducted consultation at the community level. Furthermore, the EIA department at the Ministry of Environment (MoE) highlighted that thirty days is not long enough for them to conduct true community consultation.

Under the principles of FPIC IP have the right to either provide or withhold consent for the use of their land. In three of the four cases studies no attempt

was made to seek any type of formal consent from the community regarding the ELC granted on their land. One key issues that appeared was that many IP, like most Cambodians, did not have any formal documentation indicating ownership of the land which they live on. The Sub-Decree on Procedures of Registration on Land of Indigenous Communities attempts to address this problem, outlining the process for IP communities to be recognized, registering as legal entities and owners of their land. However, the process is complicated and lengthy; at the time of the report only three IP communities across the country had land titles.

All four communities from the research reported being provided with minimal to no information about the ELC or mining licence on their land. Many had not even been told what area of land was granted. To be fully ‘informed’, in line with the requirements of FPIC, communities must know about timelines, scale, location, impacts and mitigation plans before they give or withhold consent. None of the four communities were provided with this information.

The ‘Free’ element of FPIC did not seem to be upheld either. In all four cases various forms of intimidation were used with communities to achieve compliance. Intimidation, manipulation and coercion will always undermine FPIC. Unless this is addressed IP communities in Cambodia will never be able to fairly engage with the process to manage their lands.

Government, companies and civil society all have a role to play in ensuring that all the elements of FPIC can be realised for IP communities. The following recommendations will help to achieve this aim – they are explained in detail in the recommendations section of the report:

Government

- Respect the rights of Indigenous communities to provide or withhold consent.
- Ensure respect for Article 23 of the Land Law
- Legally define ‘consultation’ to include FPIC principles
- Provide all full, clearly explained, and honest information to affected Indigenous communities
- Increase the time allocated for public consultation to ensure communities have sufficient time to consider and respond
- Ensure that Indigenous communities are informed, in advance of any approvals for projects to proceed
- Restrict the use of military, police or private security service personnel

- Where eviction of communities is absolutely unavoidable international law must be followed
- Provide 'easy access' to grievance mechanisms for Indigenous communities affected by ELCs or other economic development projects

Civil Society

- Be led by communities
- Encourage networking and sharing of experiences amongst communities
- FPIC needs to be better understood by those educating and supporting IP communities
- Empower communities with knowledge about land rights

Companies

- Abide by the relevant laws that facilitate greater recognition of FPIC
- Undertake thorough impact assessments, including independent human rights impact assessments
- Provide 'easy access' to operational-level grievance mechanisms for Indigenous communities
- Restrict the use of military, police or private security service personnel
- Where eviction of communities is absolutely unavoidable international law must be followed

1. INTRODUCTION

This paper presents case studies of four indigenous communities in Cambodia's Ratanakiri and Mondulakiri provinces that are facing economic land concessions (ELCs) and/or mining licences granted on their land. The case studies present the perspectives of Indigenous People (IP) communities, local government authorities, and civil society.

The cases are analysed using the framework of the principles of Free, Prior and Informed Consent (FPIC), drawing on its foundations in international law, particularly the UN Declaration on the Rights of Indigenous Peoples (UNDRIP)¹. Opportunities to improve on current practices by applying the elements of FPIC are identified, particularly suggestions identified by IP communities consulted in the research.

The field research was the key focus of this study. This ensures that the majority of the evidence gathered and presented in this paper captures the direct experiences of IP communities affected by ELCs and/or mining licences.

As background, international agreements and laws describing FPIC are reviewed, along with an analysis of Cambodian laws, policies and the current context to which the principles of FPIC relate. The perspectives of stakeholders from civil society and relevant government ministries are also incorporated.

1.1. DEFINING INDIGENEITY

Indigenous identity is an attribute closely linked to culture, often combined with an attachment to a specific geographic location. Often indigenous identity is also partly defined by who a group of people are not – which is often characterised by their status as a minority amongst a dominant cultural majority. This is the case in Cambodia for many of the country's ethnic minorities.

Considering these two elements to identify 'indigeneity' is the position taken by one of the preeminent international legal foundations for indigenous rights – the International Labour Organisation's Convention 169, *Indigenous and Tribal Peoples Convention*. The convention provides guidance on the process

¹ United Nations (2007) UN Declaration on the Rights of Indigenous Peoples

of identifying indigenous peoples. This guidance considers Indigenous Peoples as peoples whose social, cultural, and economic conditions distinguish them from other sections of the national community, and whose status is regulated wholly or partially by their own customs or traditions or by special laws or regulations. The convention also considers self-identification as a fundamental criterion for identifying indigenous and tribal peoples.²

In Cambodia ‘Indigenous communities’ are defined in the Land Law of 2001 to “a group of people that resides in the territory of the Kingdom of Cambodia whose members manifest ethnic, social, cultural and economic unity and who practice a traditional lifestyle, and who cultivate the lands in their possession according to customary rules of collective use”.³

In the Cambodian context, importantly, there is recognition of the possession of land. Overall, since connections to, and use of land (which are often heavily intertwined) are so integral to Indigenous People’s ability to exist, protection and respect for the rights of Indigenous Peoples can be seen primarily as protection and respect for the rights of Indigenous Peoples to possession of their own land. Possession is not simply a means of production or a living space:

*Their history and identity are tied to their territory through memories, stories and sacred and archeological sites. Environmental impacts not only impact and affect people’s means of subsistence; they also affect people’s relationship with their territory and their ability to continue to live as Indigenous People and maintain their own identity and customs.*⁴

² ILO Convention 169 (1989). Indigenous and Tribal Peoples in Independent Countries. ILO For instance, Article 1.1b states that an indigenous identity attaches to a group of people by virtue of “their descent from the populations which inhabited the country or a geographical region to which the country belongs, at the time of conquest or colonisation or the establishment of present state boundaries”. Viewed in this way, indigenous character is constructed in reaction to a history of land and cultural dispossession. For more on this see: Scheinin, M. (2005) *What are Indigenous Peoples?* In Ghanaea, N & Xanthaki, A. (Eds) *Minorities, Peoples and Self-determination*. Leiden, Netherlands: Msrtinus Nijhoff Publications.

³ Land Law (2001), Article 23.

⁴ Amazon Watch (2011) *The Right To Decide: The Importance of Respecting Free, Prior and Informed Consent*, Briefing Paper, p. 2.

Acknowledging “this binding tie to territory is what is the crucial element of the ‘indigenoussness’ of any group of people”,⁵ and the appreciation of the people-land-culture bond is integral to FPIC. For Indigenous People, “their territory is their market, pharmacy, hardware store, church, temple, and an integral part of their identity”⁶. In particular, the ability to have *control* over what happens to one’s land is the primary driving force behind the desire for recognition of one’s land rights. Recognition of the ongoing struggle for Indigenous Peoples to maintain or re-establish, control and decision-making power over land management has provided the momentum to develop international legal rights to respect their decision making and influence over their own land.

1.2. INTRODUCING FPIC

Within the international legal sphere, the right to Free, Prior and Informed Consent (FPIC) is the most coherent international concept to acknowledge Indigenous Peoples’ legitimate decision-making authority. This authority is characterised by the ability to approve or disapprove of activities, proposed by outsiders, on the land to which their peoples’ culture and identity is intrinsically bound.⁷ Seeking permission from an indigenous population to undertake an activity that may impact on them is not simply a process of asking community members if they agree with a project. Seeking community consent is a process that has many elements. Each of these elements are looked at in this sub-section.

1.2.1. Free

A fundamental principle of contract law is that each party must give free and genuine consent to be bound, without duress or undue influence.⁸ The ‘free’ element of FPIC is comparable to that basic common law principle. IP communities should be able to decide whether to give their consent to

⁵ Perea, J. (2009) *Land and Cultural Survival: The Communal Land Rights of Indigenous Peoples in Asia*, p. 17. The Philippines: Asian Development Bank

⁶ Amazon Watch (2011) *The Right to Decide: The Importance of Respecting Free, Prior and Informed Consent*, Briefing Paper, p. 2.

⁷ See section 2.2. below for international legal sources of FPIC

⁸ Black’s Law Dictionary (6th ed) defines duress as: “Any unlawful threat or coercion used by a person to induce another to act (or to refrain from acting) in a manner he or she otherwise would not (or would). Subjecting person to improper pressure which overcomes his will and coerces him to comply with demand to which he would not yield if acting as free agent”. Duress is grounds for invalidating a contract, since a key feature of a valid contract is that it is entered into without duress, i.e., freely.

activities on their land without being coerced, intimidated or manipulated. Unfortunately, Indigenous Peoples faced with economic development projects regularly do not enjoy this freedom.

Arguably one of the most important features of FPIC is the right of Indigenous Peoples to withhold their consent. In other words, FPIC includes the right of Indigenous Peoples to say 'no' to a proposed development on their land.

1.2.2. Prior

For the granting or withholding of consent to be meaningful, it must be decided *before* formal decisions are made (such as by the government) about whether to allow the proposed development to go ahead. In practice, this means government authorities must be willing to wait for as long as is needed until the free and informed consent of Indigenous Peoples is obtained prior to issuing any government approvals.

There is no guide to exactly how much time is required to ensure that the 'prior' element of FPIC is satisfied. However, the amount of time needed must allow for the process of obtaining consent determined by the Indigenous Peoples themselves. Each community has its own method of decision making, and therefore each community has its own timeline.

1.2.3. Informed

The 'prior' element of FPIC is closely linked to the 'informed' element. In particular, full, clearly explained and honest sources of information should be given in a timely fashion so Indigenous Peoples can make an informed decision prior to formal approval being made. Like the 'prior' element of FPIC, there is no measure for exactly when a decision can definitely be said to be informed. However, there are certain basic types of information that must be provided to indigenous communities before they can make an informed decision.

With regard to economic development projects, all plans and proposals that provide details about the timeline, scale, location, mitigation plans and other important information (such as that provided by Environmental Impact Assessments (EIAs)), must be shared with the potentially impacted indigenous community long *before* any decision is made to approve or not approve the project. Being informed relates also to the full nature of any impacts a project may have on the environment and people potentially impacted by the project.

The potentially impacted population is not just those within the immediate vicinity of the project site but *anybody* impacted in any way by the presence of the project, including those perhaps a long way from the project site, but are still impacted by things such as reduced air and water quality, etc.

An exhaustive FPIC process should involve discussion of a community's possible alternatives to development proposals before operations begin. This includes a full examination of a range of alternative development options that will allow Indigenous Peoples to meet their needs and economic, political, social and cultural aspirations. To do this, independently produced economic feasibility studies may be required to illustrate what the positive and negative economic impacts may be of the proposed project, *as well as* possible alternative means of income generation that could be pursued instead of the proposed development project.⁹ This information will be a useful addition to the EIA, together forming the body of information that the potentially impacted communities require. When all of this information is provided, communities have the necessary information needed to make an informed decision about which development pathway they wish to follow, before deciding whether to give their consent to the proposed project or not. Importantly, FPIC stipulates that all information provided to the community *must be* in forms and languages that are understood by the community themselves.

1.2.4. Consent

The notion that indigenous communities have the right to withhold or provide consent was not always uniformly recognized beyond the human rights community. For example, the largest and most influential international financial institution; the International Financial Corporation (IFC), which is the finance arm of the World Bank Group, until 2011, required only that clients engage in 'free, prior and informed *consultation*' with Indigenous Peoples potentially impacted by an IFC funded project. Only requiring clients to engage in a process of consultation, without needing to actually seek the consent of Indigenous Peoples stripped these communities of their right to provide or withhold permission for a project to proceed.

However, in August 2011 the most recent revision of the IFC Performance Standards was released and standard 7, titled 'Indigenous Peoples', explicitly

⁹ For more on this see an excellent discussion paper relating to the integration of FPIC in REDD+ Projects – Anderson, P. 'Free, Prior and Informed Consent in REDD+: Principles and Approaches for Policy and Project Development', February 2011.

outlined that it was in place to “ensure the Free, Prior and Informed *Consent* (FPIC) of the Affected Communities of Indigenous Peoples when the circumstances described in this Performance Standard are present”.¹⁰ The principles of FPIC continue to be strengthened as international financial institutions such as the IFC encode FPIC within their standards – which their clients are obliged to follow.

1.3. FPIC IN INTERNATIONAL LAW

1.3.1. Foundations

FPIC is an evolving concept that is recognised in some countries, by some institutions and organisations. However, so far a universally agreed upon definition in international law or other forms is not yet settled and so FPIC can appear differently to different communities, countries or organisations. However, although there is not yet one dominant universally agreed upon definition for FPIC, the concept is still a clear, useful way to ensure that the rights of IP communities to make decisions about their land are respected. In this section elements of FPIC are identified where they exist across many different international sources.

FPIC is derived from traditional notions of self-determination which are found in established instruments of international law. The right of people to self-determination is recognised as part of customary international law and contained in various seminal international legal instruments, such as article 1(2) of the *Charter of the United Nations*.¹¹ Moreover, the first article of both the *International Covenant on Civil and Political Rights*¹² and the *International Covenant on Economic Social and Cultural Rights*¹³ state that “all peoples have the right to self determination. By virtue of that right they freely determine their political status and freely pursue their economic and social

¹⁰ IFC, Performance Standard 7 ‘Indigenous Peoples’, page 1. Available at: [http://www.ifc.org/ifcext/policyreview.nsf/AttachmentsByTitle/Updated_PS7_August1-2011/\\$FILE/Updated_PS7_August1-2011.pdf](http://www.ifc.org/ifcext/policyreview.nsf/AttachmentsByTitle/Updated_PS7_August1-2011/$FILE/Updated_PS7_August1-2011.pdf)

¹¹ Charter of the United Nations, (1945), Article 1 (2).

¹² *International Covenant on Civil and Political Rights*, (1966), Article 1.

¹³ *International Covenant on Economic Social and Cultural Rights*, (1966) Article 1.

development". The International Court of Justice has declared this right "irreproachable".¹⁴

However, the right of Indigenous Peoples to FPIC is not quite the same as the Right to self determination, but they are related. FPIC is not designed as a challenge to the right of a national Government to have authority over the place where Indigenous People live. Rather, as the, Human Rights Committee of the UN explains, Indigenous People have a right to enjoy their own culture and this "may consist in a way of life that is closely associated with territory and use of it resources".¹⁵ Therefore FPIC ensures that the management of the territory and resources where Indigenous People live must defer to the input of Indigenous People when considering what to do to their land and resources (especially cultural, social and economic).

Viewed in this way, this idea that Indigenous People are able to determine their cultural practices and resource management dovetails with the broader notion of a right to development which all people possess, as detailed by the *UN Declaration on the Right to Development*¹⁶. In particular, Article 2(3) of this Declaration outlines the right of peoples to be free and active participants in their development.¹⁷

Other international legal instruments also recognize aspects of FPIC, including Article 5 (c) of the *Convention on the Elimination of All Forms of Racial Discrimination (CERD)*¹⁸(to which Cambodia is a signatory) that guarantees the right of everyone to take part in the conduct of public affairs at any level. Elaborating on this further, the UN Committee that oversees the implementation of CERD requires that States "ensure that members of Indigenous Peoples have equal rights in respect of effective participation in

¹⁴ In a 1995 judgment (*East Timor (Portugal v. Australia), Judgment, I.C.J. Reports 1995*), the International Court of Justice proclaimed on page 102 that "the right of peoples to self-determination...is irreproachable. The principle of self-determination of peoples has been recognised by the UN Charter and in the jurisprudence of the [International] Court [of Justice]...it is one of the essential principles of contemporary international law".

¹⁵ UN Human Rights Committee, 'General Comment 23: The Rights of Minorities (Art. 27)' (1994), paragraph 3.1.

¹⁶ UN Declaration on the Right to Development, 1986.

¹⁷ UN Declaration on the Right to Development, 1986, Article 2(3).

¹⁸ Convention on the Elimination of All Forms of Racial Discrimination, 1965.

public life and that no decisions directly relating to their rights and interests are taken without their informed consent”.¹⁹

1.3.2. The UN Declaration on the Rights of Indigenous Peoples

A watershed moment in the international legal recognition of the rights of Indigenous Peoples to control what happens on their land came on 13 September, 2007, with the almost unanimous passing of the *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP) by UN Member States, including a vote in favour from Cambodia. While not a legally binding document under international law, the UNDRIP established legal norms for the treatment of Indigenous Peoples around the world. In part, UNDRIP helped to clearly outline the basis of an international standard for how Indigenous Peoples are able to manage what happens to their lives and land. This helps raise awareness and shape the global appreciation of the Right to FPIC for Indigenous People.

In particular, article 10 of UNDRIP prohibits the forcible removal of Indigenous Peoples from their lands and prevents any relocation taking place “without the free, prior and informed consent of the Indigenous Peoples concerned and after agreement on just and fair compensation and, where possible, with the option of return.”²⁰

Additionally, in cases where Indigenous Peoples have had their lands or resources confiscated, taken, occupied, used or damaged, article 28(1) of the Declaration provides them with “the right to redress, by means that can include restitution or, when this is not possible, just, fair and equitable compensation, for the lands, territories and resources which they have traditionally owned or otherwise occupied or used”.²¹

1.3.3. ILO Convention No. 169 – Indigenous & Tribal Peoples Convention

The 1989 ILO Convention 169 (‘C-169’), known formally as the ‘Indigenous and Tribal Peoples Convention’, contains elements from which the right to

¹⁹ UN Committee on the Elimination of All Forms of Racial Discrimination, ‘General Recommendation No. 23: The Rights of Indigenous Peoples’ (1997), 4 (d).

²⁰ UN Declaration on the Rights of Indigenous Peoples, 2007, Article 10.

²¹ UN Declaration on the Rights of Indigenous Peoples, 2007, Article 10.

FPIC took form.²² For instance, Article 3 stipulates that “no form of force or coercion shall be used in violation of the human rights and fundamental freedoms of the peoples concerned, including the rights contained in this Convention”.²³ This is reflected in the ‘free’ element of the right to FPIC as it is currently understood.

Article 6 recognises the importance of consultation with Indigenous Peoples for all matters related to this broad Convention. This article requires that the application of the provisions of the Convention requires governments to “consult the people concerned...in particular through their representative institutions...whenever consideration is being given to legislative or administrative measures which may affect them”.²⁴ The second requirement of this provision is that means are established that allow Indigenous People to “freely participate...at all levels of decision-making” in all bodies (i.e. elective and administrative) that are responsible for policies and programmes which concern Indigenous Peoples. The final important element of Article 6 states that “The consultations carried out in application of this Convention shall be undertaken, in good faith and in a form appropriate to the circumstances, with the objective of achieving agreement or consent to the proposed measures”.²⁵ It is clear to see how FPIC is reflective of all of these elements of this international legal provision, albeit in a sense broader than considerations of administrative and elective decision making processes, etc.

Article 7 moves beyond these considerations of the decision making processes of administrative and elective bodies, directly to the development process. It highlights the requirement that:

The peoples concerned shall have the right to decide their own priorities for the process of development as it affects their lives, beliefs, institutions and spiritual well-being and the lands they occupy or otherwise use, and to exercise control, to the extent possible, over their own economic, social and cultural

²² Although Cambodia has not yet ratified this ILO Convention, (it has for the 8 major ILO Conventions), this section deals more broadly with the relationship between this important piece of international law and the right to FPIC, rather than how the Cambodian legal and political system views this Convention. Hence, it still is persuasive as a foundation for how FPIC is applied anywhere and instructive for understanding the foundations of FPIC in international law more generally.

²³ ILO Convention 169 (1989), Article 3.

²⁴ ILO Convention 169 (1989), Article 6.

²⁵ ILO Convention 169 (1989), Article 6.

development. In addition, they shall participate in the formulation, implementation and evaluation of plans and programmes for national and regional development which may affect them directly.

This is the provision in the Convention that most explicitly details a protection that closely reflects FPIC, particularly with the reference to the ‘right to decide their [community’s] own priorities for the process to development’. Taken together with the other aforementioned elements of the Convention,²⁶ this legal instrument has offered much to the development of the international legal notion of the right of Indigenous Peoples to FPIC.

1.4. FPIC IN CAMBODIAN LAW

Article 31 of the Constitution of Cambodia states that “The Kingdom of Cambodia shall recognize and respect human rights as stipulated in the United Nations Charter, the Universal Declaration of Human Rights, the covenants and conventions related to human rights, women's and children's rights”.²⁷ Furthermore, pursuant to Article 35 “Khmer citizens of either sex shall be given the right to participate actively in the political, economic, social and cultural life of the nation”.²⁸

These two foundational provisions of Cambodian law are especially important for Indigenous Peoples because, in theory, they ensure that the United Nations Charter, as well as the international covenants and conventions, are in operation in Cambodia. Furthermore, article 35 states that Khmer citizens, including Indigenous Peoples, have the right to ‘participate actively’ in the political, economic, social *and cultural*’ life of the nation – which means for Indigenous People that their participation in the decisions about what happens to their cultural, social and economic life is legally protected. However, this is not a guarantee of the full elements of FPIC, and article 31 does not mention any declarations aside from the UDHR, therefore precluding UNDRIP, from automatic operation in Cambodia. Nevertheless, the Constitution of Cambodia seemingly provides a measure of legal recognition for the international legal foundations for where FPIC is derived from (as outlined above – UN Charter

²⁶ There are also other elements of the Convention, albeit in specific circumstances such as mineral exploration (Article 15) and resettlement (Article 16), that also make explicit reference to key elements of FPIC.

²⁷ The Constitution of Cambodia, Article 31.

²⁸ The Constitution of Cambodia, Article 35.

and various Covenant provisions, etc) and a legal appreciation for the right of Indigenous Peoples to have a say in what happens to their lives.

Beyond the Constitution, there are many elements of domestic Cambodian law that protect the rights of all Cambodian people, not just Indigenous People, to be involved in the decision making processes that govern what happens to the land they live on.²⁹ Some of these make explicit reference to Indigenous People, and some implicitly recognise important elements of FPIC.³⁰ However no law in Cambodia makes explicit mention of the right of Indigenous People to FPIC, despite the Royal Government supporting the passage of UNDRIP through the UN when it was passed.

1.4.1. The Land Law

The traditional management of immovable property by Indigenous People is recognized in the 2001 Cambodian Land Law. Chapter 3, section 2 of the Land Law provides for collective ownership rights of Indigenous communities to their lands. However, in order to be eligible for collective ownership of their lands, Indigenous communities must be recognized as legal entities before the law.

In 2009 the Royal Government of Cambodia passed the Sub-decree on Procedures of Registration on Land of Indigenous Communities. The sub-decree requires that communities must go through the formal recognition and legal registration process before then being able to have their communal land registered by the Ministry of Interior. At the time of writing, 43 communities had been recognized by the Ministry of Rural Development, 20 communities had received legal community registration from the Ministry of Interior, and three have registered communal land. This process can take several years to complete and has various administrative stages, which has stalled many attempts to formalize the legal recognition of many Indigenous communities.

²⁹ Law on Environment Protection and Natural Resource Management (1996), Article 6; Law on Expropriation, (2010), Article 16; Sub-decree on Economic Land Concessions, (2005) Article 4; Sub-decree on Social Land Concessions, Article 9; Prakas no. 376 PRK.MOE, September 2, 2009, on Guideline for Preparing Report on IEIA or EIA, Chapter 5, Law on Concessions (2007), Article 26; Law on Mineral Resource Management and Exploitation (2001), Article 7 & 21.

³⁰ Land Law, (2001) Article 23; Law on Forestry, (2002) Articles 15 & 40; Protected Areas Law (2008), Article 4 & 11.

However, the Land Law does not require an Indigenous community to be registered for Indigenous people to maintain the right to manage the land they possess. This protection is laid out in Article 23, which makes plain that:

Prior to their legal status being determined under a law on communities, the groups actually existing at present shall continue to manage their community and immovable property according to their traditional customs and shall be subject to the provisions of this law.³¹

The ILO, which oversees the implementation of ILO Convention 169 (see above) noted in a 2007 report about legal protection for the land of Indigenous People in Cambodia:

'the rights of indigenous communities to their lands are protected by law regardless of whether they have yet registered as legal entities or not, and any delays in this process do not imply in any way that these rights do not already exist.'³²

This protection of the right of Indigenous communities to manage what happens on their land is reflective of the consent element of FPIC, since it is implied in the above-mentioned article that communities have the right to 'manage' what happens on their land. This presumably includes IP communities.

However, there is no reflection of the free, prior and informed elements of FPIC in the Land Law. For example, there is no legal protection that accompanies article 23, or any other article, ensuring that IP communities have the right to manage their land free from intimidation. Nor is there a legal guarantee that IP communities should be provided with all the necessary information needed to make an informed decision about how to manage their land, This would be an important provision when Indigenous communities are deciding how best to manage what happens on their land when an economic land concession is being considered in their area. Furthermore, the Land Law does not ensure that no official decisions to approve a project impacting Indigenous Peoples' land are made until Indigenous People themselves have decided whether or not to give or withhold their consent.

³¹ Land Law (2001), Article 23.

³² Andersen, K.E., Thornberry, F. & Sek, S. (2007). *Establishment of Indigenous Communities as Legal Entities, Cambodia – The Development of Bylaws*. Phnom Penh: ILO.

Hence, overall, while there are some important protections in the Land Law that reflect some elements of the consent aspect of FPIC, it cannot be said that the Land Law fully embraces the rights outlined by FPIC.

1.4.2. The Forestry Law

The 2002 Law on Forestry ('Forestry Law') was established to govern the management of Cambodia's forests. One part of it allows private entities to operate Forest Concessions within Cambodia's forests. While forest concessions are only one category of forested area covered under the Forestry Law, they are important in the context of FPIC because they cover the forested area that will likely see the greatest interaction between corporations and the management of forest area by Indigenous Peoples.

Considering forests as a whole, Indigenous communities in Cambodia rely heavily on access to forests for their livelihood and maintenance of cultural practices. Attempting to strike the necessary balance in the legal approach to governing the use of forests, the Forestry Law provides a minimum guarantee for Indigenous Peoples, providing them a legal right to "customary user rights" within forest areas. For example, it provides protection for these rights for Indigenous Peoples when they are taking place on land property of Indigenous Peoples that is registered with the state consistent to the land law³³. The expression 'consistent with the land law' refers to the process outlined above when Indigenous communities apply to have their status as Indigenous legally recognized by the Royal Government.

Furthermore, Cambodian Indigenous Peoples' rights to harvest forest products, and by-products, "at the amount equal or below customary subsistence use", are guaranteed in the Forestry Law.³⁴

Article 40 of the Forestry Law outlines what constitutes 'customary user rights' to forest products, by listing several activities that Indigenous People are allowed to do in Permanent Forest Reserves, without a permit:

1. *The collection of dead wood, picking wild fruit, collecting bees' honeys, taking resin, and collecting other forest by-products;*
2. *Using timbers to build houses, stables for animals, fences and to make agricultural instruments;*

³³ The Law on Forestry (2003), Article 15.

³⁴ The Law on Forestry (2003), Article 24.

3. *Grass cutting or unleashing livestock to graze within the forests;*
4. *Using other forest products & by-products consistent with traditional family use*³⁵

Furthermore, the same provision of the Forestry Law also protects the “right to barter or sell forest by-products shall not require the permit, if those activities do not cause significant threat to the sustainability of the forest”.³⁶

While use rights are an important guarantee for Indigenous Peoples, these protections are not a recognition of Indigenous Peoples right to FPIC. Only when FPIC elements are taken into consideration do the protections for use rights become relevant for this research.

In this regard, the Forestry Law does protect the right of Indigenous Peoples to be consulted in specific areas of forestry management including the issuing of forestry concessions to companies³⁷ and when considering building public roads in Permanent Forest Reserves, (which are also required to have an EIA).³⁸ However, consultation is not defined in the law. Taken in its usual form, consultation does not necessarily mean an ongoing process of dialogue with a wide spectrum of community members, involving the full provision of all important information, without intimidation or ensures the right of communities to stop a project by withholding their consent. As such, consultation in this sense cannot be said to equate to the right to FPIC.

1.4.3. The Protected Area Law

Article 4 of the Protected Area Law ensures that “the management of the protected area shall have to guarantee the rights of the local communities, indigenous ethnic minorities and the public to participate in the decision-making on the sustainable management and conservation of biodiversity”.³⁹ However, while positive that this law enshrines the right of Indigenous People to ‘participate in decision making’ in the affairs of what happens in Protected Areas, this provision falls short of giving Indigenous Peoples authority to consent or not consent, and make that consent have sway over the approval

³⁵ The Law on Forestry (2003), Article 40.

³⁶ The Law on Forestry (2003), Article 40.

³⁷ The Law on Forestry (2003), Article 13: “the Royal Government...may grant an area of production forest...to a forest concession...after consultation with concerned Ministries, local authorities and communities”.

³⁸ The Law on Forestry (2003), Article 31

³⁹ Protected Area Law (2008), Article 4.

or disapproval of certain activities. Furthermore, this legal protection does not guarantee other areas of FPIC, as mentioned above. These other considerations relate to whether the involvement of Indigenous Peoples in decision-making is guaranteed to be free from intimidation; must happen before delivering an official decision to approve or not approve any developments; is supported by a requirement for authorities and companies (where they're involved) to provide all relevant information; and that the community has the authority to halt a project where they do not consent to it.

In the same way the Forestry Law protected the rights of Indigenous Peoples to be consulted in specific cases but fell short of guaranteeing the right to FPIC, the Protected Area law takes the same approach. Specific cases where consultation is protected include during the decision-making to establish or modify a Protected Area;⁴⁰ when developing the National Protected Area Strategic Management Plan;⁴¹ when resolving conflicts arising from protected area management;⁴² and during feasibility studies in the process of establishing community protected areas. However, 'consultation' is again not defined in the Protected Area Law. Hence, it is not possible to report that the right to FPIC is included in this law, especially since none of the important characteristics of FPIC are mentioned and protected in this law, in the same way they were not in other laws. In this way, consultation alone does not constitute protection for the right to FPIC.

1.4.4. Sub-decree on Environmental Impact Assessment Process

An Environmental Impact Assessment (EIA) is required, except in special cases, for every project, whether undertaken by private, joint-venture or government.⁴³ Depending on the legal requirements for how an EIA is undertaken, an EIA can be a very important instrument that supports the right to FPIC. For instance, the EIA process can be designed in such a way that it provides full information about planned projects to affected communities. Similarly, the EIA process could be designed so that impacted communities must be regularly consulted at each stage of the project development,

⁴⁰ Protected Area Law (2008), Article 8

⁴¹ Protected Area Law (2008), Article 18

⁴² Protected Area Law (2008), Article 20

⁴³ Law on Environmental Protection and Natural Resource Management (1996), Article 6; Sub-decree on Environmental Impact Assessment Process (1999), Article 1 & 2.

implementation and decommissioning, and that community representatives have control over whether a project can proceed or not.

In the Cambodian system of environmental regulation the question about whether these considerations are included in the law are deferred by the 1999 Sub-decree on EIA Process to the 2009 Prakas on Guidelines for Conducting [an] EIA Report. Included in an annex to the Prakas is a set of requirements for what must be included in an EIA. Chapter 5 of the Guidelines requires that EIAs must include ‘stakeholder involvement’, which requires the project owner to “describe in detail the result of consultation with [the] public” including “awareness of [the] investment project to...local communities; comments of...NGO representatives; survey with local people who will be affected”.⁴⁴ There must also be included information relating to the environmental impact (including social impacts), mitigation measures and the environmental management plan.⁴⁵

While including requirements for consultation is an encouraging step towards realising greater participation from Indigenous communities, this provision in the Prakas is a lost opportunity for including additional provisions that would help realise the right to FPIC. If the Sub-decree on EIA process permitted Indigenous Peoples to give or withhold their consent for a project, without any intimidation, prior to government decisions being made to approve the project and after all important information has been provided to these Indigenous communities, this Sub-decree would go much further towards improving protections for the right to FPIC.

There are other flaws in the legislation governing EIA process that restrict the capacity of the EIA process to protect the right to FPIC. In particular, the law only provides 30 days for the Royal Government to review an environmental impact assessment (EIA),⁴⁶ which should include a period of public consultation, before a decision is made on whether or not to approve it.

⁴⁴ Prakas no. 376 PRK.MOE, September 2, 2009, on *Guideline for Preparing Report on IEIA or EIA*, Annex. This provision is supported by Article 1 of the earlier 1999 Sub-decree on Environmental Impact Assessment Process that encourages “public participation in the implementation of EIA process and take into account of their conceptual input and suggestion for re-consideration prior to the implementation of any project”.

⁴⁵ Prakas no. 376 PRK.MOE, September 2, 2009, on *Guideline for Preparing Report on IEIA or EIA*, Annex.

⁴⁶ Sub-decree on Environmental Impact Assessment Process (1999), Article 15 & 17.

Worse still, this very limited time span is compounded by the fact that the default legal perspective is that “if the Ministry of Environment fails to respond its findings and recommendations [to the EIA within 30 days], the...Ministry...will assume that the revised IEIA or EIA report has complied with the criteria of this sub-decree”.⁴⁷ Hence, if no review is made, the EIA is considered to be approved. This means EIAs for projects that could potentially impact Indigenous Peoples could be given approval without even being reviewed at all. Given the limited capacity of the Ministry of Environment to review EIAs, this is a disturbing legal perspective.

1.4.5. Sub-decree on Economic Land Concessions

In 2005 the Royal Government passed the Sub-decree on Economic Land Concessions (ELCs Sub-decree). Pursuant to article 4(3) of the ELCs Sub-decree, an economic land concession may be granted only on State private land where “environmental and social impact assessments have been completed with respect to the land use and development plan for economic land concession projects”.⁴⁸

The Sub-decree also requires that ELCs can only be granted on land where there are solutions for any resettlement issues that may exist there,⁴⁹ and only after public consultation has been carried out during the preparatory stages of developing a proposal for the establishment of an ELC.⁵⁰

Theoretically these are positive elements of legal protection around land management. However, as has been noted above, there are significant flaws in the EIA process that render it unsatisfactory in protecting the right to FPIC. Moreover, while protections for public consultation are to be welcomed, this term is not defined and therefore cannot be said to equate to FPIC because there are not express guarantees that the various elements of FPIC are protected under the law. This reflects the similar analyses made above in relation to other laws operating in Cambodia.

Finally, a legal requirement that resettlement issues must not exist in an area being considered for an ELC is also a particularly positive legal development in theory. However, additional provisions to the law would need to be added to ensure this protection actually guaranteed that solutions to resettlement

⁴⁷ Sub-decree on Environmental Impact Assessment Process (1999), Article 18.

⁴⁸ Sub-decree on Economic Land Concessions (2005), Chapter 2, iv (1) & (3).

⁴⁹ Sub-decree on Economic Land Concessions (2005), Chapter 2, iv (4).

⁵⁰ Sub-decree on Economic Land Concessions (2005), Chapter 2, iv (5).

issues were made in conjunction with community consultation and the principles of free, prior and informed consent underpinned any process of developing such solutions.

2. CASE STUDIES

Field research with IP communities was the key focus of this study. Four case studies are presented in this section. Appendix 1 outlines the process for selecting these cases and conducting the field work. Interviews with key stakeholders from civil society and government at the national and sub-national level were also conducted and data from these also informs the case studies and analysis contained in the following sections.

2.1. “A KRAMA AND A PACKET OF BISCUITS”

Kachoak Village, Kok Commune, Barkaev District, Ratanakiri (16030103)
[The community is dealing with both a rubber ELC and mining licence]

Kachoak village is home to 127 families with a population of 472 people. The Jarai ethnic group living in the *Kachoak* village have a long history of living off the land in this area to survive.

On 16 December 2009 the Hoang Anh Gia Lai Joint Stock Company was granted a licence to survey the land belonging to the *Kachoak* community for an iron ore mine⁵¹. Despite this fact, the *Kachoak* village only became aware of this when Hoang Anh moved into their village and set-up their equipment for exploration in early 2010. The community also reported that the company marked the area of land which they said had been allocated to them.



Concrete post the company use to mark the area of exploration

After the Hoang Anh company arrived and began work in the village, Senior officials from the Ministry of Industry, Mines and Energy (MIME) visited for a formal meeting with the three villages that would be affected by the mining licence granted to the company: *Sak Kneung, Lai and Kachoak*. The Village

⁵¹ Retrieved from: www.hagl.com.vn on Monday 17 October, 2011.

Chief reported that Minister of MIME explained to the villagers that the “*company came to invest in this area to help the local people*” and that the agreement had come from the ‘top’ already and that they could not do anything about it.

The villagers reported that during this meeting the company promised to build a school, road, water supply and electricity supply. During the meeting each family were offered 50kg of rice, one packet of seasoning, and 200,000 Riel (~USD 50). Villagers from *Kachoak* told us that at the time the *Lai* community refused the donation, causing the government officials to get very angry. The *Kachoak* villagers also did not agree with the announcement of what the company was offering to explore on their land, but were afraid of the consequences of not agreeing with the government; “*we do not dare to ask to meet with the company or the government, they will get angry with us and threaten us with arrest*”.

Following the announcement by Minister of MIME, the community sought the support of an organisation to assist them in registering their communal land. The organisation has offered the community a range of support, including training about their rights in this situation. However they told us that community members are still too afraid to stand up to the company or the government. Given the intimidation that is evident, this is perhaps understandable. Representatives from the NGO also reported that before visiting the village they are required, by the district police, to sign documents stating what they will be discussing.

One year after Hoang Anh arrived in *Kachoak*, the villagers discovered a second company bringing machinery to clear their land one day. They told us that about 130 villagers went to the work site, where there was a police post with polices, in an attempt to try and stop the land clearing. They were told by the worker to talk to their ‘mother’ who would be arriving at 1pm. The villagers waited but nobody arrived. The following day the villagers were threatened with arrest by the district government.

On one other occasion four families from the *Kachoak* village were invited by district police to come to a meeting that was organised by the company. At the meeting, the four families were given a krama and a packet of biscuits and were requested to fingerprint a document that was not explained to them and that they did not understand. The *Kok* Commune Chief was present at the meeting and when asked by the *Kachoak* Village Chief what the fingerprints

were for he said he *“did not know”*. They told us that they *“still don’t know what was written on the document”*. They reported that during the meeting the villagers were threatened with arrest if they did not comply and they were unable to ask any questions. The meeting lasted about one and a half hours during which time the families were shown on a map the area that *“belonged to the company”*. Similar to the mining exploration the community were never provided with any information about the potential negative impacts the project would have on their community.

The *Kachoak* villagers have sent letters of complaint to the provincial office but are yet to receive a response. The *Kachoak* villagers, like many others, want information. They feel cut out of the process; *“It is within our capacity to negotiate, the provincial authorities should also discuss with us, we don’t know what the company is doing.”* They are told virtually nothing and have no opportunities to ask questions about what is happening with their own land. They feel that *“the company should come to discuss with the Village Chief or village authorities that they wish to explore our land, that would be the right process”*. They wanted to be informed and consulted, so they can make a decision about the way that ELCs affect their land and their community; *“we should come to an agreement among the three villages that would be affected and then we could talk to the company”*.

Since work began in *Kachoak*, 2,808 hectares of the Arak spirit forest, which villagers also rely on to find food and gather products like rattan, has been cleared; *“for a long time we have depended on this forest. We want our land back so we can continue to live”*.

2.2. “IF WE AGREE OR DISAGREE IT DOES NOT MATTER”

***Malik Village, Malik Commune, Andoung Meas District, Ratanakiri (16010101)
[The community is facing two ELCs on their land]***

Malik village is home to 121 families with a population of 574 and is mostly people from the Tampuan ethnic group. The community, like many others in North-eastern Cambodia survive off their land. The villagers still use techniques such as rotational farming (where land is rested from agriculture for 2-3 years at a time) and search for food in the forest. The community also source bamboo, wood and rattan from their forest to build houses and tools for domestic use. The forest also supplies the villagers with food like wild animals; “we share food we never sell, if the animal is small we share with our neighbour if it is big we share with the whole village”.

In recent years, *Malik* has been affected by two ELCs. In March 2010, the Rithy Theavy Visna company arrived in the village to demarcate their concession – which included community rice fields – by digging half-metre holes and placing columns in the holes. It was unclear whether the commune or district knew about the ELC before the company arrived but the villagers told us whether this happened or not “*they did not talk to us*”. When the Village Chief asked the Commune Chief what was happening he was told “*no problem, you will keep your farmland.*” The villagers want the support of their government to help protect their future, but currently they feel that the “*commune and district do not care, if they give approval to the company, they are on the side of the company. They do not care much about us small people, we just live in the forest*”.

During our meeting with the Deputy District Governor, he described the official process for implementing an ELC which includes assessing the area, government officials meeting commune and district officials to discuss impact on the community. We were told that in practice however, they “*only go where there is a problem.*” While the communities turn to their local representatives, his comments also suggest that he too feels somewhat powerless to help; “*the companies don’t listen to the commune or district, they deal with the province or above.*”

At no stage has the village been shown on a map the area of land that the company has been granted under the ELC. The villagers have only seen the columns that they believe demarcate the concession. The company has not

begun clearing yet, but the community believe clearing will begin in the next few months. *“We are concerned because we survive on the forest, we worry about the future of our children, we cannot survive on one or two hectares per family.”*

This is not the community's only worry. In another area of the village the Heng Brothers company have already started clearing land on a second ELC covering community land *“they have a concession that includes 20 hectares of our forest.”* The community is gravely concerned about this; *“We want to preserve the forest so we can live we do not have money to go to the market”.* The Heng Brothers ELC has had a significant impact on the community, *“it has affected our rice fields and farming area, our family owned 2 hectares of cashew nuts but the Heng Brothers have taken it”.* When the company arrived to take their concession, they paid the villagers USD100 for their labour to clear the land. They were told *“if you don't take the \$100 you get nothing.”*

Before this land was cleared, the villagers had benefited from a cashew nut crop that was more than five years old. Twenty families ran the cashew farm and earned on average \$500 to \$600 per hectare per year. Each family owned one hectare. The company also cleared some of the community's rice fields. When villagers tried to show the workers that this was their farmland *“they stopped for a while but then just continued working when we left. They said that it has already been approved by the government”.*

Some families have lost all their land and are being supported by other members of the community, but as one woman said; *“I have no idea how they will survive next year, they have many children and cannot afford to support them all and if they clear the forest there will be many families [in this position]”.* Another described the situation frankly; *“If the company take all [our land] we would be in difficulty, with not even enough fire wood...without our land we will just die.”*

At no stage has either company attempt to get consent from the villagers; *“they do not try and get our consent, if we agree or disagree it does not matter”.* After Heng Brothers began clearing land, the community sent a complaint letter to the district government with the signatures and thumbprints of 160 families. They are yet to receive any reply.

The community does not have a clear plan about what they will do next to protect their land. They described that it is difficult to unite the village because of fear *“we wish that we could have strong unity but we are afraid that we will*

be threatened". The community had heard that villagers from nearby *Kanut* village had protested about the Heng Brothers ELC and the police accused elders of inciting unrest and threatened to arrest people. (we spoke to a man from *Kanut* village who reported that while they were threatened, *Kanut* villagers had stood firm and nobody was arrested).

Although some of the leaders have an understanding about their rights, not all villagers do, especially not about land ownership. As one leader said *"If we do know our rights, we protest to protect our rights, but no one listens, no one respects."* The villagers also described that most need to be better informed about their rights *"we have had one lesson [on our rights] a long time ago, but we forget"*. Fear and intimidation also prevented many people from taking action: *"We know that this is our land, but we are afraid the authorities always threaten us by saying 'if you protest you will be sent to jail'"*.

As with the other cases documented in this report the *Malik* villagers only want what they are entitled to; *"legally the company and authority should give us all the information before anything happens"*.

2.3. “WE NEVER HEARD ANYTHING, THEY JUST ARRIVED ON OUR LAND”

Pu-Rang Village, Saen Monourom Commune, Ou Reang District, Mondulhiri (11030204)

[The community has been dealing with a mining licence on their land for a number of years]

Pu Rang village has 98 families (with around 618 people) who all belong to the Phnong ethnic group. They depend on farming cassava, cashew nuts, and collecting resin from trees in nearby forest for their living. The families in this village do not grow rice but buy it from the markets. Most families grow vegetables and keep domestic animals like cows. They also collect food from the forest. While there are many streams nearby (*Ou Reang* means ‘many streams’), including one that runs behind their houses, they mostly drink water collected from wells that were built by NGOs.

Families individually own roughly between one and five hectares of land which they farm. The villagers also have communal land but they had not properly measured this when asked and were not sure how big it was. This includes spiritual forests and land used for rotational farming on a five year cycle. They also described that some of this land is preserved in preparation “for our children’s futures.”

In 2009 a company (they did not know the name of the BHP Billiton/Mitsubishi Consortium), just that it was a *barang* company) came to begin some mining exploration on their land. On the day that the company arrived, the Village Chief received a call from the Commune Chief who said that “today some people will come down to your village to explore for mining”. Other than this, the chief had no prior information; “we never heard anything, they just arrived on our land.” The villagers that we met did not know if the company had prior discussions with commune or district level officials (the Commune Chief declined an invitation from the local NGO to meet with us).

Given the very late notice of the company’s arrival, the Village Chief had prior engagements. He asked a trusted elder (present during our visit) to accompany the workers to point out communal and spiritual land; “They asked me to accompany them to the field and I told them not to dig holes in our communal land.” The elder reported that the company respected his requests and did not

dig where they had been asked not to. He told us *“I accompanied them for three days, each day when I came home they gave me a 10kg bag of rice, some fish sauce and a can of milk.”*

The company had a translator with them *“from downstream”* (most likely PP) and had also asked some young people from a youth group from nearby *Dak Dam* commune who could speak some English to accompany them. The elder told us that over three days, the company dug three holes, took samples and then filled these holes in again, leaving a marker post where they had been. *“The company tried to assure us that they will explore away from our communal land. But the people in the village were worried that the exploration would affect our community negatively.”*

As quickly as they had come, the company disappeared again, leaving community with little information: *“They only took samples. They said they would test the samples and that they were not sure when they would come back and where they would explore.”* The villagers were then left after that to guess about the next stages: *“We were never informed of whether they were coming back or not.”*

The villagers were never given any type of forum in which to ask questions about what the company were doing on their land. They explained *“I am afraid that we do not have any information before they do the work.”* The elder that was with the visitors for three days did manage to raise some concerns, though the answers were relatively oblique; *“I asked them what they were meaning to explore and they said they don’t know what exists and that’s why they were there to study it.”*

The elder also raised another point with the visitors; *“I raised a concern that this decision should involve all the villagers – from the four or five villagers. If the company came again it might affect all their land, so maybe they should inform all of us what they are doing.”* The response from the representatives was *“Now it is only the beginning, we don’t need to do real exploration yet. Don’t worry about it.”* But of course they did.

Like most of those we met, the current cases were not their first brush with ELCs. This village had previous experiences. About five years ago, an ELC was granted for a Vietnamese company to plant pine trees on a large area of a nearby village’s land. While the concession was not on the land of this community, chemicals used by that company had flowed into their water supply, (they reported some had even been dumped directly into nearby

streams), and a large number of their animals had died. The villagers we met had been part of a delegation that had travelled, with the provincial governor all the way to Phnom Penh to bring this situation to the attention of the Council of Ministers. Despite assurances from Minister of Council Ministry that the problem would be solved, the villagers never received any more news or compensation from the company.

The elders described that they had seen other communities on the TV affected by mining exploration. One man animatedly explained; *“we were afraid that our land would collapse, that the trees would be cut down. We were afraid they would come back to mine.”*

The whole community (all the villagers) met and agreed to protest. Within a month of the exploration, approximately 50 villagers from the five neighbouring villages went together to the provincial capital to take their case to the provincial governors office.

The villagers were supported by a local NGO, who had been working with the community on food security, to gather together at a guesthouse in town and arranged for the Provincial Governor to meet with the villagers. *“We complained to the provincial governor’s office that since the company came to explore for mining we were afraid that they would harm or damage our land. The provincial governor said that ‘this company will come to explore for mining but will not harm your communal land. That’s why we needed you to accompany them and show them where the communal land is’.* Given his support for the community in the past, the villagers explained that they trusted him; *“We agreed with this and believed him.”* A key reason for this may be that *“he is also from our ethnic group.”*

In a widely publicized decision, this first company – the BHP Billiton/ Mitsubishi Consortium joint venture – withdrew from Cambodia in August 2009. The concession was picked up by a Vietnamese company called Alumina.

More vigorous exploration began amongst the neighbouring villages in the commune towards the first half of 2010. The group described that the company had dug ‘wells’ more than five metres deep in and around farmland and houses of other villages. This company had taken samples from the bottom and not bothered to fill the holes back in. One man described that in some cases, animals had fallen in and died.

Rightly so, the villagers worried that this exploration would soon affect them. In fact, the week that we visited, this second company had visited the village to ask where they could dig. The Village Chief was away and they said they would come again soon. However, in our discussions it was revealed that they have already dug two holes on village land. The villagers stumbled upon the holes on their land back in September.

When asked about how they would like to be consulted in the future it was again clear what little information the community had been given about the potential impacts of mining on their community *"We worry that if they come back to mine [with an exploitation licence] then our animals may get sick from chemicals in the water."* If the community was truly informed about the implications of an exploitation licence, their acceptance of the early stages of exploration on their land would be highly unlikely.

2.4. “WE ARE ALL THE SAME ON THIS ISSUE”

Chhnaeng Village, Srae Khtum Commune, Kaev Seima District, Mondulkiri (11010406)

[The community is facing two separate ELCs on their land]

Chhnaeng village has 87 families (roughly 500 people), and has Indigenous People from four different ethnic groups within its boundaries (Cham Muslim, Panong, Steung and Khmer) yet “everyone in the community gets along well, even the different ethnic groups, we are all the same on this issue [ELCs].”

The village is split into two parts (*Chhnaeng* and *Chhnaeng Knong*) and is spread over a large area. A number of families live along either side of a main road. Some villagers have farmland behind their houses while others have land nearby. They grow crops including cassava, rubber and cashews as well as rice.

The village is dealing with two ELCs granted on their land. About 3-4000 hectares stretching to Kratie was granted to Sovann Reachsey Co. Ltd. A separate ELC granted to Mong Reththy Group Co. Ltd. has also been granted covering some more of their land. The concessions leave little for the villagers *“I cannot count [how much land the community will lose]” “they will take most of our land.”*

The villagers first heard about the Mong Reththy concession about ten days before the company arrived to clear land. Some villagers reported that *“the Village Chief met with the company and agreed to give all the land except 500m each side of the road”* (the Village Chief reported he was never asked to give consent). Given that some villagers had farmland that was not behind their houses, and realising that they would be left with very little, the community discussed the problem together and decided that they should try and protest to protect their land.



Land clearing activities

When Mong Reththy began clearing the land in late 2010, around 50, mostly Cham Muslim, families (those at one end of the village affected most by this concession) blocked the main road. They reported that they decided not to go to the company office nearby because the police protected it. Soon after blocking the road, about 100 military police arrived in trucks to break up the protest. Three villagers were hit and bullets were fired into the air to intimidate them. However, the protesters remained for almost 24 hours, demanding that someone from the Provincial government came to meet them. *"We waited 24 hours for a representative from the province to come with an announcement from the Council of Ministers that the company should stop."* The Deputy Provincial Governor explained that the national government had given authority back to the province to decide. While this happens, Mong Reththy has removed their machinery.

In the second ELC involving Sovann Reachsey Co. Ltd., villagers at the other end of the village have been affected since August 2011. *"We heard the engine and the fall of the trees so we went to look"* They have opted for a more conservative method of voicing their protest than with the previous ELC; *"We gave our thumb prints to [a letter of] protest at the district level twice"* but they have not received any response from the authorities; *"until now nobody has come to talk with us."* Their next step is to take their protest directly to the provincial government: *"We will continue to go further because we really depend on this farmland, we need to feed our children."*

Sovann Reachsey Co. Ltd. has started to clear communal land, some with cassava growing on it, some spirit forest, and some land reserved for rotational farming. The community has tried to stop the company's work; *"We managed to stop them for a few days and then they started again, we went back and protested again when they started and they stopped again for a few days."* But despite these temporary reprieves, *"however brave we are they always start again."*

The provincial government has established an inter-ministerial committee. The committee includes staff from the Department of Environment, Department of Agriculture, Fisheries and Forestry, the Department of Land Management, Urban Planning and Construction. One committee member said *"we try to negotiate with villagers but some of the villagers do not want to talk"*. However it appeared from our interview that the committee themselves have little power to resolve problems *"our committee cannot make any decisions, we just collect the information"*. He reported that the committee sends the

information to the provincial level and then the provincial level sends it to the national level for a decision to be made.

Some of the villagers have agreed to work with the committee to register their land; *“We are certifying all our land, our houses and farmland but not our communal land.”* They are not sure if they can ever get the communal land back. In fact they are not even sure the registration will make a difference *“We are not sure [what will happen next] but we think the company will just come and take our land...even after we register our land.”*

Other members of the community worry that registering their land is only to help secure the land for the company; this highlights the lack of trust in commune, district and provincial government. This lack of trust was also felt by the committee; *“the villagers believe our work is supporting the company, and the company believe our work is supporting the community.”* Some villagers believe that, as before, only the land 500m from the road will be granted so that those with farmland away from their homes will still receive nothing. So they refuse to agree to the registration process in protest. The committee has told those refusing that *“if they continue to refuse then at the end of the process then they will not be responsible for them.”*

The community members believe that the company should demarcate community land and company land. They also want *“commune, district and provincial government, including the forest authority to come and witness the demarcation.”* They have never had the chance to meet with the company to discuss the concession; *“then we could give thumbprints for consent”*. Yet, they have never been asked for their consent. The community has also never seen a map to indicate what area the company was given *“we have asked but they never bother to show us.”* When asked if anyone had shared information outlining the impacts of the concession they replied; *“We have never seen about the impacts [EIA] or been told...we just know when the bulldozers came to clear our land.”*

3. DISCUSSION

In this section, key themes identified by the study, both in the case studies, and from interviews with key civil society and government stakeholders are presented.

3.1. COMMUNITY CONSULTATION

In order to meet the requirements of FPIC, the current process for community consultation needs substantial improvement. All four case studies highlight that affected community members were not privy to any form of consultation, and were completely unaware of the award of an ELC on their land until land-clearing began. These findings are consistent with existing research and documentation on ELCs across Cambodia. In some cases, meetings with provincial or district government may have occurred, however those families directly affected were not informed or aware of such meetings. As the Director of Ethnic Minorities at MoRD said; *“They sometimes do not consult with the village, they consult with higher authorities.”*

As illustrated in the review of the legal context in section 1, consultation is required by the sub-decree on ELCs before an ELC can be granted. The Deputy Director of the Department of EIAs at MoE explained *“I am not sure about real practice but it [consultation] should be included. It is the law, they have to respect it”*. Community consultation must be detailed in the EIA report. However, there appears to be no systems in place, or adequate resources to check whether the companies have properly conducted community consultation.

Furthermore, the EIA department is under significant time pressures. The Deputy Director went on to explain that the current time does not allow for detailed consultation, particularly with affected communities; *“Thirty days is not long enough, three months would be sufficient”*.

The findings of this research indicates that there is currently very little true community-level consultation taking place regarding ELCs and communities are not even aware that they have a right to be consulted. Specific recommendations are made at the end of the document that would incorporate the principles of FPIC into the establishment of an effective community consultation process.

3.2. GRANTING OR WITHHOLDING CONSENT

FPIC is primarily based on the fact that Indigenous Peoples have the right to either provide or withhold consent for the use of their land. In practice in Cambodia, this right is rarely realized. In three of the four case studies, it was reported that no attempt was even made to obtain any kind of formal consent, from the community members regarding the ELCs granted on their land. In the fourth case, in Kachoak village, acceptance of 50kg of rice and 200,000 riel was considered a form of implied consent for the first ELC on their land. For the second ELC, just four families were invited to a meeting and asked to thumbprint a document they did not understand.

An often cited issue that creates complication is the fact that, like most people in Cambodia, few IP communities have any formal documentation indicating their ownership of the land that they own. The development of the Sub-decree on Procedures of Registration on Land of Indigenous Communities – which outlines how communities can be recognized, register as legal entities and register their land – attempts to address this problem. However, the process is complicated, lengthy and requires the approval of three Ministries and only three communities have succeeded in completing the process.

Yet, the 2001 Land Law protects IP groups' rights to land *even before* their legal status has been determined, though this fact is regularly overlooked as in the cases presented in this study. For consent to be applied, in line with all the elements of FPIC, substantial work is needed to facilitate IP communities' right to provide or withhold consent for projects on their land.

3.3. ACCESS TO INFORMATION

In the course of conducting this research, it was evident that consent was not even a priority for the communities we visited. Their main concern was simply getting access to information about the activities on their land.

A consistent finding in all four communities was the lack of information that villagers had about the ELC and mining licences granted on their land. This lack of information began from the very basic level of identifying what land had been granted by government under the concessions. Only in *Kachoak* village, had the villagers been shown a map detailing "*the land that belongs to the company*". In two cases, despite the workers from the company having maps demarcating the ELCs, and despite direct requests from villagers to see

these maps, they had not been shown. The posts placed in the ground, by the company, were the only indication of the boundaries of the ELCs.

FPIC requires that full and frank information is provided in a timely fashion to affected communities so that they can make an informed decision before formal approval of the project is made. In only *Kachoak* village had an attempt been made to explain the approved ELC. Yet this could hardly be considered full and frank, at no point were they given information about impact and community members certainly did not have an opportunity to make any decisions.

Similarly in *Pu Rang* village, when villagers sought information about the mining exploration (and the impact that future exploitation may have on them) the responses they encountered could be seen as purposely obtuse. The company told them; *“now it is only the beginning, we don’t need to do real exploration yet”* and the Provincial government told them *“this company will come to explore for mining but will not harm your communal land”*. These responses focus only on the exploration, these responses exclude information that the community is entitled to know. They avoid informing the community about the potential impact that exploitation would have. The FPIC principles dictate that being informed relates to *the full nature of any impacts a project may have* on the environment and people. With the full information about what may happen should the exploration produce favourable results, the community may react very differently to the mining exploration licence.

3.4. ENVIRONMENTAL IMPACT ASSESSMENTS (EIAs)

To be fully ‘informed’, in line with FPIC, requires that all details of the timeline, scale, location, mitigation plans and other important information must be shared with the potentially impacted communities long before any decisions are made to approve or not approve a development project. These details are usually contained within an EIA draft.

In Cambodia, the law requires that an Environmental Impact Assessment is undertaken on all economic development projects,⁵² and only 30 days is provided for Government and public to review them,⁵³ before a decision is made on whether to approve it. Worse than this very limited time span is the default legal perspective that “if the Ministry of Environment fails to respond

⁵² Sub-decree on Economic Land Concessions (2005), Article 4(3).

⁵³ Sub-decree on Environmental Impact Assessment Process (1999), Article 15 & 17.

its findings and recommendations [within 30 days], the...Ministry...will assume that the revised IEIA or EIA report has complied with the criteria of this sub-decree".⁵⁴ Hence, if no review is made, the EIA is considered to be approved.

In practice, EIAs are rarely made public for review. In the cases where EIAs are completed and disclosed to the public, they are often done so just a few days before the relevant ministries make a decision about an economic land concession. While NGOs at the national level have a limited chance to review these documents, affected communities very rarely do. A recent paper identified that:

"While the sub-decree requires public consultation prior to the award of concessions, the community is invariably represented at such consultations by the Commune Council members, who are frequently corrupt. In any case, the high literacy requirements for candidates to the Commune Council effectively exclude certain groups, such as indigenous groups and the poor, who are often short of education".⁵⁵

In none of the four cases studies were communities made aware of the potential impacts of the ELCs in written or any other form. When asked directly, no villagers in any of the cases had seen an EIA or knew of one being conducted. In some cases, while promises of schools, sealed roads, electricity and water supplies were made, none of these were reported to ever have been provided. As one *Malik* villager explained; *"They just tell lies."*

3.5. COMMUNITY PARTICIPATION

Despite the legal provisions that require consultation, stakeholder interviews with government and civil society highlighted that affected Indigenous communities regularly struggle to find their place in the decision making process around the ELCs and mining licences that affect them. The centralisation of much decision making in Phnom Penh creates a burden of distance for the communities affected by ELCs and mining licences, particularly IP communities in the north-east of the country. While communities first turn to commune and district officials with their concerns,

⁵⁴ Sub-decree on Environmental Impact Assessment Process (1999), Article 18.

⁵⁵ Asian NGO Coalition for Agrarian Reform and Rural Development, *Overcoming a Failure of Law and Political Will: Cambodia Country Paper (Land Watch Asia)*, p. 67.

low capacity, lack of knowledge about ELCs in their area and an inability for the sub-national levels to make decisions usually leads to concerns needing to be voiced at higher levels of government. This was the case in all of the case studies. However, as the data indicates, when communities are struggling day-to-day to survive, the time and cost requirements of these processes are often a major challenge.

Another major challenge to FPIC is the fact that communities are not even informed about whether an EIA, or some other major aspect of a development project, is taking place. This total absence of information completely undermines the capacity of the community to make a decision on whether to approve of the project going ahead, even if that decision is not respected by authorities. Time to consider a project provides time for the community to organise itself and decide on how to proceed. Without any access to any information at all, organising a community response is very difficult to do.

Furthermore, a common tendency in the Cambodian NGO sector to act 'on behalf' of rural communities, where constituency of that NGO is often doubtful, can hamper community participation. However, this can be considered understandable sometimes, when NGOs try to comply with the unrealistic timelines for review, which is often as little as one or two days notice before a public consultation takes place. Yet in the framework of FPIC, the focus of NGOs and government must be on improving consultation with the *affected communities*. As a villager from *Malik* explained; "*several NGOs want to support us, but the main concern needs to come from us.*"

3.6. INTIMIDATION AND FEAR

The 'Free' element of FPIC stipulates that Indigenous Peoples should be free from intimidation, coercion and manipulation in decision making about consent regarding the use of their land. In all four cases various forms of intimidation were used with communities to achieve compliance. Villagers regularly reported the presence of polices. Threats of arrest by government, company representatives and police were also common.

These tactics usually had the effect that was intended. Community members are afraid to even ask questions, let alone stake claims for their rights. One *Kachoak* villager told us; "*we do not dare to ask to meet with the company or the government, they will get angry with us and threaten us with arrest.*" Similarly, a *Malik* villager told us: "*We know that this is our land, but we are afraid, the authorities always threaten us by saying 'if you protest you will be*

sent to jail’.” In one of the cases, NGO workers visiting the village were forced to meet with district police before they visited the village to ‘register’ the discussions they would have.

Intimidation, manipulation and coercion will always undermine FPIC. Unless this is addressed Indigenous Peoples in Cambodia will never be able to fairly engage with the process to manage their lands.

3.7. AWARENESS OF RIGHTS

In some cases, NGOs had worked with communities to educate them about their rights. However, in some of the cases explored, the communities were not fully aware of their rights, particularly around land ownership. With more information in this area, communities would be empowered and able to stand stronger. With an awareness of their entitlements, more specific demands can be made and methods of intimidation (such as unfounded threats of arrest) may be less effective.

Representatives from the Department of Ethnic Minority Development at the MoRD informed us that they have conducted training with Indigenous communities about their rights and the process communities must follow to be recognised, legally incorporate and register communal land. However they told us that now the NGOs do this. While Indigenous communities’ rights to their land is protected under the 2001 Land Law, even before their legal status is determined, the increase in the registration of Indigenous communities, and their land, in line with the requirements of the relevant Sub-decree (see above), will strengthen their land tenure security, and thereby also their negotiating position. However, only 3 communities have been able to register their communal land under the Ministry of Land Management, Urban Planning and Construction (MLMUPC) since 2009. It is not clear why this final stage is taking so long, improvements to the expediency of this process are urgently needed.

3.8. CAMBODIAN LAW

In theory, if the legal procedures outlined in Cambodian law were followed, the process may provide some small but important measure of recognition of some of the elements of the right to FPIC of these Indigenous communities. However, at present the ELC and mining concession approval process disregards elements of FPIC that do exist in the Cambodian law, and thereby undermines the capacity of these communities to legally exist at all.

4. RECOMMENDATIONS

4.1. FOR GOVERNMENT

Respect the rights of Indigenous communities to provide *or withhold* consent.

The right of Cambodian Indigenous People to FPIC must be upheld. The Royal Government of Cambodia has a duty to respect, protect and fulfill this right, as best it can with the resources it has available to it. Presently there are many things that can be done, that do not cost anything, that would drastically improve respect for FPIC. Many of these are included below.

Ensure respect for Article 23 of the Land Law

Government bodies and project proponents should uphold the right of Indigenous People to, “*prior to their legal status being determined...manage their community and immovable property according to their traditional customs*”.⁵⁶ Non-registration of land must not be a justification for the violation of the land or other rights of Indigenous communities.

Legally define ‘consultation’ to include FPIC principles

Many laws examined above include the term consultation and require local communities to be consulted. However, none of these laws include a definition of consultation. Of particular concern is that consultation is not defined in the 2009 Prakas on Guidelines for Conducting EIA Report.

Amendments to laws such as this one, and inclusion in future relevant laws that ensure requirements for consultation include elements of FPIC will improve the legal protection for this right.

In particular, a legal definition of consultation must include guarantees that consultations are:

- Free from all forms of coercion or intimidation
- Occurs only after all important sources of information, (e.g. the project plans and sufficient information about the EIA presented in a way that

⁵⁶ Land Law (2001), Article 23.

local people can understand) have been provided to all potentially affected communities

- Before any official government decisions have been made about whether a project is to be approved or not
- Does not compromise the right of Indigenous People to withhold their consent for a project that affects them, and that by withholding this consent they have the authority to suspend the progress of the project

Provide all full, clearly explained, and honest information to affected Indigenous communities

Communities have a right to this information *prior* to the Government bodies making a decision to approve an economic development project. If the present EIA process was more rigorous, and more diligently regulated, Indigenous communities would potentially have more opportunity to participate in the EIA process, and receive greater access to information.

Increasing the availability of technical resources to communities to understand EIAs, project documents, and other important information – or requiring companies to provide this resource to communities – could also increase the likelihood that communities access full and frank sources of information they need to make informed decisions.

Communities should also be provided with opportunities to ask questions, seek further information from the company and seek advice before making their decisions. This could be facilitated by government or non-government stakeholders. However, company and authorities should not just wait for communities to ask before providing them with important information. Important documents such as the plans for the project and the EIA should be provided to all impacted communities as a matter of course.

Finally, EIAs not only inform the community about potential impact, they are a mechanism for protection for both government and companies. Properly administered EIAs are in everyone's best interest.

Increase the time allocated for public consultation to ensure communities have sufficient time to consider and respond

Significantly increasing the length of time for public consultation of EIAs, far beyond the present unrealistic 30 day requirement for review, as well as

amending the law to remove provisions that allow for approval of EIAs if they are not reviewed in 30 days, would increase the likelihood of there being greater public participation in the EIA process.

Ensure that Indigenous communities are informed, in advance of any approvals for projects to proceed

Mandatorily requiring project proponents and relevant Government officials, both separately and together (if required) to meet with communities, if communities request such meetings, would increase the likelihood that communities have the opportunities they need to pose questions to relevant stakeholders and seek information.

These meetings should be required to happen *prior* to any Government approval, at any level, being granted for the project. To ensure communities are not intimidated, all State police, military personnel or company security should be prohibited from attending any meetings. These meetings should happen at the location and time chosen by the communities, not the Government authorities or project proponents.

Communities should be made aware that they are able to call meetings of this kind whenever they require. Government authorities, with actual decision making power over the project, should be responsible for making sure they attend all such meetings, whenever requested by the community, subject to the reasonable time period needed to arrange their attendance.

Restrict the use of military, police or private security service personnel

Cambodia law requires that “military personnel be neutral in their functions and work activities”⁵⁷ and are “strictly prohibited” from using “influence and power of their own functions to exploit any advantage or for intimidating, threatening and abusing the rights of the citizens”.⁵⁸

To support the right of Indigenous People to freely decide whether to provide or withhold their consent, Government authorities at all levels must be vigilant to ensure no military personnel are ever present in a community subject to an economic development project, unless there is some unrelated emergency,

⁵⁷ Law on General Statutes for the Military Personnel of the Royal Cambodian Armed Forces (1997), Article 9.

⁵⁸ Law on General Statutes for the Military Personnel of the Royal Cambodian Armed Forces (1997), Article 17.

such as a flood, war or other natural disaster that is in line with the public duties. Military personnel involvement in a private business operation is not service in line the public duties of Cambodian Royal Armed Forces personnel. Similar restrictions should be considered for police and company security personnel, unless there is no other alternative than to deploy these personnel to the area.

Where companies inform Government authorities that they require the use of security personnel of any kind, companies should be obliged to abide by the 'Voluntary Principles on Security and Human Rights'.⁵⁹

Where eviction of communities is absolutely unavoidable international law must be followed

In cases where all other possible alternatives have been considered, with communities and authorities, evictions must be undertaken in line with international law – particularly the International Covenant on Economic, Social and Cultural Rights, and the Right to Adequate Housing in particular. This includes abidance by General Comments 4 & 7 of the UN Committee on Economic, Social and Cultural Rights.⁶⁰ Where domestic or international law is broken in the process of evicting a community, Government authorities should seek to hold those responsible, even if perpetrators are Government personnel, before the law.

Where land is forcibly or voluntarily procured from Indigenous communities, fair compensation, based on fair market rates, should be provided.

Provide 'easy access' to grievance mechanisms for Indigenous communities affected by ELCs or other economic development projects

Government authorities at all levels should ensure Indigenous communities have easy access to *effective* operation-level and higher administrative and judicial level grievance mechanisms. These grievance mechanisms should be

⁵⁹ Voluntary Principles on Security and Human Rights (2000). Available here: http://www.voluntaryprinciples.org/files/voluntary_principles_english.pdf

⁶⁰ Cambodia is a party to the International Covenant on Economic, Social and Cultural Rights. General Comments 4, 'the Right to Adequate Housing', Article 11.1 (1991) and 7, 'Forced evictions and the Right to Adequate Housing' (1997) are available here: <http://www2.ohchr.org/english/bodies/cescr/comments.htm>

designed to align with the 'Access to Remedy' Guiding Principles of the UN Guiding Principles on Business and Human Rights.⁶¹

4.2. FOR CIVIL SOCIETY

Be led by communities

As much as possible, commit resources and focus to facilitating the greater involvement of communities and their representatives in participation, consultation, negotiation and consent provision (or withholding) processes related to economic development projects. This approach should guide all NGO involvement that aims to improve outcomes for communities. This approach must supplant all approaches that aim to represent, or 'speak for' communities. Where necessary, this approach may mean committing significant resources to travelling a lot to communities and taking information, in their own language, that provides details about economic development projects, and facilitating the transportation of community representatives to attend important meetings in district, provincial and the national capital, where this would be useful to the community, as decided by the community.

This approach may also require significant NGO resources to facilitate an environment whereby all members of a community, not just men or traditionally powerful and resourceful members, are engaged in the decision-making process. Marginalised people in a community usually include disabled people, children and women, and therefore particular focus should go towards ensuring these groups have their input heard in all decision making processes.

This approach also requires NGOs to communicate frequently with communities and their representatives about all relevant developments that they hear about the project. Furthermore, the approach also requires NGOs to respect the decisions of communities, even when these decisions go against the wishes of the NGO.

Finally, this approach will likely require NGOs to commit their own, or raise from their partners', resources made available to communities to access legal and other expertise (such as community lawyers or EIA experts) that are

⁶¹ UN Guiding Principles on Business and Human Rights (2011). In particular, attention should be paid to the Principles relating to remedy – from 22-31. Available: <http://www.business-humanrights.org/media/documents/ruggie/ruggie-guiding-principles-21-mar-2011.pdf>

required to facilitate the increase in the free, prior and informed consent of Indigenous communities.

Encourage networking and sharing of experiences amongst communities

Encouraging greater community organization can be enhanced by facilitating the exposure of some communities with more experience with those that have less experience with dealing with economic development projects. NGOs should consider how they can facilitate exchanges between communities to improve their organization and 'strength'.

Cases of ELC affecting IPs need to be well documented by civil society, word of mouth will not add to evidence. Encourage communities to clearly document what happens and for this information to be made available on the public record.

FPIC needs to be better understood by those educating and supporting IP communities

At present there is little knowledge among NGO staff about FPIC. Those that have attended training on FPIC still report not clearly understanding the framework and how it can be applied to IP communities. Building the capacity of civil society staff working directly with Indigenous People, including their understanding of FPIC, will be key to better supporting IP communities. These should be staff based in the provinces not in Phnom Penh.

Empower communities with knowledge about land rights

Knowledge is power! It was clear from the case studies that communities with good knowledge of their rights were more likely to stand up and protect their rights, even when being threatened by police or military. Indigenous People need better education about their rights, ways of advocating, ways of protecting their community and how to access legal support. Education needs to be delivered to all community members, not just local authority. Education should be well developed and ongoing (not just a one off training), supported by experts in the field. If your NGO does not have experience in this field – find someone who does.

4.3. FOR COMPANIES

Abide by the relevant laws that facilitate greater recognition of FPIC

Companies are obliged to abide by the laws of the country that they operate in. Companies undertaking ELCs and other economic development projects in Cambodia should act in good faith to respect Cambodian law, particularly those elements that facilitate the right to FPIC for indigenous communities, as detailed in this report and elsewhere.

Undertake thorough impact assessments, including independent human rights impact assessments

Companies should undertake independent environmental impact assessments that include detailed dedicated sections related to human rights impact assessments, as distinct from social impact assessments. These assessments should involve a process of extensive consultation, after the provision of necessary information to make informed decisions and ask informed questions. Furthermore, these assessments should include mitigation plans that are informed by local solutions to problems that communities have the opportunity to suggest to the company (and Government). These mitigation plans should be followed closely, and where they are not, reasons for this should be communicated to the community as soon as is practicable.

Provide ‘easy access’ to operational-level grievance mechanisms for Indigenous communities

In line with the UN Guiding Principles on Business and Human Rights,⁶² companies operating economic development projects in Cambodia must establish effective multi-stakeholder grievance mechanisms that have access to independent mediation experts, part chosen by communities, if possible.

⁶² UN Guiding Principles on Business and Human Rights (2011). In particular, attention should be paid to the Principles relating to company responsibilities to provide remedy – see Guiding Principles 29 & 31. Available: <http://www.business-humanrights.org/media/documents/ruggie/ruggie-guiding-principles-21-mar-2011.pdf>

Restrict the use of military, police or private security service personnel

Where companies decide they require the use of security personnel of any kind, companies should abide by the 'Voluntary Principles on Security and Human Rights',⁶³ and inform the community of the reasons for this decision.

Where eviction of communities is absolutely unavoidable international law must be followed

In cases where all other possible alternatives have been considered, with communities and authorities, evictions must be undertaken in line with international law – particularly the International Covenant on Economic, Social and Cultural Rights, and the Right to Adequate Housing in particular. This includes abidance by General Comments 4 & 7 of the UN Committee on Economic, Social and Cultural Rights.⁶⁴ Where domestic or international law is broken in the process of evicting a community, the company should provide fair restitution and compensation to the affected communities.

Where land is forcibly or voluntarily procured from Indigenous communities, fair compensation, based on fair market rates, should be provided.

⁶³ Voluntary Principles on Security and Human Rights (2000). Available here: http://www.voluntaryprinciples.org/files/voluntary_principles_english.pdf

⁶⁴ Cambodia is a party to the International Covenant on Economic, Social and Cultural Rights. General Comments 4, 'the Right to Adequate Housing', Article 11.1 (1991) and 7, 'Forced evictions and the Right to Adequate Housing' (1997) are available here: <http://www2.ohchr.org/english/bodies/cescr/comments.htm>

5. REFERENCE LIST

Amazon Watch (2011) *The Right To Decide: The Importance of Respecting Free, Prior and Informed Consent*, Briefing Paper

Andersen, K.E., Thornberry, F. & Sek, S. (2007) *Establishment of Indigenous Communities as Legal Entities, Cambodia – The Development of Bylaws*. Phnom Penh: ILO

Anderson, P. (2011) *'Free, Prior and Informed Consent in REDD+: Principles and Approaches for Policy and Project Development'*

Asian NGO Coalition for Agrarian Reform and Rural Development, *Overcoming a Failure of Law and Political Will: Cambodia Country Paper* (Land Watch Asia)

Cambodian (1996) *Law on Environment Protection and Natural Resource Management*

Cambodia (2009) *Sub-decree No 169 on Procedures of Registration on Land of Indigenous Communities*.

Cambodian (2003) *The Law on Forestry*.

Cambodian (2001) *Land Law*.

Cambodian (2008) *Protected Area Law*.

Cambodian (2009) *Prakas no. 376 PRK.MOE, September 2, 2009, on Guideline for Preparing Report on IEIA or EIA, Annex*.

Cambodian (2005) *Sub-decree on Economic Land Concessions*.

Cambodian (1999) *Sub-decree on Environmental Impact Assessment Process*.

Cambodian (1997) *Law on General Statutes for the Military Personnel of the Royal Cambodian Armed Forces*.

Constitution of Cambodia (1993).

International Financial Corporation (2011). *Performance Standard 7 'Indigenous Peoples'*,

International Court of Justice (1995) *'East Timor (Portugal v. Australia), Judgment'*. The Hague: ICJ

International Labour Organisation (1989). *Convention 169: Indigenous and Tribal Peoples in Independent Countries*. Geneva: ILO

Perea, J. (2009) *Land and Cultural Survival: The Communal Land Rights of Indigenous Peoples in Asia*. The Philippines: Asian Development Bank.

United Nations (1945) *Charter of the United Nations*. San Francisco: UN.

United Nations (1966) *International Covenant on Civil and Political Rights*. New York: UN.

United Nations (1966) *International Covenant on Economic Social and Cultural Rights*. New York: UN.

United Nations (1986) *Declaration on the Right to Development*.

United Nations (1965) *Convention on the Elimination of All Forms of Racial Discrimination*.

United Nations (2007) *Declaration on the Rights of Indigenous Peoples*.

United Nations (2011) *Guiding Principles on Business and Human Rights*.

United Nations (1966) *International Covenant on Economic, Social and Cultural Rights*. New York: UN.

United Nations (2007) *Declaration on the Rights of Indigenous Peoples*. New York: UN.

United Nations Human Rights Committee (1994), *'General Comment 23: The Rights of Minorities (Art. 27)'*. Geneva: UNOHCHR.

6. APPENDICES

APPENDIX 1: METHODOLOGY

Identifying and Selecting Case Studies

Potential cases were identified by the team in consultation with key civil society stakeholders. At a national level, representatives from Licadho, the Indigenous Communities Support Organisation (ICSO), East West Management Institute, the UN Office of the High Commission on Human Rights (UNOHCHR), International Labor Organisation (ILO) and Development and Partnership in Action (DPA) were consulted. Many of these representatives were also members of the Extractive Industry Social Environmental Impact network (EISEI). At a sub-national level, the team met with staff from grassroots organizations working directly with affected communities. These included Highlander Association (HA), Building Community Voices (BCV), Development and Partnerships in Action (DPA), My Village (MVi). Informal conversations with other stakeholders known to the team were also helpful in identifying potential cases.

Cases that did not predominantly involve Indigenous Peoples were excluded. Priority was given to cases that had not previously been heavily documented. Drawing on detailed information gathered from grassroots organizations working with communities, cases that were currently 'active' in target locations and that highlighted the relevance of FPIC – and the need for it to be better understood and implemented – were selected.

In consultation with the NGO Forum research unit, the team identified two cases in Ratanakiri and two cases in Mondulkiri. The selected cases involved ELCs and mining licences in each province.

Conducting the Field Research

The field research was conducted by two members of the team, with the assistance of our translator. In each case, discussions with communities were facilitated by staff from grassroots organizations working with the selected communities. The rationale for this approach was twofold. Given the sensitivity of the issues at play, it was essential that the communities could trust the visiting research team with their stories. Staff from grassroots

organizations were also able to assist with translation from Khmer to local dialects (including Phnong, Tampoun, Jarai, Steung and Cham). While many community members were able to speak Khmer, access to people that spoke their local dialects allowed respondents to speak freely when they needed to add detail or speak of complex issues.

The team met with a range of key actors in each community. We were relatively flexible in our approach, being led by the data and particular circumstances of each case rather than following a pre-determined sample design. Informants generally included Village Chiefs, elders, and those active in leading the community through current experiences (such as activists and those who had represented the village on certain occasions). We met with between 10 and 20 people from each community – both in individual interviews and small groups (a striking finding was the consistency with which stories were told by different people, reducing the need for individual interviews). In two cases, women-only discussions – led by the female researcher – were conducted.

Local authorities at the village level were consulted in all four cases. In two cases, we were able to secure a meeting with a representative from the higher levels of sub-national government. This included a deputy district governor and an official from the provincial office of MRDUPC.

The team also met with a number of project staff from organizations supporting each community to gather information about the events and the support offered by various actors. Partnership with grassroots organizations were instrumental in contacting and coordinating visits to communities, particularly given the condition of roads in Rattanakiri and Mondulakiri provinces during the wet season.

Stakeholder Interviews

Stakeholder interviews with a selection of key players were conducted with civil society. The sample prioritized representatives working to support IP communities. National level stakeholders from Licardho, ICSO, EWMI, UNOHCHR, ILO and EISEI were conducted. Sub-national stakeholders included HA, BCV, DPA, and MVi.

Interviews with representatives from key government ministries were also conducted. These included staff from the Department of Local Administration in charge of the registration of IPs at MOI, the Director of Ethnic Minority

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Development at MoRD, the Deputy Director of the EIA Department at MoE and staff from the department of ELCs at MAFF. A staff member from the Mondulhiri Provincial Department of LMUPC was also interviewed.

Desk Review

Additional to the fieldwork, the team conducted a review of the international literature instrumental in the development of the principles of FPIC. Importantly, the paper analyses the context in Cambodia for implementing FPIC, including an analysis of the relevant legal and RGOC policy framework. (This review forms the basis for analysis of the case studies in the 'discussion' section of the paper).

The experience and expertise of the technical advisor, who has worked with ELC and mining licence cases both in Cambodia and in the region was essential to ensuring the relevance of the paper. Parts of the draft report were also reviewed by key stakeholders in civil society during the writing process.