

## Fact Sheet: Free, Prior and Informed Consent



**Snapshot:** The concept of free, prior and informed consent (“FPIC”) is an internationally recognized standard applicable to consultations with indigenous peoples. It is widely viewed as the best practice for seeking the views of indigenous peoples in relation to activities that affect them and their land and for ensuring that their rights are respected. The Royal Government of Cambodia (“RGC”) has demonstrated its commitment to the protection of indigenous people’s rights on a number of occasions, including through the creation of specific policies aiming to safeguard these rights. Recognizing the importance and applicability of the concept of FPIC in Cambodia, and requiring businesses to engage in meaningful consultations with indigenous communities which may be adversely affected by any type of business or development project would be the next logical step for the RGC. Similarly, businesses operating in Cambodia should observe the concept of FPIC as a best practice, to help promote the sustainability of their operations and fulfill their responsibility to respect human rights.

### Introduction

This Fact Sheet provides an overview of the concept of FPIC; an analysis of key legal issues associated with it; and considers its application to date in Cambodia. This factsheet has been produced by the Cambodian Center for Human Rights (“CCHR”), a non-aligned, independent, non-governmental organization (“NGO”) that works to promote and protect democracy and respect for human rights – primarily civil and political rights – throughout the Kingdom of Cambodia (“Cambodia”).

### Background

Cambodia is an emerging market that has seen impressive growth over recent decades, thanks to an increase in foreign investment and the country’s rich natural resources. Large swathes of land have been granted to international, regional and domestic investors for agro-industry, forestry and large-scale infrastructure projects. However, this economic development has also led to violations of land rights and environmental degradation, notably as a result of the Economic Land Concessions (“ELCs”) regime,<sup>1</sup> including impacts on land occupied by indigenous peoples.<sup>2</sup>

### What is Free, Prior and Informed Consent?

FPIC is a standard protected under the ILO Convention No. 169<sup>3</sup> and the UN Declaration on the Rights of Indigenous Peoples (“UNDRIP”) and applies in cases where a possible relocation of indigenous people is at stake.<sup>4</sup> The concept can be explained as follows:

- **Free:** there is no coercion, intimidation or manipulation.
- **Prior:** consent must be sought sufficiently in advance of any authorization or commencement of activities. There must be enough time for the indigenous consultation process to take place.

<sup>1</sup> See CCHR, ‘Cambodia: Land in Conflict’ (December 2013), <http://bit.ly/1KtPNVy>.

<sup>2</sup> See CCHR Briefing Note, ‘Access to Collective Land Titles for Indigenous Peoples in Cambodia’ (February 2016), <http://bit.ly/1o0z3wi>.

<sup>3</sup> Article 16. For the full text of the Convention, see <http://bit.ly/1HP8BLq>.

<sup>4</sup> Article 10. For the full text of the Declaration, see <http://bit.ly/1bKlrMs>.

- **Informed:** indigenous people should receive satisfactory information in relation to the project, including a preliminary assessment of its economic, social, cultural and environmental impact. Crucially, this information should be accessible to the people concerned, and accurate .
- **Consent:** process of which consultation and participation represent the central pillars.<sup>5</sup>

In practice, this requires developers to recognize and respect indigenous culture, as well as the unique relationship between indigenous peoples and their land. The spiritual value they may attribute to it and which may render the impacts of development affecting their land more severe must also be considered. For example, respecting FPIC may require the development of an inclusive and transparent consultation process that respects the governance and leadership structures of the indigenous community; the engagement in consultation before development begins, so that the views of the community can be taken into account; the provision of information regarding the project, made available to the communities in their own language. The consultation should be viewed as an exchange of views, allowing a mutually satisfactory agreement to be reached.

### The Legal status of the Concept of FPIC in Cambodia

A country is bound by the international treaties it ratifies, and by customary international law, defined as a general and consistent practice of States, followed from a sense of legal obligation.<sup>6</sup> While Cambodia has not yet ratified ILO Convention No. 169 which makes FPIC obligatory, it voted in favor of the UNDRIP.<sup>7</sup> As an instrument which enunciates six times the concept of FPIC (in articles 10, 11, 19, 28, 29 and 32) and which was adopted by more than 148 states out of 159, the UNDRIP evidences a strong political commitment to the concept of FPIC by the international community.<sup>8</sup> State practice and the emerging consensus around FPIC is further illustrated by the growing number of public statements, reports, guidelines, and policies of multiple UN and other international institutions acknowledging FPIC as a necessary tool to protect and give effect to various underlying rights.<sup>9</sup> As an example, the UN Food and Agriculture Organization's Voluntary Guidelines on the Responsible Governance of Tenure<sup>10</sup> - a key international standard - recommend that, where a project may affect resources for which indigenous communities hold rights, it "should be based on an effective and meaningful consultation with indigenous peoples, through their own representative institutions in order to obtain their free, prior and informed consent."<sup>11</sup>

Similarly, Human rights treaty bodies have made frequent references to the need for states to consult with indigenous peoples, although they have been cautious about referring to FPIC as a binding standard. The UN Committee on the Elimination of Racial Discrimination ("CERD") has stated

<sup>5</sup> Report of the International Workshop on Methodologies regarding Free, Prior and Informed Consent and Indigenous Peoples (New York, 17-19 January 2005), UN Doc. E/C.19/2005/3, para. 46, <http://bit.ly/2hi24oR>.

<sup>6</sup> *North Sea Continental Shelf Cases (Federal Republic of Germany v. Denmark; Federal Republic of Germany v. Netherlands)*, [1969] ICJ [74] - [77], <http://bit.ly/2w0ocaK>.

<sup>7</sup> UN Bibliographic information system, voting record of the UNRRIP, <http://bit.ly/2v1W4UM>.

<sup>8</sup> University of Technology Sydney, 'Summary of the UN Declaration on the Rights of Indigenous Peoples' (2007), <http://bit.ly/2ueBdLK>. For other references about FPIC, see the 'Voluntary Guidelines on the Responsible Governance of Tenure of Land' ('VGGT') (2012), <http://bit.ly/1ZY3gX>; 'OECD-FAO Guidance for Responsible Agricultural Supply Chains' (2016), <http://bit.ly/2vnL5aW>.

<sup>9</sup> UN-REDD Programme, 'Guidelines on Free, Prior and Informed Consent' (2013) 14, <http://bit.ly/2tYaKH0>.

<sup>10</sup> UN Food and Agriculture Organization, Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security (2012), <http://bit.ly/1ZY3gX>.

<sup>11</sup> *Ibid.*, paragraph 9.9.

that States parties need to “endeavor to obtain” consent,<sup>12</sup> “seek” consent<sup>13</sup> or “consult”<sup>14</sup> indigenous people. In its General Comment N°21, the UN Committee on Economic, Social and Cultural Rights (“CESCR”) has held that states must observe FPIC “when the preservation of their [indigenous peoples] cultural resources [...] are at risk.”<sup>15</sup>

In light of the above, Cambodia should respect the international commitment to the concept of FPIC it made while voting in favour of the UNDRIP, and act accordingly. Further, complying with the concept of FPIC brings a host of practical benefits: not only will it ensure respect for the human rights of indigenous peoples, but, by ensuring acceptance of any large-scale project by the local community, it would will promote its sustainability, as well as its commercial and financial viability.<sup>16</sup>

### Application of the Concept of FPIC in Cambodia

In 2009, the RGC adopted a National Policy on the Development of Indigenous People, which aims to promote the livelihoods of indigenous peoples and to improve their quality of life. The RGC also created a National Land Registration Policy, and sub-decree No. 83 was adopted, specifically related to procedures for land registration by indigenous people. So far, 18 indigenous communities have received Collective Land Titles, illustrating the official recognition of their rights over their land by the RGC. Similarly, 124 communities were officially recognised by the Ministry of Rural Development, and 111 communities were qualified as formal legal entities by the Ministry of interior.<sup>17</sup> Such recognition is a positive step; however, too often, the lack of enforcement leaves indigenous people vulnerable to negative impacts by business activities. While in some situations, Cambodian domestic law requires an impact assessment and consultations before development projects can proceed, all too often communities are not even informed before development projects begin to affect their land and livelihood, Most of the time, no meaningful attempt is made to seek their views on how they may be impacted by the projects. No consultations are held in order to discuss the possibility of mitigating any possible negative impact on their rights. Recognizing and effectively implementing the concept of FPIC would help ensure that the rights of indigenous people in Cambodia are respected in practice. The following two cases illustrates the difficulties faced by indigenous communities in Cambodia and the far reaching consequences of the lack of respect for the principle of FPIC.

#### **Case Study 1: Bunong people affected by rubber plantations in Bou Sra, Monduliri**

Since 2008, indigenous people have suffered loss of land due to two ELCs granted in Bou Sra commune, Monduliri Province, for rubber plantation. The two ELCs are now controlled by SOCFIN-KCD, a subsidiary of SOCFIN group, an international agro-industrial enterprise based in Luxembourg. The local community was not properly consulted before the ELCs were granted and land clearing started before negotiations on compensation were finalized. The concessions affected more than

<sup>12</sup> *Guatemala*, CERD/C/GTM/CO/11 [2006] [19].

<sup>13</sup> *Guyana*, CERD/C/GUY/CO/14 [2006] [14].

<sup>14</sup> *Colombia*, CERD/C/COL/CO/14 [2009] [20].

<sup>15</sup> CESCR, General comment No. 21 [2009] [55 (e)].

<sup>16</sup> UN-REDD Programme, ‘Guidelines on Free, Prior and Informed Consent’ (2013), p. 16.

<sup>17</sup> Prime Minister Hun Sen, ‘Open letter on the occasion of the 23<sup>rd</sup> international day for world’s indigenous people’ (31 July 2017), <http://bit.ly/2vyxNsj>.

850 families, mostly from the indigenous Bunong Community<sup>18</sup> that has lived in Bou Sra for generations. Bunong people use their land to cultivate farmland, worship forest spirits and to bury the deceased.<sup>19</sup> Encroaching on their land endangers the survival of their culture, community, and unique way of life.<sup>20</sup> Bunong people filed complaints with the local and national authorities, and to the UN High Commissioner for Human Rights. Despite this, community members have not yet been fully compensated.

### **Case Study 2: Indigenous people in Kbal Romeas, Stung Treng displaced due to Sesan Dam**

In 2012, the RGC approved the construction of a hydroelectric dam on a tributary of the Mekong River. When complete, it will be the largest hydropower project in Cambodia and will have severe environmental impacts, including on fisheries.<sup>21</sup> Villagers living in the area were not informed prior to this decision and received no information on their rights as affected indigenous people<sup>22</sup>. Today, the dam is almost finished, but the situation of up to 180 families, who still live in two villages that will soon be flooded, remains unresolved. Many of them belong to the indigenous Bunong Community or are from the Lao minority. Fearing to lose their land and traditions, they firmly refuse the compensation package offered to them. Likewise, they refuse to move to the resettlement villages, which are far away from the rivers and located in areas with poor agricultural land quality. They are also protesting the imminent removal of a bridge that gives them easy access to a close-by town with medical services, schools and markets. No replacement route has been provided.<sup>23</sup> Despite their opposition, the gates of the dam have been opened late July for operation testing, leading to flooding of villages still inhabited by the local community.

## **Conclusion and Recommendations**

The RGC should ensure that FPIC is applied and respected as a standard for engaging in consultation with indigenous peoples in Cambodia, both where development projects are initiated by the government, and by businesses operating in Cambodia.

### **Recommendations to the RGC:**

- ***Ratify ILO Convention No. 169, the Indigenous and Tribal People's Convention;***
- ***Ensure that all development projects - in particular ELCs, Special Economic Zones, and infrastructure projects - are preceded by meaningful consultation with any affected communities, including indigenous peoples;***
- ***Take effective enforcement action against businesses or sub-national authorities that fail to fulfill their legal obligations to conduct impact assessments and engage in consultation, including, where relevant, revoking grants of ELCs or Special Economic Zones;***

<sup>18</sup> FIDH, 'Cambodia land cleared for rubber rights bulldozed' (2011) 5, <http://bit.ly/1rTdm2h>.

<sup>19</sup> CCHR, 'Bu Sra, Monduliri', <http://bit.ly/2mnER57>.

<sup>20</sup> To read more about the consequences of the ELCs in Bou Sra, see Daily Mail, 'Cambodia's zeal for rubber drives ethnic group from land' (2016), <http://dailym.ai/2sAFNGo>.

<sup>21</sup> NGO Forum on Cambodia, Survey, 'The compensation policies and market property price – Lower Sesan 2 dam development project' (2015), <http://bit.ly/2wfzMhm>.

<sup>22</sup> 'Strengthening accountability and inclusiveness in economy development projects – The Case of the Lower Sesan II dam', <http://bit.ly/2vnmrt>.

<sup>23</sup> 'Sesan families face forced evictions and a flooded future' (2017) International Rivers, <http://bit.ly/2hiy8ZM>.

- ***Explicitly enshrine the concept of FPIC in domestic law, and amend relevant legislation to require that FPIC is respected where development projects may impact indigenous peoples;***
- ***Issue guidance to provide clarity for businesses and sub-national authorities on how they can fulfill FPIC in practice.***

**Recommendations to businesses operating in Cambodia:**

- ***Before initiating any project that may impact indigenous peoples, conduct meaningful consultation with a view to obtaining their FPIC;***
- ***Include an explicit commitment to FPIC in company policy, and publish regular reports on its implementation;***
- ***Where FPIC has not been fully respected in previous dealings with indigenous peoples affected by business operations, ensure any negative human rights impacts are effectively mitigated and adequate remedy provided.***

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