

# The Application of FPIC Standards in Cambodia

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The objective of this FPIC brief is to provide summaries of how FPIC and robust consultation procedures have been applied in practice in Cambodia across various sectors and activities. It intends to show that FPIC can be applied under various circumstances and that its application will lead to a general improvement of the communication and understanding between Government institutions, private investors and the concerned communities.

## What is FPIC?

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. It requires businesses and administrations to engage in meaningful consultations with indigenous communities which may be adversely affected by any type of business or development project or resource use protection and involves both a process and an outcome. FPIC is a standard protected under the ILO Convention No. 169 and the UN Declaration on the Rights of Indigenous Peoples (“UNDRIP”) to which Cambodia is one of the signatories.

‘Free prior and informed consent’ (FPIC), is the principle that a community has the right to give or withhold its consent to proposed projects that may affect the lands they customarily own, occupy or otherwise use. FPIC is now a key principle in international law and jurisprudence related to indigenous peoples and is increasingly accepted as a safeguard and standard by certification bodies, international financing institutes and banks as well as industry associations (e.g. mining sector companies).

Although the concept of FPIC originally evolved in relation to indigenous peoples and their respective territories, in principle it is a social safeguard that respects the rights of any community whose livelihoods will be affected by an external initiative or influenced by an interest from outside. This applies to any developments changing their tenure rights, land uses or livelihoods of local people and not only to the possible mitigation measures proposed by any investment project. In practice, any project or activity affecting indigenous and non-indigenous communities should not restrict the application of the FPIC standards to the indigenous communities only.

FPIC is necessary to ensure a level playing field between communities and the government or companies and, where it results in negotiated agreements, provides companies with greater security and less risky investments. FPIC also implies careful and participatory impact assessments, project design and benefit-sharing agreements.

The concept can be explained as follows:

FPIC includes the right of indigenous peoples to agree or refuse a proposed development on their land based on the following principles:



PA rangers, community representatives and WCS staff discussing PA zoning on the ground in Kulen Promtep Wildlife Sanctuary. Photo credit: WCS

**Free:** there is no coercion, intimidation or manipulation.

A fundamental principle of contract law is that each party must give free and genuine consent to be bound, without undue influence, being coerced, intimidated or manipulated.

**Prior:** consent must be sought sufficiently in advance of any authorization or commencement of activities. There must be enough time for a genuine and robust consultation process to take place according to their own decision-making procedures.

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.

**Informed:** indigenous peoples should receive satisfactory and comprehensive 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.

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.

**Consent:** process of which consultation and participation represent the central elements. It requires the state, companies or local authorities to negotiate in good faith with legitimate representatives of indigenous peoples, to obtain their uncoerced prior informed consent regarding any use of their lands or resources, and to provide redress for any adverse impact on indigenous peoples as a consequence of such development.

## FPIC in Cambodia Laws and Regulations

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”. 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”.

While Cambodia has not yet ratified ILO Convention No. 169, the Royal Government of Cambodia (RGC) has adopted UNDRIP and needs to provide the relevant attention to FPIC as part of corporate social responsibility and human rights due diligence.

In any REDD+<sup>1</sup> related project activities, FPIC is prescribed as one of the key safeguards and has become a requirement for any certification by international standards (e.g. Verified

<sup>1</sup> The Cancun Safeguards under the UNFCCC: <https://redd.unfccc.int/fact-sheets/safeguards.html> (Respect for the knowledge and rights of indigenous peoples and members of local communities, by taking into account relevant international obligations, national circumstances and laws, and noting that the United Nations General Assembly has adopted the United Nations Declaration on the Rights of Indigenous Peoples)

Carbon Standard and Climate, Community and Biodiversity Standard). This in turn is a precondition for accessing the global carbon market. This right of FPIC applies to REDD+ discussions regarding potential changes in resource uses that could impact the livelihoods of indigenous and other forest dependent communities.

The UN Food and Agriculture Organization's Voluntary Guidelines on the Responsible Governance of Tenure (VGGT) - 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."

The Convention on Biological Diversity (2017), is another instrument that promotes the application of FPIC and has been signed and ratified by Cambodia.

The Ministry of Environment (MoE) is in the process of finalising the new Environment and Natural Resources Code of Cambodia. The Code will include regulations on Environmental Impact Assessments (EIA), zoning of Protected Areas (PA) and collaborative management arrangements to name just three parts which should make reference to FPIC and consultative processes.

So far, there are no national or sub-national level FPIC guidelines for Cambodia, but important capacity building activities have been undertaken to build understanding of the national and regional civil society regarding FPIC rights, in particular by Oxfam Australia. The Guide to FPIC produced by Oxfam in 2010 has already been translated into Khmer language. In particular in the context of REDD+ consultations and monitoring, Government institutions and NGOs such as WCS or CLEC have acquired important capacities and FPIC knowledge.

## Four Case Studies of FPIC Application

### 1. Keo Seima Wildlife Sanctuary REDD+ project by WCS

The Seima Protection Forest (now Keo Seima Wildlife Sanctuary) REDD+ pilot project was initiated in January 2010 by the Wildlife Conservation Society (WCS) and the Forest Administration (FA) as project partners. This project aims to support protection of old-growth forests within a core area of 166,983 ha in the Seima Protection Forest in the north-eastern Province of Monduliri. Seima is one of the first official REDD+ demonstration projects in Cambodia and targets the voluntary carbon market. The government is the project proponent and carbon owner.

The need for FPIC was driven by international principles (e.g. the UN Declaration on the Rights of Indigenous Peoples - UNDRIP) and REDD-related guidelines. In order to elaborate the project document for REDD+ and to comply with international standards, WCS decided to undertake FPIC in all participating villages, a process that involved multiple consultations and negotiations between 2011 and 2013.

A full FPIC approach was conducted in all 20 villages using the designated REDD+ area on a regular basis, irrespective of whether these were officially registered indigenous peoples (IP) villages (12 Bunong communities, 1 Xtieng community), mixed villages or non-IP villages. The area is marked by a rapid influx of Khmer lowland migrants looking for land and labour opportunities. FPIC consisted of three working steps in each village, over separate visits:

Step 1 Local awareness raising, discussion of potential project impacts, consultations on project design

Day 1 - Awareness raising, impacts assessment with village leaders/committee

Day 2 - Plenary discussions with all community members

Step 2 Discussions on consent and presentation of the proposed community agreement, including independent legal advice by a local NGO, CLEC

Step 3 Finalisation and signing of the agreement between the FA and the concerned villages

Land tenure rights were clarified for several of the IP communities in the form of communal land titles issued. During 2012, a number of villagers also received Directive 01 private titles, partly located within the protected forest area.

The FPIC approach in Keo Seima Wildlife Sanctuary has resulted in the signing of village-level consent forms and ultimately the gaining of "approval to proceed with REDD" at a household-level through thumb-printed consent forms in late 2012. The village-level agreements were signed by village, commune and community committee chiefs at a formal FPIC signing ceremony with the FA in January 2013. Seima has gained particular recognition for its attention to FPIC in all concerned villages. It provides the first instance of FPIC implementation in Cambodia that adheres to international guidelines. Seima was in fact the first community REDD+ project in Asia to achieve dual validation and verification from the Verified Carbon Standard (VCS) and the Climate, Community, Biodiversity (CCB) Standard (Gold validation) in 2015. In 2016, the Seima Protection Forest was converted to a Keo Seima Wildlife Sanctuary and was transferred from FA to the Ministry of Environment (MoE).

In 2012, when FPIC was undertaken in the 20 villages, no benefit sharing system had been designed yet. Later, the RGC has agreed that participating communities will get at least 50% of net income, once project expenses have been covered. Finally, benefit-sharing was decided for 2017-18 covering community development needs, fund distribution and management for REDD+ benefit sharing. 20 villages will receive an amount of approximately US\$ 11,700 per village as a first instalment in 2019 (one-off payment).

The project also introduced a grievance mechanism where complaints can be directly submitted to the project implementation team and hotline numbers/complaint boxes for assessment and resolution. In addition, existing Commune Councils who have a legal mandate in the project zone have been identified to function as a third party to receive complaints from their constituents and either direct them to the appropriate authority or seek to resolve these directly, often by mediating between affected parties.

### Lessons from the Keo Seima Wildlife Sanctuary REDD+ project

- Implementation of FPIC provided a leading example of transparency and fairness that could also apply to other projects in the forestry, agricultural and mining sectors, by both private sector and state actors. Many of the processes used in Seima can be replicated elsewhere.
- It is important to note that the communities signed the agreements because of their expectation for positive livelihood impacts from REDD+ and because they trusted WCS as a long-time partner and also the decisions of their community leaders; nevertheless it can be considered a success to achieve full

- consent to the project by all villages.
- It is important to ensure customary rights of IPs and local communities to their forests and existing agriculture lands.
  - Full implementation of FPIC in remote villages can be a lengthy and costly process. The process took nearly 2 years in the 20 villages and involved important donor funding, but this could be partly offset by future benefits of REDD+.
  - Villagers face some difficulties in their attempt to make collective choices in an equitable way. Local communities in Cambodia usually do not have elected representations and the existing village administration is not always conducive to joint decision making, which is also a new concept for many communities.
  - Lack of strong legally-recognised local representative organisations, which could sign legal agreements on behalf of villagers. As a result, two types of agreements were signed, community agreements signed by the official village head and commune chiefs and household agreements signed by individual households.
  - The main threats to the REDD+ project come from agro-industrial concessions, mining activities, land clearing by migrants, infrastructure development and uncontrolled logging, mostly issues beyond the control of the communities. Communities in Seima have complained that their information on illegal logging activities to relevant authorities has not been addressed "satisfactorily".
  - FPIC needs to continue throughout the project cycle with a strong role of local communities in monitoring and social impact assessments.
  - Cambodia now has a total of 6 REDD/REDD+<sup>2</sup> projects under implementation or development, of which two are now close to monetising the resulting carbon credits. In line with existing regulations and international standards, FPIC must be incorporated into all these projects.

## 2. The zonation of Kulen Promtep Wildlife Sanctuary (KPWS) by WCS

The zoning of the Kulen Promtep Wildlife Sanctuary (KPWS) is another project undertaken by WCS in cooperation with MoE and local authorities. During 2017/18, the zoning activities in this protected area were partly funded by MRLG. The zoning of KPWS is based on the stipulation of the Protected Area Law (2008), Art. 11, which foresees the distinction of 4 zones in every protected area: core zone, conservation zone, sustainable use zone and community zone. The work conducted in KPWS has helped to provide inputs into the recently approved "Zoning Guidelines for Protected Areas in Cambodia", MoE, 2018.

Zoning activities in KPWS started with awareness raising on the PA law focused on zones and agreement with communities interested in zoning, this was followed by an identification of present agricultural land use and tenure and an identification of the community zones. Land use and tenure was identified as a key issue the communities wanted to solve. KPWS contains 28 key villages and 8 sub-villages. From October 2016 onwards the identification of the three other zones followed. In order to ensure full ownership of the process at the local level, a Provincial Working Group was established early on to coordinate and eventually approve the zoning activities. WCS provided a FPIC Training to the Provincial Working Group members on all the principles of FPIC. Nevertheless, the approach chosen in the zoning and mapping was one of intensive consultation, but not an application of the full FPIC procedures.

The process started with consultation events at the commune level in all 11 communes concerned. This was followed by a total of 29 village consultation events which were based on draft maps showing the four proposed zones for the relevant parts of the PA. The village meetings were attended by 20

<sup>2</sup>Yeang Donal, et al. (2018) Editorial - REDD+ in Cambodia how local communities can benefit from forest conservation. Cambodian Journal of Natural History 2018 (2) 53 - 55.





to 50 people with a strong representation of women. Discussions focussed on customary land rights and resource use practices. For all villages two different maps were prepared of the two different stages or consultations: a) a map of agricultural land use (signed by district governor, commune and village chiefs until 2015) and b) maps of village consultations on zoning (signed by commune and village chiefs in 2018). After the meeting with the necessary explanations, the maps were placed on public display for a period of 2 weeks each. Villagers were further informed through the existing Community Protected Area (CPA) committees and teachers as well as commune chief and village chief. The overall zoning poster was used for further information. The zoning poster also contained information on the grievance mechanisms.

Finally, villagers' consent was expressed by a signature of the village chief on the draft zoning maps. Thereafter, the maps were also signed by commune chiefs, district governors and eventually, after the final approval through the members of the Provincial Working Group, also by the Deputy Provincial Governor.

Throughout the process some changes to the boundaries of the four zones were introduced by the villagers, and a few modifications were considered and approved during the final review of the zones by the Provincial Working Group (provincial workshop), in particular with regard to additional areas to be reserved for Social Land Concessions to Military personnel and retired soldiers. The zoning plan is now in its final steps of completion.

### **Lessons from the zonation of Kulen Promtep Wildlife Sanctuary**

- FPIC principles were not fully applied in the case of the zoning of KPWS. Village consultation events were mainly focused on finalizing community zone boundaries, but the essential zoning of the other three zones was pre-defined and finally villagers were requested to approve the proposed four zones. Very few comments or suggestions were received from the participating villagers. Integration of villagers' views on the zoning of Protected Areas should be taken a step further in future.
- The proposed zones were based on mapping work conducted with guidance by technical staff; after the commune level had reviewed the proposed zones, village meetings were held in the key villages.
- The final boundaries of the zones do not reflect a real decision-making process at village level. It remains questionable to what degree the final signature by the village chief represents a free and informed consent to the proposed zoning.
- Important challenges were faced with new migrants, who are not integrated into the existing villages, but create their own new settlements. Migrants are therefore mostly not aware of the PA zoning. A population increase of 30% has been observed since 2012 due to migrants in the area.

### 3. The “White Building”: Phnom Penh – Urban Real Estate Re-Development

The White Building, also known as Blog Bodinh, is a 22,492m<sup>2</sup> concrete apartment building which contained 462 apartments with 2,483 residents belonging to 532 families. The community included Khmer, Kampuchea Krom, Cham and Vietnamese residents. Many of them were working as employees of the Government. The White Building was located in Tonle Bassac, Chamkar Mon, Phnom Penh.

Construction of the so-called “White Building” began in 1961 as a low-cost housing option for low- to middle-class families, and it was completely abandoned when the Khmer Rouge cleared Phnom Penh of its residents in 1975. It was re-settled from 1979 and into the 1980s. In the 1990s, urban migration led to a rapid increase in demand for housing and easy access to public services. The White Building was a popular accommodation due to its proximity to schools, hospitals and markets. In the 2000s the average size of households grew and many apartment units were remodelled and expanded.

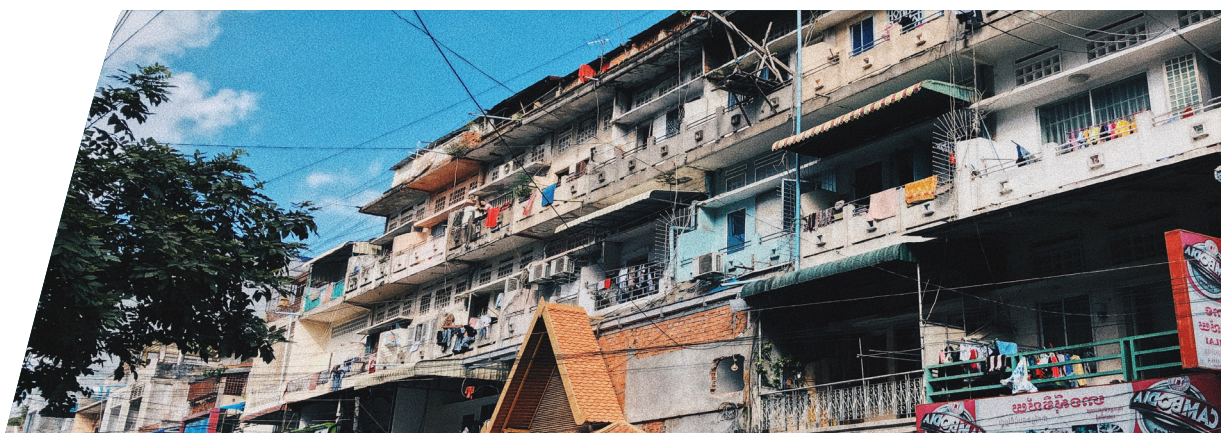
Systematic Land Registration was never applied to the White Building, so the legal tenure classification of the land and building remained unclear. Furthermore, none of the families had formal land titles granted through sporadic (“on demand”) land titling. Yet, residents possessed ID cards, resident books, family books, and birth certificates to prove their addresses and the length of their tenancy in the building. They also possessed transaction receipts issued by the Sangkat when apartments were transferred from one owner to another.

Between 2014 and 2016, local administration and central Government institutions became increasingly concerned over the structural integrity of the building. In July 2015, the Khan Chamkar Mon Office of Land Management, Urban Planning and Construction stated that the building was too old, overcrowded and that there had been illegal upgrades to the building and poor maintenance. The authorities organized an open forum to address this issue where the residents were given reassurance that there would be no forced evictions. Yet, in 2016, the building was finally classified as structurally unsound and therefore unfit for residents to live in. Government planned for its demolition in July 2017.

In late 2016, the Ministry of Land Management, Urban Planning and Construction (MLMUPC) announced that a Japanese company, Arakawa, had been awarded the contract to build a 21-story complex on the White Building site with a total budget of 70-80 million US\$. Of the proposed 21 floors a total of 8 floors would be reserved for the 532 families that lived in the White Building before. Temporary accommodation for the residents during the time of construction was foreseen.

Several consultation meetings followed between the White Building residents, MLMUPC and the Arakawa Company. Some of the initial consultations happened on site. No NGOs were directly involved in the consultations or negotiations. Nevertheless, the community had relationships with some NGOs who provided support for upgrading and maintenance as well as the defence of their rights. The Human Rights Task Force (HRTF) supported the communities to discuss their rights, devise strategies

*White building in Phnom Penh. Photo credit: Nicole Shin*



The residents were offered either a one-off compensation payment package or an apartment in the new complex. 90% of the residents opted for financial compensation. This decision was undoubtedly influenced by recent bad experiences of other people in a similar situation, especially in the Borey Keila case. The final negotiations about the details of the compensation arrangements were conducted in the MLMUPC office and they were chaired directly by the Minister, Chea Sophara. Little is known about the representation of the residents during these meetings, their requests and demands or the atmosphere in which these meetings were conducted. Nor were the residents ever entitled to direct meetings with the investor company.

Yet, in the end, by middle of 2017 over 95% of the concerned families agreed to the compensation package and left the building. They agreed to sell their dilapidated apartments at a price of US\$ 1,400 per square meter, despite many wanting upwards of US\$ 2,000 or compensation according to market rates.

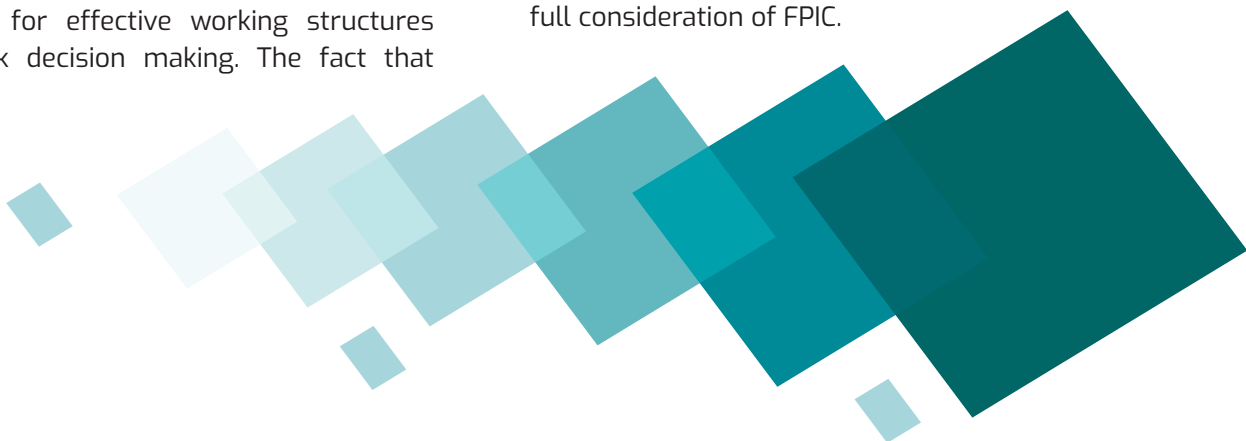
Interviews with former residents have since shown that the majority of them appreciate the consultation efforts in finding the right solution for all White Building residents, with a final offer they could accept voluntarily and without feeling forced. The compensation process in the White Building re-development was smoother than in other projects.

Recently, MLMUPC has released a book detailing the process of development at the site of Phnom Penh's White Building leading to the iconic structure's demolition in 2017 offering a model for future re-development projects according to the Minister of MLMUPC.

Although the case of the White Building does not reflect a full FPIC approach, it does nevertheless offer a few relevant lessons on consultation with project affected people.

### Lessons from "The White Building"

- In the scope of urban re-development in Cambodia which has seen several examples of forced evictions in the past and where long-lasting conflicts often prevail, the White Building stands out as a case where a peaceful and at least satisfactory solution for the former residents has been found. Compensation paid did not meet market price levels, but was generally considered as acceptable.
- Direct negotiations between the residents and the Minister of MLMUPC and his staff without the presence of any other observers are not a guarantee for equity and equality. On the other hand, these negotiations provided a forum for effective working structures and quick decision making. The fact that local residents were informed, could select between various options and were taken serious in their concerns provided important elements of a robust consultation process.
- The Japanese Arakawa Company showed high levels of respect towards the former residents and strong Corporate Social Responsibility standards in the consultations. In Japan, Arakawa is subject to close monitoring by Japanese Human Rights NGOs.
- The recent work by MLMUPC in documenting the case gives hope that this could become a model case of increased participation and consultation with residents in an urban re-development zone and a first step towards full consideration of FPIC.





#### 4. Investment in Agriculture and Forestry by Grandis Timber

The Grandis Timber Company manages an Economic Land Concession (ELC) in Kampong Speu Province for a teak plantation. The total ELC area comprises of 7,859 ha, but includes 2,259 ha of conservation area which cannot be used for plantations and where the Forest Administration (FA) with technical support by the NGOs Conservation International (CI) and Wildlife Alliance (WA) is in charge of protecting the area.

While the vast majority of ELCs in Cambodia has never been subject to an EIA, in the case of Grandis Timber there were even two EIA processes conducted. The first EIA identified the need to provide particular protection to parts of the area and this became the present conservation zone. The second and full EIA in 2009/10 followed all the steps prescribed by the Cambodian laws, although the 30 days for public display were not considered as sufficient in hindsight. Public participation in the EIA process was limited.

At the start of the project in 2009, there were no resident families in the degraded forest zone designated for the ELC. Local people only started moving in when the road construction began. Today, there are 182 families (all Khmer) across 3 villages (1 in Oral District and 2 in Phnom Srouch District) living adjacent to the ELC area. Many of these families claimed customary land within the ELC area when project implementation started.

Grandis Timber stands out as an investor with relatively high Corporate Social Responsibility standards, has aimed from the beginning to achieve full Forest Stewardship Council (FSC) certification for its plantations and has always tried to be as transparent as possible about the investment. Since the early stages of project implementation, Grandis Timber has sought advice and support from other competent organisations on issues such as land tenure (GIZ) and environmental protection (CI and WA) and maintained strong communications with the Ministry of Agriculture, Forestry and Fishery (MAFF) on all aspects of ELC management.

As in the vast majority of ELCs also in the case of Grandis Timber there were numerous boundary issues between private land, communally managed areas and state land designated for the ELC. One important early recommendation by experts was to make sure to excise all areas under local people's tenure from the ELC. In 2012, the land of all families residing in the neighbourhood was surveyed and they received Directive 01 private land titles. This was actively supported and promoted by the company.

Since 2017, the ELC has been re-surveyed and a state land title has been issued for the area in the name of MAFF. This title was handed over to Grandis Timber in line with the ELC agreement. Despite the clarification of tenure rights through titling, numerous cases of encroachment have been observed in past years. This forced the company to sign separate agreements in all these cases, be it for placing of permanent boundary poles (more than 200 agreements) or other agreements pertaining e.g. to new farms, charcoal kilns in the forest or logging activities. In total more than 400 individual agreements have been signed so far and the company maintains a dedicated staff of 3 people to manage the interaction with the local population. In order to facilitate this communication and cooperation with the local administration and the villagers,



a "Committee for Communication on the Grandis Timber ELC" (also referred to as the inter-communal working group) was created by a joint Prakas of the two Commune Councils concerned. The working group comprises of the two Vice Commune Chiefs as permanent members, representatives of the villagers and the company (eleven people in total). The working group holds quarterly meetings and additional meetings in case of urgent matters to be discussed. In the view of the company, the creation of the working group was very helpful to get feedback from communities, to communicate and discuss matters of relevance to the company and to monitor project implementation in accordance with plans and EIA data. Yet, it has to be mentioned that certain frictions remain, but members in the working group are starting to build a working relationship.

The company is faced with a high number of requests by people, despite the fact that important social infrastructure developments have already been funded and implemented (e.g. one clinic with doctor services, a primary school and day care centre, as well as a training centre which is mostly used as a venue for meetings). According to company representatives some complaints and negative attitudes towards the project still persist in the local population. New families have continued moving to the area.

### Lessons from Grandis Timber

- The case of Grandis Timber is not an example of FPIC, but provides important examples for a continued and intensive communication and consultation with the local affected population. And for regular re-assessment of any agreement reached with the communities.
- A stronger participation and consultation of the population during the EIA exercise would have clearly had further advantages and could have helped to improve the understanding and approval of the project.
- The clarification of the land tenure rights at an early stage was essential for the success of the project.
- A working group or committee with members from the local authorities, representatives of the concerned villagers and the company to consult on all matters of project implementation, negotiate agreements and to find joint solutions is crucial and should normally start from the EIA consultation stages.
- Despite the efforts undertaken to establish a regular platform for consultations, there is continued encroachment by local people and migrants into the ELC area. Additional ways have to be identified to address these issues e.g. in terms of land distribution to land-poor people or to prevent opportunistic land encroachment.

### Conclusion

Several good examples for robust consultations between Government representatives, companies and local communities exist in Cambodia. In one case a full FPIC process has been applied with good success. It now seems appropriate and necessary to foster the application of FPIC through building good policy environments in the various sectors and by constantly improving the practices.







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The Mekong Region Land Governance Project (MRLG) aims to improve the land tenure security of smallholder farmers in the Mekong Region through contributing to the design and implementation of appropriate land policies and practices. It responds to national priorities in terms of reducing poverty, increasing economic development and supporting smallholder farmers, so that they can be secure and make good decisions about land use and land management. MRLG has been operating in Cambodia, Laos, Myanmar and Viet Nam since April 2014.

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For more information on MRLG, please visit [www.mrlg.org](http://www.mrlg.org)

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