This document is intended as an input to promote application of FPIC standards on a wider scale in Cambodia, especially by government institutions in policy and practice and by the private sector. It tries to address common concerns by government officers about the challenges and risks perceived in relation to FPIC application. The intention is to explain the actual meaning of FPIC and that a FPIC process does not necessarily need to be lengthy or complicated. It reflects on the advantages that the state itself may gain in a stronger application of FPIC. Thereby, this note attempts to provide some pragmatic proposals on how FPIC standards and consultation mechanisms in general could be strengthened across various sectors and procedures.

**What is FPIC?**

The concept of free, prior and informed consent (FPIC) is an internationally recognized standard applicable to consultations with indigenous peoples (IP). 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.

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. In a project context where IP and non-IP communities are concerned, it would be discriminatory to only consult with the first group. An additional controversy could arise from the fact that IP communities need to go through a process of official recognition in Cambodia to be legally recognized. In a project reality there could be recognized and un-recognized IP communities in addition to Khmer and other ethnic groups. Legally speaking this would mean that only officially registered IP communities have the right to give or withhold their consent to proposed projects that may affect the lands they customarily own, occupy or otherwise use, while other communities need to be at least consulted in an inclusive and transparent consultation process and be given a chance for intensive collaboration. The consultation should be viewed as an exchange of views, allowing for a mutually satisfactory agreement to be reached. FPIC is not a one-off event, nor is it a procedural checklist, but a free, prior and informed process which may or may not lead to consent.
What are the main concerns of the Royal Government of Cambodia or the Private Sector with regard to FPIC?

Overall, FPIC is considered as very time consuming and costly by government institutions. There is widespread uncertainty on who would need to obtain FPIC at what time and which procedures to follow. FPIC is seen as making it difficult to come to decision-making and the fact that local people are asked for their consent is considered a serious challenge to project planning and implementation. FPIC is perceived as challenging state authority as it requires authorities higher up to listen, take account of and respond to the concerns of communities affected by any development project.

For the private sector, the main focus lies on the requirement for an Environmental Impact Assessment (EIA) in preparation of each investment project. Current EIA guidelines in Cambodia provide for limited public consultation during the EIA exercise. FPIC is generally seen as a major challenge as it could lead to serious modifications to the project, additional costs and possibly delays in implementation.

Why FPIC is useful and in the interest of the Government and the private sector?

A. FPIC helps to solve many practical issues and avoids conflict

Various countries have already put FPIC procedures into law and practice (national laws, guidelines, approval procedures). In these countries, FPIC has not stopped development from occurring and has been beneficial for both company and community.

FPIC makes good business sense:

- Achieving consent can benefit both the community and the project.
- Going forward with a large-scale project without its acceptance by communities can threaten commercial or financial viability of the project. Generally speaking, projects which have been consulted with local communities are more successful in implementation.
- Dealing with conflicts can be costly and it makes economic sense to invest and work in peace with your neighbours. Addressing issues of community concern before the project begins is likely to make the project more successful and cost-effective.
- Consultations with local communities can lead to a revision of the project design based on local knowledge and reduce overall costs through searching for compromises and alternatives.
- Public relations and reputational aspects play an increasing role in international business and therefore meeting safeguards, standards and adhering to corporate social responsibilities (CSR) will be highly beneficial for any company.
- Finally, the adherence to business standards will help to promote the image of Cambodia as a country promoting sustainable investments and development.

In the context of large-scale public and private development projects, the World Resources Institute explored this issue in its 2007 report titled: "Development Without Conflict: The Business Case for Community Consent". Based on four case studies in which FPIC played a critical role in the success or failure (and in some cases, abandonment) of these projects, the report reached a number of conclusions to support its argument that it is in the financial interest of project sponsors and their financial backers to ensure that local communities should have the right to give or withhold their consent.
The UN Guiding Principles on Business and Human Rights (2011) calls on corporations to respect human rights, independently of the State compliance with its duty to protect those rights, and to operate to internationally recognized human rights standards. This includes the requirement to consult with indigenous peoples in order to obtain their FPIC.

D. For all REDD+ and carbon trading projects

FPIC for IP communities is compulsory

The United Nations Framework Convention on Climate Change (UNFCCC) climate change negotiations on reducing emissions from deforestation and forest degradation (REDD+) have accepted the FPIC provisions in UNDRIP as one of the key safeguards for any REDD+ project in the world. Ensuring full and effective participation is a safeguard in itself and applicable to REDD+ activities to meet UNFCCC requirements in accordance with the Cancun safeguards. In practice, this means that any validation of REDD+ or carbon trading projects by certifying institutions such as Verified Carbon Standard (VCS) or Climate, Community and Biodiversity Standard (CCB) will require a comprehensive FPIC procedure in at least the IP communities participating in the REDD+ scheme. For practical, but also for anti-discriminatory reasons, this should be also expanded to any non-IP village concerned by the project.

E. FPIC shall help strengthen the legitimacy of decisions by the Government and the Private Sector

Any proof of robust consultation mechanisms and final consent by all affected people will provide additional legitimacy of any decision-making or actions by government institutions or the private sector. Any decision or project obviously have an increased effectiveness when all stakeholders have previously agreed on it.
F. Cambodia is a member or signatory to relevant UN Declarations and Covenants

The requirement to seek and obtain indigenous peoples’ FPIC is either explicitly affirmed, or clearly implied, in a range of international instruments and standards. The process leading to FPIC is based on the rights to self-determination, non-discrimination, culture and property. Such instruments include the right to self-determination in the international human rights framework (United Nations Universal Declaration on Human Rights, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights). Furthermore, Cambodia is a signatory to the UN Declaration on the Rights of Indigenous Peoples (UNDRIP, 2007) which prescribes FPIC standards for projects affecting IP communities. At least one third of the Sustainable Development Goal targets are linked to the rights in the Universal Declaration and a number of them have been connected to FPIC.

G. The role of FPIC and proof of consultations will continue to grow in the coming years as a safeguard and standard

Safeguard policies, accepted international standards or required CSR will continue to make the need for FPIC and intensive consultations an internationally accepted requirement. This will affect funding mechanisms, licensing procedures, marketing opportunities of private companies and legal procedures against those ignoring FPIC and public engagement. Governments, businesses and investors are concerned about the cost of conflicts and the practical and reputational risks of failing to respect indigenous rights.

Is FPIC too demanding?

Good examples of increased consultation exist also in Cambodia and are generally seen as successful (e.g. the case of the real-estate re-development of the “White Building” in Phnom Penh). FPIC provides a procedure to guide best practice in community consultation and negotiations. There is consensus among stakeholders across all sectors that the issue is no longer whether or not to agree to FPIC, but how to successfully implement FPIC processes on a project-by-project basis. The participation of an independent third party (CSO or NGO as facilitator or neutral observer) in FPIC negotiations between communities and developers/government is seen as useful or even necessary by many stakeholders. The necessary standards for FPIC are high, but easily achievable with training and practice, as numerous examples have shown.

There are numerous manuals and guidebooks on FPIC (see below) and training is widely available. Obviously, FPIC requires some time and careful planning in order to provide opportunities for consultation and participation. Nevertheless, examples from Vietnam have shown that large-scale FPIC work can be conducted in 78 villages over a period of 6-9 months with an average cost of approx. US$ 1,500 per village which is a reasonable time requirement and represents well-invested funds.

Training Manuals and Guidelines

- The following manuals and guidelines contain more detailed information on FPIC:
  - Guide to Free Prior and Informed Consent, Oxfam 2010
  - Guidelines for the Application of Free, Prior and Informed Consent, UN-REDD Programme, 2013

- Training Manual for Indigenous Peoples on Free, Prior and Informed Consent (FPIC), AIPP, 2014

Proposals for FPIC procedures in the Cambodian context across various sectors and activities

A. Developing national level FPIC guidelines

Cambodia has made important progress in terms of consultations and involvement of communities over recent years. A new set of laws and guidelines (e.g. Environmental and Natural Resources Code – ENR Code, National Zoning Guidelines for Protected Areas, revised EIA Guidelines) are in the process of drafting or have been approved already. Now it would be helpful to strengthen these efforts even further and upgrade the consultation levels to reflect full FPIC standards where applicable. This would have to be considered for each sector and for each activity separately.

To define minimum standards on FPIC, the Government could develop national level FPIC guidelines for Cambodia. Their purpose would be to increase the general standards of consultation and participation and to foresee FPIC where it is necessary and applicable. Preparing these guidelines could be the task of a multi-stakeholder working group that would review the existing consultation and participation frameworks.

Key aspects for FPIC guidelines are:

- The access to information: accurate and comprehensive information would need to be provided from the start of the project, in advance of any implementation, in a form and language that is easily accessible and can be used by the target audience, and with sufficient time for it to be understood, considered and responded to.
- Community representation and decision-making would need to truly correspond to the will of the community; a FPIC final agreement should be valid when at least 75% of the concerned villagers give their consent and when at least 80% of the families have participated.
- Women and all vulnerable groups are included.
- FPIC is not a one-time exercise, but needs to be maintained throughout planning, implementation and monitoring stages of investment projects.
- The entire FPIC process needs to be carefully documented, with a detailed description of the process of information sharing, consultation and participation that preceded the consent. The documentation also needs to present all comments and requests submitted and describe the way these were dealt with.
- Formal agreements need to be signed, including detailed statements of the project and all agreed aspects of the negotiation. Agreements need to be binding, but also open to review and revision if circumstances change considerably. They normally contain provisions for mitigation or compensation and detailed benefit-sharing arrangements.
- Effective grievance mechanisms are established.
- Methods and venues for dispute resolution are well defined and effective.
- Withholding of a consent does not necessarily mean a final “no”, but provides an opportunity to consult further, possibly re-design and search for alternatives.
B. FPIC in the Zoning and Management of Protected Areas

The Ministry of Environment (MoE) has recently approved the National Zoning Guidelines for the Protected Areas of Cambodia (MoE 2018). The guidelines do not mention FPIC at all. Nevertheless, it is intended to get active engagement from local communities throughout the entire process of zonation. In connection with IP communities living within Protected Areas a full FPIC procedure would need to be prescribed, as demarcation of protected area boundaries and preparing PA management plans including zoning designations pose significant risks of a loss of access to traditional resources by indigenous peoples.

In the draft Environment and Natural Resources Code (ENR Code) which is now under final revision within MoE, FPIC principles should be foreseen in the context of establishing collaborative management agreements and as a part of the EIA process, especially when dealing with IP communities. In order to foster general community engagement, intensive consultation should also be foreseen for Khmer and other communities.

C. REDD+ and carbon trading

The right to FPIC for both indigenous and local communities features very prominently in the implementation of REDD+ and is a prerequisite to international validation. One essential aspect of REDD+ interventions are the specific arrangements regarding equitable sharing of benefits from the voluntary carbon market.

The Government is in the process of establishing REDD+ in six pilot projects across the country. Two of these (Oddar Meanchey and Keo Seima) are in operation and have been validated, while the four others are in earlier stages of implementation. In order to secure certification, it will be crucial to conduct a full FPIC process wherever IP communities are concerned and not toexclude the other communities. RECOFTC has produced a useful FPIC Evaluation and Verification Toolkit for UN-REDD Programme Country Programmes (see above) which can be applied.

D. FPIC in EIA procedures and implementation of agricultural or forestry investments projects

Public participation is an integral part of any EIA process. Full EIA procedures have been required by law in the preparation of all economic development projects in Cambodia, but have only been implemented in a few cases. The preparations for the allocation of Economic Land Concessions (ELC) have not seen much public participation or even information sharing with concerned communities. Often affected communities only learned about an ELC project when implementation through land clearing began. In recent years, some ELCs have been cancelled, others reduced in size and several on-going projects are subject to land conflicts with local communities. The moratorium on new ELCs declared in 2012 is still in place.

In several investment projects, the project owners have experienced difficulties in accessing loan funding as public consultation, including FPIC in the case of IP communities, was previously not taken seriously. If new ELCs are granted in future, and in order to avoid these problems, integral FPIC requirements could be incorporated in the revised EIA procedures (in the ENR Code and the EIA guidelines) and a more systematic application of the procedures enforced. Any new guidelines or Prakas that aim to improve the management of existing ELCs could adopt FPIC as guiding principles.

As the majority of the ELC projects are now under implementation, it will be essential a) to strengthen the CSR of the companies and b) to create working groups or committees for regular consultation, joint monitoring and ad-hoc problem solving in all ELC projects, bringing together the company representatives, local concerned villagers and local authorities. It could also be beneficial to include CSO/NGO in the group.
In order to improve CSR, companies could be made aware of the "Bali Declaration on Human Rights and Agribusiness in Southeast Asia", which provides regionally specific guidance on the risks and implications of agribusiness for sustainable development and human rights in Southeast Asia. It can be utilized by companies in conducting human rights due diligence and mitigating impacts with respect to sustainable development. It also includes recommendations on implementation of FPIC when working with IP communities. Eventually, the Cambodian institutions in charge within the Ministry of Agriculture, Forestry and Fishery (MAFF) could elaborate mandatory CSR requirements consistent with the existing Guiding Principles.

E. FPIC in EIA procedures in extractive industries (e.g. Mining, Hydropower)

EIA procedures in Cambodia are currently under review. Important elements of this review consist of the finalisation of Book 2 (Environmental Assessment) in the ENR Code and a subsequent decision on public participation during the EIA process. In this context, the NGO Forum is currently preparing a document on Guidelines for Public Participation in EIA, while in 2016 another draft on Public Participation in the EIA Process has been circulated in MoE, which does not yet contain FPIC at all. In addition, the working group on Extractive Industry Social Environmental Impact (EISEI) has reviewed public participation particularly in the extractive industries.

When finalizing the participation in EIA for Cambodia, the Regional EIA Guidelines (2017) and the Guidelines on Public Participation in Environmental Impact Assessment in the Mekong Region by the Mekong Partnership for the Environment (2017) could serve as examples.

Mining and hydropower projects affect many people directly and indirectly. These types of projects are increasingly under close scrutiny and need to improve their performance in protecting and respecting indigenous rights. This poses particular challenges for transparent, inclusive, and accountable consultations and FPIC. FPIC in such projects must start at a very early stage with access to all relevant information, including technical information. In these complex projects, information needs to be provided in a form and language that is easily accessible and can be used by the target audience, and with sufficient time for it to be understood, considered, and responded to.

FPIC is relevant from the initial steps of exploration for a mining project. All project affected people and stakeholders need to be identified. And FPIC needs sufficient time. In Cambodia, only 30 days are provided for government and public to review EIA reports and come to a decision. As a general practice each project undergoing an EIA needs to elaborate a public participation plan.

4Examples in Cambodia are presented in Rock, F. (2019). The application of FPIC standards in Cambodia, Discussion Note Series #5. Vientiane: Mekong Region Land Governance
The application of FPIC procedures has proven to help investment projects to reach their objectives and to avoid the risk of long and costly conflicts and judicial processes. Projects that have applied FPIC have experienced easier access to funding and international recognition. When doing business, it is always easier and more efficient when living in peace with local communities and neighbours. Overall, Cambodia and its investors could experience important reputational gains from the stringent application of FPIC and robust consultative processes across various sectors.

F. FPIC in urban and industrial re-development

For urban re-development, mechanisms of free and informed consultations with the local residents are crucial. Once again, lessons can be drawn from previous experience such as the White Building. Procedures and steps of public consultation need to be defined for the development of public spaces regularly used or occupied by people, as well as for existing (dilapidated) buildings or industrial infrastructure where local people reside and have acquired rights.

Overall Conclusions

The application of FPIC procedures has proven to help investment projects to reach their objectives and to avoid the risk of long and costly conflicts and judicial processes. Projects that have applied FPIC have experienced easier access to funding and international recognition. When doing business, it is always easier and more efficient when living in peace with local communities and neighbours. Overall, Cambodia and its investors could experience important reputational gains from the stringent application of FPIC and robust consultative processes across various sectors.
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.

The Mekong Region Land Governance (MRLG) is a project of the Government of Switzerland, through the Swiss Agency for Development and Cooperation (SDC), with co-financing from the German Federal Ministry for Economic Cooperation and Development (BMZ) and the Government of Luxembourg.

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For more information on MRLG, please visit www.mrlg.org

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