

Global Witness complaint against Vietnam Rubber Group (VRG)

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9<sup>th</sup> June 2015

# Recommendation to the FSC Board of Directors

Impartial Complaints Panel consisting of Yingyi Zhang, James Bampton and Bert van Hensbergen

FSC shall disassociate from Vietnam Rubber Group

## Table of contents

### Contents

Table of contents .....	2
List of Abbreviations .....	5
1. Executive summary .....	6
2. The Complaints Panel .....	8
3. The Complaint.....	9
3.1 Background .....	9
3.2 The Complaint .....	9
3.2.1 Illegal logging .....	10
3.2.2 Violation of traditional and human rights.....	11
3.2.3 Destruction of high conservation values in forestry operations .....	11
3.2.4 Significant conversion of forests to plantations or non-forest use .....	11
3.2.5 Violation of any of the ILO Core Conventions.....	11
3.2.6 Role of the Panel.....	12
4. Evaluation of the complaint.....	12
4.1 Methodology and data collection .....	12
4.2 Documents and sources (description, refer to annex for bibliography).....	15
4.3 Stakeholders interviewed (description, refer to annex for list).....	15
4.4 Impediments to the evaluation .....	15
4.5 Clear and convincing evidence for disassociating with VRG.....	16
4.5.1 Illegal Logging.....	16
Illegal harvesting .....	16
Illegal timber transport .....	18
Illegal occupation of Land .....	20
Illegal Actions in relation to the issuing of ELCs.....	22
Land exceeding 10,000ha illegally allocated to a single legal person.....	25
Failure to follow laws on protected areas in Cambodia .....	26
Principal Findings in Respect of Illegality .....	31
4.5.2 Violation of traditional and human rights.....	31
Evidence Collected Investigating Allegations.....	31
General Considerations.....	31
Analysis of Specific Allegations .....	32
Land taken without consultation .....	32
Legal Analysis .....	32

Analysis of Evidence.....	33
Villagers violently evicted from their land by the company .....	39
Legal Analysis .....	39
Analysis of Evidence.....	39
Unlawful Detention and Violence towards people including children .....	41
Legal Analysis .....	41
Analysis of Evidence.....	41
Restriction of movement by villagers due to guards at company checkpoint .....	42
Legal Analysis .....	42
Analysis of Evidence.....	42
Unsafe Working Practices leading to Chemical Burns .....	43
Legal Analysis .....	43
Analysis of Evidence.....	43
Principal findings in respect of violation of human and traditional rights. ....	43
4.5.3 Destruction of high conservation values in forestry operations .....	43
Allegation investigated on HCVs:.....	44
What are High Conservation Values? .....	44
Methodology.....	44
Assessment of Evidences .....	45
Destroy HCV 1 to 3 in four protected areas in Cambodia.....	45
Destroy HCV1 in other ELCs .....	49
No awareness of HCVs and failure to follow policy of VRG .....	50
Destruction of HCV of HCV class 5 namely food sources and NTFP sources .....	53
Legal Analysis .....	53
Analysis of Evidence.....	53
Principal Findings in Relation to the Destruction of High Conservation Values .....	54
4.5.4 Significant conversion of forests to plantations or non-forest use .....	54
Allegation investigated on forest conversion: .....	55
Methodology.....	55
Evidence collected from various stakeholders .....	56
Evidence provided by VRG .....	56
Evidences provided by Global Witness.....	57
Evidence provided by an environmental NGO interviewed by the panel .....	57
Assessment of evidence.....	57
Target evergreen forest for best growing conditions for rubber trees .....	57
Large scale forest conversion within and outside the VRG ELCs .....	58

## Global Witness complaint against Vietnam Rubber Group (VRG)

Extent of overall deforestation .....	60
Involvement in deforestation .....	64
Land reclamation and clearance procedure .....	64
Indirect and direct involvement in forest clearance within and outside the ELCs .....	64
Failure to show responsibilities .....	65
Principal findings in respect of forest conversion.....	65
4.5.5 Violation of any of the ILO Core Conventions.....	65
Principal findings in respect of violation of ILO conventions.....	66
4.6 Assessment of counterevidence and counterarguments .....	66
5. Recommendation(s) to the FSC Board of Directors.....	68
Impacts of VRG activities in Cambodia. ....	70
Environmental.....	70
Social .....	71
Economic.....	71
Annexes.....	72
Annex 1 Analysis of the Complaint (publicly available) .....	72
Annex 4 Bibliography of documents and sources (publically available).....	78

## List of Abbreviations

<b>Abbreviation</b>	<b>Full wording</b>
<b>CoC</b>	Chain of Custody
<b>CoM</b>	Council of Ministers
<b>DG</b>	Director General
<b>EBA</b>	Endemic Bird Area
<b>EIA</b>	Environmental Impact Assessment
<b>ELC</b>	Economic Land Concessions
<b>ESIA</b>	Environmental and Social Impact Assessment
<b>FA</b>	Forestry Administration
<b>FA</b>	Forestry Authority
<b>FFI</b>	Fauna and Flora International
<b>FMU</b>	Forest Management Unit
<b>F&amp;P</b>	feedback and petition
<b>FSC</b>	Forestry Stewardship Council
<b>FPIC</b>	Free Prior and Informed Consent
<b>GW</b>	Global Witness
<b>GoC</b>	Government of Cambodia
<b>HCV</b>	High Conservation Values
<b>IBA</b>	Important Bird Area
<b>ICCA</b>	Indigenous Peoples' and Community Conserved Territories and Areas
<b>IEIA</b>	Initial Environmental Impact Assessment
<b>ILO</b>	International Labour Organization
<b>IUCN</b>	International Union for Conservation of Nature
<b>KBA</b>	Key Biodiversity Area
<b>MAFF</b>	Ministry of Agriculture Forestry and Fisheries
<b>MARD</b>	Ministry of Agriculture and Rural Development
<b>MoE</b>	Ministry of Environment
<b>MOU</b>	Memorandum of Understanding
<b>NGO</b>	Non-governmental Organization
<b>NTFP</b>	Non Timber Forest Products
<b>RECOFTC</b>	The Centre for People and Forests
<b>REDD</b>	Reducing Emissions from Deforestation and forest Degradation
<b>PfA</b>	Policy for the Association of Organizations with the FSC
<b>PEO</b>	Provincial/Urban Environmental Office
<b>SGS</b>	Société Générale de Surveillance
<b>SPF</b>	Seima Protection Forest and Biodiversity Conservation Area
<b>SLC</b>	Social Land Concession
<b>VRG</b>	Vietnam Rubber Group
<b>OHCHR</b>	Office of the High Commissioner for Human Rights

## 1. Executive summary

The panel recommends that FSC disassociate from VRG.

The allegations against VRG are in relation to their activities in both Laos and Cambodia. None of these properties are certified under the FSC Ps & Cs, but they are properties under the responsibility of VRG, and thus the Policy of Association must be applied. The panel has not investigated allegations in Laos in detail since more evidence was provided for Cambodia and it was only possible for budget and time reasons to visit one of the two countries.

It is important to place this disassociation into context since the panel believes that to a large extent VRG is the victim of failures by the Government of Cambodia to implement and enforce its own laws. However VRG cannot entirely pass the responsibility for these failures to the GoC since the panel believes that a responsible company would have had a due diligence system in place to identify these failures and taken measures to prevent them. The panel has also heard from a number of stakeholders that VRG is actually one of the better companies operating in Cambodia and unlike some other ELC holders is actually making investments and carrying out developments in Cambodia and Laos.

The complaint against VRG is based on the company's alleged violation of 5 of the 6 categories of unacceptable activity under the FSC Policy of Association.

The company's business model in Cambodia and Laos is to obtain concessions for state land in order to establish rubber plantations and associated processing facilities. Land that is suitable for rubber in this context is almost always land that has evergreen forest as the natural vegetation. Based on information from Satellite images and from site visits the panel finds **beyond reasonable doubt** that in order to establish its plantations the company converted forest over at least 50% of the approximately 100,000ha it holds in Cambodia.

The evidence demonstrates that VRG has occupied large areas of land and cleared them of the native trees for the establishment of rubber trees. There are a large range of legal requirements relating to these activities. First, the evidence indicates that land was reclassified from state public land to state private land while it still retained significant public value. In addition, the evidence does not show fulfilment of requirements for public consultation prior to allocating land to ELCs. The amounts of royalties collected from companies who cleared forest appears to have been a very small fraction of the required amounts. EIAs were not properly evaluated. Land claims from indigenous communities were ignored. All of these could be considered as illegal actions. In addition we have information showing that VRG occupied land to which it was not entitled by encroaching severely on river corridors and possibly by extending outside its boundaries. Evidence suggests that VRG also allowed illegal loggers to use the land over which it has control to be used for the housing of illegal loggers and the transport of illegal timber. The panel considers that these occurrences constitute **clear and convincing evidence** that VRG was involved in illegal activities in Cambodia.

The panel collected evidence regarding a number of cases in which the violation of human and traditional rights had occurred. Some of the VRG concessions contained settlements of indigenous peoples. The evidence shows that developments carried out by VRG in some cases involved the alienation of significant portions of this land without FPIC and also outside the framework of law that is designed to protect indigenous peoples land rights. During the process of securing land, it is alleged that armed government agents intimidated and used violence against protesters. In one case

on the VRG Tan Bien concession a community alleges they were laid siege and neither food nor medical supplies were allowed to enter over an extended period of about two months. Protest leaders travelling to a meeting with authorities were allegedly detained and imprisoned before being later released without charge. On the basis of these occurrences the panel finds that there is **clear and convincing evidence** that VRG was the beneficiary of human and traditional rights violations mainly but not exclusively carried out by others.

Evidence shows that much of the land that is now occupied by VRG ELCs was formerly land which formed part of significant protected areas in Cambodia. This includes significant parts of two wildlife sanctuaries and one protection forest. The establishment of the ELCs was carried out without proper evaluation of the conservation value of the area. There is no evidence that the company acted upon a survey report showing presence of three critically endangered species, or modified their plans based on the international classification of parts of the area for its biodiversity importance (EBA, IBA, KBA). During the conversion process VRG destroyed thousands to tens of thousands of resin trees which are an important source of income for local and indigenous communities. There is evidence that this was done without providing adequate compensation to the owners of these trees and often under a take it or leave it arrangement. On the basis of these observations the panel concludes that there is **clear and convincing evidence** that VRG destroyed High Conservation Values of several types during its conversion of forest to rubber plantation.

Finally based on a number of interviews it is clear that at times children are taken into the forest by their parents. On such occasions these children may help their parents with work that is paid on the basis of piece work. In addition these interviews revealed a strong risk that gangmasters who find seasonal labour for plantation work use children from time to time. The company has no formal policy and no systems for prevention of child labour. The panel found that **on the balance of probability** that there was limited child labour on the VRG plantation and that although this is unintentional that VRG does not have adequate systems to prevent this.

The panel recommends that the disassociation be for a minimum period of five years and that compensation and restoration in respect of failures is made prior to consideration of reassociation.

## 2. The Complaints Panel

### Berty van Hensbergen – Economic Chamber (Chair)

Dr Berty van Hensbergen was trained in wildlife ecology and followed an academic career for fifteen years, rising to the position of professor and head of the Department of Nature Conservation in the Forestry Faculty of Stellenbosch University in South Africa. Since 2000 he has worked in forest certification related activities. He has acted as lead auditor for FSC certification and a peer reviewer. He has been involved in forest standards development in a number of countries. He is partner in the FSC-Fair Trade certified smallholder group in Chile and is co-owner of a small teak plantation in El Salvador. He has contributed annually between 1998 and 2011 to the Sida sponsored advanced training programme in sustainable forest management and forest certification. He has carried out consulting activities in relation to forestry in more than 50 developing countries since 2000. He has been involved in forest legality issues in West Africa since 2005.

### Yingyi Zhang – Environmental Chamber

Dr. Yingyi Zhang was trained in Ecology and Biodiversity Conservation in the Life Science College of Peking University from 1992 to 2002. She has been working in the conservation of globally endangered wildlife and ecosystems in the southern and western China since 1997. She has been the director of FFI China Programme since 2009, she is experienced in ecological impact assessment of development projects, community-based conservation, protected area management, conservation strategy and action planning. She also participated in a research about the ecological impacts of Chinese overseas investment in Southeast Asia. She is now the member of IUCN Species Survival Committee Primatology Specialist Group, member of China Primatology Specialist Group and honorary member of Indigenous Peoples' and Community Conserved Territories and Areas (ICCA) Consortium.

### James Bampton – Social Chamber

With 20 years of practical forest field experience, much of it working directly with forest communities in Latin America, Africa and Asia, Mr. Bampton joined RECOFTC in 2007 as the Chief Technical Advisor for a flagship capacity building project in Cambodia. The Cambodia project resulted in enabling more than 2,000 trainees to contribute to the development of 240 community forests in seven provinces in the country and a high-level engagement with the national government. Soon, a full-fledged country program took root in Cambodia with multiple national and regional projects. In 2009, James became the overall Manager for Program Coordination, Monitoring and Evaluation at RECOFTC, with the task of ensuring synergy across RECOFTC's entire program and develop functioning Country Programs in our other focal countries. Prior to this, he had spent five years as a lead advisor to the Livelihoods and Forestry Program in Nepal and three years working with communities in the heart of the Brazilian Amazon. James has an MSc in Forestry from Oxford University, United Kingdom, and studied senior management at the Open University, United Kingdom.



## 3. The Complaint

### 3.1 Background

Vietnam Rubber Group (VRG) is one of approximately ten mega-corporations owned by the Vietnamese government<sup>1</sup>. It is a diverse corporation having interests in a variety of fields<sup>2</sup> including not only rubber growing and processing but also including real estate, development of residential and industrial parks, tourism and granite mining. The corporation is fully state owned. The corporation does not carry out any operations itself but owns numerous companies that do. Subsidiary companies are normal limited companies and their employees are not civil servants. The ownership structure is hierarchical, approximately 33 companies are second tier companies that are directly owned by VRG either wholly or as majority shareholders. A number of these companies have become listed in recent years. Second tier companies in their turn own approximately 85 subsidiaries. VRG also has minority interests in a number of other large companies such as banks either directly or through its subsidiaries.

VRG maintains a tight control of the investments of its subsidiaries where these investments are made with corporate funds but a rather looser control where investments are made with retained profits.

All of the rubber companies in Cambodia and Laos referred to in this report are third tier companies that are controlled by VRG subsidiaries in Vietnam. It is understood that the investments in Cambodia and Laos are principally made using VRG capital so that the corporation maintains tighter control over these investments.

The investments in Cambodia have been made under the auspices of an MoU<sup>3</sup> between the ministry of Agricultural and Rural Development of Vietnam and the Ministry of Agriculture Forestry and Fisheries of Cambodia.

The complaint has arisen from allegations of the activities of VRG subsidiaries in Cambodia and Laos. The complaint has a long history having first been raised as a certification complaint by GW against the certificates that VRG and its subsidiaries hold in Vietnam. When the original complaint against certification was ruled to be out of scope by the certification body the complaint was filed as a PfA complaint with FSC in September 2014. The Complaints Panel was established in December 2014.

### 3.2 The Complaint

The complaint from Global Witness (GW) deals with the activities of subsidiaries of the VRG acting in Cambodia and Laos. The complaint is detailed in the formal complaint document<sup>4</sup> submitted to FSC IC and this is in turn largely based on publicly available information in the GW 'Rubber Barons'<sup>5</sup>

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<sup>1</sup> Truong Dinh Tuyen, (2011?) Managing giant economic groups in the globalization context. p3

<sup>2</sup> For a full discussion of the structure of the company see Appendix 8.

<sup>3</sup> Government of Cambodia (2009) MOU between Ministry of Agriculture and Rural Development (MARD) The Socialist Republic of Vietnam and The Ministry of Agriculture Forestry and Fisheries (MAFF) Kingdom of Cambodia. Cooperation for Rubber Plantation Investment.

<sup>4</sup> Alley P. (2014a) Formal Complaint Regarding Vietnam Rubber Group's violation of FSC\_POL-01-004 Policy for the Association of Organisations with FSC

<sup>5</sup> Global Witness (2013) Rubber Barons: How Vietnamese Companies and International Financiers are Driving a Land Grabbing Crisis in Cambodia and Laos. Global Witness, London.

report. Following initial receipt of the complaint FSC IC requested clarification of some issues and this resulted in a second part of the complaint.<sup>6</sup>

The panel analysed the complaint in detail (Annexe 1) and identified 22 specific allegations against the company which relate to five of the six categories of unacceptable behaviour. Some allegations affected more than 1 of the categories.

PfA Category	No of Allegations
a) Illegal logging or the trade in illegal wood or forest products	5
b) Violation of traditional and human rights in forestry operations	12
c) Destruction of high conservation values in forestry operations	4
d) Significant conversion of forests to plantations or non-forest use	1
e) Introduction of genetically modified organisms in forestry operations	0
f) Violation of any of the ILO Core Conventions <sup>1</sup>	4

### 3.2.1 Illegal logging

Allegations of illegal logging relate to two specific types of illegality. Firstly it is alleged that the company either participated directly in the illegal logging or allowed it to happen on their land or permitted illegally harvested timber to be processed on their land or to be transported over their land. Secondly it is alleged that the company permitted the illegal harvesting of protected luxury trees such as rosewood (*Dalbergia* sp.) on their land.

Furthermore it is alleged that the company violated several components of the Land Act of 2001 and the regulation concerning the allocation of Economic Land Concessions contained in sub decree 146. Specifically the company exceeded the maximum area of 10,000ha allowed to be occupied by a single legal person and that the company failed to ensure that proper public consultation was carried out prior to the allocation of the ELC as required by the sub-decree.

It is also alleged that much of the land allocated to VRG subsidiaries by the government was wrongly reclassified from being state public land to state private land in contravention of the Land Act 2001. This reclassification can only be made when the land in question has lost its public interest. Much of the land allocated fell within protected areas and with forests in good condition.

<sup>6</sup> Field report from Global Witness, 2012.

Any failure to comply with the requirements of these laws would render the entire ELC illegal so that any resources harvested from the land by the company in the future would also be considered illegal.

### 3.2.2 Violation of traditional and human rights

The allegations in relation to violation of traditional and human rights fall into several categories.

- a) The use of unacceptable violence or threats of violence including armed threat by agents acting on behalf of the company to clear the land. This includes allegations of actual violence against children.
- b) The appropriation of indigenous peoples land without due process and without FPIC of affected communities.
- c) Unlawful detention of stakeholders in relation to protest activities.
- d) Unlawful restriction of access to peoples land including the effective laying of siege to a local community and restricting or preventing the entry of food and medical assistance over a period exceeding 1 month.
- e) There were also allegations relating to chemical pesticide poisoning, this is a health and safety issue. It was difficult to know exactly how to deal with this issue since surprisingly the ILO core conventions have no consideration of health and safety issues. The panel believes therefore that this can be dealt with in terms of the human right to safety and security.

### 3.2.3 Destruction of high conservation values in forestry operations

The complaint relates to destruction of social HCVs, namely HCV classes 5 and 6 being the destruction of critical resources and the destruction of cultural resources.

The allegations are that the conversion of the forest to rubber plantation deprived local populations of resin trees (*Dipterocarpus alatus*) which are an important source of income for their livelihoods.

In addition there are allegations of the restriction of access to spirit forests and burial grounds of importance to indigenous peoples.

Finally the allegation of illegal harvesting of Rosewood (*Dalbergia cochinchinensis*) trees may also constitute the destruction of HCV class 1.

### 3.2.4 Significant conversion of forests to plantations or non-forest use

The complaint alleges that the establishment of rubber plantations in areas of evergreen and semi-evergreen forest has resulted in significant conversion of forest. The allegation is that almost all of the rubber plantation area was intact forest immediately prior to conversion for planting.

### 3.2.5 Violation of any of the ILO Core Conventions

The complaint alleges that VRG employed child labour in its plantations in violation of Convention 138, The Minimum Age Convention, 1973. Children are said to have been employed in plantations at low rates of pay.

### 3.2.6 Role of the Panel

Strictly the role of the panel is to evaluate if the allegations made by the complainant can be validated. Further in the case of a decision for disassociation the panel is required to make recommendations to the FSC board about the terms for re-association.

During the work of this panel it became clear that there were significant issues that had not been identified by the complainant and the panel investigated these in order to ensure that the advice to the board about terms for re-association was as comprehensive as possible.

These issues included:

- a) The destruction of significant areas of forest comprising HCV classes 1, 2 and 3.
- b) The avoidance of large amounts of taxes, being the royalties due on timber harvested during the conversion process.
- c) Wider ranging failures to comply with the requirements of the regulations in relation to the allocation and operation of ELCs.

## 4. Evaluation of the complaint

The complaint against VRG refers to activities of its subsidiaries in both Laos and Cambodia. The allegations for both countries are similar but the evidence provided by the complainant was more complete for Cambodia than for Laos. In addition VRG has many more subsidiaries active in Cambodia than in Laos. For this reason the panel decided to focus its attention on the allegations relating to Cambodia with the view that if these were found to be valid that the situation for Laos was likely to be similar. For this reason there is no information about the allegations relating to Laos in this report.

### 4.1 Methodology and data collection

The panel collected information to investigate the complaint in four ways, by making a field visit to a sample of sites in Cambodia mentioned in the complaint, by interviewing relevant stakeholders both live and by e-mail, by accessing published literature and newspaper reports and by accessing material available on the internet.

Stakeholders to be interviewed were identified on the basis of the complaint, on the basis of personal knowledge of the complaints panel members and on the basis of information about interested and affected parties identified by the panel from published information. In addition some stakeholders were identified during interviews with other stakeholders. The panel was able to contact and interview the majority of stakeholder that it identified during this process.

During visits to the field the company had the services of Phanith Chou to translate from Khmer to English and when visiting stakeholders in the field so that the panel members were able to speak to them without the presence of VRG staff.

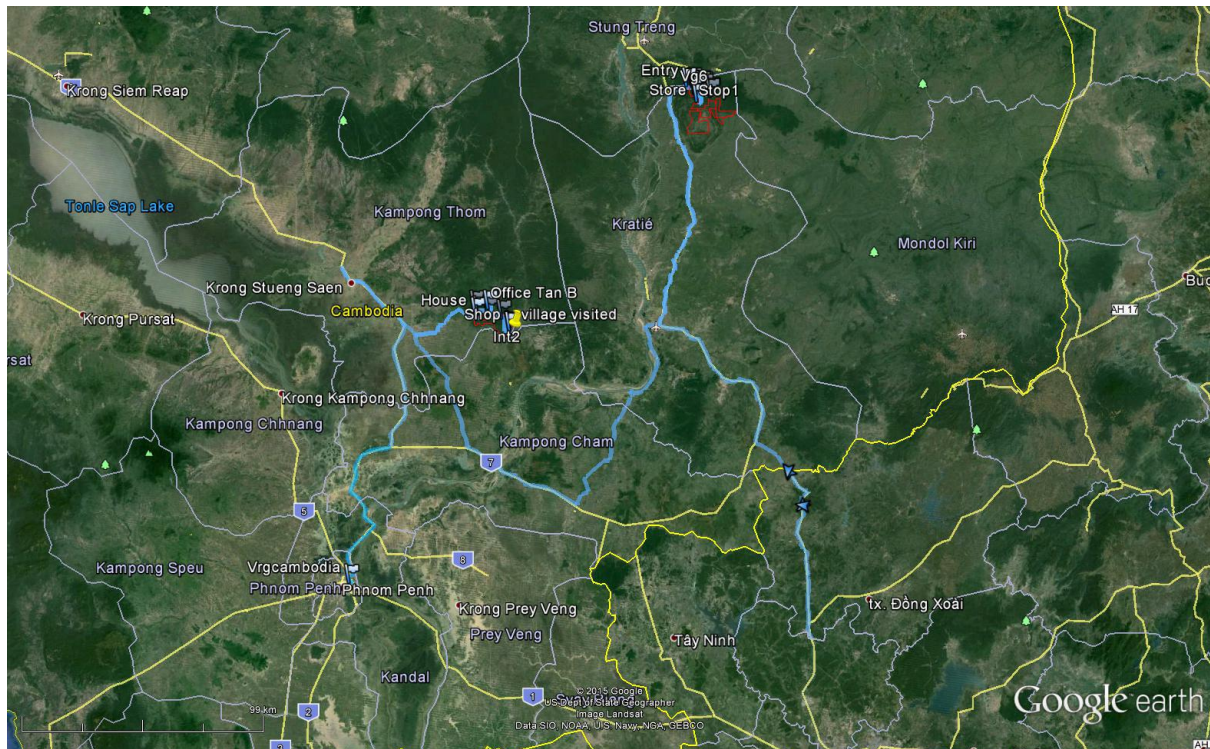
The field visit took place between the 15<sup>th</sup> and 22<sup>nd</sup> of March 2015. This included a consultation in Vietnam with VRG senior management, two days of field inspection in Cambodia and three days of stakeholder meetings in Phnom Penh. In the field the panel visited two VRG rubber plantation complexes, one in Kampong Thom Province and one in Kratie Province. The field visit was well supported by VRG who organised local logistics and allowed the panel members to visit all places requested.

The route taken by the complaints panel in Cambodia is shown in figures below. It is superimposed on Google Earth images of the country and of the specific ELCs visited by the panel. The field sites to

## Global Witness complaint against Vietnam Rubber Group (VRG)

be visited were selected on the basis of evidence presented in the complaint and further refined by the panel by examining time series of Google Earth images to identify specific points of interest.

Figure 1 Route followed by Panel in Cambodia



The panel also made use of remote sensing data in order to assess the process of deforestation that took place as a time series and to assess the magnitude of the deforestation process. This remote sensing evaluation was carried out by Sarmap S.A.

## Global Witness complaint against Vietnam Rubber Group (VRG)

Figure 2 Route taken and sites visited on Dong Nai Plantation overlaid on google earth image dated 20/03/2013 Note also the area inside the white circle where clearing appears to have occurred outside the known boundary of the ELC.

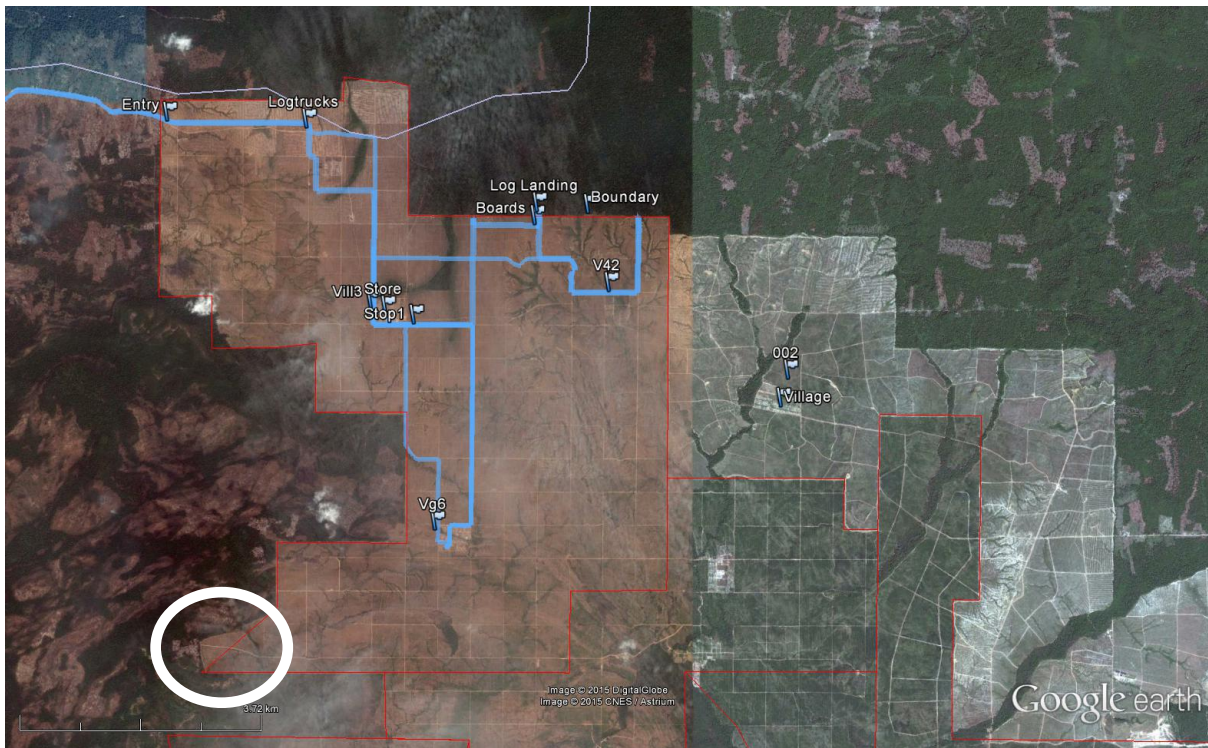
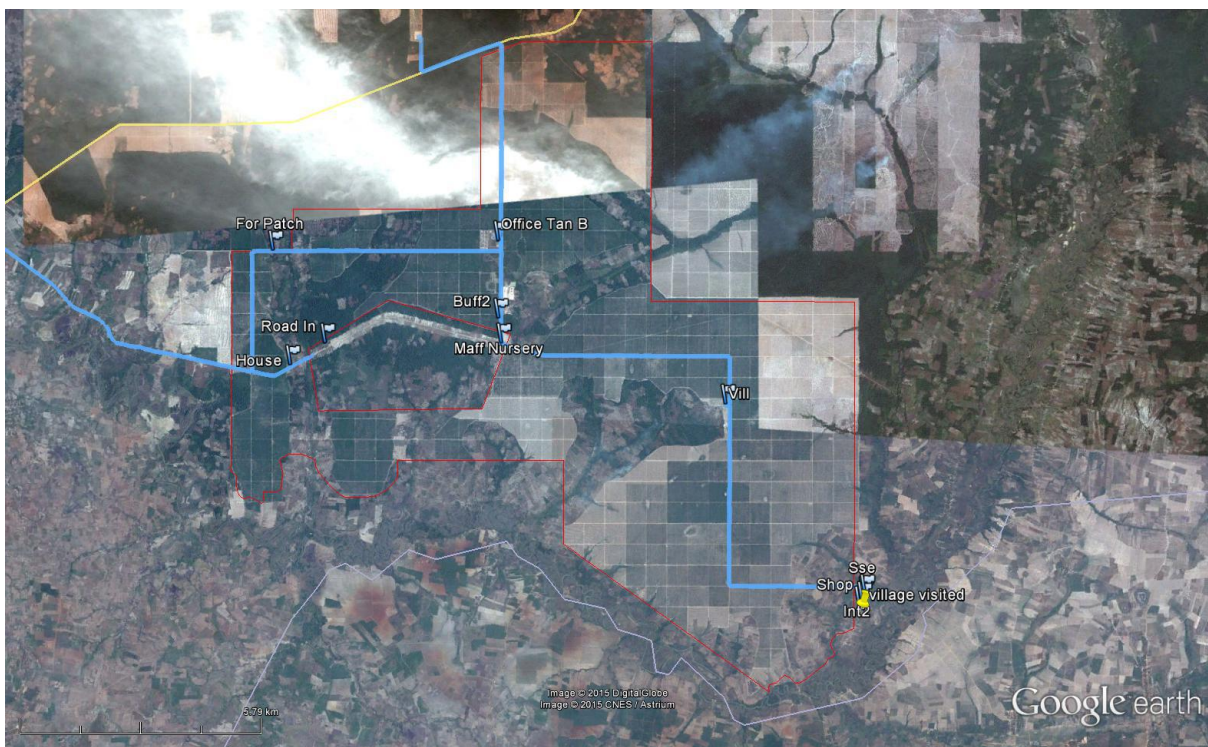


Figure 3 Route taken on Tan Bien Kampong Thom Plantation showing locations visited overlaid on Google Earth Image dated 14/02/2014.



#### 4.2 Documents and sources (description, refer to annex for bibliography)

The panel made use of a wide range of documents which included the following:

- a) Documents provided by VRG.
- b) Confidential documents provided by NGOs. These included internal reports, maps, photographs, videos and pre-publication view of embargoed documents (for obvious reasons these cannot be cited).
- c) Published reports.
- d) Newspaper articles, principally from English language newspapers in Cambodia.
- e) Information from a wide range of internet sources including:-
  - a. The web site of VRG<sup>7</sup>
  - b. The web site of Viet Capital Securities a market analysis company in Vietnam<sup>8</sup>.
  - c. The web site of the Ministry of Commerce in Cambodia.<sup>9</sup>
  - d. The web site of Open Development Cambodia (an NGO with some formal responsibility for transparency in Cambodia.<sup>10</sup>
  - e. The web site of Licadho (Cambodia's principle NGO in relation to monitoring human rights.<sup>11</sup>)

#### 4.3 Stakeholders interviewed (description, refer to annex for list)

The panel interviewed a wide range of stakeholders representing a range of different interests.

Senior staff of VRG including the Deputy Director General were interviewed in Ho Chi Minh City and accompanied the panel during visits to the field in Cambodia and freely answered the questions of the panel. In Phnom Penh the Okhna Leng Rithy the representative of VRG in Cambodia was interviewed and was cooperative in answering questions. The VRG environmental Consultant Dr. Li was also present at this interview to answer questions.

Due to the human rights situation surrounding land issues in Cambodia (as identified by the UN special rapporteur of the Human Rights Council<sup>12</sup>) the panel has elected not to publicly reveal the identities of other stakeholders that were interviewed. These included the following categories:-

Representatives of the UN Human Rights Council

Representatives of International NGOs active in Cambodia

Representatives of National NGOs

Individual stakeholders directly affected.

#### 4.4 Impediments to the evaluation

The panel examined hundreds of documents and hundreds of web pages in relation to the complaint. Many of these documents were in Cambodian or Vietnamese. The cost of translations into English was very high and for this reason it was only possible to translate a very small fraction of the available material by humans (the cost of human translating all relevant documents would have

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<sup>7</sup> <http://www.vnrubbergroup.com/en/>

<sup>8</sup> <https://www.vcsc.com.vn>

<sup>9</sup> <http://www.moc.gov.kh/SearchByComp>

<sup>10</sup> <http://www.opendevdevelopmentcambodia.net/>

<sup>11</sup> <http://www.licadho-cambodia.org/>

<sup>12</sup> Subedi S. P. (2012) Report of the Special Rapporteur on the situation of human rights in Cambodia. Addendum: A human rights analysis of economic and other land concessions in Cambodia. A/HRC/21/63/Add.1 UN Human Rights Council.

reached 10s to 100s of thousands of Euros). The remainder of the documents were machine translated using either Google translate or Microsoft translate. These translations were of mixed quality and were mainly used to determine if the documents contained material of interest. In any case all these translations have been made available to the FSC board.

It therefore remains possible that the panel may have either overlooked some evidence completely or misinterpreted some evidence as a result of this language issue. The panel has attempted to triangulate all evidence found by verification from more than a single source in order to minimise this type of problem.

A key source of evidence and given particular weight are reports prepared by the UN special rapporteur for human rights in Cambodia. This UN appointment can be considered authoritative on account of the special access the rapporteur obtains to government records and the rapporteurs independence of a particular interest group.

VRG was generally very helpful in providing necessary information to the panel. Some documents of VRG however could not be translated into English.

Only limited access to Royal Government of Cambodia representatives was obtained, and official documents limited to those supplied by VRG. Ideally, the panel would have reviewed official records such as tax receipts, reports asserting that the land being proposed for concessions was no longer of public interest, environmental and social impact assessments and Ministry of Environment assessments of them, etc.

The evaluation of the deforestation process was hampered by some gaps in the sequence of satellite images available. These gaps are primarily due to cloud cover at the time of image acquisition.

#### 4.5 Clear and convincing evidence for disassociating with VRG

The panel has carried out a detailed investigation of the issues raised in the complaint and a variety of other issues identified by the panel during its investigations. The full evidence is included in appendices 6, 7 and 8 of this document and is summarised here. As detailed below in section 5 the panel found that for three out of the five categories there was clear and convincing evidence that VRG had violated the requirements of the PfA. For one category it was on the balance of probabilities that VRG had violated the requirements of the PfA and finally for the category of forest conversion the panel found that it was beyond reasonable doubt that the company had violated the PfA.

##### 4.5.1 Illegal Logging

The panel considers that there is clear and convincing evidence that VRG subsidiaries in Cambodia have been involved in illegal logging. This involvement may be unintentional but the company certainly had knowledge of these activities and did not take actions to prevent them.

##### Illegal harvesting

The allegations made state that VRG companies are allowing their land and facilities established by third party companies on or adjacent to their land, to be used for the processing and transport of illegally harvested timber.

VRG informed us that prior to the clearing of forest to prepare for the planting of rubber that the Forestry Administration carries out a detailed survey of the timber resource in order to determine the royalty that should be paid for the trees. VRG claims to pay royalties for the timber it uses to



build its camps and other infrastructure. The third party operators contracted by VRG to clear the land are supposed to pay royalties on the remainder.

However examination of the contract between Dong Nai Kratie and MAFF indicates that the company may not pass on its responsibility in this way and that it remains responsible for the payment of all royalties. VRG claimed in interview to have paid US\$ 1 million for unpaid royalties of other companies. However given the large discrepancy between estimates of total royalties received from all sources and the amounts estimated to be due from just a small proportion of the VRG concessions it seems unlikely that this is sufficient.

*Table 1 Extract from contract between Dong Nai & MAFF*

**16.1** Before clearing the land for the development activities, Party "B" shall obtain approval from Party "A" for the logging, processing or transporting of logs found on the lands and these logs obtained from land clearance shall be subject to procurement procedure and royalty & fee payment in accordance with the principles and procedures in force.

The panel was provided by VRG with a report for Dong Nai Kratie<sup>13</sup> in which a survey of the land is detailed in terms of the timber available on it. We have summarised this information for the Northern portion of the land which is considered richer having better trees and a higher density with a total volume per ha of timber (>10cm dbh) of c200m<sup>3</sup>/ha. We have not detailed the poorer section but this has a total volume of 150m<sup>3</sup>/ha of which approximately 25% is stated as class A. The total area surveyed was 8276ha. For the purpose of the calculations below we have assumed that 4000ha falls in the better Northern half of the concession.

A conservative estimate on the royalty that should have been collected (from the Northern section of Dong Nai only) during the period of clearing from 2010 to 2012 would be US\$10.2 million.

Government revenue figures<sup>14</sup> indicate that the total revenue from all timber sources during this period was just in excess of US\$24 million. It is hard to believe that Dong Nai was the only ELC paying its full quota of royalties during this period.

In any case during the same period Dong Phu adjacent to Dong Nai was also being cleared for planting and this would have accounted for similar volumes of timber.

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<sup>13</sup> BIEN BAN KS 8.276ha (du an 2)

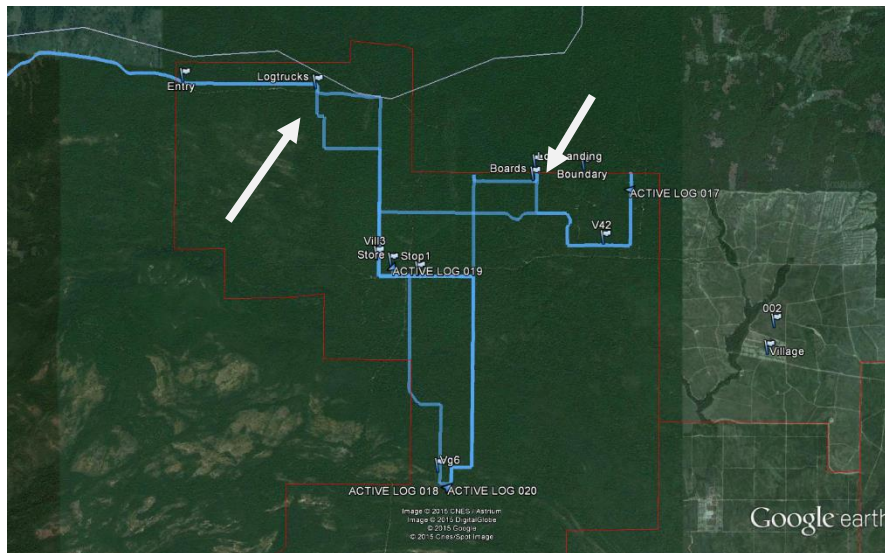
<sup>14</sup> <http://www.cambodianbudget.org/demo/tofe.php>

## Global Witness complaint against Vietnam Rubber Group (VRG)

### Illegal timber transport

During the visit to Dong Nai the panel encountered a convoy of 8 trucks carrying sawn timber parked on the main VRG access road for Dong Nai. The location of these trucks is indicated on the Google earth image below from GPS data collected by the panel.

*Figure 4 Google Earth image showing route followed by panel at Dong Nai and location of illegal log trucks and suspected illegal logging camp.*



The trucks loaded with timber (Figure 5) had no licence plates and were clearly waiting to depart during the night. Running vehicles without registration numbers is illegal and all 8 vehicles seen inside the Dong Nai ELC did not have registration plates. This could be considered as an attempt to hide the identity of the owners of the vehicles.

*Figure 5 Timber truck loaded with sawn timber and without a licence plate waiting to depart from Dong Nai ELC during the night.*



Figure 6 Camp of admitted illegal loggers at Dong Nai ELC



In addition the panel located a logging camp within the boundary of the Dong Nai ELC where admitted illegal loggers, felling trees on adjacent land were staying and from where logs were transported over the Dong Nai ELC road network to a sawmill on the Dong Phu ELC boundary.

On the basis of this evidence and the lack of control exerted by VRG on access to land granted for use by the company it seems that at the very least VRG failed to exercise due diligence of its contractors to determine if they paid the correct royalties.

VRG also failed to prevent its land from being used for transporting illegally harvested timber from adjacent ELCs and allowed facilities on its land to be used for the processing of illegally harvested timber. We know from an anonymous stakeholder that in at least one case VRG staff were overheard talking to illegal loggers about the transport so as to make it clear that the VRG employee knew the timber was illegal.

An informant<sup>15</sup> told us that a sawmill in the Binh Phuoc 1 concession was still sawing timber from surrounding forests after the concession had been completely cleared for planting and where there was no other source of legal timber. The informant also added that a checkpoint along the only road to the concession guarded by police and the military blocked all access so that illegal harvesting outside the concession could not be verified.

A number of tree species in Cambodia are classified as luxury trees and it is illegal to fell these<sup>16</sup>. The workers interviewed by the panel at the illegal logging camp admitted that the trees taken from the Dong Nai ELC and surrounding areas included Rosewood (*Dalbergia*) which is a luxury tree species.

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<sup>15</sup> Anonymous NGO informant.

<sup>16</sup> The panel has had difficulty determining precisely the legal restrictions on the harvest of different species classified as luxury wood. There is apparently Royal Government of Cambodia (2013) Directive on the Measure of Prevention, Obstruction and Suppression from Transportation, Collection, Stocking and Export of Rosewood (*Dalbergia Cochinchinensis*), Order No 2BB, 22nd February 2013, but the panel has not managed to obtain a copy. Additionally, the panel has obtained a table on timber export and royalties from Kimsun and Suntra (2006) Specific Analysis on Potential Forest and Trade Network Participant Profiling: Report Prepared to Assist the WWF in Promoting Forest and Trade Network in Cambodia, which states that payment of royalties on luxury

## Global Witness complaint against Vietnam Rubber Group (VRG)

### Illegal occupation of Land

There is also some evidence that VRG companies occupied land outside the boundaries that have been allocated to them as ELCs.

The circle in figure 2 above shows an area that has been cleared outside the boundary of the concession of Dong Nai Kratie.

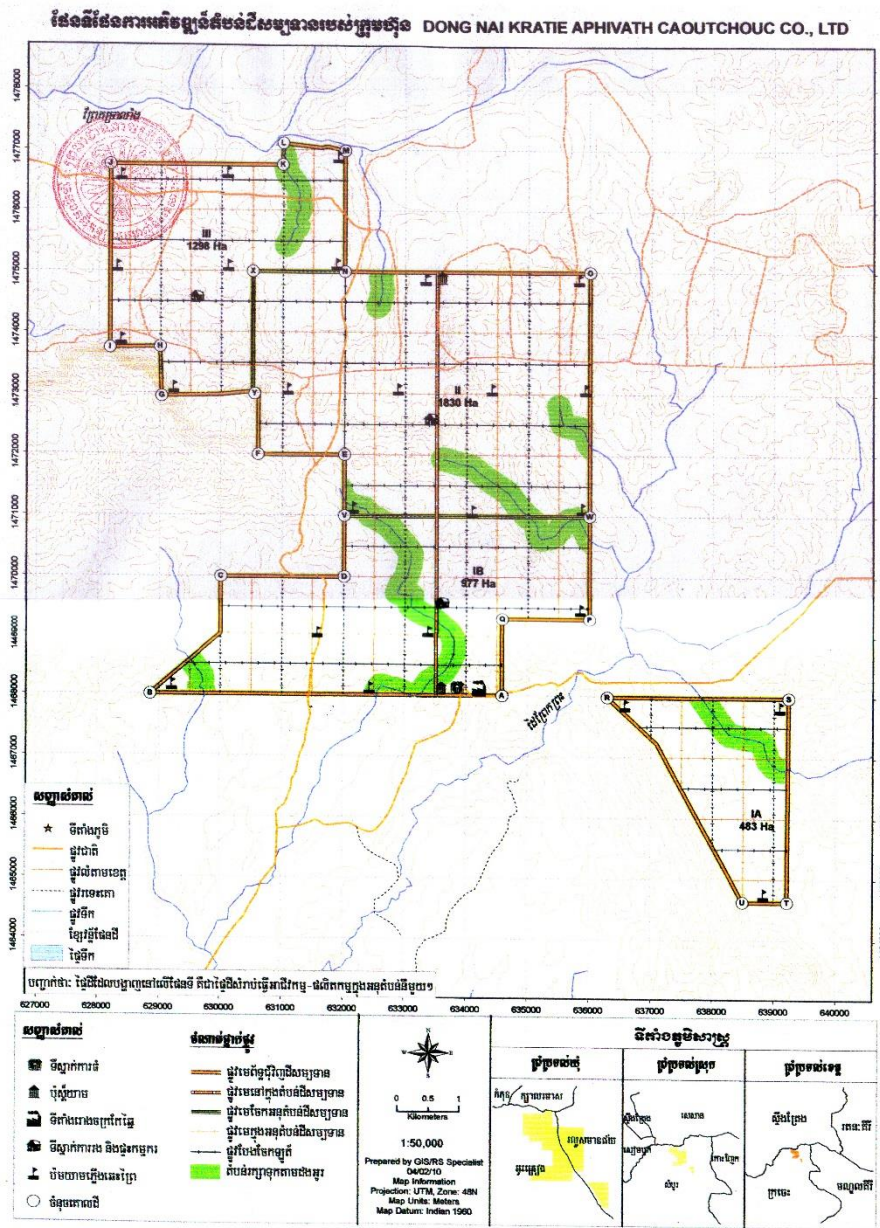
Also at Dong Nai Kratie the riparian protection zones of 200m each side of the stream have in some cases been excluded from the concession so that this is not available for planting. In other cases they are still inside the concession but may not be planted. It is clear that while VRG have generally respected external boundaries they have not always respected internal boundaries. Figure 7 shows the required size of these riparian areas. Figure 8 below shows that these riparian protection zones are much narrower than required and have resulted in several hundred hectares of additional land for rubber planting.

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grade timber is 'N/A' – presumably because it is illegal. Finally, the instruction No. 740 RBro. KKB by the Director of the Department of Forestry and Wildlife of 26 April 2001 requested all forest concessionaires to suspend the cutting of resin trees, and has yet to be revoked or amended.

# Global Witness complaint against Vietnam Rubber Group (VRG)

Figure 7 Map of Dong Nai showing excised riparian protection zones. The google earth view of figure 8 is the green area at the top left.



### Illegal Actions in relation to the issuing of ELCs

The issuing of ELCs in Cambodia is governed by the requirements of the land law of 2001. It is further regulated by Sub-Decree no 146 of 27.12.2005.

*Table 2 Extracts from Sub Decree no 146*

#### **Article 4**

An economic land concession may be granted only on a land that meets all of the following five criteria:

1. The land has been registered and classified as state private land in accordance with the Sub decree on State Land Management and the Sub decree on Procedures for Establishing Cadastral Maps and Land Register or the Sub decree on Sporadic Registration.
2. Land use plan for the land has been adopted by the Provincial-Municipal State Land Management Committee and the land use is consistent with the plan.
3. Environmental and social impact assessments have been completed with respect to the land use and development plan for economic land concession projects.
4. Land that has solutions for resettlement issues, in accordance with the existing legal framework and procedures. The Contracting Authority shall ensure that there will not be involuntary resettlement by lawful land holders and that access to private land shall be respected.
5. Land for which there have been public consultations, with regard to economic land concession projects or proposals, with territorial authorities and residents of the locality.

#### **Article 25**

The Contracting Authority shall be responsible for ensuring that a Concession Contract is enforced by establishing mechanisms and procedures for monitoring contract performance and for reporting on the management of the contract to the Ministry of Economy and Finance on regular basis and for informing the Technical Secretariat or the Provincial/Municipal State Land Management Committee.

The Contracting Authority shall cooperate with relevant ministries or institutions to review the Concessionaire's Concession Contract performance and shall obtain information from the Concessionaire and from relevant ministries or institutions concerning the Concession Contract performance.

#### **Article 35**

After receiving the development of detailed economic land concession project document or detailed unsolicited proposal, the Contracting Authority shall organize public consultations with territorial authorities and representatives of local residents by sending a copy of the document to each of the Commune Council(s) of the affected area for their review and recommendation within 28 (twenty-eight) working days from the date the Commune-Sangkat Council receives a copy of the detailed document for solicited economic land concession project or of the detailed unsolicited proposal. The Contracting Authority shall consider the comments of the affected commune council(s). If comments of the affected commune council(s) are rejected, specific

## Global Witness complaint against Vietnam Rubber Group (VRG)

Key aspects of this regulation are included in Article 4 which states that only state private land can be the subject of an ELC and which further demands that environmental and social impact assessments have been completed prior to the issue of an ELC. In addition there must be public consultation prior to the allocation of an ELC and any adverse impacts on populations must be considered. Finally the regulation requires that there is a contract between MAFF and the contract holder which is both monitored and enforced.

The regulation also gives two alternative methods of allocating ELCs. The preferred method is for the government to identify land for ELCs and to offer it on the basis of solicited competitive proposals. The alternative to be used only where there are 'exceptional'<sup>17</sup> benefits is for a proponent to identify land and to negotiate an ELC for it with the Authority. There is no evidence that there were any competitive proposals for VRG ELCs. It is hard to believe that all of the VRG rubber concessions are offering exceptional benefits.

The UN Special Rapporteur on the situation of human rights in Cambodia draws attention to irregularities in compliance with the carrying out of social consultation prior to the issuing of ELCs and also failure to carry out adequate social and environmental impact assessments. The inadequacy of the environmental impact assessment is highlighted by the failure of the Dong Nai EIA to deal with the three species on the IUCN list of critically endangered species that are mentioned in the land survey of Dong Nai.<sup>18</sup>

In addition there is evidence that VRG subsidiaries did not comply with the mitigation requirements of the EIAs. Specifically at Dong Nai and Dong Phu the EIA provided as part of the master plan<sup>19</sup> by VRG requires a riparian protection of 150-200m on either side of a stream. These protection zones are clearly marked on maps provided to us by VRG (Figure 7 above).

In practice these set aside zones are much narrower than the EIA requirement.

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<sup>17</sup> Cambodia Sub-Decree 146 of 27/12/2005 on Economic Land Concessions Chapter 3, Part 2, Article 18

<sup>18</sup> BIEN BAN KS 8.276ha (du an 2) Section 6.

<sup>19</sup> KHTT 2.502ha&phu luc I (du an 1) chapter D. Translated by FSC.



*Figure 8 Streamside protection zone at Dong Nai. The yellow bar showing the widest part is 130m long.*

This pattern is general throughout the Dong Nai and Dong Phu ELC. In the contract this land area 400m wide along all streams has been subtracted from the allocated concession area. The effect of this practice is to illegally increase the size of the plantable area by 20-30ha per km of stream length. The company's failure to comply with the requirements of the EIA is considered by the Panel an indication of not being in compliance with relevant regulations.

Failures in the process of social consultation are highlighted in Annexe 6 of this report and dealt with below in relation to violations of human rights.

The land law of 2001 also specifies the special conditions related to the lands belonging to indigenous communities. It is clear from article 25 that the lands belonging to indigenous communities are those that are identified by communities as such regardless of whether these have been formally registered. Furthermore article 28 makes it clear that no one outside the community is permitted to acquire any rights over indigenous communities' lands. It follows that community land should never form part of an ELC regardless of the situation in relation to registration.



Table 3 Extracts from the land law of 2001<sup>20</sup>

**Article 25**

The lands of indigenous communities are those lands where the said communities have established their residences and where they carry out traditional agriculture.

The lands of indigenous communities include not only lands actually cultivated but also includes reserved necessary for the shifting of cultivation which is required by the agricultural methods they currently practice and which are recognized by the administrative authorities.

The measurement and demarcation of boundaries of immovable properties of indigenous communities shall be determined according to the factual situation as asserted by the communities, in agreement with their neighbours, and as prescribed by procedures in Title VI of this law and relevant sub-decrees.

**Article 28**

No authority outside the community may acquire any rights to immovable properties belonging to an indigenous community.

It therefore follows from this that any ELC that overlaps the land of indigenous communities could be considered as illegal. The Special Rapporteur on Human Rights provides a list of such ELCs<sup>21</sup> which includes a number of ELCs issued to VRG subsidiaries. These include CRCK, Krong Bok Ratanakiri, Kiri Development Co., and (Dak Lak Mondulkiri, Thy Nga & PNT Co. Ltd subsidiary companies).

[Land exceeding 10,000ha illegally allocated to a single legal person](#)

The investments made by VRG companies in Cambodia fall under a bilateral agreement<sup>22</sup> between the governments of Vietnam and Cambodia as represented by the Ministry of Agriculture and Rural Development (MARD) of the Socialist Republic of Vietnam and the Ministry of Agriculture Forestry and Fisheries (MAFF) of the Kingdom of Cambodia. This agreement takes the form of a Memorandum of Understanding which was signed by the respective Ministers in Phnom Penh on 22<sup>nd</sup> September 2009.

Article I of the MOU is essentially an offer by MAFF to facilitate the allocation of up to 100,000ha of ELC land for the purposes of establishing rubber plantations for 'enterprises' belonging to MARD.

Article IV of the MOU requires MARD enterprises to obey the laws and respect the customs of Cambodia.

<sup>20</sup> Government of Cambodia (2001) Law on Land (translated from Khmer) August 2001.

<sup>21</sup> Subedi S. P. (2012) Report of the Special Rapporteur on the situation of human rights in Cambodia.

Addendum: A human rights analysis of economic and other land concessions in Cambodia. A/HRC/21/63/Add.1 UN Human Rights Council. P99

<sup>22</sup> Government of Cambodia (2009) MOU between Ministry of Agriculture and Rural Development (MARD) The Socialist Republic of Vietnam and The Ministry of Agriculture Forestry and Fisheries (MAFF) Kingdom of Cambodia. Cooperation for Rubber Plantation Investment.

Article VII requires MARD to certify the capacity of 'enterprises' to invest before they officially process their proposals.

Informal Legal Advice was sought by the panel from qualified barristers in the UK on the relative status of such a bilateral MOU to national law. The legal opinion was that if a conflict should exist between the national laws and the agreements contained in the MOU then the national law would override the MOU. Thus an MOU of this type does not allow a government or its agents to break their own national law.

It is quite clear from this MOU that MAFF does not view MARD as being limited by Article 59<sup>23</sup> of the land law of 2001. It must be presumed that this is because as a ministry of a sovereign state that MARD is not considered to be controlled by 'natural persons'<sup>24</sup> and that therefore the enterprises owned by MARD should be considered as independent persons.

It is not entirely clear to us how VRG as a state owned economic group<sup>25</sup> can be considered in comparison with a normal company. All employees of VRG appear to be civil servants<sup>26</sup> within MARD and therefore it can be assumed that it is a branch of the government and therefore cannot be considered to be controlled by natural persons. This is because the natural persons in control of VRG are executing government policy in their management of the group rather than independently acting for the benefit of the shareholders.

According to the Deputy Director General the intention is to privatise all subsidiaries and the group itself by 2020 and at this point VRG will become an independent company under the control of natural persons.

From this it follows that for the purpose of Article 59 the Government of Cambodia does not view MARD and its sub-entity VRG as being natural persons in relation to their control of multiple subsidiaries. It does however view the subsidiary enterprises as legal persons under the control of natural persons. Thus the requirement is interpreted as being that no VRG subsidiary should control more than 10,000ha of ELC land in Cambodia.

This may be the case for Dau Tieng Rubber Corporation in relation to two ELCs in Cambodia, namely Dau Tieng Kratie Rubber and Dau Tieng Cambodia Rubber. These two companies between them hold approximately 15000ha but it has been impossible to demonstrate that these are ultimately controlled by Dau Tieng Rubber Corporation in Vietnam.

#### [Failure to follow laws on protected areas in Cambodia](#)

According to the article 41 and 43 of 2008 Cambodian Protected Areas Law, granting ELCs by MAFF for rubber plantation in the protected areas including Boeng Per Wildlife Sanctuary, Kulen-Promtep Wildlife Sanctuary and Snoul Wildlife Sanctuary is illegal. So is any practice the company will do for land and forest clearance that may include forest fire, felling and clearing plants and destroying wildlife habitat. (See Table 4 for relevant articles)

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<sup>23</sup> Government of Cambodia (2001) Law on Land (translated from Khmer) August 2001. Article 59.

<sup>24</sup> Silkenat J.R., Hickey J.E. & Barenboim P.D. (2014) Eds. Legal Doctrines of the Rule of Law and the Legal State (Rechtsstaat), Springer Heidelberg

<sup>25</sup> Truong Dinh Tuyen, (2011?) Managing giant economic groups in the globalization context.

<sup>26</sup> Huynh Trung Truc pers. Comm.

Table 4: Extraction from the 2008 Protected Area Law<sup>27</sup>

**Chapter VIII PERMIT AND PROHIBITION AND ENVIRONMENTAL AND SOCIAL IMPACTS ASSESSMENT**

**Article 36:** All clearances and bulldozing within the open land or forestland in protected areas for the purposes of building all types of public infrastructures through the core zone and conservation zone shall be strictly prohibited.

These activities can only be carried out in the sustainable use zone and community zone with approval from the Royal Government of Cambodia at the request of the Ministry of Environment.

**Article 41:**

Each protected area shall be protected against destructive practices or harms caused by illegal land claim, collection, commercialization, pollution in the areas containing valuable biological resource, forest fire, swidden agriculture, transmission of diseases and pests including invasive plants and animals.

Prohibited practices considered destructive and harmful include:

2. Collection of timber and non-timber products (NTFPs), fishery products and natural resources in a manner violating the recognized and authorized access rights.
3. Felling, pruning, clearing or poisoning plants, or uprooting tree stumps.
7. Destroying natural grassland, plants and wildlife habitats.

**Article 42:**

Processing natural resources products and by-products, and fisheries, establishing and operating sawmill bases for wood processing, timber process plants, shops to process natural resources products and by-products, fisheries and all kinds of kilns in the protected areas are strictly prohibited.

**Article 43:**

No physical person or legal entity may have authority to issue permission, either directly or indirectly, to fell trees, clear forestlands, poison, electrocution, hunt or trap for any species of animals or to undertake activities to collect NTFPs, wildlife, to take land or components of natural resources into their ownership within a protected area, which contravene the provisions of this Law.

**Article 44:**

To minimize adverse impacts on the environment and to ensure that management objectives of protected areas are satisfied, an Environmental and Social Impact Assessment shall be required on all proposals and investment for development within or adjacent to protected area boundary by the Ministry of Environment with the collaboration from relevant ministries and institutions. The procedures for Environmental and Social Impact Assessment for any projects or activities shall comply with provisions pertaining to the process of Environmental and Social Impact Assessment.

Meanwhile, the ELC granting for rubber plantation in the Binh Phouc I could be seen as a violation of the Forest Law<sup>28</sup> (see relevant articles in the Table 5) since it is part of the buffer zone of Seima Protection Forest and Biodiversity Conservation Area.

<sup>27</sup> Government of Cambodia (2008) Cambodian Protected Areas Law.

Table 5: The relevant articles in the Forest Law on the protection forest

**Article 10**

**2- Protection Forests shall be maintained primarily for protection of the forest ecosystems and natural resources therein.** Protection Forests consist of the followings:

- Reserve Forests for special ecosystems;
- Research forests;
- Forests for regulating water sources;
- Forests for watershed protection;
- Recreation forests;
- Botanical gardens;

**Article 22**

Ministry of Agriculture, Forestry and Fisheries shall propose to the Royal Government of Cambodia to designate as **Protection Forest** any part of the Permanent Forest Reserves, which qualifies as a special ecosystem area, an area of scientific, cultural, or tourism value or an area **for biodiversity, water and soil conservation.**

**Article 28**

**No one** has the rights to issue a permit to **harvest forest products & by-products** within all types of Protection Forests in the Permanent Forest Reserves.

Ministry of Agriculture, Forestry and Fisheries may propose to the Royal Government to change the classification of an area in the Protection Forest to Production Forest, based upon the submission by the Forestry Administration of new studying data showing that the area has sufficient potential for extraction of forest products & by-products. Otherwise, it is prohibited to harvest forest products & by-products.

**ANNEX**

**GLOSSARY**

Protection Forest : Forest area having the **primary function for protecting the forest ecosystem** including the water resources regulation; conservation of biodiversity, land, water, watershed and catchments areas; wildlife habitat, fishes, prevention of floods, erosions, sea water intrusion; soil fertility and valuable for cultural heritage which serve the public interests. Protection forest under this Law does not include the protected areas under the jurisdiction of Ministry of Environment pursuant to the Environmental Protection and Natural Resources Management Law

The granting of ELCs in a protected area is also considered privately to be illegal by officials in the MoE. However, the argument used by the government officials responsible is that the area in question is degraded and not valuable for conservation or for timber revenues<sup>29</sup>, and this is declared through a report supposedly detailing a field assessment. Following this, a Sor Chor Nor

<sup>28</sup> Government of Cambodia (2002) Law on Forestry (translated from Khmer) September 2002.

<sup>29</sup> Personal interview with a senior official in MoE

(Government Decision) is issued from the Prime Minister's Office accepting the assessment and thus the process starts.

The granting of ELCs in a protected forest with evergreen forest was also considered to be illegal by the Cambodia government in the case of Binh Phouc I. An environmental NGO has been working on the conservation of SPF for ten years and lobbied the Forestry Administration to cancel the concessions of Binh Phouc I, Binh Phouc II and Easter Rubber when they found three concessions are located in the buffer zone of SPF<sup>30</sup>. According to the statement of local NGO staff about the whole decision-making process of cutting off half area of these three ELCs by the Cambodia government, the Minister of MAFF reported the case to the Prime Minister and asked him to cancel the concession. The Prime Minister therefore appointed the deputy Prime minister to establish a commission of inquiry to do an investigation. The commission of inquiry concluded that it is illegal to grant ELCs in a protected forest and it is also illegal to grant a concession with evergreen forest in it<sup>31</sup> and decided to cut off half of the area of three ELCs to make it that only half of the area is illegal<sup>32</sup>.

Although a new environmental impact assessment law has been drafted but has not yet been enacted, the article 44 of 2008 Cambodian Protected Areas Law (see box 1) explicitly requires the development of environmental and social impact assessment of all development projects in the protected areas.

The 1996 Law on Environmental Protection and Natural Resource Management first laid down the requirement to all on-going and proposed development projects and activities for EIAs<sup>33</sup>. The Article 6 in Chapter 3 of this law says: "Assessment of environmental impacts shall be carried out on every project and activity by the Ministry of Environment before it is submitted to the Royal Government for Decision".

The Sub-Decree 72 on Environmental Impact Assessment Process<sup>34</sup> further explains the process of environmental impact assessment and the list of projects that should submit the initial EIA and the full report of EIA. The articles 6-9 in Chapter III states that a project owner must conduct initial environmental impact assessment (IEIA) and apply to the MoE or the Provincial/Urban Environmental Office (PEO)<sup>35</sup> for reviewing the IEIA report and pre-feasibility study report, and a full report of EIA will be required in case a project tends to cause a serious impact to the natural resources, ecosystem, health and public welfare. In addition, this sub-decree 72 listed all projects required to conduct IEIA or EIA in the annex which include agriculture and agro-industrial land equal

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<sup>30</sup> The panel interview with a representative of the NGO. The name is kept confidential.

<sup>31</sup> The panel interview with a representative of the NGO. The name is kept confidential.

<sup>32</sup> Government of Cambodia (2012) Letter from the Deputy Prime Minister to the Prime Minister for the approval of adjusting the area of three ELC of three Vietnamese companies and reserving the area for forest protection "*Prakas of ELCs in SPF\_Eng.doc and Prakas of ELCs in SPF\_Kh.pdf*" dated 12 September 2012. Provided by the NGO.

<sup>33</sup> Government of Cambodia (1996) Law on Environmental Protection and Natural Resource Management.

<sup>34</sup> Government of Cambodia (1999) Sub-decree 72 on Environmental Impact Assessment Process. Further details about the guidelines for preparing a report of EIA and IEIA are found in a couple of subsequent prakas that the panel has not been able to access.

<sup>35</sup> If the project takes at the provincial level, the EIA reports will be submitted to PEO. Since VRG ELCs were operated by individual subsidiary companies, the EIA report may be approved and checked by the PEO.

to or over 10,000ha and land covered by forest or logging equal to or over 500ha for agriculture development. In this respect all VRG ELCs should have made at least the IEIA and some ELCs possibly with HCVs such as the six ELCs located in the existing protected areas should have made the full EIA report.

During the meetings with the panel VRG claimed that the company was required by the law to make an initial EIA report as part of the feasibility study and a full report of EIA later<sup>36</sup>. During the field visit to Dong Nai, the subsidiary company acknowledged to the panel that the full report of EIA of Dong Nai has not been finalized and submitted<sup>37</sup> yet although the two sections of Dong Nai were granted in July 2008 and Jan 2010 respectively and the rubber planting is done there. As for Binh Phouc I, there is no EIA report issued even it is located in a protected forest for biodiversity conservation and key biodiversity area identified by a global conservation NGO<sup>38</sup>.

The panel only finds two poorly developed initial EIA reports of Dong Nai in the master plans provided by VRG<sup>39,40</sup>. Both two master plans of Dong Nai made just very short and brief description of the natural resources in the proposed area based on a one day's field survey<sup>41,42</sup>. As a result both IEIA reports are brief and general without any detailed baseline biodiversity information, evaluation of HCVs, finding of significant potential negative impacts on the environment and site-specific proposed mitigation measures. The reports also follow the same framework with very similar content, conclusions and proposed activities and look much like the copy of each other. Despite the field survey and assessment report of proposed Dong Nai<sup>43</sup> made by a task force organized by the MAFF and provincial government authorities reveals the possible occurrence of several globally endangered tree and animal species, the IEIA reports obviously do not mention those species at all and completely miss the chance of further identifying and assessing the potential HCVs and proposing mitigation measures to conserve it.

The panel was informed by the VRG that the company signed contracts with an EIA agency recommended by the Cambodia government to conduct EIAs. However, the poor development of EIA reports was reported by a few interviewees. A senior government official informed a member of the panel that the companies often use the same template for all sites and make little attempt to adapt them to the specific site while NGO staff interviewed said the EIA report were copied with

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<sup>36</sup> FSC (2015) notes "16.03.2015 Notes meeting with VRG in HCM berty.doc"

<sup>37</sup> FSC (2015) notes "17.03.2015 Notes visit Dong Nai.doc"

<sup>38</sup> FSC (2015) notes of panel interview with an environmental NGO in Cambodia. "20.03.2015\_Notes stakeholders meeting in Phnom Penh.doc"

<sup>39</sup> Master Plan for the Investment of Rubber Plantation Development and Processing for Dong Nai Kratie Aphivath Caoutchouc Co LTd.; (*"KHTT 2.502ha&phu luc I(du an 1)"*). Chapter D: Environmental and Social Impact Assessment. P39-49; Annex 5 1.2

<sup>40</sup> Master Plan for the Investment of Rubber Plantation Development and Processing for Dong Nai Kratie Aphivath Caoutchouc Co LTd.; (*"KHTT 4.588ha&phu luc I(du an 2)"*). Chapter D: Environmental and Social Impact Assessment. P43-56; Annex 5 1.17

<sup>41</sup> Master Plan for the Investment of Rubber Plantation Development and Processing for Dong Nai Kratie Aphivath Caoutchouc Co LTd.; (*"KHTT 2.502ha&phu luc I(du an 1)"*). Chapter D: Environmental and Social Impact Assessment. P11; Annex 5 1.2

<sup>42</sup> Master Plan for the Investment of Rubber Plantation Development and Processing for Dong Nai Kratie Aphivath Caoutchouc Co LTd.; (*"KHTT 4.588ha&phu luc I(du an 2)"*). Chapter D: Environmental and Social Impact Assessment. P13. Annex 5 1.17

<sup>43</sup> FSC (2015) notes of panel interview with an environmental NGO in Cambodia. "20.03.2015\_Notes stakeholders meeting in Phnom Penh.doc"

each other and staff of a conservation NGO active in Cambodia said the technical staff in MoE responsible for EIA usually open EIA agency to get contracts from development companies<sup>44</sup>.

#### Principal Findings in Respect of Illegality

- 1.) VRG has allowed illegal timber activity on land over which it has control.
- 2.) VRG has occupied land that was granted to them without full compliance with the rules for granting ELCs.
- 3.) VRG has failed to ensure that all royalties due on timber harvested during the conversion of land from forest to plantation have been paid.
- 4.) VRG has occupied small areas of land outside the boundaries and significant areas of riparian reserve.
- 5.) VRG has occupied land granted to them in violation of laws on protected areas.
- 6.) It has not been possible to conclude that VRG exceeded the limit of 10,000ha of ELCs that can be granted to a legal person or to multiple legal persons under the control of the same natural persons.

#### 4.5.2 Violation of traditional and human rights

The panel found that in relation to violations of traditional and human rights in forestry operations that there is clear and convincing evidence that in the process of acquiring access to the economic land concessions granted to VRG companies that human rights were violated by government and other private agents acting for the benefit of VRG as follows:

- A. Local residents were deprived of their rights to access and utilise forest resources.
- B. Local communities, and in particular Indigenous Peoples, have been deprived of their land rights and properties by eviction without adequate compensation and without due legal process.
- C. That during evictions government and other private agents used levels of intimidation and in some cases violence and unreasonable detention that seriously infringed the human rights of many people.

#### Evidence Collected Investigating Allegations

##### General Considerations

Article 31 of the Constitution of the Kingdom of Cambodia states *“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. Every Khmer citizen shall be equal before the law, enjoying the same rights, freedom and fulfilling the same obligations regardless of race, colour, sex, language, religious belief, political tendency, birth origin, social status, wealth or other status. The exercise of personal rights and freedom by any individual shall not adversely affect the rights and freedom of others. The exercise of such rights and freedom shall be in accordance with the law”*.

The land law (2001) specifies the special conditions related to the lands belonging to indigenous communities. Article 25 states *“The lands of indigenous communities are those lands where the said communities have established their residences and where they carry out traditional agriculture. The lands of indigenous communities include not only lands actually cultivated but also include reserved necessary for the shifting of cultivation which is required by the agricultural methods they currently*

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<sup>44</sup> Personal communication with an anonymous staff of the NGO

*practice and which are recognized by the administrative authorities.” Furthermore article 28 makes it clear that no one outside the community is permitted to acquire any rights over indigenous communities’ lands: “No authority outside the community may acquire any rights to immovable properties belonging to an indigenous community”.*

It follows that community land should never form part of an ELC regardless of the situation in relation to registration and that therefore any ELC that overlaps the land of indigenous communities would be considered to be illegal even if compensation is paid. Such lands must always be excluded from ELCs.

## Analysis of Specific Allegations

### Land taken without consultation

#### Legal Analysis

Cambodian law for the establishment of ELCs requires consultation. Sub-decree 146<sup>45</sup> on ELCs (2005) contains: Article 4.5 *“Land for which there have been public consultations, with regard to economic land concession projects or proposals, with territorial authorities and residents of the locality.* Article 4.3<sup>46</sup> of the sub-decree refers to the need of Environmental Impact Assessments (EIAs) as required by the Law on Environmental Protection and Natural Resource Management (1996) *“Environmental and social impact assessments have been completed with respect to the land use and development plan for economic land concession projects.”*

The Law on Environmental Protection and Natural Resource Management (1996)<sup>47</sup> has Chapter VII on Public Participation and Access to Information, which called for the EIA process to be detailed *“The procedures for public participation and access to information on environmental protection and natural resource management shall be determined by Sub-decree following a proposal of the Ministry of Environment.”*

Sub-decree 96<sup>48</sup> on Environmental Impact Assessment Process (1999) requires the proponent to *“Foster public participation in the environmental impact assessment process in recognition that their concerns should be considered in the project decision-making process.”* It does not, however, give any further details as to how this should be done.

The United Nations Declaration on the Rights of Indigenous Peoples (2007) was adopted by Cambodia, although as a ‘Declaration’ is non-legally binding. Article 30.2 specifically states *“States shall undertake effective consultations with the indigenous peoples concerned, through appropriate procedures and in particular through their representative institutions, prior to using their lands or territories for military activities.”*

Although not ratified by Cambodia, ILO Convention 169 in Article 7.1 goes further, requiring consent *“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 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.”*

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<sup>45</sup> Government of Cambodia (2005) Sub-Decree 146: Sub Decree on Economic Land Concessions Article 4.5

<sup>46</sup> Government of Cambodia (2005) Sub-Decree 146: Sub Decree on Economic Land Concessions Article 4.3

<sup>47</sup> Government of Cambodia (1996) Law on Environmental Protection and Natural Resource Management. Chapter VII

<sup>48</sup> Government of Cambodia (1999) Sub-decree 96 on Environmental Impact Assessment Process. Article 1.



Based on the Charter and Organisation of the Vietnam Rubber Group<sup>49</sup>; and on the recommendation of the General Manager of Vietnam Rubber Group<sup>50</sup>, the Executive Board of Vietnam Rubber Group made the Decision ‘on the receiving and responding to feedback and petition and providing information to individuals and organisations on rubber development projects of VRG in Cambodia and Laos’ on 16 July 2014. This was in direct response to the allegations made by GW in the ‘Rubber Barons’ report.

### Analysis of Evidence

Although enshrined in the environmental and ELC legislation, in Cambodia ‘consultation’ is a murky concept. The ‘Contracting Agency’ always claims to have consulted the community. Such assertions hold a grain of truth, as in reality consultation is likely to take the form of discussions with local Commune Chiefs / Commune representatives / Village Heads that are expected to be supportive of the proposed ELC<sup>51</sup>. However, whether all Commune Council members are consulted, or whether villagers are, is unlikely as there are no detailed mechanisms inscribed in Cambodian legislation for doing so beyond the vague generalities outlined above. Managers interviewed at Dong Nai stated that the Cambodian authorities conducted meetings from local to high levels whilst determining whether and where the ELC should be granted. The Ministry of Agriculture, Forestry, Fisheries (MAFF) ‘Management Team’ requests Provincial authorities to hold consultations, and that company representatives were present at some of these meetings. Managers interviewed asserted that Commune Council and Village Heads were consulted and that indigenous forest people’s concerns were taken into consideration. Due to a lack of availability of documentation it is difficult to prove or disprove either way.

It is also notable that the Vietnamese guidance on the ‘management of construction investment silviculture<sup>52</sup>’ (No. 73/2010 / QD-TTg Hanoi, November 16, 2010, Ban hành quy chế quản lý đầu tư xây dựng công trình lâm sinh) doesn’t appear to have any provisions for community-level consultation beyond the requirements for evaluation stipulated in Article 8.3<sup>3</sup> “*People’s Committees at district and commune level shall organize the assessment of the projects decided for investment (if any). The arbiter for assessment of projects shall be appointed by the level which decides on the investment*”. Vietnamese company managers are therefore unlikely to be experienced in community level consultation. Regardless, in the granting of ELCs, VRG companies concede all responsibility to the Cambodian authorities in relation to consultation before an ELC granted.

From the documentation provided by VRG, the files for the Master Plan for Dong Nai contain ‘Office Of Government Number: 1336/SChN Phnom Penh, date 28 May 09 2009<sup>53</sup>’ which has article 6 that translates as “*Before reclaiming the land, the Company must formulate a concrete management–development plan and prepare an environmental and social impact assessment (ESIA) report having the recognition and support of competent authorities and the local people.*” This suggests that the Cambodian authorities do not accept sole responsibility for consultation through which ‘recognition, consensus and support of the local communities’ can be achieved. It would be surprising if such a provision did not exist in similar documents relating to other ELCs. Similar provisions appear in the

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<sup>49</sup> Issued together with Decree no. 28/2014/ND-CP issued on 10/04/2014 of the Vietnam Government – article 23i

<sup>50</sup> Petition No 20039/TTr-CSVN on 11/7/2014

<sup>51</sup> Milne, S., Pak, K. & Sullivan, M. (2015) *Shackled to nature? The post-conflict state and its symbiotic relationship with natural resources*. In Milne, S. & Mahanty, S. (2015) *Conservation and Development in Cambodia – Exploring Frontiers of Change in Nature, State and Society*. Earthscan / Routledge, Abingdon, UK.

<sup>52</sup> Official FSC sourced translation of article 8.3 of file named: Quản lý đầu tư xây dựng công trình lâm sinh.

<sup>53</sup> Official FSC sourced translation of article 6 of file named: 2-VB.1336.SChN (du an 2)

document 'Ministry of Agriculture Forestry and Fisheries Number: 5485/547. KSK. NPPK Phnom Penh, 25 September 2010<sup>54</sup> – *"The Company must comply with conditions guaranteeing people in the project area benefit from the project and must comply with conditions on suspending implementation of the project in areas with proprietary rights conflicts until measures for a complete and satisfactory solution are in place. Before reclaiming the land, the Company must formulate a concrete management-development plan and prepare an environmental and social influence assessment (ESIA) report having the recognition and support of competent authorities and the local people."*

Furthermore, the file 'The Ministry of agriculture and forestry & Fisheries Number: 7165/KSK Phnom Penh, December 28, 2008'<sup>55</sup> has a final point *"A rubber plantation investment must have a master plan and an annual implementation plan having the support of the authorities and the local people"* that would appear to require the Dong Nai Kratie to have community consent for its annual investment plan.

The survey report of the 'Working Group to determine the boundaries of land, crop land with obstacles to DT with other people and to preserve an area of land concessions DONG NAI Company APHIVATH CAOUTCHOUC Kratie, LTD Ro Luas Meanchey commune, Sambor district, Kratie province'<sup>56</sup> demonstrates that at least some minimal consultation with a commune councillor took place while demarcating the land for the Dong Nai ELC *"2- Land areas under dispute with the local people: According to Mr. Keo Bo Pha, O Krieng commune council: in the land concession of the DONG NAI KRATIE APHIVATH CAOUTCHOUC CO.,LTD, there is no land dispute with the local villagers because the land is in a remote area. However there is one Dipterocarpus alatus tree from which the people extract resin. Mr. Tong Hul, Head of Sambor district added: As for land under dispute with the local people in the first survey, there is no land under dispute with the local people. There are only a few Dipterocarpus alatus trees the people are extracting resin from along the stream."* Given this, and the fact that local people are likely to include indigenous people<sup>57</sup>, it was premature to simply conclude<sup>58,59</sup> *"The land concession is not related to any dispute with the people's land. However there are a number of Dipterocarpus alatus trees the people extract resin from along the stream"*, and there should have been further consultation with local villagers beyond simply the Commune Heads to determine if other land registration processes were underway or desired (e.g. indigenous peoples communal land or community forestry or private land registration), whether there was any spirit forest in the area, and exactly how many resin trees were important to how many people, and whether they would be willing to give them up for fair compensation. Instead, it could be argued that it is not within the legal mandate of Task force to demarcate the land; remove disputed land and other conservation areas from 4,595 ha Dong Nai Kratie Aphivath Rubber Co. land concession in O Krieng and Ro Luas Meanchey communes, Sambor district, Kratie province to state in their conclusion 2 *"In the land concession, there are no areas in dispute with local villagers, but there are a*

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<sup>54</sup> Official FSC sourced translation of text on page 2 of file named: 1-VB 5485-547 CUA BO (du an 2)

<sup>55</sup> Official FSC sourced translation of text on page 2 of file named: 1-VB 7165 CUA BO(du an 1)

<sup>56</sup> Official FSC sourced translation of text on page 2 of file named: 6-BAO CAO KHAO SAT(du an 1)- survey report for part I

<sup>57</sup> See additional analysis of evidence for formal complaint 7 on page 14

<sup>58</sup> Official FSC sourced translation of text on page 4 of file named: 6-BAO CAO KHAO SAT(du an 1)- survey report for part I

<sup>59</sup> Official FSC sourced translation of various similar statements given throughout file named 13- BC KHAO SAT (du an 2). This document refers to the minutes of the mission [file name: 14-BIEN BAN KHAO SAT (du an 2)] also officially translated by FSC sourced translators. This also appears to be very similar to the file named: 6-BAO CAO KHAO SAT(du an 1)- survey report for part I, referred to earlier

*number of Dipterocarpus alatus trees from which the local gather resin.” And propose “For these trees, the commune chief requests that the Company work with the commune to negotiate with the local villagers at the time of deployment”<sup>60</sup> since felling resin trees is illegal.*

Given that resin tree ownership by local villagers was identified as detailed above, it is to the credit of Dong Nai Kratie Aphivath Rubber Co. that they did pay compensation to villagers<sup>61</sup>. However, although “*The villagers agreed to the unit price offered by the company*”, the “*Unit price for a resin tree is 12,000 riel and for a missing bulldozed tree 6,000 riel*” is paltry given that the timber value of such trees is considerably more. Even the resin value would be significantly higher. Evans et al. (2003)<sup>62</sup> give income yields for resin trees in Mondolkiri as being in the range 9000 to 19000 riel per tree per year. Normal compensation for a capital asset yielding a constant return is usually in the range 7 to 10 times income value so that the range of compensation to be offered should be from 63000 to 190000 riel per tree. A fair price is probably in the region of 120,000 per tree (not taking into account inflation since 2003) or ten times what was actually paid by VRG.

The panel only had the opportunity to interview villagers at one site on the periphery of Tan Bien ELC in Kampong Thom province, (Village located at 12°28'15.41"N 105°31'19.08"E) established around 2007. Here some villagers stated that they had occupied some land where the Tan Bien ELC was later to be granted, although these are characterised as ‘outsiders’ encroaching on company land by Tan Bien management. As a result around 200ha farmland and *chamkar*<sup>63</sup> land of some villagers was taken under the ELC and cleared for rubber plantation. Although compensation of USD 80 – 120 / ha was paid as compensation for the labour for clearance, the loss of land was instrumental in numerous families leaving the village after ELC establishment. A villager reported to the panel that the company had held one meeting with the villagers, but generally were not being informed of company activities. Tan Bien does not employ a full-time staff member to focus on social issues, but a Vietnamese employee with limited Khmer is responsible for such issues since 2008.

Ongoing conflicts and complaints by indigenous people and local communities in relation to various VRG affiliated company ELCs would suggest that consultations prior to the granting of the ELCs was inadequate. The panel was informed of the following cases:

- The panel was informed of a conflict over the land granted for the Tan Bien ELC<sup>64</sup> where >1,000 families occupying the area were evicted, including numerous disabled veterans and Cham minority people who had been allocated the land in 2004 under a Social Land Concession (SLC) signed by the Provincial Governor. During a period of around one year the people of Kraya village were intimidated by the local authorities through the Forestry Administration (FA) officials, police, military and military police. In 2009 the people were evicted following the blockading of the village and were coerced into thumb-printing documents that said they agreed to be relocated. <sup>65</sup> Although the panel has not seen the ESIA for Tan Bien, it would be reasonable to assume that there should be similarities as to

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<sup>60</sup> Official FSC sourced translation of text under section 4 – Conclusions and evaluations in file named 13- BC KHAO SAT (du an 2)

<sup>61</sup> Official FSC sourced translation of text in file named: Dot 1.pdf

<sup>62</sup> Evans T.D. Hout Piseth, Phet Phaktra and Hang Mary (2003) A study of resin-tapping and livelihoods In southern Mondulkiri, Cambodia, with implications for conservation and forest management. WCS.

<sup>63</sup> Non-paddy perennial agriculture or orchard – in this case primarily cashew nut orchards.

<sup>64</sup> Appendix 8, Figure 3

<sup>65</sup> Interview with anonymous NGO representative.

the measures to mitigate against identified social impacts with the ESIA for Dong Nai that the panel has seen<sup>66</sup>, and which contains a table in Chapter D that states “*during the process of implementing the development plan, the company guarantees people cannot be asked to relocate from their settlement areas.*” A violent confrontation followed a failed attempt by the villagers to negotiate with a land distribution committee apparently appointed by the company but then cancelled.<sup>67,68,69</sup>

- The Phnong indigenous community in the Bousra commune of Mondulhiri province is affected by an ELC associated with Dak Lak Rubber Company, a company affiliated with VRG as a ‘Subordinate Member’<sup>70</sup>. The ELC contract for 4,162 hectare, signed on 8 June 2012, was granted by MAFF. The plantation is being developed directly on land claimed by the indigenous people and there is little or no land left for the indigenous community to register for themselves<sup>71</sup>.
- PNT Co., Ltd (7,900 Ha)<sup>72</sup>, CRCK Rubber Development (6,155 Ha)<sup>73</sup> and Thy Nga Development and Investment Co., Ltd (6,060 hectare)<sup>74</sup>, three companies affiliated with VRG, were granted ELCs in 2009 and 2010 to develop rubber plantations within Prey Lang, Roveang District, and have reportedly cleared land where indigenous Kouy people previously tapped resin trees for customary use. Consequently, concession-affected communities are struggling to earn a livelihood and collect enough food<sup>75</sup>.
- It was also reported to the panel that no consultation took place with villagers affected by the C.R.C.K. Aphivath Caoutchouc Co., Ltd in Kampong Thom province, where 10 villages in 3 communes are apparently negatively impacted with the loss of farmland and spirit forest. Clearance logging of the ELC is alleged to be also laundering timber from two community forests in Sandan and Dang Kamphet communes, as well as resin trees from a wide area. There was no response to a request by the Community Peace-building network to clarify the boundaries of the ELC<sup>76</sup>. RECOFTC staff working on the USAID funded Sustaining Forest Biodiversity project in the Prey Lang Landscape report that the company illegally, and without consultation, bulldozed a part of neighbouring Prey Kbal Ou Thnung and Prey Kbal Ta Kong community forests during 2014. In a meeting with the District Governor an agreement was reached for the company to pay compensation for the damage to the CFs<sup>77</sup>. However, to date there has been no follow up, and the company is clearly not being proactive in trying to resolve the issue.
- In 2010, two VRG member companies, Dau Thieng (Cambodia) Rubber Development Co., Ltd.<sup>78</sup> and Dau Thieng (Kratie) Rubber Development Co., Ltd.<sup>79</sup>, received ELCs of 7,972 hectares and 6,592 hectares respectively by Sub Decree determining the area as state

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<sup>66</sup> FSC translation of KHTT 2.502ha&phu luc I(du an 1) in Folder: 1. Master Plan Dong Nai Kratie Chapter D / Chöông D

<sup>67</sup> <http://www.licadho-cambodia.org/articles/20100402/109/index.html>

<sup>68</sup> <http://www.licadho-cambodia.org/reports/files/1432010-HRDReport2008-2009Final-ENG.pdf>

<sup>69</sup> <http://www.signalfire.org/2009/12/08/police-move-on-kraya-villagers/>

<sup>70</sup> Appendix 8, Figure 3 Subordinate Membership

<sup>71</sup> A/HRC/21/63/Add.1, Para. 163, Footnote 237& Annex II – provided by Benjamin Rutledge of OHCHR

<sup>72</sup> Appendix 8, Figure 3

<sup>73</sup> Appendix 8, Figure 3

<sup>74</sup> Appendix 8, Figure 3

<sup>75</sup> A/HRC/21/63/Add.1, Para 153 & Annex II, page 111 – provided by Benjamin Rutledge of OHCHR

<sup>76</sup> Panel interview with NGO staff

<sup>77</sup> Email exchange with RECOFTC staff

<sup>78</sup> Appendix 8, Figure 3

<sup>79</sup> Appendix 8, Figure 3

private land. During a visit in May 2012 to Svay Chreah commune, Snoul district, Kratie province, the Special Rapporteur on the Situation of Human Rights in Cambodia, Surya Subedi, learned about four community members affected by the ELCs that were summoned to the provincial court in September 2011. They were called for questioning related to intentional damages committed on 28 April 2011, the date the community members blocked the road to prevent the bulldozing of their farmland. According to the Special Rapporteur, the questioning can be seen as a sign that the judiciary has increasingly been used to criminalize individuals and communities exercising their right to claim their land and their rights to freedom of expression and assembly<sup>80</sup>.

- There have also been reports of encroachment by concessionaires of land already in the process of titling, for example the Kao Su Ea Lev rubber company in Ratanakiri province, that is affiliated with VRG<sup>81</sup>, involving Jarai indigenous peoples<sup>82</sup>.
- The Binh Phuoc Kratie Rubber 1 Company Limited<sup>83</sup> is actually mostly in Mondul Kiri province, and is located inside the Seima Protection Forest. The Forest Administration (FA), with support from an environmental NGO has been developing Community-based Production Forestry<sup>84</sup> since 2006 in the buffer zone area of the Seima Protection Forest around a core zone that is being developed as Cambodia's second voluntary REDD project. The pilot started before Seima was declared a Protection Forest and has since completed a detailed forest inventory, management plan and trial harvest plan. The Panel was informed that, however, the Director General (DG) of the FA will not authorise the pilot harvest, presumably because the Forest Law (2002) explicitly states in Article 28 "No one has the rights to issue a permit to harvest forest products and by-products within all types of Protection Forests in the Permanent Forest Reserves."<sup>85</sup> Simultaneously a parallel process of land registration of the indigenous community in the nearby Pukong village has been taking place. Most of the people living in Pukong village are Bunong indigenous people, which shows an ethnic, social, cultural, and economic unity. They live in a traditional way making use of land collectively. The process of land registration has reached the second stage, in which the statute of the indigenous community has been drafted pending adoption by the congress and official recognition by the Ministry of Interior. During this registration process, the community encountered losses of forest and resin trees, which are an important source of revenue. These resources have been destroyed in a systematic manner. According to the information provided to the Panel, for these offences, community members, officials of production forestry protection organizations, and competent officials have repressed, arrested offenders, confiscated proofs, and reported to technical authority. However, forestry offences and felling the community's resin trees have not been resolved effectively yet because these crimes have been settled via reconciliation and impunity for powerful offenders. At the same time, members of the indigenous community, the local authority, the

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<sup>80</sup> A/HRC/21/63/Add.1/Rev.1, para. 182f – provided by Benjamin Rutledge of OHCHR

<sup>81</sup> Kao Su Ea Lev is not one of the 19 VRG affiliates listed in the submission by VRG, nor is it listed on the map of VRG affiliated companies on the wall of the VRG office in Phnom Penh under either Region III (Mondol Kiri, Ratanak Kiri, Stung Treang) or under Subordinate Membership. However, the complaint could be referring to Eah'leo BM which is listed in the submission by VRG as being in Lumphat district of Ratanakiri. However there is a company listed on the VRG web site with a very similar name [http://www.vnrubbergroup.com/en/member\\_list\\_detail.php?id=elratanakiri](http://www.vnrubbergroup.com/en/member_list_detail.php?id=elratanakiri)

<sup>82</sup> A/HRC/24/36, page 16 – provided by the OHCHR

<sup>83</sup> Appendix 8, Figure 3

<sup>84</sup> In Cambodia's National Forest Programme (2010) Community-based Production Forestry is referred to as Commercial Community Forestry is one of alternative community forestry modalities to be piloted.

<sup>85</sup> Personal knowledge

provincial authority, and technical officials as well as working groups of civil society organizations have all recognized the issue of destruction of natural resources and shortcomings of the resolution. Moreover, all stakeholders are willing to continue collaboration and discussions in order to seek to solve the issue of destruction of natural resources and to enhance indigenous people's rights and livelihoods effectively<sup>86</sup>. The conflict continues to this day with regular newspaper articles relating continued rights abuses<sup>87,88</sup>. Nevertheless, VRG, with other stakeholders including villagers, has identified small areas of paddy and *chamkar* where Indigenous People from the Chokchar community had measured during Indigenous Land Titling preparations in 2012<sup>89</sup> - these are the places the community have a very strong (almost cast-iron), and genuine claim to the land. These areas fall both within and outside the area identified by VRG in its map of the Binh Phuoc ELC<sup>90</sup> as 'land owned by residents' and 'land cultivated by residents'<sup>91</sup>. Despite the community requesting an area of 1,204ha including the area identified by the company as 'land owned by residents' and part of the land identified as 'land cultivated by residents', the company is proposing a smaller area of 753ha outside the area they identified as 'land owned by residents', so the community has made a counter request to extend this to 874ha which would include a small proportion of the land identified by the company as 'land owned by residents'. Given this situation there appears to be a mismatch between both what the company and the villagers identified as belonging to the local community, suggesting there is probably some validity in the company's claims that villagers are demanding more than they used and have already made some deals with outsiders to sell the land<sup>92</sup>. Indigenous groups have been negatively impacted by Krong Buk<sup>93</sup> and Veasna Investment<sup>94</sup> ELCs in Ta Veng and Andong Meas districts in Ratanakiri province. Global Witness have provided substantive evidence to support this<sup>95</sup>. Krong Buk affects Chan village, and Veasna Investment affects Ka Nat Thum village and Chan villagers report that the farmland of 47 families is inside the concession area, whereas Ka Nat Thum villagers report 30. Most of the villagers found out about the concession by noticing outsiders in the area or by discovering marking on trees used to demarcate the concession. Chan villagers saw outsiders collecting soil samples in 2008, and one or two months later, bulldozers were transported to the area. Villagers declare that in 2010, a team from the company went to the village, and when villagers asked them why they had sprayed farmers' trees, the company replied that they would protect the land and not sell it. Neither of the villages was

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<sup>86</sup> Executive Summary of 'Report on Deforestation in Production Forestry Areas in Pukong Village, Sre Preah Commune, Keo Seima District, Monduliri Province' submitted to the panel by an environmental NGO and 'Case Study: Systematic Illegal Logging in Keo Seima, Monduliri' submitted to the panel by a social NGO.

<sup>87</sup> Brief Follow up and Intervention Report of Illegal Logging Case in Pukong Village, Sre Preah Commune, Keo Seimar District, Monduliri Province. 21-24 February 2015 submitted to the panel by a social NGO.

<sup>88</sup> <https://www.cambodiadaily.com/news/mondoliri-villagers-tell-of-rampant-logging-blame-authorities-80088/>  
<https://www.cambodiadaily.com/opinion/government-should-protect-indigenous-peoples-and-their-forests-81157/>

<sup>89</sup> Binh Phuoc1 Vs Chokchar.jpg provided by an environmental NGO

<sup>90</sup> Ban do Binh Phuoc 1 (in Bu Dop).jpg provided by VRG

<sup>91</sup> Unofficial translation of legend from Khmer to English by panel member colleague

<sup>92</sup> Allegation made by Okhna Leng Rithy when interviewed by the panel at the VRG office in Phnom Penh and verified by an NGO in correspondence with the panel.

<sup>93</sup> Appendix 8, Figure 3

<sup>94</sup> Appendix 8, Figure 3

<sup>95</sup> Field report from Global Witness, 2012.

consulted on the implementation of the land concession around their villages. In Chan village, farmers know that the company is called Krong Buk, and they received the information that the company would spare their paddy fields. Ka Nat Thum, however, has some documents about the investments. Villagers acquired them by taking the keys of the company's bulldozers and stating that they would not give the keys back until they got some information on the investment. The lack of general information also resulted in some unintentional land transactions. In Ka Nat Thum, villagers lost farmland involuntarily through thumb-printing. One of the companies<sup>96</sup> organised a party and brought a buffalo to eat. People were asked to give their thumbprints on a paper. Villagers report that they did not understand what was written on the paper, and they were told it was to receive medicine and second hand clothes. In the end, the thumbprints turned out to be signatures to give their land to the company<sup>97</sup>.

The above is ample evidence demonstrating that consultation processes have been inadequate and have led to negative impacts on numerous people, particularly in relation to indigenous people and the case of the people from the Social Land Concession at Tan Bien. However, VRG companies do not take responsibility for the adequacy of the consultation process undertaken by the Cambodian authorities regardless of the human rights abuses caused.

Although VRG has recently established a mechanism for receiving and responding to feedback and petition (F&P) of individuals and organizations about VRG's rubber development projects in Cambodia and Laos, limited responses to submissions from plaintiffs have been received so far, and the activities in question have not been put on hold whilst the complaints are investigated and addressed.

## Villagers violently evicted from their land by the company

### Legal Analysis

Beyond the legislation cited above, some other legal instruments should be considered:

Sub-decree 146 on ELCs (2005) contains Article 4.4, which states "*Land that has solutions for resettlement issues, in accordance with the existing legal framework and procedures. The Contracting Authority shall ensure that there will not be involuntary resettlement by lawful land holders and that access to private land shall be respected.*"

Article 40 of United Nations Declaration on the Rights of Indigenous Peoples (2007) states "*Indigenous peoples have the right to access to and prompt decision through just and fair procedures for the resolution of conflicts and disputes with States or other parties, as well as to effective remedies for all infringements of their individual and collective rights. Such a decision shall give due consideration to the customs, traditions, rules and legal systems of the indigenous peoples concerned and international human rights*".

### Analysis of Evidence

The Tan Bien case detailed above is well documented. In addition to the above reports, the panel also received the following:

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<sup>96</sup> Ka Nat Thum village is not only affected by Veasna Investment, but also by ELCs granted to Heng Brothers and C.R.D.

<sup>97</sup> Bues, A. 2011 Increasing Pressure for Land - Implications for Rural Livelihoods in Developing Countries: The Case of Cambodia. Submitted to Welthungerhilfe

357 families of disabled soldiers and war veterans are facing eviction in connection to the grant of economic land concession in Kro-Year commune, Santuk district, Kompong Thom province. Approximately 357 families of disabled persons and war veterans were granted land in the Banteay Lo-Ngeang area in 2004. From 2004 to January 2008, additional families moved in the hope that they too would be allocated land. 1,362 families were believed to be residing in the area by early January 2008. On 9 January 2008, OHCHR recorded that a mix of armed forces (approx. 30 people including forestry administration officials, police, gendarmeries and military) was sent to Kro-Year commune, Santuk district to seal a public road and prevent people from entering the area. Families were told to leave the area because the land had been granted to the Vietnamese Tan Bien company. The blockade allowed people to leave but prevented anyone from entering, including those who attempted to bring food into the area. OHCHR received information on 28 January 2008, that five people had fallen seriously ill from lack of food. The five were evacuated to a hospital in Choeng Prey district, Kompong Cham province. Three people were also arrested and released the next day after signing agreements that they would not oppose the ELC (Internal Note of OHCHR dated 28 January 2008).<sup>98</sup>

These forms part of a pattern of violence and intimidation against stakeholders in communities in Cambodia. Although evidence suggests that the actual violence and intimidation is normally carried out by government agents, the company could have eliminated this risk by reaching settlements with the communities affected prior to the granting of the ELC. As demonstrated above, the consultation processes prior to the granting of ELCs was wholly inadequate and did not allow for negotiation with those currently occupying the land subsequently granted for ELC development so as to avoid eviction. Although reports explicitly implicate the state security forces, not the company per se, it appears that the company made no attempt to ensure that the people occupying the land were treated with dignity and respect.

The Agreement between the Ministry of Agriculture, Forestry and Fisheries and Dong Nai in Kratie<sup>99</sup> is assumed to be representative of all such contracts between the Cambodian government and ELC companies. Article 6.1 obliges the Cambodian government to assist the company to uphold its contractual rights. This enables local authorities to involve in disputes with local people. However, Article 6.2 requires the company to seek resolution to such conflicts and to cease activities when necessary.

The spirit of the above article is clearly not being followed currently in the Bin Phuoc ELC in Mondulkiri with the wilful destruction of indigenous Bunong people's shelters on land they have been farming for generations as reported in The Cambodia Daily on 1 April 2015<sup>100</sup> whilst the panel was investigating this complaint. VRG doesn't appear to have made any attempt to transform the conflict between the Binh Phuoc ELC and the local indigenous people despite knowing that 'villagers violently evicted from their land by the company' is one of the allegations in the complaint against them. Instead, it is reported that "the company used six workers and started to burn the houses while police and military police gave protection to the workers"—directly implicating Binh Phuoc and VRG in this eviction.

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<sup>98</sup> OHCHR (2008) Internal Note by OHCHR dated 28 January 2008.

<sup>99</sup> 12. Hop dong to nhuong Dong Nai – Kratie / Contract

<sup>100</sup> <https://www.cambodiadaily.com/news/police-burn-down-mondulkiri-minority-communitys-shelters-81153/>



## Unlawful Detention and Violence towards people including children

### Legal Analysis

Liberty is included in Article 3 of the UN Declaration of Human Rights and security is included in Article 3 of the UN Declaration of Human Rights.

Article 38 of the Cambodian Constitution (1993) states *“The law guarantees there shall be no physical abuse against any individual. The law shall protect life, honour, and dignity of the citizens. The prosecution, arrest, or detention of any person shall not be done except in accordance with the law.”*

The old Provisions Relating to the Judiciary and Criminal Law and Procedure Applicable in Cambodia during the Transitional Period (1992) appears to have only been superseded by Criminal Code of the Kingdom of Cambodia in 2010<sup>101</sup>. In it, Article 10.2 restricts detention to the minimum period required to bring a person before a judge and in any case not more than 48 hours. Chapter 3 on Police Custody of Code of Criminal Procedure of the Kingdom of Cambodia (2007) articles 96 – 102 provide further details.

### Analysis of Evidence

The story of Kraya villagers where the Tan Bien ELC has been established has been summarised above. Related to this particular allegation is the reported arrest of six villagers in October 2008 with three being detained for several days before the deputy provincial governor intervenes to gain their release. This appears to have been illegal. This was followed by policemen allegedly beating up a young teenager from the village on November 16, 2009. When residents gathered to demand an explanation, police fire at the ground to disperse the crowd. In response, villagers set fire to four of the rubber company’s vehicles and 11 police motorbikes. This led to Provincial authorities issuing arrest warrants November 19, 2009 for 20 villagers accused of masterminding the violence. Four of the wanted men are arrested en route to Phnom Penh the following day.

The first incidence of arrest of villagers in October 2008 would be illegal if they were detained for more than 48hours, as they were later released without charge. Police records and interviews with those detained/arrested would be necessary to determine exactly. The second incident is related to the vandalism of private property.

With regard to children, the beating of a ‘young teenager’ would suggest someone under 18 years old, and violent conduct of any kind towards anyone in such circumstances is illegal and unacceptable regardless of being meted out by policemen. The panel, however, were unable to obtain further independent proof of the incident or age of the individual assaulted.

The panel was, however, shown photographs of armed police chasing and beating villagers near the CRCK ELC in Kampong Thom following a dispute.<sup>102</sup>

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<sup>101</sup> Kingdom of Cambodia (2007) Code of Criminal Procedure of the Kingdom of Cambodia

<sup>102</sup> Anonymous NGO interview.



Figure 9 Armed Police Chasing Protesters. (Image removed to protect identity)

Restriction of movement by villagers due to guards at company checkpoint

#### Legal Analysis

Liberty is included in Article 3 of the UN Declaration of Human Rights.

Article 40 of the Cambodian Constitution (1993) states “Citizens’ freedom to travel, far and near, and legal settlement shall be respected”.

Article 2 of the Forest Law (2002) states “The State ensures customary user rights of forest products & by-products for local communities and as further provided in the provision of this Law or other relevant laws” and further details are given in article 40.

The legal framework does not allow anyone the right to restrict access to forests for customary use.

#### Analysis of Evidence

The story of Kraya villagers where the Tan Bien ELC has been established has been summarised above and links to further reports corroborate the allegations, although the worst abuses happened more than 5 years ago. In particular in January 2008 a mixed force of police and soldiers surround and isolate Kraya for the first time. Movement in and out of the village is restricted for several months. After the blockade, police maintain a presence around the village. This was repeated after 16 November until the eventual forced eviction of villagers in December 2009.

Additionally, the panel was informed that security guards had established a checkpoint along the road into the Binh Phuoc ELC in Mondulkiri many kilometres from the actual boundary of the ELC and that local people were prevented from passing.

Clearly restrictions to movement of local communities and indigenous people has been occurring in relation to the establishment of VRG affiliated ELCs. It is not clear who is controlling or paying the guards in question as it is not possible to determine whether the guards are police or soldiers operating under government authority or under payment by the companies in question, or a third

party—a distinct possibility in the case of Binh Phuoc as the purpose of the checkpoint has been suggested to enable the illegal logging of the area outside the ELC without interruption.

#### Unsafe Working Practices leading to Chemical Burns

##### Legal Analysis

Security is included in Article 3 of the UN Declaration of Human Rights, although health and safety is only explicitly stated as an issue in relation to Child Labour in the ILO core conventions.

The Labour Law of Cambodia (1997) contains provisions for all enterprises employing more than 8 permanent employees to develop an internal regulation (Art. 22) that, amongst other things, should address health and safety measures for workers (Art. 23) and that such regulations should be drawn up after consultation with workers' representative (Art. 24).

In Chapter VIII of the Labour Law (1997) on health and safety of workers, Article 230 states “*All establishments and work places must be set up to guarantee the safety of workers*”. However, chemical use is not explicitly mentioned.

##### Analysis of Evidence

VRG have submitted to the panel guidelines for preparing land for rubber plantation<sup>103</sup>. ‘Ensuring the safety of workers’ is mentioned in articles 11 and 14 in relation to land reclamation for planting with rubber, although this appears to be related to working with machinery (bulldozers, etc.), rather than chemicals, but the panel has not received an internal regulation as required by article 22 of the Cambodian Labour Law.

A member of the panel inspected the chemical store at Dong Nai and could find no harmful pesticides or empty containers that had contained such pesticides.

Nevertheless, the panel found no additional or corroborating evidence in interviews with villagers near Tan Bien and with Dong Nai workers.

The panel considers this allegation may fall outside PfA unacceptable activities.

##### Principal findings in respect of violation of human and traditional rights.

- 1) Local residents were deprived of their rights to access and utilise forest resources.
- 2) Local communities, and in particular Indigenous Peoples, have been deprived of their land rights and properties by eviction without adequate compensation and without due legal process.
- 3) During evictions government and other private agents used levels of intimidation and in some cases violence and unreasonable detention that seriously infringed the human rights of many people.
- 4) During the eviction process at Tan Bien agents acting for VRG appear to have denied medical and food access to people living in the village for a period approaching two months.
- 5) There is insufficient evidence to conclude that VRG caused the poisoning of local people.

#### 4.5.3 Destruction of high conservation values in forestry operations

The panel found that in relation to the destruction of high conservation values in forest operations there is clear and convincing evidence that VRG subsidiaries in Cambodia were directly involved in:

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<sup>103</sup> QUY TRÌNH KỸ THUẬT KHAI HOANG TRỒNG CAO SU - Thành phố Hồ Chí Minh 11/2009

## Global Witness complaint against Vietnam Rubber Group (VRG)

- a) Destroying significant areas of evergreen and semi-evergreen forest inside national protected areas which are considered by conservation NGOs to be of high conservation value in themselves and to contain multiple high conservation values. (HCVs 1,2,3)
- b) Destroying thousands of resin trees on which local people depend for income without adequate compensation. (HCV 5)

### Allegation investigated on HCVs:

- 1) Possible destruction of HCV Class I (rosewood) and other rare and endangered species.
- 2) The panel also identified that some of the forest conversion is also likely to have destroyed forests containing HCV1, HCV 2 and HCV 3.
- 3) Destruction of HCV of class 5 by clearing communal land and forest and removing food sources and NTFP sources.
- 4) Destruction of HCV class 5 namely food sources and NTFP sources. Destruction or loss of spirit Forest HCV class 6
- 5) Destruction of HCV Class 5 (Resin trees) and restriction of access to Spirit forests and burial grounds HCV Class 6

### What are High Conservation Values?

FSC listed the following six categories of High Conservation Values (HCVs) <sup>104</sup>:

HCV 1 – Species diversity. Concentrations of biological diversity including endemic species, and rare, threatened or endangered species that are significant at global, regional or national levels.

HCV 2 – Landscape level ecosystems and mosaics. Intact forest landscapes and large landscape-level ecosystems and ecosystem mosaics that are significant at global, regional or national levels, and that contain viable populations of the great majority of the naturally occurring species in natural patterns of distribution and abundance.

HCV 3 – Ecosystems and habitats. Rare, threatened, or endangered ecosystems, habitats or refugia.

HCV 4 – Critical ecosystem services. Basic ecosystem services in critical situations, including protection of water catchments and control of erosion of vulnerable soils and slopes

HCV 5 – Community needs. Sites and resources fundamental for satisfying the basic necessities of local communities or indigenous peoples (for livelihoods, health, nutrition, water, etc.), identified through engagement with these communities or indigenous peoples.

HCV 6 – Cultural values. Sites, resources, habitats and landscapes of global or national cultural, archaeological or historical significance, and/or of critical cultural, ecological, economic or religious/sacred importance for the traditional cultures of local communities or indigenous peoples, identified through engagement with these local communities or indigenous peoples.

### Methodology

There is no available biodiversity baseline information about the species, habitats, ecosystems and landscapes of the VRG ELCs. Meanwhile, VRG has almost finalized the land clearance and rubbers planting in their ELCs now but no sound EIAs has been done or completed by VRG yet. There are only

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<sup>104</sup> FSC (2014) FSC Principles and Criteria for Forest Stewardship FSC-STD-01-001 V5-1 EN P18

two brief chapters on the environmental and social impact assessment in the master plans of Dong Nai provided by VRG. The panel therefore mainly collected secondary documentations, books and information and interviewed VRG and conservation NGOs working in the same or proximate regions to evaluate the HCVs 1 to 4 may occurred in the concessions.

Evidence and data about HCV 5 and 6 are collected mainly through meeting with VRG and its subsidiaries, interview with villagers and national and international NGOs, and verifying files and documents provided by VRG, GW and interviewees. Since HCV 5 and 6 are more associated with human rights of local communities, the relevant result of evaluation is presented in details in the Annex 6.

## Assessment of Evidences

### Destroy HCV 1 to 3 in four protected areas in Cambodia

Until recently, the landscape of Cambodia was dominated by evergreen, semi-evergreen and dry dipterocarp forests but Cambodia lost 22% of its forest cover between 1973 and 2009 which was mainly driven by the needs of land for agricultural and agro-industrial production including rubber, sugar, rice and biofuel<sup>105</sup>.

There are two protected area systems for biodiversity conservation in Cambodia<sup>106</sup>. In 1993 Cambodia government established and recognized 23 protected areas including seven national parks, ten wildlife sanctuaries, three protected landscapes and three multiple use area<sup>107</sup>. The MoE are responsible for the management, conservation of biodiversity, and sustainable use of natural resources in the above protected areas<sup>108</sup>. Protection/Protected Forest is another sort of protected area managed by MAFF as a category of Permanent Forest Reserves maintained primarily for the protection of forest ecosystems and natural resources<sup>109</sup>.

From the documentary evidences the panel received from VRG and correspondences by emails, the company currently owns 17 ELCs with a total area of 127,186ha in Cambodia (Table 6). Among 17 existing ELCs of VRG in Cambodia, six are located in protected forests or wildlife sanctuaries and occupy 35% of the total area of ELCs.

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<sup>105</sup> Save Cambodia's Wildlife (2014) Atlas of Cambodia: Maps on Socio-Economic Development and Environment. Save Cambodia's Wildlife: Phnom Penh, Cambodia P10

<sup>106</sup> Tordoff A. et al (2012) Ecosystem Profile, Indo-Burma Biodiversity Hotspot - 2011 Update. Critical Ecosystem Partnership Fund.

<sup>107</sup> Government of Cambodia (1993) Royal Decree of Cambodia on the Protection of Natural Areas.

<sup>108</sup> Government of Cambodia (2008) Cambodian Protected Areas Law. Chapter II Responsible Institutes, Article 4.

<sup>109</sup> Government of Cambodia (2002) Law on Forestry (translated from Khmer) September 2002

## Global Witness complaint against Vietnam Rubber Group (VRG)

Table 6: The name, size and location of VRG ELCs in protected area in Cambodia

	Name of VRG	Size (ha) <sup>^</sup>	Protected Area	Province	Key Biodiversity Area#
1	CRCK II	9235	*Boeng Per Wildlife Sanctuary	Kampong Thom	No
2	Bean Heack	9480	#Boeng Per Wildlife Sanctuary	Kampong Thom	No
3	Me Kong	8000	#Boeng Per Wildlife Sanctuary	Kampong Thom	No
4	Tay Ninh	7600	#Kulen-Promptep Wildlife Sanctuary	Oddar Meanchey	No
5	Vketi	5059	*Snoul Wildlife Sanctuary	Kratie	Yes, KMH28
6	Binh Phuoc 1	5100	#Seima (protected forest and biodiversity conservation area)	Mondul Kiri	Yes, KMH28
	<b>In total</b>	<b>44474</b>			

Data sources: \* ODC database<sup>110</sup>; # Save Cambodia's Wildlife<sup>111</sup>; ^ VRG<sup>112</sup>

The Binh Phuoc I is located in the buffer zone of Seima Protection Forest and Biodiversity Conservation Area (SPF), a kind of protected area maintained primarily for protection of the forest ecosystems and natural resources and managed by the MAFF<sup>113</sup>. The Vketi is located in the Snoul Wildlife Sanctuary under the management of the MoE<sup>114</sup>.

Both SPF and Snoul Wildlife Sanctuary are part of the Eastern Plains Landscape in Cambodia<sup>115</sup> and one of "Global 200 Ecoregions"<sup>116</sup> for its globally significant Mekong lowland dry evergreen forest and rich biodiversity. Meanwhile, the two protected areas lie in southwest of the Snoul/Keo Sema/ O Reang Important Bird Area (IBA) in South Vietnam Lowlands Endemic Bird Area (EBA) identified by

<sup>110</sup> Open Development Cambodia (2015) <http://www.opendevdevelopmentcambodia.net/>

<sup>111</sup> Save Cambodia's Wildlife (2014) Atlas of Cambodia: Maps on Socio-Economic Development and Environment. Save Cambodia's Wildlife: Phnom Penh, Cambodia P27, 32

<sup>112</sup> Vietnam Rubber Group (2015) List of VRG ELCs in 2015, "Danh sách dự án tại Campuchia", Annex 5

<sup>113</sup> Government of Cambodia (2002) Law on Forestry (translated from Khmer) September 2002.

<sup>114</sup> Government of Cambodia (2008) Cambodian Protected Areas Law

<sup>115</sup> Save Cambodia's Wildlife (2014) Atlas of Cambodia: Maps on Socio-Economic Development and Environment. Save Cambodia's Wildlife: Phnom Penh, Cambodia P30

<sup>116</sup> WWF (2000) The Global 200: A representation approach to conserving the Earth's Distinctive Ecoregions. Conservation Science Program, World Wildlife Fund, Washington;

Birdlife International for its significant bird diversity and endemism<sup>117</sup>. It also overlaps with the Snoul/Keo Sema/O Reang Key Biodiversity Area (KBA) in the Southern Annamites Western Slopes Conservation Corridor of Indo-Burma Hotspot for its significant diversity and endemism of mammals, birds and reptiles<sup>118</sup>.

This KBA or IBA are outstanding for its unique assembly of large and endangered mammals in the world, including but not limited to tiger (*Panthera tigris*, IUCN Globally Endangered), Asian elephant (IUCN Globally Endangered), Black-shanked douc langur (*Pygathrix nigripes*, IUCN Globally Endangered), yellow-cheeked crested gibbon (*Hylobates gabriellaem*, IUCN Globally Endangered), Banteng (*Bos javanicus*, IUCN Globally Endangered), Germain's Silvered langur (*Trachypithecus germaini*, IUCN Globally Endangered), sun bear, and several species of muntjak, macaques and leaf monkeys.<sup>119,120,121</sup>

SPF was established in 2009 by a sub-decree with the facilitation of the World Conservation Society (WCS). The agreed vision for this site is: *A well-managed forest landscape that supports increasing wildlife populations and improving livelihoods for the people who currently live there*<sup>122</sup>. WCS and FA developed SFPBCA a second Cambodia pilot site of REDD and the project is also frequently cited as a model for integrated site-based biodiversity conservation project<sup>123</sup>. WCS conducted an assessment of High Conservation Values (HCV) of the core zone of SPF which reveals five main HCVs of the site<sup>124</sup>:

*HCV1: Forest areas containing globally, regionally or nationally significant concentrations of biodiversity values regionally or nationally significant.*

*It is not only a protected area but owns 41 globally threatened vertebrate, 10 globally threatened plant species, and several endemic species including yellow-cheeked crested gibbon, black-shanked douc langur, 3 restricted-range bird species, frog and rattan.*

*HCV2: Forest areas containing globally, regionally or nationally significant large landscape level forests.*

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<sup>117</sup> Birdlife International (2015) Endemic Bird Area factsheet: South Vietnamese lowlands.

<sup>118</sup> Tordoff A. et al (2012) Ecosystem Profile, Indo-Burma Biodiversity Hotspot - 2011 Update. Critical Ecosystem Partnership Fund.

<sup>119</sup> Birdlife International (2015) Endemic Bird Area factsheet: South Vietnamese lowlands;

<sup>120</sup> Tordoff A. et al (2012) Ecosystem Profile, Indo-Burma Biodiversity Hotspot - 2011 Update. Critical Ecosystem Partnership Fund;

<sup>121</sup> The IUCN Red List of Threatened Species. Version 2014.3. <[www.iucnredlist.org](http://www.iucnredlist.org)>. Downloaded on 15 April 2015

<sup>122</sup> Pollard E. and Evans T (2012) Seima Protection Forest High Conservation Values Assessment. Wildlife Conservation Society – Cambodia Program, Phnom Penh, Cambodia. P1

<sup>123</sup> Tordoff A. et al (2012) Ecosystem Profile, Indo-Burma Biodiversity Hotspot - 2011 Update. Critical Ecosystem Partnership Fund. P214

<sup>124</sup> Pollard E. and Evans T (2012) Seima Protection Forest High Conservation Values Assessment. Wildlife Conservation Society – Cambodia Program, Phnom Penh, Cambodia. PIII

*HCV3: Forest areas that are in or contain rare, threatened or endangered ecosystems.*

*The site conserves what is probably the largest remaining block of lowland southern Annamitic forest and large areas of deciduous dipterocarp forest. Both of these forest types have suffered globally from extremely high levels of deforestation and conversion. The SPF Core Area includes areas of the unique Sen Monorom grasslands. SPF is one of only two protected areas to do so.*

*HCV5: Forest areas fundamental to meeting basic needs of local communities*

*HCV6: Forest areas critical to local communities' traditional cultural identity*

In addition, at least ten tree species recorded in the core zone of SPF are listed as globally Endangered, Vulnerable or Critically Endangered in the IUCN Red List<sup>125</sup>, among which the Siamese rosewood (*Dalbergia Cochinchinensis*, IUCN Globally vulnerable), a luxury or precious wood with a high market value, was listed in the CITES Appendix II<sup>126</sup> in March 2013 due to the extensive threat it obtains from the illegal logging and international trade and the Burmese rosewood (*Dalbergia bariensis/ Dalbergia oliveri*, both IUCN Globally Endangered) is reported to be under the same threat<sup>127</sup>. Among them there are also four *Dipterocarpus spp.* could be used by local or indigenous people as resin tree such as *Dipterocarpus alatus* (IUCN Globally Endangered with a local name of Choeteal tuck) and *Dipterocarpus costatus* (IUCN Globally Endangered with a local name of Choeteal bangkouy).

Although there is no detailed inventory survey of biodiversity and HCV assessment in the buffer zone of SPF and neighbouring Snoul Wildlife Sanctuary, the two ELCs of VRG may contain similar HCVs considering it is of same landscape and ecosystems and proximity to the SPF core zone. The interview with an environmental NGO in Cambodia draws to the same conclusion since the forest in the Binh Phouc I used to be part of a large intact primarily forest and contiguous to the forest in the core zone of SPF and also was part of the land of indigenous Bunong people<sup>128</sup>. It was also reported by the same interviewee that the rosewood were illegally harvested, sawed and laundered within and 5 km outside the Binh Phouc I and other two nearby concessions of other companies.

The other evidence shows that the Binh Phuoc I overlaps at least with the distribution of wild Asian elephant and yellow-cheeked crested gibbon (*Hylobates gabriellaem*) while the Vketi ELC with the gibbon based on the known distribution of these two globally endangered species<sup>129</sup>.

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<sup>125</sup> Pollard E. and Evans T (2012) Seima Protection Forest High Conservation Values Assessment. Wildlife Conservation Society – Cambodia Program, Phnom Penh, Cambodia P11

<sup>126</sup> CITES (2013) Convention on International Trade in Endangered Species of Wild Fauna and Flora Appendix II, dated 13 June 2013

<sup>127</sup> Global Witness (2015) The Cost of Luxury: Cambodia's Illegal Trade in Precious Wood with China. Global Witness, London.

<sup>128</sup> FSC (2015) notes of panel interview with an environmental NGO in Cambodia. “20.03.2015\_Notes stakeholders meeting in Phnom Penh.doc”

<sup>129</sup> Save Cambodia's Wildlife (2014) Atlas of Cambodia: Maps on Socio-Economic Development and Environment. Save Cambodia's Wildlife: Phnom Penh, Cambodia P30



The importance of the biodiversity significance in this area is demonstrated by the fact that the three ELCs in the area granted to Vietnamese companies were reduced in size by 50% when the issue was given media attention and the government became embarrassed by it. In 2012 the council of ministers excised half of the Binh Phouc I ELC and the other two Vietnamese ELCs for the conservation of evergreen and semi-evergreen forest<sup>130</sup>. In total about 15,092ha was saved from the conversion to rubber.

#### Destroy HCV1 in other ELCs

The VRG presented the panel a field survey and evaluation report<sup>131</sup> about the proposed concession of Dong Nai before it was granted. The report mainly assessed the species, density and timber volume of trees above 10 cm of diameters at breast height (DBH) for commercial purpose but also had a brief inventory of wildlife investigated by the field survey and interview with local people. The results showed that at least three tree species recorded in this survey are listed in the IUCN red list, which are *Shorea farinose* (Globally Critically Endangered), *Madhuca pasquieri* (Globally Vulnerable) and *Mangifera minutifolia* (Globally Vulnerable)<sup>132</sup>. The report also mentioned that the northern part of the forest cover and structure was still complete in general and contains the Dipterocarpaceae spp. after the big trees of over 80 DBH with commercial value such as Dipterocarpaceae alatus (Globally Endangered) had been harvested in 1990s.

According to this report, the forest in Dong Nai has never been totally cleared or displaced by plantations or crops before the concession was granted and the forest structure was still largely kept, the panel thus infers that the diversity of plant species was not changed a lot and the rare and endangered species may still exist before it was granted as an ELC. The brief inventory of wildlife also partly supports the conclusion that the forest structure and function was mainly kept because boar, roe deer, deer, porcupine, bears, rabbits, lizards, turtles, *Rhinopithecus avunculus*<sup>133</sup>, buffalo and bison<sup>134</sup> were reported in the proposed area. The interview with the local people by the panel also showed the forest in the concession used to have boar, monkey and peacock at least.

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<sup>130</sup> Government of Cambodia (2012) Letter from the Deputy Prime Minister to the Prime Minister for the approval of adjusting the area of three ELC of three Vietnamese companies and reserving the area for forest protection “*Prakas of ELCs in SPF\_Eng.doc and Prakas of ELCs in SPF\_Kh.pdf*” dated 12 September 2012.

<sup>131</sup> Official FSC sourced translation of article 6 of the file named: 15. BIEN BAN KS 8.276ha (du an 2). Annex 5, 1.16

<sup>132</sup> According to the conservation information provided by the IUCN red list, the three tree species are not distributed in Cambodia but in China, Vietnam or Thailand. Since there is no available baseline data of tree species in Cambodia, it is difficult to tell whether it is a wrong identification or these species can also be found in Cambodia.

<sup>133</sup> This species is critically endangered and only distributed in a limited area in northern Vietnam and impossible to exist in this area. It may be other monkey species with long tails such as langur or macaque.

<sup>134</sup> It should be another mistake of species identification or wrong translation. The most possible and similar animal would be Banteng (*Bos javanicus*, IUCN Globally Endangered) considering the large tract of evergreen forest in this area before the concession was granted.

## No awareness of HCVs and failure to follow policy of VRG

During the formal meetings and field visit, the panel held a strong impression that both senior managers and ordinary staff from the VRG and its member companies are not aware of the exact requirements of PfA, let alone the meaning and definition of High Conservation Value.

VRG provided to the panel a series of legal documents, reports and minutes about the granting of Dong Nai as an ELC and also explained the general procedures of ELC selecting and approval<sup>135</sup> by the Cambodia government. Based on the specific case of Dong Nai and the information on ELC granting on the website of open development Cambodia<sup>136</sup>, the following general procedures on VRG ELCs granting in Cambodia are summarized:

1. VRG established a legal entity in Cambodia which became a member company of VRG
2. MAFF and local government representatives recommended and introduced potential lands to VRG
3. The member company of VRG selected the land based on three main criteria: a) Land suitable for rubber plantation; b) Good infrastructure conditions to minimize investment; c) as few land cultivated by local people as possible.
4. The member company submitted a formal request of an ELC in a specific site from the MAFF.<sup>137</sup>
5. MAFF established a technical task force consisting senior staff of its apartments and worked with a working group consisting of officials from targeted provincial and district government to survey and evaluate the proposed area.<sup>138</sup>
6. MAFF requested a land for ELC for rubber plantation from the Council of Ministers (CoM) by a letter<sup>139,140</sup>
7. The CoM issued a letter to MAFF on the principle approval of ELC and laid on specific requirements such as asking the company to cooperate with MAFF to excise the land having dispute with local communities or need to be preserved, register for the conversion of land use, report initial environmental and social impact assessment

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<sup>135</sup> FSC (2015) notes "16.03.2015 Notes meeting with VRG in HCM.doc" P4-5

<sup>136</sup> Open Development Cambodia (2015) <http://www.opendevdevelopmentcambodia.net/>

<sup>137</sup> Letter of Dong Nai Kratie Caoutchouc Aphivath Co. LTD to MAFF, dated 15 Jun 2007, "8-VB CUA CTY(du an 1).doc". Annex 5

<sup>138</sup> Report on the survey and evaluation of proposal by Dong Nai Kratie Aphivath Rubber Company for granting of additional land concession in Sambor district, Kratie province. "15. BIEN BAN KS 8.276ha (du an 2).doc" translated of article 6 as "En\_Formal request of translation.doc" dated 17 Aug 2009. The field survey was conducted from August 3 to 10, 2009.

<sup>139</sup> Letter of MAFF to the CoM, dated 28 Dec 2007, "1-VB 7165 CUA BO(du an 1).doc". Annex 5. In the document, the year of date was wrongly translated according to the records of other legal documents.

<sup>140</sup> Letter of MAFF to the CoM, dated 25 Sep 2009, "1-VB 5485-547 CUA BO (du an 2).doc". Annex 5. In the document, the year of date was wrongly translated according to the records of other legal documents.

- before signing the contract.<sup>141,142</sup>
8. MAFF established a working group/task force consisting of senior staff of its departments including General Department of Agriculture, General Department of Forest Protection and Department of Statistics and Planning, and gave a mission order to the targeted provincial government to establish another working group to work together with MAFF working group to determine the concession boundaries and remove dispute land and other conservation area from the proposed concession. The provincial administrative court therefore established a working group consisting of representative of provincial authorities, district authorities and local communes. Two working groups worked together with the representatives of the member company to conduct the field survey to identify any dispute land/resin tree or land need to be preserved such as the buffer zone of rivers, and demarcate the boundary by identifying the coordinates. The company will put forward their specific needs on land acquisition such as the deduction of land not suitable for rubber plantation and the buffer zone of rivers before the survey.<sup>143,144</sup>
  9. The task force wrote and submitted the field survey report to MAFF which showed the result of survey as well as the request of the company such as the building of road, offices, worker's house and nursery or excising land not suitable for rubber plantation.<sup>145,146</sup>
  10. MAFF requests delegation of full powers from the CoM to sign contract with the member company on the ELC based on the field survey report in item 8.<sup>147,148</sup>
  11. CoM issues a legal document to MAFF on the delegation of full powers to MAFF to sign the contract on the ELC.<sup>149,150</sup>
  12. The member company paid deposit of 1US\$ per hectare to MAFF and the contract was signed between MAFF and the company.<sup>151,152</sup>

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<sup>141</sup> Letter of CoM to MaFF, dated 2 Jan 2008, "2-SChN 2502 ha(du an 1).doc" Annex 5

<sup>142</sup> Letter of CoM to MaFF, dated 28 Sep 2009, "2-VB.1336.SChN (du an 2).doc" Annex 5

<sup>143</sup> Minutes of task force on land demarcation, removal of land under dispute and other conservation areas from the 2502ha land of concession of Dong Nai, dated 23 Jan 2008, "7-BIEN BAN KHAO SAT(du an 1).doc" Annex 5

<sup>144</sup> Minutes of task force on land demarcation, removal of land under dispute and other conservation areas from the 4959ha land of concession of Dong Nai, dated 15 Oct 2009, "14-BIEN BAN KHAO SAT (du an 2).doc" "EN\_Formal request of translation" Annex 5

<sup>145</sup> Survey report of the Working Group to determine the boundaries of land, crop land with obstacles to DT to preserve an area of land concessions DONG NAI Company APHIVATH CAOUTCHOUC Kratie., LTD Ro Luas Meanchey commune, Sambor district, Kratie province. (6-BAO CAO KHAO SAT(du an 1) Annex 5. The field survey was conducted from Jan 18 to 25, 2008.

<sup>146</sup> Survey report of task force to demarcate the land; remove disputed land and other conservation areas from 4,595 ha Dong Nai Kratie Aphivath Rubber Co. land concession in O Krieng and Ro Luas Meanchey communes, Sambor district, Kratie province. dated 28 Oct 2009, "13- BC KHAO SAT (du an 2)" Annex 5. The field survey was conducted from October 8 to 15, 2009

<sup>147</sup> Letter of MAFF to CoM, dated 29 Jan 2008, "3-VB 439.047 Xin Uy Quyen(du an 1).doc" Annex 5

<sup>148</sup> Letter of MAFF to CoM, dated 22 Jan 2010, "3-VB 435-068 Xin Uy Quyen (du an 2).doc" Annex 5

<sup>149</sup> Legal document of CoM to MAFF, dated 1 Feb 2008, "4-GIAY UQ 2502 ha(du an 1).doc" Annex 5

<sup>150</sup> Legal document of CoM to MAFF, dated 26 Jan 2010, "4-GIAY UQ 4.588ha (du an 2).doc" Annex 5

<sup>151</sup> Contract on investment rubber plantation between the Ministry of Agriculture and Co NL and Dong Nai Kratie Africa Vat Rubber signed on 4 Jul 2008. "contract.pdf" Annex 5

<sup>152</sup> Contract on investment rubber plantation between MAFF and Dong Nai Kartie Aphivath Caouthouc co. LTD signed on 29 Jan 2010 "ELC\_2\_VN Version (1).pdf" Annex 5

13. The disclosure of land allocation and information in 30 days by a governmental commission after the contract was signed and the member company was not involved
14. Master Plan with an initial ESIA report was submitted by the member company for approval in six months after contract signed
15. Land registration of the ELC from the state public land to state private land within three months after the master plan was approved as required by the contract.
16. The member company was allowed to commence the rubber planting after the master plan is approved.
17. The member company paid the land fee annually (no later than the 31<sup>st</sup> January each year) to MAFF according to the concessionary land rate defined by the Cambodia government and competent institutions according to the contract.

During the meetings with VRG and field visit, the panel asked specific questions to their senior staff about how VRG identifies and conserves HCVs and relevant management measures, but VRG believed that it is the complete responsibility of Cambodia government and its authorities to find out the HCVs and excised the preserved area from the ELCs from the step 5 to 11. VRG believed that it is the responsibility and liability of authorized agencies to check if there is any land of local people or with rich biodiversity, and emphasized that the granting of ELCs itself means that there is no valuable forest and HCVs on it otherwise the land will be excised or not granted from the right beginning. They argued that they followed the Cambodia laws and requirements of government authorities and believed that the FSC definition of HCVs has been captured by the environmental laws, but they failed to explain the detailed articles and showed the panel their internal management procedures that may help them to evaluate the capacity of Cambodia government to identify and preserve HCVs.<sup>153</sup>

VRG also said that they are not allowed to participate in the above steps from 5 to 11 of ELC granting, but the meeting minutes provided by VRG showed that representatives of the member company actually participated in the field survey for land demarcation and put forward the requests including excising the land not suitable for rubber plantation from the proposed concession<sup>154</sup>. In addition, the survey report on the proposed section 2 of Dong Nai revealed the occurrence of several endangered species of trees and animals, but VRG did not take any actions to verify the information<sup>155</sup>. The documentary evidences provided by VRG did not have any feasibility study report carried out by the company itself and its initial ESIA reports in the master plans also failed to identify any HCVs.

All the above evidences showed that VRG have very low awareness of HCVs defined by FSC and made no attempt to identify and preserve the HCVs in their concessions from the right beginning.

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<sup>153</sup> FSC (2015) notes "16.03.2015 Notes meeting with VRG in HCM berty.doc" Annex 5

<sup>154</sup> Minutes of task force on land demarcation, removal of land under dispute and other conservation areas from the 4959ha land of concession of Dong Nai, dated 15 Oct 2009, "14-BIEN BAN KHAO SAT (du an 2).doc" "EN\_Formal request of translation" Annex 5

<sup>155</sup> Report on the survey and evaluation of proposal by Dong Nai Kratie Aphivath Rubber Company for granting of additional land concession in Sambor district, Kratie province. "15. BIEN BAN KS 8.276ha (du an 2).doc" translated of article 6 as "EN\_Formal request of translation.doc" Annex 5

Although VRG failed to show any specific regulation and policy on the protection of HCVs in the ELCs in Cambodia, it provides an internal technical guideline on the land reclamation with a specific article that says: “Principle of land reclamation:...Not included in the area of protected areas of natural heritage, forest protection, forest national monuments, temples; and other restricted areas as prescribed by law. For the rubber plantation project... the owner investors must also comply with the law on natural resources and environment of the host country”<sup>156</sup>. Therefore, the evidences showed that the rubber development projects of VRG in Cambodia did not comply with their own policy as well.

## Destruction of HCV class 5 namely food sources and NTFP sources

### Legal Analysis

Indigenous people’s rights to their traditional occupations and establishment of indigenous people’s communities have been recognized and protected by laws of the Kingdom of Cambodia<sup>157</sup> and international laws that Cambodia has endorsed. Indigenous communities have the right to collective ownership<sup>158</sup>. At the same time, the rights to customary use of forestry by-products by local communities living in or nearby Permanent Forest Reserve areas do not require permission to collect the products<sup>159</sup>. Indigenous people’s resources are not subject to destruction<sup>160</sup>. Indigenous people’s rights have also been incorporated by the Royal Government into the National Policy on Development of Indigenous People. This Policy has a vision and focus to develop all sectors in areas where indigenous people live in order to alleviate poverty and enhance indigenous people’s livelihoods<sup>161</sup>.

### Analysis of Evidence

It is difficult to prove precisely what was in the forest before being cleared once everything has gone. However, there is enough circumstantial evidence on typical forest composition to determine that the forests contained resources that villagers relied on for their livelihoods, in particular the resin trees which provide valuable income to forest communities who otherwise depend on subsistence agriculture.

Nevertheless, there is ample evidence to indicate that the areas being cleared were relatively rich forest, and that local communities and indigenous people:

- Numerous publicly available papers describe the floristic composition of evergreen forest, especially in relation to resin trees, and how local people relate to the forest<sup>162</sup>.
- The ELC managers interviewed by the panel all admitted that substantial royalties were paid on timber from the forest clearance, and the panel saw with their own eyes, timber being cut, stored and transported from immediately outside Dong Phu. VRG representatives in Phnom Penh even admitted paying USD 1 million on royalties due by other companies granted logging rights in some affiliated company ELCs.

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<sup>156</sup> VRG (2009) The technical process of reclaimed rubber (Issued together with Decision No. 276 / HDQTCSVN day of the Group 04/11/2009 Industrial Rubber Vietnam) “*Quy trinh lam dat.pdf*” Article 2 item 1 Annex 5

<sup>157</sup> see section on 'general considerations' above under the heading 'violation of traditional and human rights'

<sup>158</sup> Constitution 1993 (Article 44), and 2001 Land Law (Articles 25 and 26).

<sup>159</sup> Forest Law (Chapter 9, Article 40).

<sup>160</sup> UN Declaration on Indigenous People’s Rights (Article 8.2.b).

<sup>161</sup> National Policy on Development of Indigenous People (Ministry of Rural Development), 24 April 2009, page 15.

<sup>162</sup> Examples include: Milne & Sullivan, 2015; Cheetham, 2014; WCS, 2013; Pollard & Evans, 2012; Koy et al., 2011; Prom, 2009; Hoev et al, 2006.

- The ELC managers confirmed that resin trees were cleared from within ELC boundaries and VRG have provided example documentary evidence for compensation paid.
- Villagers and their representatives interviewed, especially from around CRCK, Binh Phuoc 1 and Krong Bork, have confirmed that thousands of resin trees have been lost.
- A confidential report<sup>163</sup> prepared by an NGO details how the loss of access to forest hampers indigenous people's survival as it reduces the areas for hunting, foraging and for upland shifting cultivation.
- In numerous cases there are allegations that 'spirit' forest or cemeteries have been destroyed. This is highly likely, and the companies visited did not offer to demonstrate a single case where they had set aside an area of spirit forest.

Although compensation has been paid for the loss of resin trees in some cases<sup>164</sup>, it has not been paid in others. Where it has been paid, it has not been a choice—it's been 'take it or leave it', as the trees inside ELCs would be felled anyway. The compensation paid—between USD 1.50 to 3.00 / tree—is nowhere near the timber value, nor even the annual resin value per tree. VRG management admitted that the level of compensation was set simply because there were so many resin trees and it would be too expensive to pay more, although given the overall investment costs these don't appear to be anywhere near prohibitive costs<sup>165</sup>. The loss of resin trees, as NTFPs that provide critically important income can be considered as a loss of HCV class 5. The villagers affected by Krong Bork, Binh Phuoc 1 and CRCK are clear examples of this.

The reduction in the scope for indigenous people to practice their traditional way of life based on the forest, and subsequent deterioration of their livelihoods, can be considered as loss of HCV class 5. The villagers affected by Krong Bork, Binh Phuoc 1 and CRCK are clear examples of this.

#### Principal Findings in Relation to the Destruction of High Conservation Values

- 1) That in converting evergreen forest to plantations in the Seima Protection Forest that VRG has destroyed areas containing HCV categories 1, 2 and 3.
- 2) That in converting other evergreen forests to plantations that VRG has most probably destroyed numerous sites containing HCV category 1 resources in the form of rare and endangered species including some considered critically endangered.
- 3) That in felling resin trees without adequate compensation and that by clearing large areas of forest containing other resources of importance to indigenous peoples and local communities VRG destroyed HCVs of Category 5
- 4) VRG most likely cleared spirit forests of importance to local communities thereby destroying HCVs of category 6.

#### 4.5.4 Significant conversion of forests to plantations or non-forest use

The panel found that in relation to significant conversion of forests to plantation or non-forest use that it is **beyond reasonable doubt** that VRG subsidiaries in Cambodia are directly involved in the conversion of evergreen and semi-evergreen forest to rubber plantations and that:

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<sup>163</sup> Reference is confidential

<sup>164</sup> See analysis under complaint 1 above, and footnote 23

<sup>165</sup> Official FSC sourced translation of file named: dot1.pdf shows that Dong Nai alone the total number of 1,670 resin trees to be paid for amounted to 17,256,000 riel (USD 4,208.78 equivalent), of which actual resin trees comprised 1,206 (costing 14,472,000 riel) and 464 missing bulldozed resin trees (costing 2,784,000 riel).

## Global Witness complaint against Vietnam Rubber Group (VRG)

- a) Such conversion covers almost 100% of the area planted to rubber since all non-rubber areas are excised from the FMU.
- b) the total area of conversion in Cambodia is approaching 100,000ha
- c) the management of VRG in Cambodia has at least some management control of other associated companies which are also responsible for conversion.
- d) the business model of VRG in Cambodia specifically targets areas of evergreen forest since these areas provide the best growing conditions for rubber trees.

### Allegation investigated on forest conversion:

Formal complaint<sup>166</sup> Page 7 Line 21 – 22 and Page 8-9: Conversion of forest cover to plantations in three VRG ELCs (Dong Phu, Dong Nai and Hoang Anh Mang Yang)

### Methodology

To understand the change of forest cover of VRG ELCs in Cambodia, the panel collected satellite images from different sources including GW and an environmental NGO before and after the land were granted. In addition, annual deforestation in 17 selected ELCs was analyzed by an independent consulting company through the interpretation of satellite images of Landsat 5/8 from 2008 when the PfA was in effect to 2014 when the formal complaint was accepted by FSC. The boundary of each ELC was overlaid on the satellite images analyzed to understand the forest conversion each year. These ELCs were chosen for analysis because they are either alleged by GW and/or other interviewees for deforestation or approved to be located in protected areas in Cambodia.

There is obvious discrepancy about the exact size and boundary of about half of ELCs between the evidence from GW, VRG and public data on the website of Open Development Cambodia<sup>167</sup>. It mainly stems from the different perception of concession, adjustment of boundaries after the land was granted, and the poor public availability of relevant government documents. VRG has deducted the land in dispute with local communities, buffer zones of streams for soil and water conservation, and other plots not allowed by local authorities for plantation from their concessions, which largely explains why VRG provided also different data in different occasions. The panel mainly applied the information of the boundary and size of ELCs in the master plans or legal documents whenever possible during the assessment.

During the field visit, the panel assessed the ground truth by GPS and interviewed loggers, temporary workers, company staff, and local villagers. The panel also interviewed different stakeholders including the certification body, international organizations, and national and international NGOs on March 15<sup>th</sup>, 21<sup>st</sup> and 22<sup>nd</sup>, 2015 to collect more evidence.

In addition the panel used the Google earth and Global Forest Watch (<http://www.globalforestwatch.org/>) to cross-check the change of forest cover during the verification and assessment.

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<sup>166</sup> Alley P. (2014a) Formal Complaint Regarding Vietnam Rubber Group's violation of FSC\_POL-01-004 Policy for the Association of Organisations with FSC

<sup>167</sup> Open Development Cambodia (2015) <http://www.opendevdevelopmentcambodia.net/>

## Global Witness complaint against Vietnam Rubber Group (VRG)

### Evidence collected from various stakeholders

#### Evidence provided by VRG

VRG stated in the meeting with the panel that they have 19 Economic Land Concessions (ELCs) for rubber plantation in total in Cambodia (FSC note). However, they provided the maps and sizes of just 17 ELCs and one rubber project transferred from other investors and explained that the other two ELCs have been transferred to other investors because the soil was not suitable for rubber plantation. The total area of 17 ELCs and one rubber project acknowledged by VRG reaches 127,993ha in Cambodia (Table 7).

Table 7: List of VRG Projects of Rubber in Cambodia

NO.	Name	Location	Total Area (ha)
1	Phu Rieng <sup>1</sup>	Snoul District, Kratie Province	8,349
2	Dong Nai	Sam Bo District, Kratie Province	7,097
3	Dong Phu	Sam Bo District, Kratie Province	9,345
4	Vketi	Snoul District, Kratie Province	5,059
5	Dau Tieng – Cambodia	Snoul District, Chlong, Kratie Province	7,972
6	Dau Tieng – Kratie	Snoul District, Chlong, Kratie Province	6,592
7	Tan Bien	Santuk District, Kampong Thom Province	8,100
8	Me Kong	District Prasat, Preah Vihear province, Rovieng District, Kampong Thom Province	8,000
9	Phuoc Hoa <sup>2</sup>	Santuk District, Kampong Thom Province	9,184
10	Ba Ria Kampong Thom <sup>2</sup>	Santuk District, Kampong Thom Province	5,914
11	CRCK II	Stoung District, Kampong Thom Province; Chikraeng District, Seam Reap Province	9,235
12	Bean Heack	Prasat Balangk District, Kampong Thom Province; Chikraeng District, Seam Reap Province	9,480
13	CRCK	Sandal District, Kampong Thom Province	6,155
14	Hoang Anh Mang Yang	Veun Sai District, Rattanakiri Province	7,195



## Global Witness complaint against Vietnam Rubber Group (VRG)

15	Krong Buk	Andong Meas and I Vien District, Rattanakiri Province	6,765
16	Eah leo	Lumphat District, Rattanakiri Province	8,400
17	Chu Prong K <sup>1</sup>	Phala District, Steung Treng Province	7,400
18	Binh Phuoc 1	Keosema District, Mondulkiri Province	5,100
19	Tay Ninh	Trapeang Prasat District, Oddo Meanchey Province	7,600
20	Kiri Development <sup>3</sup>	Veun Sai District, Rattanakiri Province	807

1. ELC granted from the right beginning but transferred to other investors because the soil is not suitable for rubber plantation.
2. ELC was transferred from other investors in 2008
3. It was not considered as an ELC but a rubber project by VRG and transferred to VRG in March 2012.

Data sources: List of ELCs in Vietnamese provided by VRG, email correspondences

### Evidences provided by Global Witness

GW provided the Landsat-7 satellite images showing the change of forest cover in three ELCs in the formal complaints<sup>168</sup>. On the request of the panel, GW provided the shape files of all 19 ELCs of VRG except the Tay Ninh and Ba Ria Kampong Thom. Meanwhile, more Landsat-7 satellite images showing forest cover change before and after the plantation and deforestation maps were provided by GW<sup>169</sup> for six ELCs including Dong Phu, Dong Nai, Hoang Anh Mang Yang, Krong Buk, Tan Bien and Phu Rieng.

### Evidence provided by an environmental NGO interviewed by the panel

An environmental NGO<sup>170</sup> provided satellite images showing the forest conversion from 2012-2015 after VRG was granted in 2011 within and outside the boundary of the Binh Phuoc I.

### Assessment of evidence

#### Target evergreen forest for best growing conditions for rubber trees

Ample evidences from VRG and other sources showed that all the existing concessions including the ones transferred from other investors were located in large tracts of contiguous lowland evergreen natural forests in Cambodia (ELCs map of VRG, google earth). The Phu Rieng used to be covered mainly by semi-evergreen forest (GW map) but was transferred to other investors in 2008. VRG explained that the soil of this concession is not suitable for rubber plantation. Same was the Chu Prong K that is also located not in or proximity to any large patch of evergreen forest. In addition at least two interviewees during the field trip said that evergreen forest has the best soil for rubber plantation.

<sup>168</sup> Alley P. (2014a) Formal Complaint Regarding Vietnam Rubber Group's violation of FSC\_POL-01-004 Policy for the Association of Organisations with FSC p 8, p 9

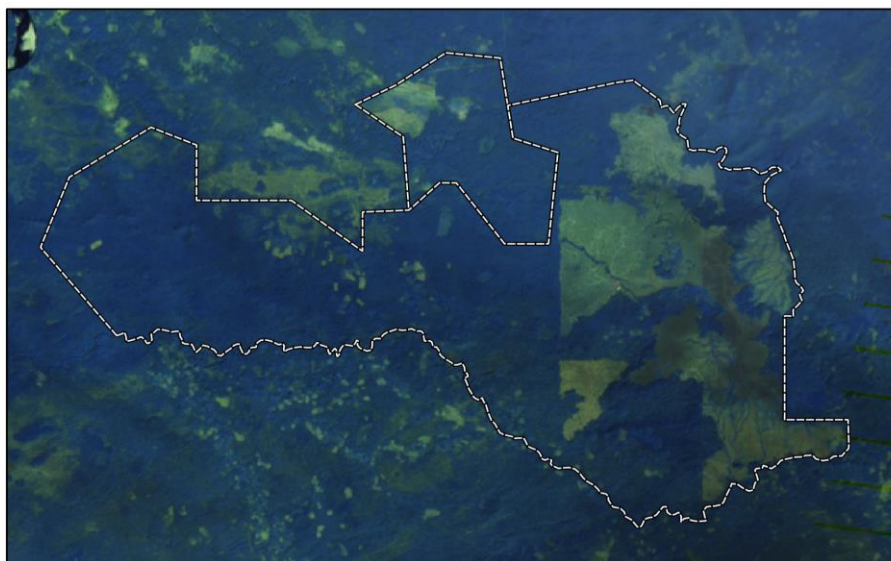
<sup>169</sup> Global Witness (2006-2012) Landsat-7 satellite images of the ELCs Dong Phu, Dong Nai, Hoang Mang Yang, Krong Buk, Tan Bien and Phu Rieng. (*Annexe 5: Documents not publically available*)

<sup>170</sup> Anonymous environmental NGO (2012-2015) Satellite images showing the conversion in the Pao Derm Svay area

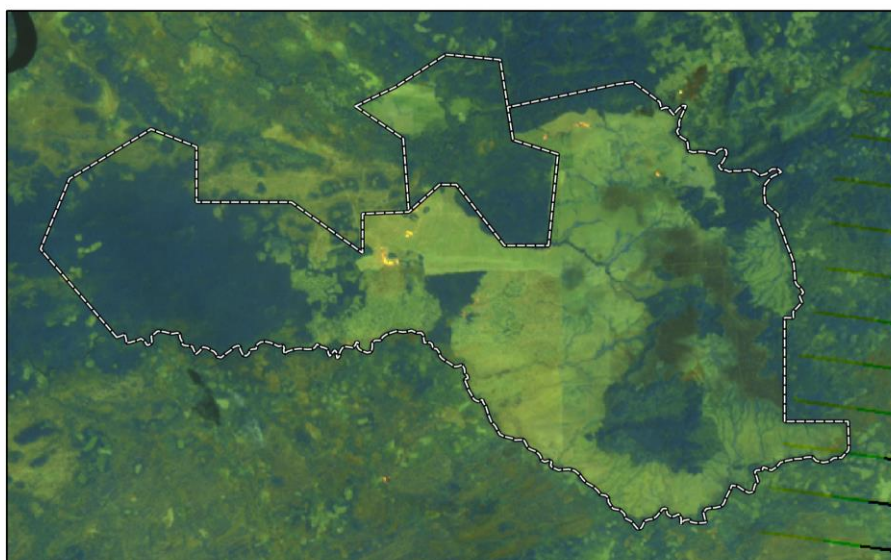
## Global Witness complaint against Vietnam Rubber Group (VRG)

### Large scale forest conversion within and outside the VRG ELCs

The satellite images provided by GW showed clearly the conversion of large patches of evergreen or semi-evergreen forest into plantations from 2008/2009 to 2012 in eight ELCs including not only the six ELCs they alleged but the neighbouring Phuoc Hoa and Ba Ria Kampong Thom. Meanwhile, the images showed that at least six ELCs including Dong Phu, Dong Nai, Tan Bien, Phuoc Hoa, Ba Ria Kampong Thom and Hoang Anh Mang Yang were located in large blocks of contiguous evergreen forest before the start of plantation in 2008 which was largely displaced by plantation in 2012. (see the satellite images shown in Figure 10 below)



LANDSAT-7  
L71EDC1111005050402  
Acquisition Date: Jan 05,  
2011



LANDSAT-7  
L72EDC1112072050100  
Acquisition Date: Mar 12,  
2012

*Note: this is a false color rendering of LANDSAT-7 imagery using band 7-5-4. Dark blue-green to green means dense forest, while light green indicates absence of forest.*

*Deciduous and semi-evergreen forests' blue-green / green color varies depending on season, while evergreen forests remains dark blue-green.*

Figure 10 Landsat-7 satellite images provided by GW in their formal complaint to FSC International (2014) showing forest clearance in the rubber concessions owned by VRG.

The contract<sup>171</sup> of Binh Phuoc I was signed on October 2011. The satellite images provided by an environmental NGO showed that this ELC was located in a large tract of contiguous evergreen forest and covered entirely by forest in 2012. However, the forest in the ELC was almost gone and displaced by plantations in 2015 with a few forest left mainly along the streams. In addition, deforestation expanded to at least five sites outside the boundary of the Binh Phuoc I among which the most serious one was caused by a newly built road connecting Binh Phuoc I and the neighbouring ELC.

<sup>171</sup> Vietnam Rubber Group (2011) Contract of ELC Binh Phuoc I

### Extent of overall deforestation

Sarmap S.A conducted a GIS deforestation analysis showing the total area of conversion in each ELC for 16 selected ELCs of VRG and for one selected ELC of VRG's associated company. Sarmap provided an analysis consisting of a series of maps which showed the deforestation in the area, within the ELC and outside its boundaries. Although the maps show visually the deforestation within the ELC and outside its boundaries, the quantitative data of deforestation only represents the deforestation which has taken place within the boundaries of the concessions. Deforestation outside of the concession boundaries has not been numerically quantified.

The full extent of the deforestation is given in Table 8 below and we can see from the table that this amounts to more than 98,000ha or 87% of the entire concession area.

An example of a classified satellite analysis is shown in figure 10 below.

#### Vegetation Analysis ELC 8,11,12

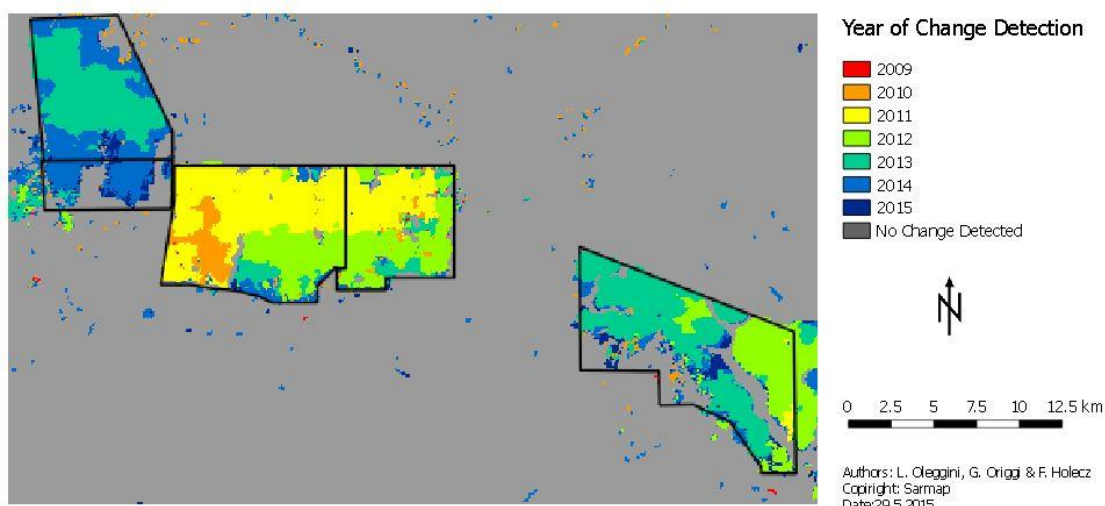


Figure 1 Annual Deforestation for Bean Heack and Me-Kong ELCs from 2009-2015

Global Witness complaint against Vietnam Rubber Group (VRG)

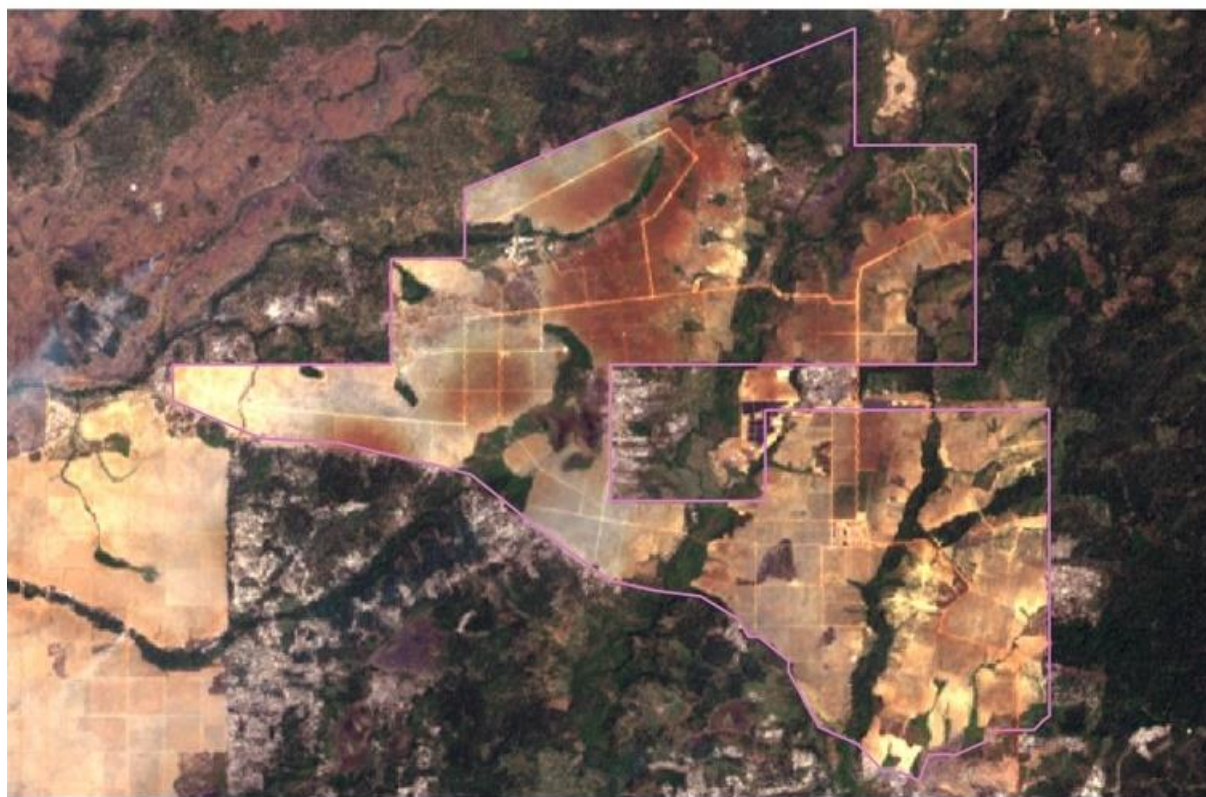
Table 8 Annual and Overall Deforestation on VRG ELCs

No	Name of ELCs	Year granted <sup>172</sup>	total area granted (ha)	overall deforestation after granted (ha)	Deforestation Percentage	Annual Deforestation from 2009-2015						
						2015	2014	2013	2012	2011	2010	2009
1	Dong Nai 1 & 2	Jul-08 & Jan-10	7097	6406	90%	7	49	97	1016	3079	1428	729
2	Dong Phu 1 & 2	Jan-10 & Mar-11	9345	3055*	33%	7	37	45	0	1650	1316	717
3	Vketi	Jul-08	5059	4692	93%	2	4337			189	164	
4	Dau Thieng-Cambodia	Dec-10	7972	7832	98%	221	7358			21	232	
5	Dau Thieng-Kartie	Dec-10	6592	6010	91%	252	5534			85	139	
6	Tan Bien	Jul-07	8100	8100 <sup>173</sup>	100%	382	790	423	41	3439	2929	1139
7	Me Kong	May-10	8000	6739*	84%	424	623	3679	1828	89	97	2
8	Phuoc Hoa	Mar-06	9184	8025	87%	23	171	766	1689	3156	2139	80
9	Ba Ria Kampong Thom	Mar-06	5914	5770	98%	90	284	379	156	2657	2021	183
10	CRCK 2	May-10	9235	8546*	93%	243	1352	444	1658	4002	848	9
11	Bean Heack I & 2	Jan-10 & Mar-11	9480	9170*	97%	142	2117	3356	1829	1519	207	9
12	Kiri Development	Jul-09	807	365*	45%	0	14	352	0	0	413	0
13	Hoang Anh Mang Yang	Sep-09	7195	5999	83%	0	221	1169	286	454	3804	65
14	Krong Buk	Apr-10	6765	6443*	95%	13	414	915	893	383	3826	5
15	Binh Phuoc I	Oct-11	5100	4260*	84%	1160	3100			0	54	
16	Tay Ninh	Jan-12	7600	6963*	92%	216	6747				34	
	<b>In Total</b>		<b>113445</b>	<b>98370</b>	<b>87%</b>							

<sup>172</sup> Open Development Cambodia (2015) <http://www.opendevdevelopmentcambodia.net/>

<sup>173</sup> River buffer zone and a highland area have been excised from the Tan Bien although these areas are still located within the boundary of ELC. Thus the deforestation reaches 8,813ha in total. Since the deforestation in the deducted areas was conducted by FA instead of VRG, the panel thus estimated the total deforestation done by VRG is almost 100% based on the map 1 and 2.

## Landsat image 2015 – ELC 18



*Figure 12 Landsat Image 2015- ELC 18 Phu Rieng, showing deforestation of the area and concession boundaries, by Sarmap S.A, May 2015.*

During the field visit to Dong Nai and Tan Bien, the panel noticed that the rubber planting has done in the two concessions and the oldest rubber tree in Tan Bien was planted about 6 years ago and going to be ready for tapping. However, there are still many big tree stumps and dead trees left in the plantation. The traces of forest fire were easily seen on those stumps. The undergrowth of plantation was quite dense and diverse in the plantation of Dong Nai. All these evidences showed that the plantation used to be good forest and had never been cultivated before. One anonymous interviewee driving across the Tan Bien concession in 2012 witnessed and described how the forest was cleared by bulldozers after big trees had been harvested for wood and burned finally for land clearance. To the north boundary of Dong Nai, there are still large patch of evergreen forest but under great threat from illegal logging now. Large-scale forest clearing is still ongoing in the neighbourhood of both Dong Nai and Tan Bien (see Figures 12 and 13 below). The interviewees said that the forest in the concession used to have macaque, wild boar and peacocks before the land was granted to VRG, which also indicated that the forest still has its main ecological function even some big or luxury trees have been removed.

Global Witness complaint against Vietnam Rubber Group (VRG)



*Figure 13 Northern boundary of Dong Nai, log landing (March 2015, photo by Complaints Panel)*



*Figure 14 Northern boundary of Dong Nai, forest recently converted (March 2015, photo by Complaints Panel)*

### Involvement in deforestation

#### Land reclamation and clearance procedure

Many evidences from VRG, GW and other sources show the following general procedure after the concession is granted:

1. If no one claims the land or resin tree within 30 days after the land was granted, the land clearance started
2. If yes, either excluding them out of the concession by the announcement of local government or relying on local government to negotiate with local people about the compensation for the resin tree
3. Pay compensation to local people for felling down their resin trees
4. MAFF/FA will designate staff to estimate the valuable trees on the land and harvest them by hiring a subcontractor
5. MAFF/FA will recommend a local company to VRG for clearing forest and land
6. VRG will sign contract with the local company to clear land and fell down the resin tree compensated
7. The subcontracted company clear the forest and land with the participation of local government and military soldiers
8. Local FA staff will check the timber harvested and Royalty paid to the government

The allegations, news reports and information provided by GW and interviewees indicate that in step 7 the subcontracted companies hired police and military soldiers with guns to stop the access of ELCs by local people by setting up checking points, deterred local people who might have land dispute and protest, and protect any illegal activities including illegal logging, harvesting luxury rosewood in and outside the ELCs, setting up sawmills and laundering illegal timber in at least Dong Nai, Dong Phu, Phu Rieng, CRCK, Tan Bien, Binh Phuoc I and Hoang Anh Mang Yang.

#### Indirect and direct involvement in forest clearance within and outside the ELCs

The above model of forest clearing procedure with violence and illegality seems to be quite common across Cambodia but also extremely notorious for its serious social conflicts with local and indigenous people and negative environmental impacts including biodiversity loss, drying of water sources and others. It not only happened in several ELCs of VRG but also in other ELCs in Cardamom Mountain and central and southern Annamites Mountain where large tracts of primary forest still exist.

After the forest and land was cleared, the check points and sawmills will be removed and the ELCs will be accessed by the people again. Unfortunately, the roads built by the company in and outside the concession in fact make the nearby intact forest much easily accessible and liable to be destroyed by illegal logging and forest clearance.

However, ample evidences show that the companies either do not make sufficient efforts at best or do not have intentions or awareness at worst to stop the illegal activities. As mentioned previously in Section 4.6 above, the panel saw, during its field visit to Dong Nai, big timber trucks with sawn boards passing by in the concession without licence plates which was illegal, but the accompanying company staff concealed it with an excuse. The panel also interviewed the illegal loggers camping just outside the northern boundary of Dong Nai but the company said that it is not of their business to know the illegal logging and deforestation outside the boundary and they have no responsibility for it. Meanwhile, Dong Nai said that the roads of ELCs are only for the use of company but admitted that it fails to stop the use by illegal loggers outside the concession to transport timbers.



## Global Witness complaint against Vietnam Rubber Group (VRG)

The evidence showed that some company staff may be involved in the transportation of illegal timber with or without the acknowledgement of the company. An anonymous interviewee who happened to be in Dong Nai in 2014 witnessed the chat between the company staff and owner of trucks for illegal timber transportation at the entrance of the concession.

In addition, other evidences showed that seasonal workers of VRG ELCs participated in the illegal logging outside the concession while they had no work to do in the concession during the field visit in Dong Nai.

### Failure to show responsibilities

VRG fails to show any social and environmental responsibility and benefits from the whole business model even if the forest clearing was mainly conducted by the local government officials, policemen, military soldiers and subcontracted local companies.

VRG provides a contradictory and confusing definition of forest by stating that rubber is also a forest tree and meanwhile real forest should have three layers and have animals living in it. The company also provides different answers about whether or not the concessions were covered by the forest. Some said that the concessions they obtained in Cambodia do not have any forest but bushes on it, some said that they know nothing about the concession until the land was granted while someone else said that forest still existed in the concessions but the land was granted under the Cambodia policies and regulations. The company states that if there is any forest on the concession granted, the forest would had been exploited by others and are considered by the Cambodia government of no economic value, in another word the cost of harvesting the forest is higher that the profits of forest product, even if it is located in a protected area and under the management of MoE.

The documentary evidences provided by the company showed that there are still patches of forest or land left in the ELCs of VRG which is mainly distributed along streams or near local villages and has not been developed. Many of them are demarcated clearly in the maps of VRG when some are not. However, the company stated that these plots are even not part of their concession and thus not of their responsibility to preserve them. The panel saw the dense natural forest along the streams in Tan Bien were being cleared by the Forestry Administration for “restoration with luxury wood plantation”. The company said that was used to be required to be preserved by local government as a buffer zone for soil erosion prevention and they believed that they have no responsibility for its conservation.

VRG also failed to show any internal management regulations on avoidance of direct or indirect involvement of the subsidiaries and their staff and seasonal workers in illegal activities inside and outside their concession. There are two technical guidelines on land reclamation and rubber planting, but they are mainly about the technical skills instead of management policies.

### Principal findings in respect of forest conversion.

- 1) VRG has converted natural forest to plantation at all of its ELCs.
- 2) The conversion is in excess of 50% of the total area in all its concessions.
- 3) VRG has converted in excess of 50,000ha of natural forest to plantation in Cambodia.

### 4.5.5 Violation of any of the ILO Core Conventions

The panel found that in relation to the violation of the ILO core conventions that it is **on the balance of probabilities** that VRG subsidiaries make use of:-

#### A. Low levels of child labour

- B.** This use of child labour is not likely to be intentional but can happen in the following circumstances:
- i.** The gangmaster system used by the company to satisfy its seasonal labour needs, especially for land cleared prior to plantation, is open to abuse and that the company does not have adequate policies and systems in place to prevent child labour; and
  - ii.** Minors may accompany parents who are working on piece-work assignments, such as weeding or fertilising, and may assist with the work so it is finished more quickly.

#### Principal findings in respect of violation of ILO conventions

- 1) VRG most probably made some use of child labour in the establishment of its plantations.
- 2) It is unlikely that this use of child labour was intentional or systematic.
- 3) VRG does not have adequate policies and practices to prevent child labour.

#### 4.6 Assessment of counterevidence and counterarguments

The panel heard from a number of stakeholders that VRG is actually one of the better companies operating in Cambodia. Unlike many other companies involved in ELCs in Cambodia, VRG is actually investing substantial amounts in the development of its rubber plantations and associated processing facilities. In addition even GW<sup>174</sup> has been able to engage with the company to develop a complaints procedure with the intention of implementing corrective actions.

The main counterarguments presented by VRG in relation to the allegations are that the majority of the actions described in the allegations were carried out by third parties, more specifically by agents of the Cambodian government in upholding the legal rights of the government to make land available to third party investors for ELCs.

The panel considers that these arguments cannot be used as a defence in this case since it would allow any company to benefit from the unethical and/or illegal activities of third parties to achieve their aims while at the same time claiming exemplary standards of behaviour. It is a general principle in the FSC system that a company accepts responsibility for the activities of all agents that carry out activities on their behalf<sup>175</sup>.

Specific examples of areas where the company has sought to pass on responsibility to third parties include:-

- a) Since gangmasters are used by the company to fulfil their seasonal labour requirements it is the responsibility of the gangmasters to ensure that there is no use of child labour. The company takes no actions to ensure that gangmasters do not employ children.
- b) The land clearing activities are contracted to third parties, although the company claims to pay royalties on the timber they use for their own purposes there is no control to ensure that royalties are paid on all timber taken from the site by the contractors.
- c) During the process of allocation of ELCs there is a legal requirement for consultation with local stakeholders. The company allows this consultation to be carried out by agents of MAFF and does not control that this is adequately done.

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<sup>174</sup> Alley P. (2014a) Formal Complaint Regarding Vietnam Rubber Group's violation of FSC\_POL-01-004 Policy for the Association of Organisations with FSC p12

<sup>175</sup> FSC-STD-01-001 V5-0 D5-0 EN Clause 5.

d) During the process of site capture government agents including armed police and others have infringed the civil rights of local stakeholders in a variety of ways more fully described elsewhere in the report.

In the latter two examples the panel has identified clear failures of the third parties to adequately carry out their legal responsibilities and it is therefore clear that any responsible company should have internal due diligence procedures to ensure that agents acting on their behalf are acting ethically and legally.

In addition the company argues that all their activities have received the approval of the Cambodian regulatory authorities and for this reason must be considered to be legal.

The panel understands that the failings that have led to the complaint are institutional failings both of the Cambodian Regulatory Authorities (MAFF, MoE etc.) and of VRG. The regulatory authorities have chosen to look the other way and have been derelict in following their own laws. The panel also received information from one stakeholder<sup>176</sup> that there are individuals inside the regulatory authorities who are very unhappy with the present situation but that all attempts to raise these issues through the formal channels have been blocked.

Therefore the panel cannot accept this as an argument in the face of overwhelming evidence that government agencies in many countries act outside the legal framework with impunity. In the case of Cambodia the special rapporteur for the United Nations<sup>177</sup> has identified numerous failures

*“The majority of the challenges I have identified in this report (analysed in sections V-VIII) derive from a failure to apply the domestic legal framework – that is, the laws, policies and regulations that the Government itself has developed (explained in section III).”*

This report which became available in October 2012 should have caused any responsible company to review its current and past activities to determine if the government agencies acting on its behalf were acting within the law. On the contrary the panel has received evidence that government agents acting on its behalf have continued to infringe on the human rights of residents in its Binh Phuoc 1 ELC as late as April 2015.<sup>178</sup>

It must be remembered that the activities of VRG subsidiaries were carried out under the auspices of the MOU<sup>179</sup> of 2009 in which MAFF agrees to facilitate the rubber investments of MARD enterprises (VRG) in Cambodia. Therefore VRG is placing high reliance on these agencies to be self-policing.

The panel therefore believes that any responsible company in these circumstances should carry out the due diligence necessary to ensure it is acting within both the spirit and the letter of the law and that it cannot rely on dysfunctional regulatory authorities to ensure this.

In relation to the allegation that the company exceeded the 10,000ha limit on the total area of ELCs that can be owned by a single company or by multiple companies controlled by the same natural

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<sup>176</sup> Interview with an anonymous stakeholder.

<sup>177</sup> Subedi S. P. (2012) Report of the Special Rapporteur on the situation of human rights in Cambodia. Addendum: A human rights analysis of economic and other land concessions in Cambodia. A/HRC/21/63/Add.1 UN Human Rights Council.

<sup>178</sup> <https://www.cambodiadaily.com/news/police-burn-down-mondolkiri-minority-communitys-shelters-81153/>

<sup>179</sup> Government of Cambodia (2009) MOU between Ministry of Agriculture and Rural Development (MARD) The Socialist Republic of Vietnam and The Ministry of Agriculture Forestry and Fisheries (MAFF) Kingdom of Cambodia. Cooperation for Rubber Plantation Investment.

persons VRG argues that its subsidiaries are all independent companies and therefore the limit applies at the level of the company not at the level of the group.

The panel finds that VRG is not a company in the normal sense of the word but rather can be considered an investment arm of the government. The staff of VRG seem to be civil servants and housed in the ministry of Agriculture and Rural Development. Being part of the government VRG is not controlled by natural persons but by the government as a legal person. The panel therefore finds that in strict terms the landholding in excess of 10,000ha by VRG is not illegal. On the other hand the use by the company of nominee shareholders to start companies in Cambodia and to obtain ELCs (a behaviour deplored by the UN special rapporteur)<sup>180</sup> indicates to the panel that VRG considered that there could be a risk of an alternative interpretation of the law and that the company may have been concealing ownership to protect itself from this. VRG<sup>181</sup> have argued that the use of nominee shareholders who are said to be directors of the Vietnamese parent companies is used to expedite the legal progress of company formation and to meet Cambodian legal requirements. If this is the case then it suggests that the use of nominees is at the least a vehicle to avoid some legal restrictions relating to international investment by companies.

In relation to the allegation of forest conversion the company argues that the areas on which rubber plantations are established were not considered forest since they were degraded below the level of economic usefulness. The panel finds this counterargument to be invalid for two principal reasons. Firstly the FSC does not only consider the economic value of forests as important but also the biodiversity and the environmental and social benefits provided by the forest. It is clear from the limited detailed information the panel obtained about Dong Nai that there was indeed significant biodiversity present including a wide range of large mammal species and endangered trees. Secondly it is clear that despite protestations of lack of economic value the inventory carried out as part of the land delineation process for Dong Nai and which the panel analysed for economic value indicates that the timber royalties alone would have a value in excess of US\$10 million.

A final concern of the panel relates to the use of the term 'Rubber Barons' by Global Witness in relation to VRG. This reference is both wrong and misleading. VRG as a state owned company is not controlled by any individual or group of 'Barons' but instead is owned directly by a sovereign state. The use of the term can mislead the casual reader into thinking that there is individual control of the activities and that the solution can be found in better law enforcement. This is certainly not the case, as an arm of a sovereign state dealing with another sovereign state the solution must eventually be found in the form of bilateral and multilateral policies and practices.

## 5. Recommendation(s) to the FSC Board of Directors

**The FSC shall disassociate from Vietnam Rubber Group.**

The standard of certainty for this decision is **beyond reasonable doubt**.

Based on the evidence presented above and in the report above and in its annexes:

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<sup>180</sup> Subedi S. P. (2012) Report of the Special Rapporteur on the situation of human rights in Cambodia. Addendum: A human rights analysis of economic and other land concessions in Cambodia. A/HRC/21/63/Add.1 UN Human Rights Council. p40

<sup>181</sup> VRG (2015) E-mail of 12/05/15.

## Global Witness complaint against Vietnam Rubber Group (VRG)

VRG was accused of violation of five of the six categories of unacceptable activities of the PfA namely:-

1. Illegal logging or the trade in illegal wood or forest products
2. Violation of traditional and human rights in forestry operations
3. Destruction of high conservation values in forestry operations
4. Significant conversion of forests to plantations or non-forest use
5. Violation of any of the ILO Core Conventions

The panel found that in relation to Illegal logging or the trade in illegal wood or forest products that there is **clear and convincing evidence** that VRG subsidiaries in Cambodia

- a) permitted the use of their land for the transport and processing of illegally harvested timber and
- b) that the company failed to ensure the payment of all royalties on timber harvested from their ELCs and
- c) that ELCs were issued to the company in violation of a number of laws and regulations and for that reason the ELCs may be considered illegal.

The panel found that in relation to violation of traditional and human rights in forestry operations that there is **clear and convincing evidence** that in the process of acquiring access to the economic land concessions granted to VRG companies that human rights were violated by government agents acting for the benefit of VRG as follows:

- a) Local residents were deprived of their land rights and properties by eviction without adequate compensation and without due legal process.
- b) That during evictions government agents used levels of intimidation and in some cases violence and unreasonable detention that seriously infringed the human rights of many people.

The panel found that in relation to the destruction of high conservation values in forest operations that there is **clear and convincing evidence** that VRG subsidiaries in Cambodia were directly involved in

- c) Destroying thousands of resin trees on which local people depend for income without adequate compensation.
- d) Destroying significant areas of evergreen forest inside national protected areas which are widely recognized by both national and international conservation NGOs and donors to be of high conservation value in themselves and to contain multiple high conservation values.

The panel found that in relation to significant conversion of forests to plantation or non-forest use that it is **beyond reasonable doubt** that VRG subsidiaries in Cambodia are directly involved in the conversion of evergreen forest to rubber plantations and that:

- e) Such conversion covers almost 100% of the area planted to rubber since all non-rubber areas are excised from the FMU.
- f) the total area of conversion in Cambodia is approaching 100,000ha
- g) the management of VRG in Cambodia has at least some management control of other associated companies which are also responsible for conversion.
- h) the business model of VRG in Cambodia specifically targets areas of evergreen forest since these areas provide the best growing conditions for rubber trees.

The panel found that in relation to the violation of the ILO core conventions that it is **on the balance of probabilities** that VRG subsidiaries make use of:-

- a) Low levels of child labour
- b) And that this use of child labour is not likely to be intentional but the gangmaster system used by the company to satisfy its seasonal labour needs is open to abuse and that the company does not have adequate policies and systems in place to prevent child labour.

The panel recognises that VRG was not directly responsible for all of these activities since in many cases the activities were carried out by third parties either government agents or subcontractors. The panel has taken this situation into account and believes that an FSC certified organisation cannot simply pass its responsibilities on in this way.

The panel recommends that disassociation should be for a minimum period of 5 years.

Prior to re-association that stakeholders that were inadequately compensated for their losses should be fully compensated at a rate determined by an arbitrator independent of both VRG and the Government of Cambodia. The rate should take into account the long term value of the losses of land or forest resources such as resin trees.

Prior to re-association the company should ensure that all companies have a verified restoration plan that will restore at least 10% of each FMU to natural forest. This restoration plan should be preceded by an EIA conducted by a well-recognized and prestigious organization independent of VRG and the government of Cambodia with the full participation of key stakeholders to evaluate the negative environmental impacts of each ELC and propose reasonable and fair compensation measures including but not limited to the restoration of natural forest of similar size in or out of the ELC, restoration of buffer zones for streams, soil-erosion control and contribution to protection of existing protected areas.

Prior to re-association that the company will make additional significant long term contributions to the conservation of key biodiversity areas or protected areas negatively affected by the conversion activities. That such contributions will be agreed with and verified by environmental and social NGOs active in the affected regions.

### Impacts of VRG activities in Cambodia.

In reaching its conclusions the board should consider the immediate and future impacts of the activities with which VRG has been associated.

#### Environmental

The Mekong basin has recently been identified by WWF<sup>182</sup> as one of the most significant deforestation fronts in the world. The major deforestation risk in the area is identified as conversion to large scale agriculture.

The areas of evergreen forest targeted by VRG companies in many cases hold significant amounts of biodiversity including many rare species.

These forests were not significantly degraded in terms of their ecological functioning as witnessed by the large fauna still present in them.

The damage caused by the enormous scale of deforestation in Cambodia is irreversible.

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<sup>182</sup> WWF (2015) Living Forests Report Chapter 5

## Social

The findings of the Complaints Panel evaluation suggest that:

- activities of the company have caused significant suffering to many hundreds or thousands of people both directly and by depriving them of land.
- The activities of the company have in many cases deprived indigenous communities of their traditional lands and it is suspected that one reason for the great haste in land capture is to prevent these communities from completing their land registration.
- The company has impoverished the owners of tens of thousands of resin trees by failing to provide adequate compensation.
- The employment offered by the company as justification for its presence is largely seasonal and unskilled and poorly paid.

## Economic

The failure of the company to ensure that full royalties are paid for the trees taken during conversion has deprived the government of Cambodia of many tens, possible hundreds of millions of dollars of revenue.

## Annex 1 Analysis of the Complaint

The complaint from global witness is very long and includes allegations of repeated violations of a number of the policy of association categories. For this reason we have analysed the complaint in order to identify the specific allegations and to determine which PfA category is affected and if the specific allegation would actually constitute a PfA violation. As a result of this analysis the panel identified the 22 valid violations listed in the table below.

S.N.	Complaint Document	Reference in Complaint Page, Line	Nature of Complaint	PfA category Affected	ILO Fundamental Principle Affected	Independent Evidence	Other evidence possibilities	Probable decision and things still to be done.
1	Formal Complaint	Page 5, Line 7	Land Holding Exceeds legal maximum for a single company	a		No		Cambodian authorities do not consider the law has been broken. However the panel believes that VRG has a high level of control of its subsidiaries in Cambodia. In other jurisdictions parent companies would be considered. The panel has no information about the situation in Laos. Need to look in further detail at VRG shareholdings. Companies share the Logo of VRG and share the address of VRG in Cambodia. VRG admits it has 100,000ha in Cambodia
2	Formal Complaint	Page 5, Line 34	Land taken without consultation	a, b		No		Company takes no responsibility for the adequacy of the consultation process leaving it to the government. We have ample evidence if it being inadequate, particularly in relation to indigenous people and the case of the Social Land Concession at Tan Bien.
3	Formal Complaint	Page 6, line 9	Villagers violently evicted from their land by the company	b		No	Verification through other organisations and newspaper articles, as well as direct interviews with alleged impacted parties. The companies my answer questions about their relationship with army and police.	Tan Bien case is well documented. It forms part of a pattern of violence and intimidation against stakeholders in communities in Cambodia. Actual violence and intimidation is normally carried out by government agents. Company could have eliminated this risk by reaching settlements with the communities affected. Company made no attempt to do this.



Global Witness complaint against Vietnam Rubber Group (VRG)

4	Formal Complaint	Page 6 Line 11	Use of Child Labour	f	Effective Abolition of Child Labour	No	Verification through other organisations and newspaper articles, as well as direct interviews with alleged child labourers and their families. The companies may answer questions about their employment policies and practices, and even show employment records.	No evidence of systematic use of child labour. Children do work in the plantations with parents. The company has no internal policy on preventing child labour. Company does not check identities and ages of workers provided by gangmasters or its own employees.
5	Formal Complaint	Page 6 Line 11	Unsafe Working Practices leading to Chemical Burns	b, f	Effective Abolition of Child Labour	No	Verification through other organisations and newspaper articles, as well as direct interviews with alleged impacted parties. The companies may answer questions about their chemical use policies and practices.	No additional evidence, no corroborating evidence. Considered to fall outside PfA. Alleged pollution of rivers at CRCK 1 may be HCV violation.
6	Formal Complaint	Page 6 line 18	Restriction of movement by villagers due to guards at company checkpoints	b		No	Verification through other organisations and newspaper articles, as well as direct interviews with alleged impacted parties. The companies may answer questions about their access policies and practices.	An NGO confirms that village at Tan Bien was blockaded by government agents for periods including blocking of access for food and medicines. This formed part of intimidation campaign prior to eviction. Arrest and detention of community leaders. Binh Phuoc one checkpoint well outside the forest and denying local communities their legal access to forest products.
7	Formal Complaint	Page 7 line 3	Unlawful Detention and Violence towards people including children	b		Yes	Verification through other organisations and newspaper articles, as well as direct interviews with alleged impacted parties. The companies may answer questions about their relationship with army and police, as well as their version of events.	An NGO provided photograph of armed police chasing community members.

Global Witness complaint against Vietnam Rubber Group (VRG)

8	Formal Complaint	Page 7 line 6	Forcible eviction of villagers by armed forces	b		No	Same as for complaint 3	Same as for complaint 3
9	Formal Complaint	Page 7 line 18	Destruction of HCV of HCV class 5 namely food sources and NTFP sources.	c (b too?)		No	We can dig up various references relating to forest types and diversity as well as traditional use (especially relating to resin trees - I have added to the bibliography a report on this subject - Prom Tola (2009) - I shall add this to the background documents file).	Inadequately compensated resin trees. Numerous cases including zero compensation in some cases.
10	Formal Complaint	Page 7 line 21 to Line 22	Conversion of forest cover to plantations; illegal logging of resin tree	d		No	Propose asking GlobalForestWatch is they could map the ELCs and show the historic trend of deforestation.	All evidence points to 100 percent conversion. All remaining forest land is excised from the ELC. No Change in practice since certification
11	Formal Complaint	Page 8 Line 3	Illegal logging of rosewoods	a		No	Need evidence from company for this.	Very likely that rosewoods exist in the converted area. Thus logging illegal. Actual logging carried out by subcontractor. FA said to measure for royalty payment. Panel has doubts that this occurs based on stakeholder interviews.
12	Formal Complaint	Page 10 line 1	Destruction of HCV of HCV class 5 namely food sources and NTFP sources. Also destruction or loss of spirit Forest HCV class 6	c		No	As for 9 above for HCV 5. For HCV we will need to interview villagers and perhaps show us where spirit forests were.	Loss of spirit forest confirmed by NGOs.
13	Formal Complaint	Page 10 line 29	Destruction of HCV Class 5 (Resin trees) and restriction of access to Spirit forests and burial grounds HCV Class 6	c		No	As for 9 and 12 above.	

Global Witness complaint against Vietnam Rubber Group (VRG)

14	Formal Complaint	Page 10 line 30-31	Illegal logging of valuable trees may including rosewoods and resin trees. Possible destruction of HCV Class 1 (rosewood) and 5 (Resin trees)	a, c		No		Rosewood is on Cites Appendix 1?
15	Formal Complaint	Page 11 line 3 - 15	Illegal allocation of land which because it has forest cover is considered land of public interest. In addition illegal allocation of land without adequate stakeholder consultation	a		No		All concessions are allocated on areas of forest in good condition primarily evergreen and many are in formally protected areas. List these.
16	Sen Sereimongkol vs Tan Bien	Page 1 line 6	Loss of community land	b		No		Was a social land concession for disabled soldiers and poor Cham. These were evicted without consultation. An NGO will send details of this.
17	Sen Sereimongkol vs Tan Bien	Page 2 line 27	Villager said to have died from herbicide exposure	b		No	The companies may answer questions about their chemical use policies and practices.	No evidence of this.
18	Sen Sereimongkol vs Tan Bien	Page 2 line 33 - 40	Villagers suffered health problems as a result of chemical exposure	b		No	As above	No further evidence, no dangerous toxins seen in company storage.
19	Sen Sereimongkol vs Tan Bien	Page 3 line 25	Forcible and violent eviction	b		Yes NGO Report		
20	Sen Sereimongkol vs Tan Bien	Page 4 line 3	Chemical poisoning	b		No		

Global Witness complaint against Vietnam Rubber Group (VRG)

21	Sen Sereimongkol vs Tan Bien	Page 4 line 15	Child Labour, Child aged 11 and others working. Paid about US\$3.75 per day	f	Effective Abolition of Child Labour	No		
22	Sen Sereimongkol vs Tan Bien	Page 6 line 14	Child Labour, Children go with parents to work in the concession	f	Effective Abolition of Child Labour	No		Children working with parents confirmed in Tan Bien and Dong Nai.
	PfA Categories	a) Illegal logging or the trade in illegal wood or forest products			ILO Fundamental Principles and Core Conventions	Fundamental Principles	Core Conventions	
		b) Violation of traditional and human rights in forestry operations				Freedom of association and the effective recognition of the right to collective bargaining	C87 Freedom of Association and Protection of the Right to Organise Convention, 1948 C98 Right to Organise and Collective Bargaining Convention, 1949	
		c) Destruction of high conservation values in forestry operations				Elimination of all forms of forced or compulsory labour	C29 Forced Labour Convention, 1930 C105 Abolition of Forced Labour Convention, 1957	
		d) Significant conversion of forests to plantations or non-forest use				Effective abolition of child labour	C138 Minimum Age Convention, 1973 C182 Worst Forms of Child Labour Convention, 1999	
		e) Introduction of genetically modified organisms in forestry				Elimination of discrimination in respect of employment and	C100 Equal Remuneration Convention, 1951 C111 Discrimination (Employment and Occupation) Convention, 1958	

Global Witness complaint against Vietnam Rubber Group (VRG)

		operations				occupation		
		f) Violation of any of the ILO Core Conventions <sup>1</sup>						

HCV 1 – Species diversity. Concentrations of biological diversity\* including endemic species, and rare\*, threatened\* or endangered species, that are significant\* at global, regional or national levels.

HCV 2 – Landscape\*-level ecosystems\* and mosaics. Intact forest landscapes and large landscape\*-level ecosystems\* and ecosystem\* mosaics that are significant\* at global, regional or national levels, and that contain viable populations of the great majority of the naturally occurring species in natural patterns of distribution and abundance.

HCV 3 – Ecosystems\* and habitats\*. Rare\*, threatened\*, or endangered ecosystems\*, habitats\* or refugia\*.

HCV 4 – Critical\* ecosystem services\*. Basic ecosystem services\* in critical\* situations, including protection\* of water catchments and control of erosion of vulnerable soils and slopes.

HCV 5 – Community needs. Sites and resources fundamental for satisfying the basic necessities of local communities\* or indigenous peoples\* (for livelihoods, health, nutrition, water, etc.), identified through engagement\* with these communities or indigenous peoples\*.

HCV 6 – Cultural values. Sites, resources, habitats\* and landscapes\* of global or national cultural, archaeological or historical significance, and/or of critical\* cultural, ecological, economic or religious/sacred importance for the traditional cultures of local communities\* or indigenous peoples\*, identified through engagement\* with these local communities\* or indigenous peoples\*. (C9.1 P&C V4 and Motion 2014#7)

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**A note on URLs: All web addresses in the bibliography were viewed during the period from Late January – early May 2015.**

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