

# **A HUMAN RIGHTS ANALYSIS OF THE DRAFT LAW ON AGRICULTURAL LAND**

**Review of the 6<sup>th</sup> Draft Law of the Ministry of Agriculture, Forestry and Fisheries  
dated 15 October 2016**

prepared by the Office of the United Nations High Commissioner  
for Human Rights (OHCHR) in Cambodia

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## I. INTRODUCTION

The draft Law on Agricultural Land represents an important step toward the establishment of a comprehensive system for the management of agricultural land by all users, including private owners and tenants, land concessionaires and other enterprises, and indigenous peoples. The timely release of the draft Law allows all concerned to submit their views, which is a critical means by which the right to participate in public affairs is realized. OHCHR is pleased to take part in the process by offering a human rights analysis of the draft Law.

The OHCHR's analysis is based on the applicable international human rights standards, drawing in particular from the Universal Declaration of Human Rights, the United Nations Declaration on the Rights of Indigenous Peoples, the United Nations Guiding Principles on Business and Human Rights, and the range of legally binding international human rights treaties to which Cambodia is a party.

Nearly all human rights are at stake when agricultural land is not properly managed, especially for subsistence farmers, indigenous peoples and other vulnerable persons and groups. In the case of indigenous peoples, whose cultures and religions are closely tied to their land, their right to freedom of religion and to practice their own cultures will be seriously affected, sometimes irreversibly. When protesting violations of their rights, they will need full respect for their civil and political rights, including their rights to freedom of expression, peaceful assembly and association, the right to an effective justice system that guarantees the rights to a fair trial and to effective remedies. The subject addressed by the present draft Law – the management of agricultural land – demonstrates once again the inherent indivisibility and inter-dependence of civil and political rights, on one hand, and economic, social and cultural rights, on the other.

The present analysis reveals that the general effect of the draft Law would be to allow for the consolidation of small farming plots into larger farms at the discretion of the Ministry in charge of agriculture, without recourse to due process. OHCHR does not dispute the need to modernize the agriculture sector and that consolidation could achieve greater efficiency in some respects. However, such a process can and must be carried in a way that respects human rights; it is important for the draft Law to explicitly set this out. According to human rights standards, affected small farmers should be presented with full information about all their options, offered proper compensation at market value should they choose to sell their plots, and be provided with sufficient support to enable them to transition into their new lives without sacrificing their quality of life. Under no circumstances does the exigency of efficiency alone justify their forced removal from their own land. In this regard, a major gap in the draft Law is the absence of specific criteria, procedures, or remedial recourses by which the process of consolidation of small farms would be regulated. Also missing are provisions to determine the new ownership structure resulting the consolidation of farms, which creates risks of more land-related conflicts in the future.

Most worrying is the lack of criteria that would distinguish between small farmers and large agribusinesses in the application of the sanctions set forth in Chapter XI, which include large fines that would clearly be beyond the means of subsistence farmers. It is essential to establish strong guarantees of due process, clear thresholds in regard to each sanctionable offense under the Law by which judges can determine guilt or innocence, and guarantees for reasonable and proportionate application of sanctions in the case of a violation of the Law.

Taking into consideration the importance and complexity of the law and the views expressed by concerned groups, including small farmers, and indigenous communities and civil society organizations, OHCHR has found the consultation process to be less than fully participatory. Different versions of the draft were presented during the regional and national consultations, often at the last minute – for example, draft 6 was circulated in English on Friday, 16 December 2016, for a consultation taking place on Monday, 19 December – and the consultations themselves were not always conducive to meaningful debate. The second and fifth drafts were never publicly released. Guaranteeing the right of participation in public affairs in practice allows consensus to be built, which in turn requires sufficient time for free debate, argumentation, and where needed also for research on the most contentious issues. The debates

should be based on all relevant information, transparently shared in a language and format accessible to all stakeholders well ahead of the public consultations. To demonstrate respect for human rights, the process is as important as the outcome.

The present analysis covers only those Articles of the draft Law on Agricultural Land deemed to have implications for human rights. Most other Articles on which OHCHR has no comments to offer are not reproduced here, except some shown without comment purely for ease of reference (to facilitate comprehension of the Articles analyzed that refer to them). The analysis is based on an unofficial English translation produced by the Mekong Regional Land Governance (MRLG) of the draft Law released in October 2016.

## II. HUMAN RIGHTS ANALYSIS

### Chapter I General Provisions

**Article 1.** This Law aims at determining the legal framework for the management of agricultural land in the Kingdom of Cambodia.

**Comments:** It would be important to state at the outset that the draft Law aims to establish a legal framework that explicitly recognizes that among its aims is the promotion and protection of human rights.

**OHCHR recommends** the following sentence to replace Article 1: *“This Law aims at determining the legal framework for the management of agricultural land in the Kingdom of Cambodia, in a manner consistent with the Constitution of Cambodia and international human rights treaties and standards to which Cambodia is party.*

**Article 2.** Objectives of this Law include:

- Support policies and strategies for agricultural production development, diversification, and agro-commercialization/agribusiness
- Ensure management and use of agricultural land estate for sustainable, effective and transparent long-term agricultural production;
- Increase agricultural production potential in accordance with the nature of agricultural land estate in order to contribute to enhancing agriculture-based social development and national economy;
- Conserve and improve agricultural soil quality, utilize agricultural infrastructure effectively in order to ensure sustainable development of agricultural production;
- Contribute to protecting and preserving agricultural land estate as well as conserving overall agro-ecosystem in agricultural production areas which are essential for national agricultural heritage.

**Comments:** To ensure that the draft Law will be used as a tool for the promotion and protection of human rights and not as justification for their violation, it would be useful to include language to that effect among the objectives of the law.

**OHCHR recommends** the addition of two bullet points as follows:

- *Ensure that no activities undertaken under this law contribute to violations of human rights.*
- *Integrate human rights due diligence as a core component of impact assessments.*

### Chapter II Competent Authorities

#### **Article 5.**

The management of agricultural land estate in the Kingdom of Cambodia shall be under the authority of the Ministry in charge of agriculture.

The Ministry in charge of agriculture shall carry out its functions within the framework of management of agricultural land estate in compliance with this Law and existing relevant regulations.

**Comment:** It is important for the Law to clearly state that it is to be implemented in accordance with applicable international human rights norms.

**OHCHR recommends** adding to the second paragraph of Article 5: “*The Ministry ... in compliance with this Law, the applicable international norms, and existing relevant regulations.*”

#### **Article 7.**

Under the scope of this Law, the unit in charge of agricultural land estate affairs shall carry out the following missions and tasks:

1. Manage agricultural land estate, agricultural infrastructure and use of all forms of agricultural land for sustainable agricultural production;
2. Study, prepare, and propose strategic policies and legal framework for effective management of agricultural land estate;
3. Study, prepare, and implement long-term strategic plans for management and use agricultural land estate at national and sub-national levels, as well as action plans for management and use of agricultural land estate at all levels;
4. Study and identify agricultural production areas and cultivation land areas as well as determine classification criteria for agricultural land estate in order to develop an agricultural land use map as a technical basis and as a legal instrument for enforcing this Law in collaboration and coordination with relevant ministries, institutions, and sub-national administrations;
5. Study, collect information, and develop baseline data on agriculture, reflecting scientific, economic, social and agro-ecosystem in order to determine potential agricultural land estate and agricultural production as well as needs for development and use of agricultural infrastructure, which can ensure sustainability for agricultural production;
6. Research and develop database and baseline data on pedology, agronomy, and agricultural land estate for monitoring and evaluation of changes in the quality of agricultural land and impacts of land deficit in order to identify programs and measures to prevent or restore soil quality;
7. Implement registration of use of agricultural land, conduct agricultural land census, manage all agricultural production activities and investment projects using agricultural land estate by encouraging the application of rules for sustainable agricultural cooperation and agricultural land estate conservation directives;
8. Support agricultural communities and agricultural land users that apply sustainable agricultural operation, and use appropriate agricultural inputs, as well as participation in preserving agricultural soil quality through provision of technical assistance, encouragement, and other supporting activities in accordance with the objectives of this Law;
9. Provide technical services in identifying potential areas for agricultural production, carry out surveys, assessment, and improvement of agricultural land as well as provide services of agricultural engineering work for agricultural production;
10. Promote implementation of extension programs with systemic participation from relevant stakeholders, and public awareness raising which shows the importance of management, use, development and conservation of

agricultural land estate as well as restoration of agricultural land estate and agro-ecosystem;

11. Enhance national and international cooperation to strengthen the capacity for effective management of agricultural land estate;
12. Monitor, investigate, prevent and take appropriate measures on all illegal activities in improper agricultural operation, which leads to destruction of soil quality and agro-ecosystem, clearance of new agricultural land, leaving of cleared land idle or freezing of agricultural land for non-agricultural land speculation, and effectively enforce this Law;
13. Fulfill other tasks within the framework of the purpose and scope of this Law.

**Comments:** Article 7 sets out a mission for the unit in charge of agricultural land estate affairs to prepare agricultural policies and to promote and monitor their implementation. Article 9 sets out a requirement of the State to undertake public consultation on decision-making on agricultural policies. Read together, the requirement to undertake public consultations is left to an unspecified entity, leaving vague whether the responsibility falls to the government unit in charge of agricultural land estate affairs, or another unit. OHCHR is concerned that the separation of the duty to consult in Article 9 from the detailed duties of this unit in Article 7 could be interpreted to mean that public consultation need not be foreseen to take place at the time of policy formulation.

OHCHR affirms the importance of meaningful consultation at the policy-making stage, particularly with potentially affected persons and communities, which would result in better policies being formulated that integrate measures to minimize human rights risks. This right is provided for in Article 25 of the International Covenant on Civil and Political Rights, by which “Every citizen shall have the right and the opportunity, (without discrimination) ...and without unreasonable restrictions: (a) To take part in the conduct of public affairs, directly or through freely chosen representatives...”.

Several international human rights treaties, which Cambodia is a party to, set out the obligation of the states to eliminate discrimination in participation in public and political affairs. Article 7 of the Convention on the Elimination of All Forms of Discrimination against Women specifically provides that “States Parties shall take all appropriate measures to eliminate discrimination against women in the political and public life of the country and, in particular, shall ensure to women, on equal terms with men, the right.” The International Convention on the Elimination of All Forms of Racial Discrimination, in its article 5, requires States Parties to “eliminate racial discrimination in the enjoyment of, inter alia, political rights, in particular the right to participate in elections – to vote and to stand for election – on the basis of universal and equal suffrage, to take part in the Government as well as in the conduct of public affairs at any level and to have equal access to public service.”.

Meaningful consultation entails the public release of all relevant information well ahead of the consultation. While OHCHR supports the need for public awareness raising, as reflected in subparagraph 10, such a unilateral transmission of information from the Government to the public falls short of the two-way exchange of information and views that would result from public consultation. See further comments on Article 9.

In addition, OHCHR notes that paragraph 1 of this Article confers on the Government a responsibility to “manage” agricultural land estates. The term reappears in paragraph 2 of Article 90, by which the ministry is to manage *permanent* agricultural land estates through certain promotional activities. Insofar as the draft Law recognizes that land may be subject to occupancy and user rights under various arrangements under Chapter V, including by concessionaires, indigenous peoples, and others who would logically be responsible for managing their own land, the precise managerial actions that the relevant authorities would be permitted to undertake under Article 7, paragraph 1, should be outlined so as to clearly differentiate between management by land occupants and users and management by the authorities. If the intention is to restrict the permissible managerial actions to those listed in paragraph 2 of Article 90, it should be so stated.

**OHCHR recommends** a reformulation of subparagraph 10 as follows:

*“Promote the implementation of outreach and consultation programs in which all relevant stakeholders shall be systematically invited to participate and through which information on proposed agricultural policies will be shared and consensus sought on issues related to the management, use, development and conservation of agricultural land as well as restoration of agricultural land and agro-ecosystem. Meaningful consultation, particularly among potentially affected persons and communities, will be undertaken on the basis of full and timely disclosure of all relevant information.”*

### **Chapter III Sustainability of Agricultural Land Estate**

#### **Article 9.**

Management of agricultural land estate shall ensure the sustainability for agricultural production through participation of relevant stakeholders in line with the Land Policies and National Policy on Agricultural Land Estate.

The State shall ensure public participation in all decision-making that may cause risks on sustainability of the use of agricultural land estate by local communities whose livelihoods depend on agricultural occupations in the Kingdom of Cambodia.

**Comments:** The placement of an obligation to ensure public participation in decision-making under a section on the “sustainability of agricultural land estate” and the language in the second sub-paragraph of Article 9 implies that public participation is only required when the livelihoods and practices of local communities threaten the sustainability of agricultural land estates, not at earlier stages nor when decisions potentially affect the sustainability of people’s livelihoods. OHCHR underscores that participation in public affairs is a human right in itself, as provided for in Article 25 of the International Covenant on Civil and Political Rights, and therefore should be required before agricultural policies are adopted and implemented. See OHCHR comments on Article 7.

Particular attention is needed to ensure that traditionally overlooked groups are included in such processes. One of them is women, particularly rural women. Article 14 (2) of the Convention on the Elimination of All Forms of Discrimination against Women states that “states shall take all appropriate measures to eliminate discrimination against women in rural areas in order to ensure, on a basis of equality of men and women, that they participate in and benefit from rural development and, in particular, shall ensure to such women the right: (a) to participate in the elaboration and implementation of development planning at all levels; and (f) to participate in all community activities.”

The right of indigenous peoples to participate in decision-making is covered in Article 18 of the UNDRIP, according to which “indigenous peoples have the right to participate in decision making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions”.

In practice, experience shows that public consultations can be superficial if rules are not set out on the specific steps to be taken to guarantee meaningful consultation. The human rights standards call for Free, Prior and Informed Consent (FPIC), as set out in the United Nations Declaration on the Rights of Indigenous Peoples, in all decisions to be taken that may affect human life. (See OHCHR suggestion to add “Free, Prior and Informed Consent (FPIC)” in the Glossary)

For any process by which the consent of indigenous peoples is sought to be meaningful, it should be undertaken through procedures and institutions determined by indigenous peoples themselves. Indigenous peoples should specify which representative institutions they will authorize to express consent on their behalf.

The right of public participation applies to all potentially affected persons. The Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security, which are accepted by Cambodia, define consultation and participation as “engaging with and

seeking the support of those who, having legitimate tenure rights, could be affected by decisions, prior to decisions being taken, and responding to their contributions; taking into consideration existing power imbalances between different parties and ensuring active, free, effective, meaningful and informed participation of individuals and groups in associated decision-making processes”.

A precondition for meaningful participation in public affairs and decision-making process is the ability to access the relevant information. The right to information is set out in Article 19 of the Universal Declaration of Human Rights, and 19 (2) of the International Covenant on Civil and Political Rights, according to which “the right to freedom of expression” includes “freedom to seek, receive and impart information and ideas”. In the case of human rights defenders, this right is reinforced in Article 6 of the Declaration on Human Rights Defenders.<sup>1</sup>

**OHCHR recommends** that clear rules to govern the holding of public consultations be established by adding the following provisions:

*“The Ministry in charge of agriculture shall ensure that projects, plans, activities or decisions in the field of agriculture will be open to public participation in accordance with specific criteria to be set out in an implementing prakas:*

- a) Early notification - The relevant authority responsible for specific projects, plans, activities or decisions with the potential to affect the livelihoods of individuals and communities should announce such projects, plans, activities and decisions at least 12 months prior to their commencement.*
- b) Accessible information - The responsible ministry or relevant institution will ensure that all potentially affected persons are provided on a timely basis with the information needed to participate effectively in decision-making processes in the agricultural sector. The companies selected to undertake a project shall disclose all relevant individual and business financing relationships, impact assessments undertaken, and any information on the potential consequences of their projects, plans, activities or decisions. The legal agreement by which the Government confers the company the right to undertake a project shall include a specific provision clearly setting out the public interest in such information and explicitly exempt it from confidentiality rules.*
- c) Respect for local cultures – Projects, plans, activities or decisions shall be developed on the basis of adequate and relevant scientific assessments, as well as the traditional knowledge of affected local communities, including indigenous peoples.*
- e) Reasonable timeframe - Public participation processes shall provide the public with a fair and reasonable amount of time to evaluate the information presented and to respond to any relevant proposals and proposed decisions by proponents, ministry, or other relevant institutions or authorities.*
- f) Appropriate levels of participation - All public participation processes shall provide for genuine opportunities for public participation at each stage of the decision-making process. Indigenous peoples should be able to specify which representative institutions are entitled to express consent on behalf of the affected peoples or communities. A minimum target rate of women participants at each consultation shall be set at [xx]%. ”*
- g) Adaptive processes – All public participation processes shall be designed, implemented and revised as necessary to match the needs and circumstances of the project, plan, activity or decision and to reflect the needs and expressed preferences of participants. ”*

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<sup>1</sup> According to Article 6 of the UN Declaration on Human Rights Defenders, “Everyone has the right, individually and in association with others: (a) To know, seek, obtain, receive and hold information about all human rights and fundamental freedoms, including having access to information as to how those rights and freedoms are given effect in domestic legislative, judicial or administrative systems; (b) As provided for in human rights and other applicable international instruments, freely to publish, impart or disseminate to others views, information and knowledge on all human rights and fundamental freedoms; (c) To study, discuss, form and hold opinions on the observance, both in law and in practice, of all human rights and fundamental freedoms and, through these and other appropriate means, to draw public attention to those matters.”

h) *Transparent results – All contributions from the public will be considered in the decision-making process. The public participation process shall, at its conclusion, provide information and a rationale on whether or how the public input was considered and affected the final decision.*

(i) *Mechanisms and procedures should be established to verify that free, prior and informed consent has been sought. The development of such mechanisms and procedures should involve affected communities, including indigenous peoples.*

## **Chapter V Management and Use of Agricultural Land**

### **Section 1 Agricultural Land Rules**

#### **Article 24.**

A natural person or a legal entity who occupies and uses agricultural land estate for the purpose of agricultural crop production in the Kingdom of Cambodia shall be obliged to implement sustainable agricultural practices in line with provisions and procedures under this Law.

The Royal Government encourages and gives support for public participation in the implementation of sustainable agricultural practice for owners and farmers who occupy and use agricultural land for agricultural crop production in the Kingdom of Cambodia.

Relevant government ministries, institutions, and sub-national administrations shall join to give support in their jurisdiction for effective implementation of the National Policy on Agricultural Land Estate and National strategic plan for management and use of agricultural land estate in collaboration with the Ministry in charge of agriculture and take part in promoting awareness raising among people in fulfilling the obligation to implement sustainable agricultural practice.

**Comments:** The obligation on farmers to “implement sustainable agricultural practices,” as set out in the first subparagraph of Article 24, opens the possibility for new government controls to be imposed on the use of land by farming families that are subject to punitive measures in case of failure to comply under Chapter XI. The vagueness of the term “sustainable agricultural practices” would allow State agencies considerable discretion to arbitrarily disrupt agricultural production by farmers. While the listing of the elements of such practices in Article 26 helps to address this concern in part, the precise threshold at which a farmer could be considered to have failed to comply remains unclear. This provision presumes that all farmers are unequivocally in a position to adopt such agricultural practices.

The requirement for the authorities to raise public awareness of more sustainable agricultural techniques, tools and practices (as set out in Article 7, subparagraphs 6-10, and Article 24, subparagraph 2) and thereby to assist farmers in progressively adopting better practices is preferable to obliging farmers to comply with a requirement to practice vaguely stated sustainable practices that carry punitive consequences. This would conform with Article 11, subparagraph 2(a), of the International Covenant on Economic, Social and Cultural Rights, to which Cambodia is a party and which establishes a State responsibility to take measures “to improve methods of production, conservation and distribution of food by making full use of technical and scientific knowledge, by ... developing or reforming agrarian systems in such a way as to achieve the most efficient development and utilization of natural resources.”

**OHCHR recommends** the following modification to Article 24 in the first subparagraph: “*A natural person or a legal entity ... shall be encouraged to implement sustainable agricultural practices in line with the provisions and procedures under this Law.*” To ensure that the required outreach programmes will specifically target those who experience shows tend to be difficult to reach, OHCHR recommends that the following new text be inserted in the second subparagraph of Article 24: “*... sustainable agricultural practices for owners and farmers, including vulnerable groups, such as women, indigenous peoples, and subsistence farmers, who ....*”

## **Article 26.**

General rules for sustainable agricultural practice are defined as follows:

- 1- Shall use agricultural land in the framework for the purpose of agricultural production;
- 2- Shall use agricultural land in accordance with natural conditions of agro-ecosystem; and in accordance with classification of agricultural land for potential crops.
- 3- Shall preserve and improve quality of agricultural soil that is being used in order to increase or maintain the level of soil fertility, to maintain the stability of soil quality and land characteristics, as well as to preserve the balance of agro-ecosystem;
- 4- Shall use appropriate agricultural inputs in crop production and crop protection by avoiding agricultural land pollution, and destruction of common agro-ecosystem of agricultural production areas;
- 5- Shall apply multiple techniques or measures in the agricultural crop production system by ensuring the prevention of soil and fertility erosion from watershed areas and prevention of soil and sand sediment in plain areas.

## **Article 28.**

A public or private natural person or legal entity who occupies agricultural land classified under provisions and procedures of this Law shall use his/her land only for agricultural production purpose.

State land may be granted as concession, leased, or used for agricultural crop production purpose based on the classification of agricultural land estate, agro-ecosystem conditions, and potential of agricultural land productivity by types of crops.

**OHCHR comments:** The term “only” in the first sentence of Article 28 appears to suggest that housing or other vital structures might not be permitted on agricultural land. As defined in the Glossary to the draft Law, "Agricultural land refers to all forms of land of ownership in the Kingdom of Cambodia, including structures or infrastructure serving agriculture, which is used or divided by a policy or through a national land use plan under the Land Law for use for agricultural production purpose, including economic land concession or social land concession granted by the Royal Government for use for the purpose of development of agricultural production as well as other lands that have agricultural production potential, which is currently not used, by classification as permanent agricultural land estate in accordance with provisions under this Law." If Article 28 is interpreted as requiring farmers to transfer their homes out of their “agricultural land,” it would contradict the inclusion of such structures serving agriculture in the above definition and could, moreover, have significant financial implications, particularly for family farmers.

The second paragraph of Article 28 indicates that land is to be classified without outlining the process by which classification is to take place. If the (re)classification of family plots of agricultural land prevents them from continuing to cultivate for their livelihood, it could hold important implications for their right to an adequate standard of living and the right to freely choose their work, as provided under Articles 11 and 6 of the ICESCR. Given the high risk of such an eventuality, decisions of this nature should be the result of consent-seeking consultations with land owners and local communities that occupy or use the land.

**OHCHR suggests** the following changes to Article 28: “*A public or private natural person or legal entity who occupies agricultural land classified under provisions and procedures of this Law shall use*

*the land primarily for the purpose of agricultural production. The classification of land will be the result of consultation with and consent obtained from land owners and local communities that have customarily used the land or are dependent on it for their livelihoods.*

**Article 35.**

In addition to existing relevant provisions, a natural person or a legal entity, an owner who occupies and uses agricultural land of more than 5 (five) hectares shall not have rights to leave the land idle or to freeze the land without agricultural production practices for more than 3 years, starting from date of the ownership certificate.

Agricultural land owners who leave the land idle or without agricultural production practices as stipulated in paragraph 1 of this article shall be fined in accordance with penalty provision in this law.

The government is entitled to make decision to allow the ministry in charge of agriculture to take actions on idle agricultural land for public interest temporary use under agricultural production purpose for the period of one year up until when the land owners file a new request to use their agricultural land under agricultural production purpose.

**OHCHR comments:** OHCHR acknowledges the apparent intention behind this provision to enable the Government to proactively and temporarily reallocate land that has fallen into disuse for productive purposes. However, OHCHR notes that Article 35 would seem to contradict the right to property as recognized in Article 44 of the Cambodian Constitution, by which “All persons, individually or collectively, shall have the right to ownership...” It further contradicts Article 17 of the Universal Declaration of Human Rights, according to which “Everyone has the right to own property alone as well as in association with others. No one shall be arbitrarily deprived of his property.”

In practical terms, Article 35 discounts the possibility of a farm-owner deciding to temporarily stop farming for any number of valid reasons. Considering that some crops, some traditional practices of some indigenous groups of shifting agriculture recognized in Article 37, or other circumstances may require land to lay fallow for a certain period, three years would seem too short a timeframe by which to determine that a plot of land has been abandoned or is in disuse. In addition, steep reductions in crop prices may make farming unprofitable at a given moment. There may be other unforeseeable reasons for keeping a plot of land in disuse.

**OHCHR recommends** that the deletion of this Article.

**Section 2**  
**Traditional Agricultural Land of Indigenous Communities**

**Article 37.**

The State shall ensure indigenous communities’ rights to traditional agricultural land use under provisions and procedures under this Law and existing laws.

The practice of shifting cultivation by indigenous communities shall be recognized under this Law as land use for agricultural purposes, which is arranged and classified as agricultural land reserve of agricultural land estate for indigenous communities’ traditional agriculture.

**OHCHR comments:** Due to the inextricable links between their identities and cultures, on one hand, and the lands on which they live and the natural resources on which they depend, on the other, indigenous peoples are exposed to different types of risks and levels of impacts from decisions about the use of their land, often including the loss of identity, culture, and customary livelihoods. Decisions that regulate the management and use of land and natural resources may therefore affect indigenous peoples in ways not felt by other groups in society. Under the United Nations Declaration of the Rights of

Indigenous Peoples (UNDRIP), such decisions should only take place in exceptional circumstances and only after the free, prior and informed consent for relocation has been obtained from the concerned communities. There is a potential conflict between the recognition of “traditional agricultural land use” in paragraph 1 and its classification as “land use for agricultural purposes” in paragraph 2, particularly in the case of indigenous peoples whose cultural practices include shifting agriculture. See OHCHR comments on Article 9 and FPIC in the Glossary.

**OHCHR recommends** that the draft Law add an article reaffirming Article 25 of the 2001 Land Law. With reference to the five types of lands (residential land, actual farming land, sifting cultivation land, spiritual forest, and burial ground) identified in Article 06 of Sub-Decree 83, entitled “Sub-Decree on Procedures Of Registration of Land of Indigenous People,” as eligible for ownership by indigenous communities, OHCHR recommends that they be reserved for this purpose

To safeguard indigenous peoples from adverse land-related impacts, international norms require that special and differentiated consultation procedures be undertaken as necessary to enable indigenous peoples to participate meaningfully. The distinctive cultural patterns, histories, as well as linguistic or other distinctions of indigenous peoples can prevent them from participating in consultations designed for other Khmer people, often leading to their marginalization in normal democratic processes, both in terms of substance and process, unless deliberate measures are taken to overcome such gaps.

Articles 23-28 of the 2001 Land Law and Articles 15, 37, and 40-47 of the 2002 Forestry Law recognize the right of indigenous peoples to own their land, which would appear to correspond with the right to property set out in Article 44 of the Constitution and Article 17 of the Universal Declaration of Human Rights (see OHCHR comments on Article 35). However, Article 37 is drafted in a narrow sense, which could be read in contradiction of the UDHR. It makes reference to the practice of shifting cultivation by indigenous communities and recognizes it under this Law as “land use for agricultural purposes”, which is arranged and classified as agricultural land reserve of agricultural land estate for traditional agriculture by indigenous communities. The differences between the rights conferred on indigenous peoples under an “agricultural land reserve” and under the collective land titles that indigenous communities may apply for under Article 44 of the Cambodian Constitution and Articles 23-28 of the 2001 Land Law should be clarified.

Article 18 of the UNDRIP provides that “indigenous peoples have the right to participate in decision-making in matters which would affect their rights,” while Article 19 requires that “States shall consult and cooperate in good faith with the indigenous peoples concerned ... in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.” Thus, the consent of affected indigenous groups must be sought on all decisions affecting them, which involves proactive consultation with them at all stages of the project. It follows that in cases where indigenous peoples find a project to be detrimental to their human rights, they have the right to withdraw their support for it and for related activities. In such instances, the aspects of a project that indigenous peoples expect will negatively impact on their rights should not be pursued any further.

**OHCHR recommends** the following revision to Article 37:

*“The State shall ensure the rights of indigenous communities to traditional agricultural land use under provisions and procedures under this Law and existing laws, including applicable international human rights law.*

*The practice of shifting cultivation by indigenous communities shall be recognized as land use for agricultural purposes. Such land shall be classified as an agricultural land reserve of agricultural land estates for the traditional agricultural practices of indigenous peoples.*

*The lands legally identified as eligible for ownership by indigenous communities shall be reserved for their use; they may not be used for any other purpose except for “works done by the State that are required by the national interests or a national emergency need,” as established by Article 26 of the 2001 Land Law.*

*The State shall guarantee the rights of indigenous communities to use their traditional agricultural lands under the provisions and procedures established under this and other existing applicable laws, in*

*particular the 2001 Land Law, Sub-Decree No 83 (No 83 ANK.BK) and the 2009 National Policy on the Development of Indigenous Peoples.*

*The State shall safeguard the individual and collective rights of indigenous peoples, including by seeking their consent through meaningful consultations wherever they are present in a project site, have a collective attachment to a project site, or have the right to traditional ownership or occupation in accordance with Article 26(2) of the United Nations Declaration on the Rights of Indigenous Peoples, including the rights to own, use, develop and control the lands, territories and natural resources.*

*Consultations with indigenous peoples shall be free from intimidation or coercion, must take place prior to the allocation of land for particular projects and/or approval of projects and project-related activities with impacts on the lands and resources of indigenous peoples and local communities, and seek to ensure that affected peoples, whether directly or indirectly impacted, are well informed and have access to all relevant information (from government, project and outside independent sources and research) in a language and format that they understand in order to arrive at voluntary consent. The mutually accepted process between the company/State authority and indigenous peoples shall be documented and evidence of agreement between the parties on the outcome of all negotiations shall be publicly disclosed.*

*Indigenous peoples have the right to withdraw their support for the project and project related activities that impact their rights, and may also choose to not engage in consultation processes related to the project. Any aspects of a project that do not have the consent of the affected indigenous communities shall not be further pursued.*

*Whenever Concession Agreements or Leases may have a direct or indirect impact on indigenous peoples, once the arrangements for consultation have been agreed upon with the peoples concerned, the Project Proponent shall:*

- a) In full consultation with the affected community/communities, identify potential impact and, with the peoples concerned, agree on mitigation measures and benefit-sharing arrangements;*
- b) Explore alternative project designs to avoid physical relocation of indigenous peoples. In exceptional circumstances, when it is not feasible to avoid relocation, the Proponent shall not carry out such relocation of indigenous communities from their lands without their free, prior and informed consent. The Proponent shall prepare a resettlement plan that is compatible with the preferences of the affected communities and that includes a land-based resettlement strategy. Wherever possible, the resettlement plan should allow the affected peoples to return to the lands and territories they traditionally owned, or customarily used or occupied, when the reasons for their relocation cease to exist;*
- b) Ensure that compensation for any lost asset is fair, equitable and acceptable and is, at a minimum, equivalent to the market price; further ensure that the mitigation measures foreseen are appropriate and sustainable;*
- c) Ensure that any discrimination in the mitigation measures, including gender discrimination, shall be strictly prohibited and remedied when it occurs; further ensure that appropriate measures will be taken in respect of those individuals and groups whose livelihoods would be most threatened by resettlement to prevent any deterioration in their standard of life.”*

### **Article 38.**

The Ministry in charge of agriculture shall collaborate / coordinate with the Ministry of Land Management, Urbanization, and Construction, sub-national administration, and indigenous communities to determine and classify reserved agricultural land for traditional agriculture of the indigenous communities.

Indigenous communities shall not be encouraged to expand the scope of shifting cultivation practice outside the reserved agricultural land areas which have been classified and registered as agricultural land under provisions and procedures under this Law.

The people who migrate shall not have the privilege as indigenous peoples and shall not have the rights to use agricultural land for traditional shifting cultivation practice, as other indigenous communities.

**Comments:** Article 38 needs to be understood in light of other relevant laws in force. Article 25 of the 2001 Land Law states that “The lands of indigenous communities include not only lands actually cultivated but also includes reserved necessary for the shifting of cultivation ...” Article 4 of the 2009 sub-decree on the Procedures for Registration of Land of Indigenous Communities states that “Reserved land necessary for shifting cultivation or reserved land for rotation agriculture or swidden farm land refers to land used previously by indigenous community as rice field or farm for traditional shifting cultivation”. In addition, the Ministry of Environment (MOE) is currently drafting a Environment and Natural Resources Code of Cambodia that contains provisions for communal titles to be issued by the MOE that could be appropriate for indigenous communities. It appears that these titles would include lands that indigenous communities consider as their reserve lands. It is important to establish in advance of the adoption of the Environmental Code and the Agricultural Land Law how their respective provisions on land registration will complement each other.

Further to its comments and recommendations on Article 37, OHCHR notes with concern, in the second paragraph of draft Article 38, the prohibition of any expansion of areas subject to shifting cultivation, which may become necessary, for instance, if the population of some indigenous communities should grow. Shifting cultivation is part of the traditional lifestyle and customs of indigenous communities specifically recognized in the Land and Forestry Laws.

Articles 24 - 28 of the Land Law recognize the right of indigenous communities to collective ownership of their lands and the right to manage their lands themselves. The lands of indigenous communities include residential and agricultural land, and encompass land reserved for shifting cultivation. Article 23 of the Land Law states that “Prior to their legal status being determined under a law on communities, the [indigenous] groups actually existing at present shall continue to manage their community and immovable property according to their traditional customs and shall be subject to the provisions of this law.” In other words, indigenous communities are permitted to continue to manage their communities and land according to their traditions and customs, pending the determination of the legal status of their communities. This is consistent with Article 37 of the Forestry Law, which specifically allows “communities that traditionally practice shifting cultivation to conduct such practices on land property of indigenous community which is registered with the state.”

Article 5 (d)(v) of the International Convention on the Elimination of All Forms of Racial Discrimination provides for “the right to own property alone as well as in association with others.” The UNDRIP expresses this right in respect of indigenous peoples in an obligation of States to “provide effective mechanisms for prevention of, and redress for: ... Any action which has the aim or effect of dispossessing them of their lands, territories or resources” (Article 8 (2) (b)) and a “right to be secure in the enjoyment of their own means of subsistence and development, and to engage freely in all their traditional and other economic activities” (Article 20 (1)). Thus, according to the Convention and UNDRIP, indigenous peoples have a right to their lands and resources under customary occupation and use, as well as a right to practice their traditional livelihoods, which in the case of indigenous communities in Cambodia encompasses shifting cultivation practices. Recent research by the United Nations Food and Agriculture Organization confirms that shifting cultivation is of paramount importance to their future food security and for environmental sustainability.<sup>2</sup>

In view of the above, the imposition of artificial limits to the land area that may be used by indigenous peoples for their traditional agricultural practices would appear to contravene both national and international standards. In addition, the passive and vague wording used (“shall not be encouraged to expand ...”) makes it difficult to anticipate the kinds of specific actions would constitute “encouragement” and thus be judged to be illegal, giving rise to practical questions. For instance, in the case of an indigenous community with a growing population that can no longer be supported with the

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<sup>2</sup>*Shifting cultivation, livelihood and food security, New and old challenges for indigenous peoples in Asia*, Food and Agricultural Organization of the United Nations, 2015.

agricultural land allocated to it, it would appear that its leader could be found guilty of violating this provision if he or she were seeking to discuss and renegotiate the boundaries of the agricultural land allocated to his or her community.

**OHCHR recommends** the deletion of the second paragraph of Article 38.

**Article 40.**

Management of indigenous communities' traditional agricultural land shall be defined by a Prakas of the ministry in charge of agriculture.

**OHCHR comments:** In addition to Article 8 (2) (b) and Article 20 (1) of the UNDRIP (see OHCHR comments on Article 38), Article 3 of the same Declaration sets out that “Indigenous peoples have the right to self-determination. By virtue of that right, they freely determine their political status and freely pursue their economic, social and cultural development” and Article 4 provides that “Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions.” Article 3 echoes Article 1 of both the ICCPR and ICESCR, which establish the right to self-determination for all persons. See OHCHR comments on Article 9. It follows that the management of their traditional agricultural land, with its importance for the economic, social and cultural development of indigenous peoples, is a matter to be left to indigenous peoples themselves rather than regulated by Prakas.

**OHCHR recommends** deletion of this Article.

**Section 3**  
**Agricultural Land under Agricultural Development Areas**

**OHCHR comments:** Section 3 allows for the concentration of land held by small scale farmers or farming families, which could jeopardize multiple rights unless accompanied by appropriate safeguards to prevent abuse.

**OHCHR recommends** the addition of the following new introductory article to Section 3: *“The application of this Law shall not undermine the customary land tenure rights of indigenous peoples and local communities. Any decision to establish an agricultural land zone or an agricultural development zone will be based on a detailed assessment of customary land use and ownership rights in the area and consent-seeking consultations with land users with customary rights to the land.”* OHCHR further recommends that a requirement on authorities to recognize customary tenure arrangements also be cross-referenced throughout the law.

**Article 41.**

Agricultural land areas occupied and used by small/medium holder farmers for family agricultural production can be concentrated to establish an agricultural development area in order to promote development of agricultural production and to participate in effective and sustainable agricultural land use, in line with the National Policy on Agricultural Land Estate.

**OHCHR comments:** According to the Glossary that accompanies the Law, the “Agricultural Development Areas” envisaged in Article 41 refers to “land areas that are occupied and used by smallholder farmers for family agricultural production, which can be concentrated to establish an agricultural development area in order to promote development of agricultural production by receiving technical assistance for agricultural cooperation, which ensures high economic efficiency and to

contribute to sustainable use of agricultural land according to the National Policy on Agricultural Land Estate”. Article 41 establishes the possibility of such concentration of land.

Questions arise about the potential effect of Agricultural Development Areas on other established processes to formalize rights, including through collective land titles, and to what extent this might exacerbate social conflicts over land and resource rights at the local level. An important omission in Article 41 are the conditions under which “land areas occupied and used by small/medium holder farmers for family agricultural production can be concentrated to establish an agricultural development area,” which indicates that an agricultural development area can be created virtually anywhere, over any form of agricultural land - private land, collective land, or social land concessions.

As Article 41 does not require consultation with or the consent of affected individuals and communities with regard to Agricultural Development Areas prior to land concentration and no process is set out for the dissolution of such Areas, it appears possible for land concentration of an involuntary nature to be imposed on individual and family farmers, whether land owners or tenants, and indigenous communities, which would violate the principle of FPIC (See Glossary). Moreover, although Article 41 does not confer the authority to concentrate land to any specific institution, Articles 43 and 44 oblige local MAFF departments and commune/Sangkat councils to work together to establish Agricultural Development Areas, to decide about their respective localities, as well as agriculture land use, which implies that decisions relating to Agricultural Development Areas can be taken by the MAFF and local authorities. This would appear to be an exclusive right to make a final decision for land concentration, without channels through which affected individuals and communities may appeal such decisions or claim judicial remedies.

**OHCHR recommends** that Article 41 be reformulated to read: “*Agricultural land areas occupied and used by small/medium scale farmers engaged in family agricultural production can be, upon consultation with and with the agreement of the owners, concentrated to establish an agricultural development area ...*”

#### **Article 43.**

The Ministry in charge of agriculture shall encourage and coordinate with sub-national administrations to study and assess the potential of small- or medium-holder farmers’ agricultural productivity and agricultural land use in the process of development of agricultural development areas in provinces/municipalities of the Kingdom of Cambodia.

Municipal/provincial departments of agriculture are tasked to support and collaborate with commune/Sangkat councils in the arrangements and establishment of agricultural development areas in their respective localities and to prepare long- and medium-term commune/Sangkat agricultural development plans and annual plans of actions, which specify database of commune/Sangkat agricultural land use and agricultural programs that need to be implemented and developed in the long term.

**Comments:** See OHCHR comments on Article 41 regarding the need for a requirement to consult with and to obtain the consent of affected individuals and communities. To ensure that sub-national administrations have the capacity to undertake the tasks entrusted to them under Article 43, it would be important to provide them with the necessary support and training.

**OHCHR recommends** that Article 43 be reformulated as follows:

*“The Ministry in charge of agriculture shall encourage and coordinate with sub-national administrations to study and assess the current and future potential agricultural productivity and agricultural land use of small- or medium-holder farmers who give their free, prior and informed consent for their land to be included in agricultural development areas in provinces/municipalities of the Kingdom of Cambodia.*”

*Municipal/provincial departments of agriculture shall support and collaborate with commune/Sangkat councils in the arrangements and establishment of agricultural development areas in their respective localities, based on the free, prior and informed consent of the land owners and tenants, and to prepare long and medium-term commune/Sangkat agricultural development plans and annual plans of actions, which specify database of commune/Sangkat agricultural land use and agricultural programs that could be implemented and developed in the long term.*

*The Ministry in charge of agriculture shall train and support sub-national administrations to carry out participative and transparent consultations toward these ends.*

#### **Article 44.**

A commune/Sangkat agricultural development plan shall emphasize potentials of agricultural land use for the establishment of an agricultural development area, which specifies programs and activities in accordance with potential existing local resources and participation/inputs from all local stakeholders.

The establishment and management of an agricultural development area shall be defined by a Prakas of the Ministry in charge of agriculture.

Guidelines on commune/Sangkat agricultural development planning shall be defined by a joint Prakas of the Ministry in charge of agriculture and the Ministry of Interior.

**Comments:** See OHCHR comments and recommendations on Article 43.

### **Section 4 Agricultural Land under Concession Agreement**

#### **Article 45.**

Agricultural land under concession agreement refers to state land granted by the government as concession in the form of Economic Land Concession (ELC) agreement or other forms of concession agreement for long-term use within the framework of investment of agricultural production, agro-industrial investment projects, or other development projects within the purpose of agricultural production.

The government shall ensure that agricultural land use under concession agreement is not involved in conflict of interest with local communities.

The use of agricultural land under concession agreement shall involve local communities and stakeholders in consultation and shall comply with the national policy on agricultural land estate, the Strategic Plan for management and use of agricultural land estate, as well as provisions in the law and other relevant existing regulations.

Procedures for consultative process on the use of agricultural land under concession agreement shall be determined by a Prakas of the Ministry in charge of agriculture.

**OHCHR comments:** Several laws and procedures in force govern economic land concessions (ELCs), including part of Title II, Chapter 5, of the 2001 Land Law, the 2005 Sub-Decree on Economic Land Concessions, the 2011 Civil Code, as well as the 2007 Sub-Decree 114 on the Mortgage and Transfer of the Rights over a Long-Term Lease or an Economic Land Concession (see Annex). In May 2012, Prime Minister Hun Sen announced a moratorium on the issuance of new ELCs and instructed the authorities to scrutinize existing ones. As a result, in August 2014, the Government published a Decision to Create an Inter-Ministerial Commission to Inspect, Demarcate and Assess Economic Land Concessions. In February 2016, the Prime Minister declared an end to the government's review of Cambodia's ELCs, pledging that nearly 1 million hectares of the re-appropriated property would be handed over to poor families.

By adding a new layer to the rules and regulations in force, Section 4 could reactivate ELCs if the concession land is not involved in a conflict of interest with local communities and if consultations take place with them. The second paragraph does not clearly set out the timing of the consultations that must take place with affected persons, whether prior to the decision or act of concession, or afterwards. The requirement for consultations does not clearly set out a process to ensure that they will be genuine, as opposed to pro forma, consultations.

In addition, the current draft Law allows for State Public Land to be used as agricultural concessions, in contravention of Articles 16 and 17 of the 2001 Land Law, which allow transactions or the transfer of rights on State public property only when it loses its public interest value. Article 16 of the 2001 Land Law specifies “State public property is inalienable and ownership of those properties is not subject to prescription. State public properties cannot be acquired by the special acquisition provisions ... When State public properties lose their public interest use, they can be listed as private properties of the State by law on transferring of state public property to state private property.” According to the Article 17 of the Land Law, “The property belonging to the private property of the State and of public legal entities may be the subject of sale, exchange, distribution or transfer of rights as it is determined by law.”

**OHCHR recommends** the reformulation of Article 45 as follows:

*“In line with the Land Law, the ELC sub-decree and the Civil Code, agricultural land under a concession agreement refers to state private land granted by the government as a concession for long-term use within the framework of investment in agricultural production, agro-industrial investment projects, or other development projects within the purpose of agricultural production.*

*The land encompassed in Economic Land Concessions that are cancelled will be distributed to family farmers under fair, equitable and transparent procedures, or included in Social Land Concessions and land donations to the poor, in accordance with Article 83 of the 2001 Land Law. Family farmers that have lost or will lose land to Economic Land Concessions shall be compensated fairly. Land owned or occupied by family farmers shall only be included in future Economic Land Concessions with their free, informed and prior consent.*

*The government shall ensure that concession agreements do not involve land that is the subject of conflict with local communities, including indigenous communities. For all concession projects, the Ministry in charge of agriculture shall ensure that public participation processes are conducted in accordance with the criteria established in Article 9 of the present Law. Concessions will only be granted on land classified as State Private Land, in accordance with the 2001 Land Law.”*

#### **Article 47.**

Concession agreement within the purpose of agricultural production which uses state land shall ensure the condition of agro-ecosystem and soil productivity on the proposed land, which reflect the potential of agricultural crop production and the appropriate characteristics of agricultural production.

A concessionaire shall submit an application attached with a preliminary project proposal for agricultural concession, which includes the following required information:

- Background and capacity of the concessionaire in carrying out an agricultural production occupation inside the country or outside the country;
- Clear objectives in applying for concession, indicating the type of agricultural production, potential crop types, annual production volume, agricultural land area needed, and agricultural production investment duration;
- Technical operation, financial resource capacity and needs for inputs for the process of agricultural production investment during the period of the agreement;
- Other necessary information as required by the Royal Government.

**OHCHR comments:** See Introduction on the right to participate in public affairs.

**OHCHR recommends** the following reformulation of Article 47:

*“Concession agreements for the purpose of agricultural production involving state land shall include provisions aimed at preserving the condition of agro-ecosystem and ensuring soil productivity, reflecting the potential agricultural crop production and appropriate methods of agricultural production.*

*Concessionaires must submit an application with a preliminary project proposal for agricultural concession, with the following information:*

- *Background, prior experience and capacity of the concessionaire to engage in agricultural production, whether inside or outside the country;*
- *Clear objectives for applying for the concession, indicating the type of agricultural production, potential crops, expected annual production volume, agricultural land area needed, and duration of the investment in agricultural production;*
- *Technical operation, financial resources and inputs needed for the investment in agricultural production during the period of the agreement;*
- *Detailed report on the process of consultation undertaken with affected persons and local communities, and how the consultation specifically involved the most vulnerable (in particular women and indigenous peoples).*
- *Other necessary information as required by the Royal Government.”*

#### **Article 50.**

A concession agreement within the purpose of agricultural production shall be valid for no more than 50 (fifty) years, subject to types of agricultural crop production and volume of concession project investment.

According to the concessionaire’s proposal, and based on the assessment report by the Ministry in charge of agriculture on the efficiency of the implementation by the concessionaire, the Royal Government may decide to extend a concession agreement for a period of no more than the original period in the initial agreement.

A concession agreement with the purpose of agricultural production may be terminated prior to the end date of its validity when the Ministry in charge of agriculture has found that the concessionaire has severely breached the conditions of the agreement or has committed an offense in violation of this and other relevant laws.

The rules for conflict resolution in the process of implementation of the concession agreement with the purpose of agricultural production shall be conform with the conditions of the agreement, the provisions of this and other relevant laws.

**OHCHR comments:** See OHCHR comments on Article 45. The omission of references to existing standards contained in other laws and regulations on ELCs in force risks leading to confusion in the implementation of Article 50. For instance, Article 50 does not refer to the fact that under Article 59 of the Land Law, the size of ELCs should not exceed 10,000 hectares, or that the sub-decree on ELC’s limits ELC’s to a maximum duration of 99 years, while paragraphs 1 and 2 of this Article allow for a maximum duration of 50 years, subject to renewal for up to 50 additional years, or 100 years in total.

**OHCHR recommends** that Article 50 be reformulated as follows:

*“A concession agreement for the purpose of agricultural production shall be valid for no more than 50 (fifty) years and not exceed 10 000 hectares. The Royal Government may decide to extend the concession agreement for the same area for a period of no more than the original period in the initial agreement and in any case no longer than 49 years, or 99 years in total.*

*The granting of a concession and its potential extension shall be based on a formal request by the concessionaire and on a detailed public assessment report issued by the Ministry in charge of*

*agriculture on the real or potential impact of the concession on local communities, their livelihoods and cultures, the environment, and any other aspect of the concession deemed significant by the Government and the affected communities. In case of an extension, the assessment report shall also contain an assessment of the efficiency with which the agreement was implemented by the concessionaire. The full and effective participation of local communities in the assessments shall be guaranteed. A proper, public and participatory assessment shall also be carried at the end of the concession period.*

*A concession agreement for the purpose of agricultural production may be terminated prior to its expiration date when the concessionaire is found to be in breach of the conditions of the agreement or to have committed one or more offenses under this Law or other relevant existing laws.*

*Rules for the resolution of any conflicts arising from the process of implementation of concession agreements granted for the purpose of agricultural production shall be established in the conditions of the agreement, in accordance with the provisions of this and other relevant laws. Any conflict resolution mechanism or process shall be made accessible, equitable, transparent, and compatible with human rights standards, and based on the engagement of and dialogue with affected stakeholders.”*

### **Article 51.**

A concessionaire is obliged to develop an agricultural production management plan under concession agreement within a period no more than 18 (eighteen) months after the effective date of a concession agreement.

The agricultural production management plan under the concession agreement shall be approved by the Minister in charge of agriculture and shall be developed as follows:

1. An agricultural production management master plan, extent of the entire land concession area, for a duration of the concession agreement;
2. An area-level agricultural production management plan, which spreads over the whole concession land area, in different stages for a duration of the concession agreement;
3. Annual agricultural production operation plan at block-level operation in different area level for annual agricultural production operation.
4. Social and Environment Impact Assessment Report on the concession area shall be reviewed, evaluated and approved in advance by Ministry of environment.

**Comments:** In order to ensure that comments made during the consultations are given due consideration and that the concerns expressed during the public consultation will be reflected in the final plans, all agricultural management plans should be submitted to public consultation *prior* to the conclusion of concession agreements. Sufficient time should be allocated for such consultations and documents should be publicly available well-ahead of the public consultations. With regard to Social and Environmental Impact Assessments, the draft Law should also take into consideration the current discussions on the draft Environmental Code, which contains specific provisions on SEIAs, in order to avoid contradictory or confusing rules.

**OHCHR recommends** the following reformulation of Article 51 (proposed changes in *italics*):

“A concessionaire is obliged to develop an agricultural production management plan under concession agreement at least *12* (twelve) months *before* the effective date of the concession agreement sought.

The agricultural production management plan ... (no changes proposed to this paragraph)

A Social and Environmental Impact Assessment Report for the concession area shall be reviewed, evaluated and approved in advance by the Ministry in charge of the environment, in line with the requirements of the *Environment and Natural Resources Code of Cambodia*. *Social and environmental impact assessments shall be publicly released at least 120 days prior to the final consideration of the project, including maps, plans, and all proposed mitigation measures for the project. In addition to the Social and Environmental Impact Assessments to be undertaken at agreed regular intervals, they shall*

*also be conducted prior to decisions on any major new activity, changes to a concession agreement or associated plans, or new contracts; and in response to changes in the operating environment, such as an increase in social tensions.”*

**Article 52.**

Agricultural production management plan, location and land area for agricultural production operation and Social and Environmental Impact Assessment Report for areas under the concession project shall ensure prior participatory consultation with local communities and relevant stakeholders in line with the provisions of this law and existing relevant regulations.

**Comments:** OHCHR welcomes the introduction of a requirement to ensure prior participatory consultation with local communities and relevant stakeholders. There are many ways, however, that the concept of participatory consultation, even when accepted and fully intended, can be translated in practice into formalistic meetings that do not result in meaningful consultation. The implementation of the law will have particular impact on indigenous peoples and local communities with customary land tenure. It would be important to specify in law the main elements of meaningful consultation to ensure that the rights of all affected persons, including indigenous peoples – as recognized in the Land Law of 2001 and the Forest Law of 2002 – are upheld. See OHCHR recommendations on Article 9.

**OHCHR recommends** that Article 52 be revised as follows:

*“Agricultural production management plans shall be subject to participatory consultation with local communities and relevant stakeholders prior to their approval, in line with the provisions of this and other applicable laws and regulations, to be conducted by the Ministry in charge of agriculture. Information shall be released for meaningful consultations about the plans, which shall include the location and land area for agricultural production operations, the land area to be preserved for the use and benefit of local communities, information about any extension of the concession contract, and the text of all Social and Environmental Impact Assessment Reports for areas under the concession project. When any part of a concession site and/or its area of influence holds important implications for the livelihoods or cultures of indigenous peoples, their participation in consultation shall be facilitated, in accordance with the principle of Free, Prior and Informed Consent, through special procedures to be established for this purpose also with the Free, Prior and Informed Consent of the potentially affected peoples.”*

**Article 54.**

Ministry in charge of agriculture has jurisdiction to manage, monitor, review and enforce the law on the implementation of concession agreement and on all agricultural production operation by concessionaire, in accordance with agricultural production management plan under concession agreement.

Concession agreement within the purpose of agricultural production shall be reviewed every 5 (five) years over the implementation agreement by concessionaire, agricultural land use under rules of sustainable agricultural operation and the implementation of the directive on agricultural land conservation, in line with the provisions and procedures in this law.

Units in charge of agricultural land estate affairs have the jurisdiction to provide technical services for the assessment of the situation of agricultural land use under concession agreement before the effective date of the agreement, at the review period of every 5 (five) years and after the end date of the concession agreement.

**Comments:** OHCHR welcomes the attribution of responsibility to monitor and enforce the implementation of concession agreements and to regularly review agricultural land use under concession

agreements. To ensure that concession agreements are faithfully implemented and, should new circumstances arise requiring changes in the way they are implemented, to ensure that such changes are known to potentially affected persons and communities, the regular reviews should be undertaken with their involvement and the results should be publicly released. Among the common risks of agricultural production to the environment and to human health is the possibility of excessive exposure to dangerous pesticides or pollutants, which for this reason OHCHR suggests should be monitored more frequently than every five years.

**OHCHR recommends** that the second paragraph be revised as follows: *“The implementation of concession agreements shall be reviewed every 3 (three) years for the purpose of assessing the use of agricultural land, conformity with the guidelines for sustainable agricultural operation, the directive on agricultural land conservation, and the provisions and procedures in this Law. Reviews shall be subject to public consultation. In the event that changes are proposed in the concession agreements or implementation of the plans of the concessionaire, they shall be subject to public consultations to be conducted in accordance with the principle of Free, Prior and Informed Consent.”*

## **Section 5** **Agricultural Land under Lease**

### **Article 57.**

State land under lease for agricultural production purpose shall be under the jurisdiction of the Ministry in charge of agriculture and shall be registered as agricultural land for use, in line with provisions in this law.

Lease of State land for agricultural production purpose shall ensure condition of agro-ecosystem and soil productivity in the proposed location, which responds to the types of potential crops and appropriate characteristics for agricultural production.

A lease of State land for agricultural production purpose shall have a duration of not over 15 (fifteen) years, and shall be reviewed every 5 (five) years over the lessee’s implementation of the requirements of sustainable agricultural operation and the directive on agricultural land conservation in compliance with provisions and procedures under this Law.

**Comments:** With respect to paragraph 3, taking into consideration that Article 59 of the Land Law establishes a limit of 10,000 hectares on economic land concessions, reiterating the same limit in this provision would help to ensure consistency to avoid potential discrepancies between economic land concessions and State land under lease for agricultural production purpose.

**OHCHR recommends** the addition of a new sentence at the end of paragraph 3 as follows: *“State land leased for the purpose of agricultural production shall not exceed 10,000 hectares.”*

### **Article 59.**

For the purpose of this Law, in general, a lease of agricultural land shall have the following minimum requirements:

1. Identity of the lessee and land owner, “lessor”;
2. Purpose of the lease of agricultural land for the implementation for agricultural production projects;
3. Location and identity of the agricultural land for the to be leased, including geographic information and clear boundaries;
4. Clear description of assessment of initial situation of agro-ecosystem of the location of leased land, condition of pedology, potential of soil productivity and soil quality;
5. Duration of leasing and effective date of the lease;

6. Deposit for the lease, in order to be used to fix the damage of agricultural soil quality wages and procedures for wage payment;
7. Responsibilities of the “lessee” and the land owner, “lessor” in compliance with provisions under this Law and other relevant existing laws;
8. Conditions for terminating a lease during the period of validity;
9. Conflict resolution rules;
10. Other requirements according to the forms of lease in compliance with relevant existing laws and regulations.

**Comments:** OHCHR welcomes the requirement to include conflict resolution rules (paragraph 9) in leases for agricultural land. In case human rights are violated, peoples should have access to effective recourse mechanisms such as conflict resolution and grievance mechanisms to prevent further violation of human rights. This right to an effective remedy is set out in Article 8 of the Universal Declaration of Human Rights and article 2 (3) of the ICCPR. According to the latter provision, State undertake “to ensure that any person whose rights or freedoms ... are violated shall have an effective remedy ... (and) to ensure that the competent authorities shall enforce such remedies when granted”. This corresponds to Principle 29 of the UN Guiding Principles on Business and Human Rights, which reads:

“Principle 29. To make it possible for grievances to be addressed early and remediated directly, business enterprises should establish or participate in effective operational-level grievance mechanisms for individuals and communities who may be adversely impacted.”

According to the OHCHR commentary on the Guiding Principles, operational-level grievance mechanisms perform two key functions relating to the responsibility of business enterprises to respect human rights. First, they support the identification of adverse human rights impacts as a part of an enterprise’s ongoing human rights due diligence by providing a channel for those directly impacted by the enterprise’s operations to raise concerns when they believe they are being or will be adversely impacted. By analysing trends and patterns in complaints, business enterprises can also identify systemic problems and adapt their practices accordingly. Second, these mechanisms make it possible for grievances, once identified, to be addressed and for adverse impacts to be remediated early and directly by the business enterprise, thereby preventing harms from compounding and grievances from escalating. Such mechanisms need not require that a complaint or grievance amount to an alleged human rights abuse before it can be raised, but should specifically aim to identify any legitimate concerns of those who may be adversely impacted. If concerns are not identified and addressed, they may over time escalate into more major disputes and human rights abuses.<sup>3</sup>

It is important to note that indigenous peoples often have their own internal functioning dispute resolution mechanisms, judicial systems and grievance mechanisms, which they operate through their own representative institutions and based on their respective customary laws. In addition, indigenous peoples may choose to participate in alternative dispute resolution mechanisms which are premised on respect for their institutions and customary laws and practices. Their existing mechanisms are more likely to meet the criteria outlined in Principle 31 of legitimacy, accessibility, predictability, equitability, rights compatibility and transparency. It also reduces the potential for violations of their self-governance rights that can occur in contexts where externally imposed mechanisms and structures are inconsistent with indigenous customary laws and practices.

For such mechanisms to fulfil their intended role, the Law should detail the essential features and procedures for conflict resolution. This is set out in Principle 31, which reads:

“Principle 31. In order to ensure their effectiveness, non-judicial grievance mechanisms, both State-based and non-State-based, should be:

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<sup>3</sup>“Guiding principles on business and human rights: Implementing the United Nations ‘Respect, Protect and Remedy’ Framework”, HR/PUB/11/04, United Nations publications 2011, commentary on Principle 29, pp. 31-32.

- (a) *Legitimate*: enabling trust from the stakeholder groups for whose use they are intended, and being accountable for the fair conduct of grievance processes;
- (b) *Accessible*: being known to all stakeholder groups for whose use they are intended, and providing adequate assistance for those who may face particular barriers to access;
- (c) *Predictable*: providing a clear and known procedure with an indicative time frame for each stage, and clarity on the types of process and outcome available and means of monitoring implementation;
- (d) *Equitable*: seeking to ensure that aggrieved parties have reasonable access to sources of information, advice and expertise necessary to engage in a grievance process on fair, informed and respectful terms;
- (e) *Transparent*: keeping parties to a grievance informed about its progress, and providing sufficient information about the mechanism's performance to build confidence in its effectiveness and meet any public interest at stake;
- (f) *Rights-compatible*: ensuring that outcomes and remedies accord with internationally recognized human rights;
- (g) A source of *continuous learning*: drawing on relevant measures to identify lessons for improving the mechanism and preventing future grievances and harms;

Operational-level mechanisms should also be:

- (h) Based on *engagement and dialogue*: consulting the stakeholder groups for whose use they are intended on their design and performance, and focusing on dialogue as the means to address and resolve grievances.”

The first seven criteria apply to any State-based or non-State-based, adjudicative or dialogue-based mechanism. The eighth criterion is specific to operational-level mechanisms that business enterprises help administer.

According to the OHCHR commentary on Principle 31, “a grievance mechanism can only serve its purpose if the people it is intended to serve know about it, trust it and are able to use it. These criteria provide a benchmark for designing, revising or assessing a non-judicial grievance mechanism to help ensure that it is effective in practice. Poorly designed or implemented grievance mechanisms can risk compounding a sense of grievance amongst affected stakeholders by heightening their sense of disempowerment and disrespect by the process.”<sup>4</sup>

“Since a business enterprise cannot, with legitimacy, both be the subject of complaints and unilaterally determine their outcome, these mechanisms should focus on reaching agreed solutions through dialogue. Where adjudication is needed, this should be provided by a legitimate, independent third-party mechanism.”<sup>5</sup>

The inclusion of the rules in the lease agreement implies that the conflict resolution mechanism foreseen is to be administered by the concerned enterprise. This may be done by the enterprise alone or in collaboration with other stakeholders. Conflicts may also be resolved through recourse to a mutually acceptable external expert or body. The mechanism should not require that those bringing a complaint to first access other means of recourse.<sup>6</sup> While operational-level grievance mechanisms can be important complements to wider stakeholder engagement and collective bargaining processes, they cannot substitute for either. They should not be used to undermine the role of legitimate trade unions in addressing labour-related disputes, nor to preclude access to judicial or other non-judicial grievance mechanisms.<sup>7</sup>

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<sup>4</sup> Guiding principles on business and human rights, Commentary on Principle 31, p. 34.

<sup>5</sup> Guiding principles on business and human rights, Principle 31 and associated commentary, pp. 33-35.

<sup>6</sup> Guiding principles on business and human rights, Principle 29 and associated commentary, p. 31.

<sup>7</sup> Guiding principles on business and human rights, Principle 29 and associated commentary, p. 32.

The responsibility to provide remedy is also a general principle of responsible tenure governance in the Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security, which read:

*“Non-state actors including business enterprises have a responsibility to respect human rights and legitimate tenure rights. Business enterprises should act with due diligence to avoid infringing on the human rights and legitimate tenure rights of others. They should include appropriate risk management systems to prevent and address adverse impacts on human rights and legitimate tenure rights. Business enterprises should provide for and cooperate in non-judicial mechanisms to provide remedy, including effective operational-level grievance mechanisms, where appropriate, where they have caused or contributed to adverse impacts on human rights and legitimate tenure rights. Business enterprises should identify and assess any actual or potential impacts on human rights and legitimate tenure rights in which they may be involved. States, in accordance with their international obligations, should provide access to effective judicial remedies for negative impacts on human rights and legitimate tenure rights by business enterprises. Where transnational corporations are involved, their home States have roles to play in assisting both those corporations and host States to ensure that businesses are not involved in abuse of human rights and legitimate tenure rights. States should take additional steps to protect against abuses of human rights and legitimate tenure rights by business enterprises that are owned or controlled by the State, or that receive substantial support and service from State agencies.”*

Finally, Article 40 of the UNDRIP provides the right of indigenous peoples to access conflict resolutions procedures to resolve conflicts and disputes with States or other parties, which include business enterprises where their rights are infringed upon. Such procedures must take into account the customs, traditions, rules and legal systems of indigenous peoples concerned.

**OHCHR recommends** that subparagraph 9 be strengthened to reflect the above listed considerations, as follows:

*“9. conflict resolution rules, including rules that provide for:*

- *consultation with affected stakeholder groups in regard to the establishment of clear procedures, with defined timeframes for each part of the process, and other relevant modalities. Such procedures must take into account the customs, traditions, rules and legal systems of the concerned affected communities, including indigenous peoples;*
- *timely public release of the outcomes;*
- *release to all parties to a conflict of all the information submitted by the other parties;*
- *admissibility of human rights concerns among the permissible grounds for a complaint;*
- *regular participatory reviews of the effectiveness of the conflict resolution procedure and the outcomes of cases for the purpose of introducing systemic corrective measures, as needed;*
- *provision of interpretation and translation services for alleged victims, if needed, particularly for members of indigenous communities; and*
- *implementation of the rules without prejudice to other dispute settlement mechanisms, such as the courts, the Arbitration Council, or any mediation processes administered by State institutions.”*

#### **Article 60.**

In implementing a lease of agricultural land, the lessee shall be mainly responsible for using agricultural land as follows:

1. Use the land for agricultural purpose only, and implement agricultural crop production as precisely stated in the purpose of lease of agricultural land;

2. Use the leased land in compliance with rules on sustainable agricultural operation and avoid inappropriate use of land, which results in depletion, erosion, losses of soil quality or soil fertility, and agricultural land pollution as well as agro-ecosystem;
3. Enable the lessor to enter and examine, at appropriate time, the status and conditions of the use of the agricultural land under lease;
4. Not to be entitled to re-lease to a third party the entire land area or any part of the agricultural land under the lease except for prior agreement by the lessor;
5. Not to abandon or leave the leased land idle by not carrying out agricultural production except for provisions in the conditions of lease termination;
6. On the end date of the lease, return the leased agricultural land to the lessor in the original conditions of land use as assessed;
7. Repairs any damages or compensate for restoration of the leased agricultural land in the case that the lessee breaches the land use conditions resulting in damages of soil quality differing from its original condition.

**Comments:** Paragraph 6 of Article 60 suggests that upon the expiration of a lease, the leased agricultural land is to be returned to the lessor in the original conditions of land use as assessed. It may be practically impossible to return a plot of land years or decades later in its “original conditions”. If the “original conditions” is considered to refer to “original soil quality,” this provision would imply that the lessor might need to keep the land fallow for 3 to 5 years before the end of the lease to allow the soil to return to its original quality, which might in any case be prevented by changes in the neighbouring environment. If this is the objective, this should be clearly specified for the sake of transparency.

**OHCHR recommends** deletion from paragraph 6 the phrase “conditions of land use as assessed” or a reformulation establishing a clear definition of the “original conditions” of the land to be restored.

#### **Article 64.**

Strictly prohibited is the lease of either state land or private agricultural land along Cambodia’s border to a natural person or legal entity of a foreign nationality of countries that share a border with Cambodia.

**Comments:** Article 2 of the ICCPR (paragraph 1) and of the ICESCR (paragraph 2) provide for freedom from discrimination of any kind, and present a non-exhaustive list of non-permissible grounds for discrimination, such as “race, colour, sex, language, religion, political or other opinion, *national or social origin*, property, *birth* or other status” (emphasis added). This reinforces the prohibition of racial discrimination, defined as “any distinction, exclusion, restriction or preference based on race, colour, descent, or *national or ethnic origin* which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, cultural or any other field of public life,” established in the ICERD. As a party to these treaties, Cambodia is obliged to prohibit discrimination as so defined.

There are exceptions. States parties are permitted to restrict some rights to citizens, such as the right to vote. However, according to the United Nations Committee on the Elimination of Racial Discrimination, “differential treatment based on citizenship or immigration status will constitute discrimination if the criteria for such differentiation, judged in the light of the objectives and purposes of the Convention, are not applied pursuant to a legitimate aim, and are not proportional to the achievement of this aim”.<sup>8</sup> By prohibiting the lease of state land or private agricultural land along Cambodia’s border only and specifically to “natural persons or legal entities of a foreign nationality of countries that share a border with Cambodia” – namely, Vietnamese, Laotians and Thai – Article 64 would be clearly be discriminatory.

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<sup>8</sup> General Recommendation No. 30 (2004) on discrimination against non-citizens, of the United Nations Committee on the Elimination of Racial Discrimination.

National standards also prohibit discrimination based on nationality. The 1994 Law on Immigration states in its Article 2: “Any person who does not have Cambodian nationality shall be considered an alien, without discrimination as to the nationality, belief, religion or where he/she originated”. New Article 8 of the 1994 Law on investments is of particular relevance as it stipulates that “A foreign investor shall not be treated in any discriminatory way by reason only of the investor being a foreign investor, except in respect of ownership of land as set forth in the Land Law”. In the draft Law, Article 64 only refers to leases which do not impact the ownership of the land.

This provision appears aimed at addressing a popular fear of perceived land encroachment in the border areas by neighbouring people or countries. This is evident when only Vietnamese, Laotians and Thai nationals are prevented from buying land in only the border areas, in contrast to other foreigners who presumably would be able to purchase land there, or to the rest of the country where Vietnamese, Laotians and Thai nationals would be permitted to purchase land for agricultural production. It is a right and duty of all nations to manage their territory, and thus this might be considered by some to be a “legitimate aim” within the meaning of the ICERD. However, blanket prohibitions based on nationality amount to racial discrimination. When the land in question is not a subject of a territorial dispute, the logical way to fulfil this “legitimate aim” would normally be to proceed to demarcate the land according to the agreed coordinates and to thus ensure that all those who seek to purchase land in Cambodia, including in the border regions, have entered the country legally and have the legal capacity to do so.

**OHCHR recommends** either the deletion of Article 64, or a revision that eliminates the discriminatory elements so as to comply with the international obligations of Cambodia, particularly under the International Convention on the Elimination of All forms of Racial Discrimination.

**Chapter VI**  
**Conservation of Agricultural Land Estate**  
**Section 1**  
**Conservation of Agricultural Soil quality**

**Article 73.**

The following shall be prohibited:

- (1) Agricultural land pollution by using excessive agricultural pesticide or chemical substances or disposal of all kinds of pollutants that causes destruction of agricultural soil quality and original agro-ecosystem;
- (2) All activities of digging, clearing, and filling of agricultural land as well as technically faulty agricultural engineering activities that lead to soil erosion or sediment, and destruction of original agro-ecosystem;
- (3) Burning of plant or crop waste on rice fields or plantations that leads to destruction of useful micro-organisms and cause the damage to agricultural soil quality.

**Comments:** See OHCHR comments on Articles 37 and 43. The practice of traditional cultivation methods – including shifting cultivation – by indigenous peoples is a right protected under Article 37 of the present draft Law, the 2001 Land Law, and several international human rights treaties to which Cambodia is a party, including the ICCPR (Articles 1 and 27) and the ICERD (Article 5 (d)(v)). Since shifting cultivation, for many indigenous groups, involves burning land that is to lay fallow for a certain period of time, Article 73 would appear to contradict Article 37.

If the intention is to discourage such practices, this should be done by introducing better practices through training and material and financial support, as outlined in Article 43, based on a sound evidentiary basis, rather than through outright prohibition. OHCHR stresses that the traditional cultures and practices of indigenous peoples must be respected, and that any changes thereto must be a result of choices made voluntarily.

**OHCHR recommends** the following reformulation of Article 73, subparagraph 3:

*“(3) Burning of plant or crop waste on rice fields or plantations that leads to the destruction of useful micro-organisms and damages the quality of agricultural soil, with the exception of indigenous peoples who are authorized to practice their traditional cultivation methods.”*

## **Chapter VII Transfer of Agricultural Land**

### **Article 84.**

Agricultural land estate, which is classified under provisions of this Law, under any form of ownership, may be used and developed outside agricultural purposes only if it comes with the government’s decision through development projects of necessary public interests that have higher economic priority and potential than agricultural production.

Agricultural land estate related to development projects through the government’s decision as stated in this article shall be transferred in compliance with provisions of this law and existing relevant regulations.

**Comments:** Article 84 recognizes that the State may determine that the public interest in certain development projects may outweigh the private interest in the use of certain lands. However, by allowing the government to unilaterally decide to occupy or transfer any agricultural land estate, without consultation with or the consent of affected persons, groups or enterprises, Article 84 negates the requirement for consultations contained in Articles 7, 9, 37, and 45.

Article 84 also negates the recognition of private and community ownership and use contained in Article 44 of the Cambodian Constitution, and Article 17 of the Universal Declaration of Human Rights. See OHCHR comments on Article 35. According to Article 29 of the Universal Declaration of Human rights and Article 4 of the International Covenant on Economic, Social and Cultural Rights, States may subject rights “only to such limitations as are determined by law” “solely for the purpose of... general welfare in a democratic society”. The Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security provide that “... states should expropriate only where rights to land ... are required for a public purpose. State should clearly define the concept of public purpose in law, in order to allow for judicial review”.

Without qualification or any procedure about how a decision to take over such land is to be taken, any procedure for actually taking it over, or criteria for consultation or compensation, Article 84 presents high risks for the right to property, which are compounded by the ambiguity of the following terms:

- “government’s decision” – it is unclear whether this would be through a Prakas, directive, or other official channel and at what level, whether at the level of a ministry or would require higher authorization such as from the Council of Ministers;
- “necessary public interests” – no criteria are presented for determining such interests, no designation of the institutions that can make such a determination, and on what evidentiary basis;
- “higher economic priority and potential than agricultural production” – the ways in which the priority attributed to a development project is determined and its potential is to be measured are unclear; and
- “transfer” – whether private ownership would be annulled and ownership is to be transferred to the State, or user rights are to be transferred without ownership, for which the State is to pay user fees to the owner(s).

Moreover, Article 84 contains no mention of the right to information, which is guaranteed in Article 19 of the ICCPR, about the precise “higher economic priority,” the “public interests” concerned, the evidentiary basis for believing them to be “necessary,” the procedures for decision-making on the priority to be pursued and the identification of the lands to be transferred to the State, and the procedures

for consultation, compensation, and transfer. The Law fails to clearly state that fair compensation will be offered to the owners and occupants of the land to be transferred.

**OHCHR recommends** a thorough reformulation of Article 84, integrating precise definitions of the terms “government’s decision,” “necessary public interests,” “higher economic priority and potential than agricultural production,” and “transfer.” The reformulation should set out a transparent procedure for the determination of the selected “development projects of necessary public interests that have higher economic priority and potential than agricultural production” that involves public consultations, particularly with recognized experts in the relevant field. A transparent procedure for the eventuality of land being taken over by the State for such projects from land owners and occupants should be established through which their Free, Prior and Informed Consent must be obtained before the designated land is transferred and which entails a transparent assessment of fair levels of the compensation to be offered for the land.

#### **Article 85.**

The Royal Government shall have the rights to transfer state land, regardless of jurisdiction of any ministries or institutions they may be under, into agricultural land estate for the purpose of agricultural production development via concession agreement or long-term agricultural development projects in compliance with provisions in this Law and existing relevant regulations.

State land, which is transferred for the purpose of this Article, shall have its original classification reversed into agricultural land estate classification under the jurisdiction of management of the Minister in charge of agriculture and shall get registered as agricultural land for use in accordance with provisions under this Law.

**Comments:** Article 85 allows State land to be sold, leased or granted for agricultural cultivation under a concession or long-term development projects. According to Article 2, paragraph 3, of the United Nations Declaration on the Right to Development, “States have the right and the duty to formulate appropriate national development policies that aim at the constant improvement of the well-being of the entire population and of all individuals, on the basis of their active, free and meaningful participation in development and in the fair distribution of the benefits resulting therefrom.” The right of the State to take the kind of decisions permitted in Article 85 is thus recognized in international human rights law, under condition that it be undertaken through a participatory process and that it contribute to a fair distribution of the benefits from those decisions. See OHCHR comments on Article 84 on the need for transparent procedures and a sound evidentiary basis for the designation of land to be transferred. The right to information, which is set out in Article 19 of the ICCPR, about the decisions taken and the reasoning for them should be explicitly guaranteed as a constituent element of “active, free and meaningful participation”.

Special consideration should be given to State land that is presently protected for the purposes of environmental preservation or for their use by indigenous peoples. Such land should continue to be protected for these purposes, which correspond to Articles 13, 14 and 17 of the ILO Convention on Indigenous and Tribal Peoples and Articles 25, 26, 28, 29, and 32 of the UNDRIP. In respect of indigenous peoples, their right to self-determination must be protected, as provided for in Article 1, paragraph 2, respectively, of both the ICCPR and ICESCR in the following identical provision: “In no case may a people be deprived of its own means of subsistence.”

**OHCHR recommends** a reformulation of Article 85, setting out a transparent procedure for the determination of the selected State land to be transferred for agricultural land estates that involves public consultations, particularly with recognized experts in environmental protection and the potentially affected persons or communities. All relevant information on which the decision to transfer land is based should be made public. In addition, the reformulation should specify that State land upon which any persons or communities depend, particularly indigenous peoples, will be exempt from the transfers permitted under this Article.

### **Article 86.**

All development projects covering agricultural land estate shall be studied and assessed for social, economic, and agro-ecosystem impacts of agricultural production areas and shall be recommended by the Committee for National Policy on Agricultural Land Estate.

The Ministry in charge of agriculture shall propose to the Royal Government all the proposals for transfer of agricultural land although they are not for agricultural purposes, in order to ensure that the transfer of agricultural land gains high economic effectiveness, benefiting, as a priority, local communities and minimizing social, economic, and agro-ecosystem impacts as well as avoiding the occurrence of land conflicts.

Units in charge of agricultural land estate affairs of the Ministry in charge of agriculture shall have a jurisdiction to study and assess conditions of agricultural land that are proposed for a transfer for use or for development of non-agricultural production purposes.

**Comments:** OHCHR welcomes the stated aim of this Article that any transfer of agricultural land should primarily benefit local communities as a priority. OHCHR further welcomes the requirement to conduct environmental and social impact assessments for development projects involving the transfer of agricultural land to another designation that may not be destined for agriculture. According to international human rights standards, impact assessments should be participatory, involving members of the affected communities in particular. See OHCHR comments on Article 9. Toward this end, information about the design, conduct and results of impact assessments should be made public and readily accessible and the responsibility for conducting assessments should be attributed to a clearly defined entity in Article 86, paragraph 1.

The process set out in this Article would seem to be that upon recommendation by the Committee for National Policy on Agricultural Land Estate, the Ministry in charge of agriculture would make recommendations to the government about specific development projects that could lead to a transfer of agricultural land to a private developer for non-agricultural use. In contrast to the aim of Article 84, which is to promote the public interest, Article 86 appears to allow land transfers for private interests, as long as they promise “high economic effectiveness, benefiting, as a priority, local communities.” It omits any obligation to conduct consultations with or to obtain the Free, Prior, and Informed Consent of those affected, which could potentially violate their right to property. See OHCHR comments on Article 84. In order to ensure that the aim of “high economic effectiveness, benefiting, as a priority, local communities and minimizing social, economic, and agro-ecosystem impacts” is properly and objectively assessed, detailed criteria for each of these concepts should be established against which the anticipated impact of development projects can be measured, in order to enable informed decisions to be taken.

Article 86 omits to mention the procedure by which any land transferred that is already in the possession of an individual, family, community or enterprise would be compensated for. OHCHR comments and recommendations on Article 37 set out a human rights approach to compensation for land on which indigenous communities depend, which are applicable not only to those communities but to all persons affected by land transfers.

**OHCHR recommends** that Article 86 be reformulated to include the following elements:

- *a procedure for public consultations on recommendations for the transfer of agricultural land estates for non-agricultural use by a designated agency, such as the Committee for National Policy on Agricultural Land Estate;*
- *a procedure for obtaining Free, Prior and Informed Consent of owners and occupiers of agricultural land estates that are recommended to be transferred under development projects for non-agricultural use;*

- *precise criteria by which to measure “high economic effectiveness, benefiting, as a priority, local communities and minimizing social, economic, and agro-ecosystem impacts”;*
- *a participatory procedure for determining fair compensation levels for all persons, families, or communities affected by land transfers, based on the market value of the land lost by them; and*
- *attribution of responsibility for the conduct of environmental impact assessments of development projects, as well as their continuous monitoring, to a clearly defined State agency.*

## **Chapter VIII**

### **Participation and Awareness Raising**

#### **Article 89.**

Natural person or legal entity or land owner who occupies and use agricultural land in the Kingdom of Cambodia are obliged to engage in preservation of soil quality, conservation of agricultural land estate and agro-ecosystem, for the sustainability of national agricultural heritage.

**Comments:** Article 89 reinforces obligations on family farmers to engage in the “preservation of soil quality, conservation of agricultural land estate and agro-ecosystem, for the sustainability of national agricultural heritage.” It echoes a similar obligation set out in Article 24 and appears to refer to Article 26, which sets out the elements of “sustainable agricultural practices”. In its comments on Article 7, OHCHR recommended that the obligation be changed to encouragement. See OHCHR comments on Articles 7 and 24.

**OHCHR recommends** that in Article 89, the term “obliged” be replaced with “*encouraged*.” It further recommends the addition at the end of Article the following phrase: “... *heritage, in conformity with Articles 24 and 26. Such a natural person or legal entity or land owner may request assistance from the Ministry in charge of agriculture toward this end, which shall provide such assistance in accordance with Article 7.*”

#### **Article 90.**

The Royal Government shall encourage for preservation of soil quality, conservation of agricultural land estate and agro-ecosystem, for the sustainability of national agricultural heritage through local communities’ participation and relevant social organizations’ support, in which gender mainstreaming shall be encouraged as a priority.

The ministry in charge of agriculture shall take appropriate measures to manage permanent agricultural land estate through implementation of public education and awareness raising programs for local communities, indigenous communities, farmers, and users of all forms of agricultural land in collaboration with all levels of relevant ministries and institutions, local authorities, international and international organizations.

**Comments:** OHCHR welcomes the stated aim of encouraging gender mainstreaming in the participation of local communities and with the support of relevant social organizations in the preservation of soil quality, as a priority. In contrast to the other priorities, however, the specific actions that would comprise gender mainstreaming are not set out, which creates a risk that some officials may reduce this important consideration to a simple headcount of female participants at events, rather than the full integration of women’s views, concerns and proposed solutions. The Ministry of Women’s Affairs should be able to provide guidance and concrete suggestions in this regard.

**OHCHR recommends** the addition at the end of the first paragraph of the following new sentence: “*The specific actions by which gender mainstreaming should be ensured shall be set out in a separate Prakas.*” The Prakas should be developed jointly with the Ministry of Women’s Affairs. Alternatively,

the requirement could be detailed in the Article itself (and cross-referenced, where relevant, including in Article 91), as well as defined in the Glossary to the Law.

## **Chapter X Agricultural Land Agents and Law Enforcement**

### **Article 99.**

A person who does not accept the measures taken by a competent agricultural land agent has the rights to submit a written complaint to the Ministry in charge of agriculture within 30 (thirty) days from the date of receipt of examination minutes of a competent agricultural land agent.

The Minister in charge of agriculture must appoint an investigation mechanism for the complaint against the measures by a competent agricultural land agent and must issue a decision on the complaint within 60 (sixty) days from the date of receipt of the complaint.

In case that the person does not accept the decision by the Minister in charge of agriculture, s/he has the rights to submit complaints to other mechanisms of the Royal Government or to lodge a complaint to the court under due process.

**Comments:** The UN Guiding Principles on Business and Human Rights present a clear set of criteria that should be reflected in non-judicial grievance mechanisms to ensure their effectiveness. According to the Guiding Principles, effective grievance mechanisms share certain characteristics of: legitimacy, accessibility, predictability, equitableness, transparency, and compatibility with human rights. They must further be a source of continuous learning, and be based on engagement and dialogue. These are explained in the OHCHR comments and recommendations on Article 59.

**OHCHR recommends** that Article 99, paragraph 2, be supplemented with the following additional text at the end: *“This mechanism shall meet the standards for grievance mechanisms set out in Article 59 (as revised). In the absence of a decision within the defined timeframe, the measures taken by the competent agricultural land agent shall be suspended until the final decision of the grievance mechanism is published.”*

## **Chapter XI Penalty**

### **Article 112.**

A transitional fine of 10,000,000 (ten million) Riels to 20,000,000 (twenty million) Riels for natural person or legal entity, owner or user of agricultural land classified under this law for family agricultural production in agricultural development areas or under lease for agricultural production practice, who commits any of the following acts:

1. Perform agricultural engineering work by clearing, scrapping, leveling, filling, digging, piling or other work other than agricultural land preparation which causes erosion, loss of surface level soil fertility, change in texture and soil quality, incremental land sediment formation or downstream sand, loss of water sources, loss of agricultural biodiversity and severe impact or destruction of common agro-ecosystem in agricultural production areas.
2. Perform agricultural operation by using agricultural chemical substances or all types of agricultural substances which cause agricultural pollutants, loss of soil quality, imposing dangers to agricultural biodiversity and severe impact or destruction of common agro-ecosystem in agricultural production areas.
3. Breach the prohibitions as stated in article 73 and 81 of this law.

4. Leave land idle without agricultural production practice or freeze the land of more than 5 (five) hectares for the period of 3 (three) years, from the date of ownership or tenure registration.

In case of recalcitrance, the transitional fine shall be doubled or a case is filed for submission to court under due process.

**Comments:** OHCHR acknowledges the need for the general approach proposed of introducing sanctions for the degradation of agricultural land and for leaving such land idle. However, OHCHR is concerned by the equal treatment of large land holders and industrial-scale large agribusinesses, on one hand, and subsistence or small family farmers, on the other, and all the mid-scale farming operations in between. In the case of subsistence and small scale farmers, fines of 10,000,000 (ten million) Riels to 20,000,000 (twenty million) Riels may be unreasonably punitive, given the comparatively small scale of the damage that they would be capable of causing and the fact that such amounts are likely to be realistically beyond their capacity to pay, while it may be so low for large-scale agribusinesses to serve as a deterrent. Sanctions should be reasonable, proportionate to the offense, and based on clear measurements of the damaged allegedly caused. With respect to the latter point, the term “severe impacts” in paragraph 2 needs to be clearly defined, including the measurements that would prove such “severe impacts”, the absence of which may allow for the arbitrary imposition of the foreseen sanctions.

With respect to paragraph 4, preventing land owners from leaving their own land idle or to “freeze” the land without agricultural production contradicts the right to property recognized in the Article 44 of the Constitution and Article 17 of the Universal Declaration of Human Rights. See OHCHR comments on Article 35. If the concern addressed here is a perceived need to ensure that all agricultural land is actually used for agricultural production, it would be more appropriate and respectful of the right to property for the government to identify and offer to purchase idle land, at market value. The government would then, with legal ownership, have the right to determine how that land should be used.

More broadly, the Articles contained in the Chapter on penalties should be amended to define with precision the specific actions that constitute the offences for which penalties are introduced. The Chapter would benefit from following the approach taken in the Criminal Code of Cambodia, in which offences are listed individually and defined with precision, and maximum punishments are set out for each. All the terms that may be unclear for individuals should be explained in the glossary.

#### **Article 113.**

A punishment ranging from 1 (one) year to 5 (five) years imprisonment and/or a fine ranging from 250,000,000 (twenty-five million) Riels to 50,000,000 (fifty million) Riels shall be applied for a natural person or a legal entity who occupies and uses state land for agricultural production under concession agreement, or under lease agreement, committing any of the following acts:

1. Freeze agricultural land for real estate business project or other development projects other than agricultural production purpose, in contrary to this law.
2. Transfer tenure rights, sell or pawn a portion or whole of state land to third party in collusion, clandestine in the form of transfer of tenure rights and transfer the use of agricultural land or by any other manipulative means.

**Comments:** A number of terms in paragraph 2 would need elaboration so as to allow for an objective assessment when the imposition of punitive sanctions is sought. Since no person or entity should have the legal authority to conduct transactions with State land other than the original concessionaire, there should be no need for those imprecise supplementary words that may lead to unfruitful legal debate in court, including “pawn,” “in collusion,” “clandestine,” and “manipulative”. Paragraph 2 should instead simply prohibit all transactions of State land by anyone other than the State agents with the duly recognized and formally vested authority to undertake such transactions.

**OHCHR recommends** that paragraph 2 be reformulated as follows: “*Transfer tenure or usage rights to a third party of any state agricultural land granted as a concession without the formally vested authority to do so.*” In addition, specifying the kind of official document that would prove “formally vested

authority” to undertake transactions of agricultural land or tenure rights thereon on behalf of the State would strengthen Article 113.

## **Appendix to the Law on Agricultural Land: Recommended additional entries for the Glossary**

In the present analysis, OHCHR has recommended the reformulation of a number of Articles to integrate several new concepts of key importance to the Agricultural Land Law and its implementation in a manner that would be consistent with Cambodia's human rights obligations and with the current Cambodian national legal and policy framework. Finding the Glossary attached to the draft Law to be a useful reference to help facilitate understanding, OHCHR recommends that the following new concepts be added:

***Indigenous peoples or indigenous community:*** According to Article 23 of the 2001 Land Law, “an indigenous community is a group of people that resides in the territory of the Kingdom of Cambodia whose members manifest ethnic, social, cultural and economic unity and who practice a traditional lifestyle, and who cultivate the lands in their possession according to customary rules of collective use. Prior to their legal status being determined under a law on communities, the groups actually existing at present shall continue to manage their community and immovable property according to their traditional customs and shall be subject to the provisions of this law.” This generally corresponds to the term “indigenous peoples,” which is more commonly used in international human rights law.

***The Principle of Free, Prior and Informed Consent (FPIC):*** A principle set forth in the United Nations Declaration on the Rights of Indigenous Peoples, based on international human rights law, according to which consultations with indigenous peoples must be **Free** from intimidation or coercion, must take place **Prior** to the allocation of land for particular projects and/or approval of projects and project-related activities with impacts on the lands and resources of indigenous peoples and local communities, and seek to ensure that affected people, whether directly or indirectly impacted, are well **Informed** and have access to all relevant information (from government, project and outside independent sources and research) in a language and format that they understand in order to arrive at voluntary **Consent**. The Principle applies whenever indigenous peoples are present in, or have collective attachment to, a project site and/or its area of influence, and is given effect through special and differentiated consultation procedures, with a view to maximizing the meaningful participation of indigenous peoples in the decisions affecting their lives.

***Human Rights Due Diligence:*** The international obligation of businesses to, and of States to ensure that they do, take steps to identify, prevent, mitigate and account for any adverse human rights impacts that their operations may have (Principles 17-24 of the United Nations Guiding Principles on Business and Human Rights). Such obligations are aimed at proactively anticipating and preventing potentially adverse social, environmental and human rights impact and maintaining communication with affected persons and communities through direct communication.

***Meaningful Stakeholder Engagement:*** In contrast with formalistic stakeholder engagement, the meaningful engagement of concerned stakeholders in the planning and decision making on projects or related activities that may impact their communities, livelihoods and land is characterized by: open access to all relevant information relating to the project in question, including all impact assessments, information about the implications of the project for the affected communities; the availability of such information in the languages and formats of the target groups to facilitate understanding; the creation of means by which to reach out to individuals or groups of people who are vulnerable, marginalized from the established decision-making processes, or face the greatest risks from the projects in question (with a focus on women, among others) to involve them in the decision-making processes; and specific steps to ensure the representation of affected persons and groups in the consultations and decision-making mechanisms.

***The Principle of public participation:*** Principle according to which those who may be affected by a decision shall be entitled to provide informed, timely and meaningful input prior to the taking of the decision. It recognizes the fact that participatory decision-making leads to better informed decisions, enhances the ability of governments to respond in a timely manner to public concerns and demands, improves acceptance of and compliance with decisions, and thus helps to prevent disputes from arising by mitigating potentially adverse effects early on.

**The Principle of access to information:** Principle according to which information shall be made accessible to individuals, communities, legal entities and civil society concerning proposed projects and their impact. Such information should include the business enterprises or international or national lending institutions that are supporting the project or related activities either through grants, credit or technical assistance, environmental and social impact assessments and mitigation and resettlement plans, and information on the transport and use of any hazardous materials and any operations planned in their communities. Information on proposed projects and their impacts on environmental protection and natural resource management should be made widely available and publically accessible in a manner that maximizes the opportunity for public participation in planning and decisions affecting the society.

**The Principle of access to effective remedies:** Principle by which peoples, individuals, communities, and legal entities should have access to appropriate remedial procedures, whether administrative, judicial or other in nature, to enable the resolution of environmental, agricultural or ownership related disputes. Impartial, effective and efficient procedures and remedies should be established to enforce procedural rights, sanction those responsible for the harm, and establish an incentive structure that encourages compliance.

**Gender mainstreaming:** The process of continuously assessing the implications for women and men of planned actions, including the formulation of legislation, policies or programmes. It aims at integrating the concerns and experiences of women as well as of men in the design, implementation, monitoring and evaluation of policies and programmes in the political, economic and societal spheres, so that women and men benefit equally. Mainstreaming includes gender-specific activities and affirmative action, whenever women or men are in a particularly disadvantageous position. Gender-specific interventions can target women exclusively, men and women together, or only men, but must always be aimed at their equal participation in and equal benefit from development efforts. It is based on the premise that, from starting base of inequality, apparently neutral programmes that do not reflect a gender perspective will often result in the perpetuation of inequality.

## **Annex. Current Legal Provisions on Economic Land Concessions (ELCs)**

The provisions of current Cambodian law in force that are referred to in various Articles of the present draft Law are reproduced below for ease of reference.

### **1. The Law on Land (2001)**

#### **Chapter V. Land Concessions**

##### **Article 48**

A land concession is a legal right established by a legal document issued under the discretion of the competent authority, given to any natural person or legal entity or group of persons to occupy a land and to exercise thereon the rights set forth by this law.

##### **Article 49**

Land concessions shall respond to a social or economic purpose.

Land concessions responding to a social purpose allow beneficiaries to build residential constructions and/or to cultivate lands belonging to the State for their subsistence.

Land concessions responding to an economic purpose allow the beneficiaries to clear the land for industrial agricultural exploitation of land in the territory of the Kingdom of Cambodia.

##### **Article 50**

There may be several other kinds of concessions such as authorizations for the use, development or exploitation of State land, whether or not related to rendering a public service, such as mining concessions, port concessions, airport concessions, industrial development concessions, fishing concessions. These concessions do not fall with the scope of the provisions of this law.

##### **Article 51**

A land concession may not be gratuitously granted except for the concession responding to a social purpose given to poor families to establish residences for themselves and/or to develop subsistence cultivation.

##### **Article 52**

A land concession may only create rights for the term fixed by the concession contract in accordance with the provisions of this law.

A land concession cannot establish ownership rights on the land provided for concession except for concessions responding to social purposes.

##### **Article 53**

A land concession can never result from a de facto occupation of the land. The land concession must be based on a specific legal document, issued prior to the occupation of the land by the competent authority,

such as the State or a public territorial collectives or a public institution that is the owner of the land on which the concession is being granted. The concession must be registered with the Ministry of Land Management, Urban Planning and Construction.

#### **Article 54**

A land concession is conditional. It must comply with the provisions of this law that are provisions of public order.

The concession document may further contain other specific clauses that have contractual force.

#### **Article 55**

A land concession is revocable through governmental decision when its legal requirements are not complied with.

The concessionaire is entitled to appeal these decisions in compliance with the procedures provided by law.

A court may cancel the concession if the concessionaire does not comply with specific clauses specified in the contract.

#### **Article 56**

The rights of a concessionaire on conceded land during the period of the concession are the rights attributed to an owner, save for the right to alienate. The concessionaire is entitled, in particular, to the protection of his rights by the competent authorities.

A concessionaire may defend the land which he has been given in concession, against encroachment of infringement, irrespective of its forms.

A concessionaire may take the fruits of the land [and] carry out any agricultural developments in accordance with the intended purpose of the concession. The concessionaires may not make any alternation to the intended purpose of the land that causes damage affecting its natural structure or exploit it in such a way that it is destroyed at the end of the concession.

#### **Article 57**

Conceded land cannot be transferred through alienation. A transfer of conceded land can only result from the creation by the competent authorities of a new concession contract for the benefit of the new concession titleholder.

In the case of the death of a concessionaire, his successors may continue, if they so wish, to exercise his rights during the remaining period of the concession.

#### **Article 58**

A land concession can only be granted on lands that are part of the private property of the State.

The land concession may not violate roadways or transportation ways or sidewalks or their borders and the ground necessary for their maintenance, nor to waterways, pools, ponds, and water reserves to be used by the people in their daily lives.

## **Article 59**

Land concessions area shall not be more than 10,000 hectares.

Existing concessions which exceed such limit shall be reduced. However, if such reduction would result in compromising the exploitation in progress, a concessionaire may obtain a specific exemption. The procedures for reductions and specific exemptions shall be determined by sub-decree.

The issuance of land concession titles on several places relating to surface areas that are greater than those authorized by the first paragraph in favor of one specific person or several legal entities controlled by the same natural persons is prohibited.

## **Article 60**

The procedure for granting land concessions for residences as well as land concessions for agricultural subsistence or for industrial agricultural exploitation shall be determined by sub-decree.

## **Article 61**

The maximum duration of a land concession is limited to ninety-nine years.

## **Article 62**

Any land concession created for the purpose of industrial cultivation must be exploited within twelve months after issuance of the concession. If this is not complied with, it [the concession] will be considered as cancelled.

Any failure to exploit [lasting] longer than 12 months, without proper justification, shall be grounds for cancellation of the concession.

All land concessions granted before this law has come into force that are not exploited within 12 months after this law comes into force shall be cancelled.

Any failure by a concessionaire to fulfill the conditions attached to the concession charges book shall be grounds to withdraw the concession.

In the case of withdrawal of a concession, for whatever reason, the concessionaire is not entitled to claim any compensation for any damage.

## **2. Sub-Decree on Economic Land Concession (No. 146 / 2005)**

### **Article 2**

The following terms have the meanings defined below:

- Economic Land Concession refers to a mechanism to grant private state land through a specific economic land concession contract to a concessionaire to use for agricultural and industrial-agricultural exploitation.
- Industrial-agricultural exploitation refers to:
  - cultivation of food crops or industrial crops including tree planting to be tree plantation.
  - raising of animals and aquaculture,

- construction such as a plant or factory and facilities for the processing of domestic agricultural raw materials, or
- a combination of some or all of the above activities.
- Contracting Authority refers to the authorities who have the legal power and exercise such power as granted by the Prime Minister to enter into Economic Land Concession Contracts on behalf of the Royal Government of Cambodia and who carries out duties in accordance with provisions of this sub-decree.
- Regulatory Institution refers to an authority who has the legal power to issue and enforce rules and regulations governing the activities or facilities that are the subject of the Economic Land Concession Contract.
- Technical Secretariat refers to the Technical Secretariat for Economic Land Concessions.

### **Article 3**

Economic land concessions may be granted to achieve the following purposes:

- To develop intensive agricultural and industrial-agricultural activities that requires a high rate and appropriate level of initial capital investment.
- To achieve a specific set of agreements from the investor for developing the land in an appropriate and perpetual manner based on a land use plan for the area.
- To increase employment in rural areas within a framework of intensification and diversification of livelihood opportunities and within a framework of natural resource management based on appropriate ecological system,
- To encourage small as well as large investments in economic land concession projects, and
- To generate state revenues or the provincial or communal revenues through economic land use fees, taxation and related services charges.

### **Article 4**

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

- 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.
- 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.
- Environmental and social impact assessments have been completed with respect to the land use and development plan for economic land concession projects.
- 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.
- 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.

### **3. Sub-Decree on the Mortgage and Transfer of the Rights over a Long-Term Lease or an Economic Land Concession (No. 114/2007)**

The purpose of this Sub-Decree is to determine principles and terms and conditions for granting rights to investors to put up as security and transfer of rights over a long-term lease or an economic land

concession during the period of time not exceeding the period prescribed in the long-term lease agreement or the economic land concession agreement.

A mortgage or transfer of rights over a long-term lease or rights over an economic land concession shall not extend to the mortgage or the transfer of the concessionary land or the long-term leased land that the investor receives from the State. The investor cannot transfer or mortgage their rights over an economic land concession which has not been developed in conformity with the conditions of the economic land concession agreement. A land concession can only create rights for the period specified in the agreement establishing such economic land concession. The right over land concession cannot create ownership on the conceded land for the benefit of the concessionaire.

Only immovable property registered in the Master Land Register can be subject to a concession or long-term lease. In case the lease is made with the Royal Government and the land is not titled, the lease shall be signed by the Minister of the Ministry of Economy and Finance together with relevant ministers or heads of institutions, or provincial-municipal governors who are the trustee authorities of the said land. The land concession or long-term lease shall be mentioned on the land title certificate at the Ministry of Land Management, Urban Planning and Construction. The Ministry of Land Management, Urban Planning and Construction shall issue a “Certificate of long-term lease” and a “Certificate of economic land concession”. The lessee or concessionaire shall have the right to mortgage or transfer their right over the long-term lease or the land concession as well as the buildings and/or other immovable properties that they have constructed on the land except as otherwise specified in the lease agreement or the economic land concession agreement or restricted by law. A natural person or legal entity or a group of people authorized to lease land from the State can sub-lease to a third party subject to prior approval from the competent authority.

The fees due for issuing the certificate of long-term lease and of economic land concession and inscription shall be determined by a joint-Prakas of the Ministry of Land Management, Urban Planning and Construction, and the Ministry of Economy and Finance.

#### **4. The Civil Code of Cambodia (2011)**

### **Chapter IX. Rights Created by Concession**

#### **307. Rights created by concession**

The provisions of the Civil Code relating to perpetual leases shall apply *mutatis mutandis* to land rights created by concession, within the scope of the conditions relating to such concession, except where otherwise provided by special law.