

Review, Comments and Recommendations on the Draft Environment and Natural Resources Code (Version 11) of Cambodia

March 2019

Written by George Cooper

The Ministry of Environment in Cambodia began drafting the Environment and Natural Resources Code (ENR Code) in 2015 and it has now reached the stage of draft 11.1 for certain sections. It is expected that the Government will finalize and adopt this new legislation in 2019 although the process remains uncertain. If adopted, the ENR Code will be one of Cambodia's longest laws breaking new ground in a large variety of areas and would provide higher levels of environmental protection, openness and accountability than is the case with virtually all of Cambodia's existing laws.

MRLG with its partners in Cambodia, Wildlife Conservation Society (WCS), The Center for People and Forests (RECOFTC), NGO Forum on Cambodia, Independent Mediation Group (IMG) and some independent consultants have been mobilized to analyze various drafts of the code and has shared recommendations with the Ministry with the aim to achieve a better recognition and a stronger protection of customary tenure rights, and a greater control over land and natural resources by smallholder farmers in protected areas and forest lands. This review intends "to take stock of what has changed" from earlier drafts of the ENR Code and "to assess the extent of improvement that might exist in terms of our key interests" when comparing drafts 10/11 with the previous drafts that the organizations' comments were based on. It was also to "assess how much of our joint initial recommendations still appear relevant." Another objective was "to prepare key recommendations, after consultation of the partners, on the latest draft (10 or 11, depending on the latest draft available, with focus on book 1, 4 and 9).

The following are key recommendations:

1. Add a principle and a glossary provision clarifying customary tenure rights.

In the ongoing development of Cambodian law, there have been a number of instances of the recognition of the existence of customary law regarding land and natural resources, and explanations of what groups it applies to. The instances of recognition and the explanations have been bit by bit, however, and as a whole they are not as coherent as they might be.

In particular recognitions and explanations have involved the 2001 Land Law, the 2002 Forest Law, the 2008 Protected Areas Law (PAL), the 2009 subdecree on Procedures for Registration of Land of Indigenous Communities, the 2009 Policy on Registration and Right to Use Lands of Indigenous Communities in Cambodia, and the Civil Code (CC), that took effect in 2011.

The focus of the Land Law on customary rights is on "indigenous communities", which are numerically small groups "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".

¹ This note takes account of comments from a report by MRLG (December 2017) on draft 6 of the ENR Code: <http://mrlg.org/resources/comments-on-the-proposed-environmental-code-of-cambodia-v6-and-proposed-amendments-for-a-better-recognition-of-customary-tenure-rights-in-protected-areas/>, and separate reports by WCS, RECOFTC and NGO Forum on various drafts of the ENR Code.

² The drafts of the ENR Code that were available during the review, which took place in mid-2018, were a complete version of 10 and an incomplete version of 11. All references below to draft ENR Code provisions are to draft 11 unless it is specifically stated that a provision being referred to is in 10.



It is usually understood that these communities are the original occupants of the areas they now inhabit. It is indicated but not clearly stated that the types of lands that may be titled to these communities already belong to them.

The Forest Law recognizes the indigenous communities that are recognized in the Land Law. Also recognized are "local communities" whose "residence is inside or nearby the State forest and having their custom, religious belief and culture that depend on Forest Products & By-products for their subsistence." "For local communities living within or near the Permanent Forest Reserves, the state shall recognize and ensure their traditional user rights for the purpose of traditional customs, beliefs, religions and living as defined in this article."

The PAL recognizes "the local community and indigenous ethnic minorities". The local community "Refers to indigenous ethnic minority communities or a group of villagers who have original houses in one or more villages that are in or near State's forest areas that have tradition, custom, belief, religion, culture and living by depending on finding product, by-product and use those forest resources as basic." The indigenous ethnic minority is "Indigenous people living in mountainous areas, most of whom make their living by practicing shifting agriculture and other additional livelihoods, such as hunting, fishing, and collection of forest products/by-products."

The Lexicon of the 2009 Policy on Registration and Right to Use Lands of Indigenous Communities in Cambodia contains by far the most detailed description of what is an "Indigenous minority": "Ethnic group residing in Cambodia for a long time and that has its own language, culture, custom and tradition different from the Khmer which constitutes the core nation. The indigenous communities include the Phnong, the Khuoy, the Tomphuon, the Jaray, the Kroeung, the Preuv, the Kavaet, the Stieng, the Kraul, the Mil, the Kachok, the Poar, the Khaogn, the Chhoung, the Suey, the Thmon, the Lun, the Suuy, the Rodae, the Khe, the Roong, the Stung, the Loeun, the Somrae and other indigenous minorities. All these indigenous minorities have traditional ways of living and cultivate land in their possession according to customary rules of collective land use. The indigenous minorities represent 1% (one percent) of the total population and have been living in harmony with the Khmer for a long time in some of the provinces such as Ratanakiri, Mondolkiri, Kratie, Preah Vihear, Kompomg Thom, Stung Treng, Oddar Mean Chey, Kompomg Cham, Pursat, Kompomg Speu, Koh Kong, Battambang, Preah Sihanouk, Banteay Mean Chey, Siem Reap and other areas."

³Article 23.

⁴Article 23 also says "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." The words "Prior to their legal status being determined under a law on communities" is a vague way of saying "Prior to their lands being titled".

⁵Articles 11, 15, 37, and in the Glossary definition of "Land of Indigenous Community".

⁶Glossary definition of "Local Community".

⁷Article 40.

⁸Lexicon definitions of Conservation Zone, Sustainable Use Zone, Local Community Zone, and Community Protected Area.

⁹Lexicon definition of "Local Community".

The glossary of ENR Code draft 10 defines "Indigenous peoples" in almost exactly the same way as does the Land Law. Draft 10 defines "local community" as "A group of any size whose members reside and interact in a specific locality, share a natural and/or built environment, and who share characteristics based on their social group, common interests, and/or common cultural and historical heritage."

The Civil Code has the most direct mentions of the existence and legal force of customary law regarding land and natural resources. Article 131 says "A real right permitted under customary law shall be valid under this Code to the extent that it does not conflict with the provisions of this Code and special law." Article 306 says "Ownership and other real rights of ... minority ethnic groups and other communities shall be subject to the provisions of the Civil Code, except where otherwise provided by special law or custom." Article 130 says "A real right is the right to directly control a thing, and may be asserted against all persons." Article 132 lists types of "real rights". They include ownership, possession, use rights and security interests, among others.

The draft ENR Code has mentions of "customary rights", "customary tenure rights", and "customary ... land tenure", but there is no full-blown definition of any of these terms nor of their legal force.

We believe the writing of the ENR Code is an important opportunity to improve the clarity and coherence in Cambodian formal, written law of customary law regarding tenure rights over land and natural resources. We also believe that doing so would improve the clarity of the code overall, since the draft now contains a number of references to what in effect are customary tenure rights without fully explaining them. We further believe that any effort to provide greater clarity should be built upon provisions in existing Cambodian law. We would therefore like to suggest:

(A) Add an article similar to the following to Book 1 Title 1 Chapter 2 "General Principles":

Article 19 The Principle that customary tenure rights are equivalent to ownership rights that belong to all communities and other groups that engage in customary and collective practices with land and natural resources

Tenure rights equivalent to ownership rights are held to lands and natural resources by any community or other group engaging in customary practices, including collective management, of such lands and natural resources when these lands and natural resources are used exclusively by the community or group. When a community or group shares customary use and collective management of land and natural resources with other communities or groups, then the right is equal to a joint ownership right. These rights prevent these lands and natural resources from being used by anyone else without the free, prior and informed consent of the affected communities or groups. The communities and groups referred to include but are not.



(B) Add a Glossary provision that reads like this:

Customary rights – Rights which result from a long series of habitual or customary actions and which have acquired the force of a law within a geographical or sociological unit. Customary rights are socially and groups themselves. These rights are generally exercised collectively. They pertain to any community or group whose actions meet the above definition, regardless of the ethnicity of community or group members. As such these rights may be held by any and every ethnicity that exists within Cambodia, including Khmer and Lao, as long as the community or group meets the above definition.

2. Clarify relationship between draft ENR Code provisions on sustainable management of natural resources, and provisions on customary rights elsewhere in the draft ENR Code as well as in other legal texts.

Draft code article 344 reads "Collaborative Management Communal Land Title Rights are additional to any other privilege enjoyed by indigenous communities including rights under other legal provisions and legal instruments." Article 358 reads "Stewardship and use right over state lands under collaborative management are additional to privileges enjoyed by indigenous communities in accordance with the laws and legal instruments in force."

In case of a conflict between either of the above two provisions and indigenous communal rights provided by other legal texts, it is unclear what prevails.

Provisions in Book 4 on other types of programs besides Collaborative Management (CM), such as Protected Area Systems and Biodiversity Conservation Corridors, are silent on the relationship between the rights and obligations created by these programs and the rights of indigenous communities under other legal texts, not to mention the rights of holders of customary tenure rights in general. For example, draft code article 340 says that collaborative management may be applied to "reserved indigenous people's or other customarily conserved lands". Land Law article 23 says "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." What happens when the probably inevitable clash occurs between the two different management systems?

Although the draft code does not say so explicitly, there are indications that the collaborative management rights are superior to the other rights. Article 360 says "These Collaborative Management Communal Land Title Rights do not include the right to sell or transfer the lands designated as Collaborative Management Zones." (See also article 354.) But what if the collaborative management zone to which the collaborative management title pertains is also covered by an indigenous communal land title (ICLT)? Under the Land Law there are limited rights to transfer ICLT lands. Also, draft code article 359 says that following the "designation of a Collaborative Management Protection Zone", "Regardless of any additional registration or requirements, such communal use title of land under Collaborative Management shall not be violated." Establishment of this zone appears to be the final step in creating collaborative management in a particular locale. Given that, what would the "additional registration or requirements" refer to? If they refer to ICLT then the rights provided by ICLT would seem to be subordinate to the CM requirements.

We believe it is important to clear up these ambiguities and in ways that make customary tenure rights superior to obligations created by these Book 4 programs. We therefore suggest adding an article like the following to Book 1 Title 1 Chapter 2 "General Principles":

Article 20 The principle that customary tenure rights are superior to obligations created by sustainable management of natural resources programs created by this law

In case of a conflict between obligations created by sustainable management of natural resources programs in this law, and rights provided under customary law, whether provided in this or in any other legal text, customary rights shall prevail.

3. Make clear that free, prior and informed consent (FPIC) applies to all types of decisions, programs etc. by government that impact lands and national resources of indigenous communities

Proposed additions are in blue, and deletions are in red strikethrough.

There are a number of strong FPIC provisions in the draft ENR Code, but it is not completely clear if they cover all government decisions that might impact ICs' lands and natural resources. For example, FPIC is applied to management of the Protected Areas System (PAS) (article 291), but there is no mention of FPIC concerning creation of PAS, Biodiversity Conservation Corridors (BDCCs), or collaborative management schemes. Article 18 says FPIC applies to "Any proposed project". The glossary in code draft 10 defines "project" as "Any public or private activity, program, business, service, or other undertaking, the performance of which requires any permit or approval or is otherwise regulated by the government." This glossary definition would seem to cover, for example, creation of a PAS, BDCC, or collaborative management scheme, but does it? In any case FPIC provisions are not extended to customary lands and NR in general. We therefore suggest the amendment of article 18 as follows. (Proposed additions are in blue, and deletions are in red strikethrough.)

Article 18 The Principle of Free, Prior, and Informed Consent for ~~Indigenous Peoples' communities~~ holders of customary tenure rights

Any proposed project, program or activity that might impact communities' customary rights, especially the development, use, or exploitation of land and natural resources, whether by the private sector or by government and including the creation of new protected areas, shall receive the communities' free, prior, and informed consent.

4. Make provisions on commercial activities in the protected areas more explicit for local communities.

The draft code has a number of provisions allowing commercial activities inside the sustainable use zone and community zone of the protected area. These provide an opportunity for local communities to improve their livelihoods while ensuring sustainable management of natural resources, but it is not clear if commercial activities are possible in the community protected areas (CPAs). We, therefore, suggest an addition in blue below for article 314 to make this provision more explicit.

5. Suggested revisions to miscellaneous other articles

Proposed additions are in blue, and deletions are in red strikethrough.

Article 285: Protected area establishments and the immovable properties of local and indigenous peoples.

The ministry or institution responsible for environment and natural resources may, at the request of a community of local or indigenous peoples, establish a component of the Protected Area System for any area that is of collective significance or provides crucial benefits to local or indigenous peoples.

Article 311 (Para. 3)

Zoning process shall include consultations with local authorities, [local communities within and nearby the Protected Area](#), and relevant partners with experience in the research, protection, and management of natural resources and other relevant stakeholders as provided for in Book 1, Title 2 and 3 of this Code. The zoning shall receive the Free, Prior, and Informed Consent of communities [holders of customary tenure rights' within the Protected Area](#)

Article 311 (Points #3 and 4)

3. Sustainable Use Zone: management area(s) of both high economic potential and significant conservation and ecosystem value, with high potential for contributing to the sustainable livelihood of local communities and indigenous peoples. [Any lands and natural resources covered by this zoning that include customary lands and natural resources of local communities and indigenous peoples that are not eligible for land titles, may be the subject of land registration and titling as collaborative management community titles. Such lands and natural resources that may be covered by collaborative management community titles include but are not limited to water sources, grazing areas, fisheries, and forests.](#)

4. Community Zone: Management area(s) for socio-economic development of the local communities and indigenous peoples currently using the area including [all of their customarily used lands and natural resources, which include but are not limited to residential lands, paddy fields, other cultivated and planted fields, home garden or swidden agricultural lands, cemetery areas, water sources, fisheries, grazing areas, forests including sacred forests, and reserved lands.](#)

[Certain of the above uses may be considered exclusive to and may be titled to indigenous communities or collectivities under the 2001 Land Law, Subdecree 83 \(2009\) On Procedures for Registration of Land of Indigenous Communities, or the 2008 Protected Areas Law article 11: Residential lands, paddy fields, other cultivated and planted fields, home garden or swidden agricultural lands, cemetery areas, sacred forests, and reserved lands. Certain of the above uses may only be the subject of collaborative management community titles providing permanent usufruct rights to Khmer and indigenous communities: Water sources, grazing areas, fisheries, and forests."](#)

Article 314:

The ministry or institution responsible for environment and natural resource, sub-national administrations, and relevant entities with jurisdiction for management of any portion of a Protected Area, may decide on specific site(s) in Sustainable Use Zone ~~or Community Zone~~ with both high economic potential and low conservation and ecosystem value for commercial activity.

Article 318:

Consistent with the management plans under this Title or the collaborative management plans under Title 2 of this Book, the relevant management authorities of the components of the Protected Area System may determine that certain portions of a sustainable use zone ~~or community zone~~ with both high economic potential and low conservation and ecosystem value are best suited to commercial activities.

Article 340:

This Title applies to all areas that are eligible for implementation of Collaborative Management. Protected Area System, Community Protected Areas; Community Forestry; Community Fisheries and other communities that have previously submitted applications for registration as a community forestry or prepared to apply for such status; other state public lands with ecosystem or conservation values; and ~~reserved indigenous peoples~~ or other customarily conserved lands shall be eligible to be managed in accordance with the principles of Collaborative Management stipulated in this Title.

Note: Subdecree 83 (2009) on Procedures for Registration of Land of Indigenous Communities recognizes reserved land of indigenous peoples as eligible for communal land titles, therefore such reserved land should not be within the scope of the collaborative management scheme.

6. Add interim protection article concerning collaborative management (CM)

Creating collaborative management areas will probably take a long time, as has indigenous communal land registration (ICLR). ICLR procedures involve a joint prakas on interim protection of indigenous communal lands. Likewise, We suggest adding an interim protection article for lands eligible for collaborative management:

Article XX Interim Protection

Persons responsible for management of any area entitled to collaborative management are eligible to apply to the ministry or institution responsible for environment and natural resources for interim protection of that area. Application may be made at any time including prior to initiating the process of establishment of collaborative management. The interim protection application shall be simple. There shall be an accompanying map that shows the area for which interim protection is requested. The techniques for making the map shall be similar to those used for making preliminary maps that are submitted with indigenous communal land registration applications. The decision on the interim protection application shall be quick and time-bound. The effect of applying interim protection shall be that no commercial development of any kind shall be allowed by any government official or agency, and no commercial activities of any kind shall be allowed, other than small, family-scale businesses.

A prakas shall be issued by the Minister of the ministry or institution responsible for environment and natural resources to elaborate the interim protection process.

7. Provide right of individuals and organizations to help communities understand the ENR Code.

The ENR Code will be long and complex and difficult for communities to understand. We suggest adding something like this to Book 1, Title 1, Chapter 2, General Principles:

Article XX Right to receive assistance

Organizations and individuals with relevant abilities may meet and help any communities that are affected by this code to understand and exercise their rights under the code.

If the ENR Code as adopted generally resembles the draft code versions examined for this note, it will have a very large impact on the land and natural resources tenure rights of holders of customary rights. As we are concerned with such rights, the suggestions provided in this document are shared in an attempt to make these impacts positive for smallholder farmers and indigenous communities in Cambodia. This code is the place to finally clarify the legal status of customary rights, to state directly what legal force is attached to them, and to make clear who has such rights. We hope that in the material above, we have made suggestions that would help the code achieve these results.

This Discussion Note was written in consultation with Christian Castellanet and Ngo Sothath (MRLG), Alistair Mould, Teng Rithiny, and Chea Phalla (WCS), Hou Kalyan (RECOFTC), Poch Sophorn (IMG), Florian Rock and Antoine Deligne.

Cooperating Partners:



Full Citation: Cooper, G. (2019). *Review, Comments and Recommendations on the Draft Environment and Natural Resources Code (Version 11) of Cambodia*, Discussion Note Series #4. Vientiane: Mekong Region Land Governance.



This work is licensed under a Creative Commons Attribution-NonCommercial-ShareAlike 4.0 International (CC BY-NC-SA 4.0)

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

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

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

The MRLG project is implemented by Land Equity International (LEI) in partnership with GRET Professionals for Fair Development and supported by the Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ).

Mekong Region Land Governance

Unit 11, House No. 262, Ban Saphanthong Kang, Sisattanak District, Vientiane Capital, Lao PDR

PO Box 2973, Vientiane Lao PDR 01000

Phone: +856 21 454 807

Email: info@mrlg.org

Disclaimer

The views, opinions and interpretations expressed in this publication are those of the authors and contributors. They should not be interpreted as representing the official or unofficial views or positions of SDC, BMZ and Luxembourg.

Funded by:



GRAND DUCHY OF
LUXEMBOURG

Implemented by:



Supported by:

