
IV. Expropriation Laws and Practices: Cambodia²²⁸

Cambodia became independent in 1946 and sovereign in 1956. The Constitution of newly independent Cambodia recognized private property rights, and required compensation for any taking of private property for “public use.”²²⁹ Such private ownership of land continued through the years until the Khmer Rouge took power in 1975 when the private property system was abolished. The Khmer Rouge Constitution stated that property “for everyday use” remained in private hands whereas “all important means of production,” including land, belonged to “the people’s state.”²³⁰ Under the Khmer Rouge’s dictatorship, all urban dwellers were forced to move to the countryside for farming, and their immovable properties were confiscated and transformed into state-owned property.²³¹

The Khmer Rouge was defeated by Viet Nam in 1979. Ten years later, Cambodia gained its independence from Viet Nam (in 1989), followed by a massive government redistribution of land. While declaring all land to be “the collective property of the people,” the rights to use and possess land were given to farmers.²³² Because most urban property owners were killed or died and ownership documents were destroyed during 1975–1979, people came to cities and occupied vacant buildings on a “first-come, first-served” basis.²³³

Under the new land system, rural land was categorized into three types of usage: housing land, cultivating land, and concession land. Although farmers

were permitted to own housing land only, the practical difference between ownership rights and possessory rights was not significant since possessory rights were transferable, inheritable, and perpetual in length.²³⁴ In urban areas, the government usually allowed people to remain on the land they occupied and to have the right to buy and sell such possessory rights.²³⁵ However, they were considered informal settlers because they had no formal documents evidencing their right to the property.²³⁶

It was not until 1993 that private ownership was fully restored under the Constitution. The current legislation governing land ownership is the Land Law of August 2001. The current Land Law recognizes claims to land made only after the downfall of the Khmer Rouge in 1979.

A. Land Expropriation Legislation in Cambodia

With respect to compensation for state expropriation of land, the Cambodian legal framework for land expropriation has three distinctive features. First, the 1993 Constitution provides that the state may expropriate private property “only in the public interest.”²³⁷ The 2001 Land Law reiterates this requirement as follows: “No person shall be deprived of his ownership, unless it is in the public interest.”²³⁸ Second, the standard of “fair and just compensation” for state expropriation is adopted both in the 1993 Constitution and in the 2001 Land Law.²³⁹ Third, with respect to the timing of giving compensation, both the Constitution and Land Law explicitly require compensation be made before expropriation starts.²⁴⁰ On the issue of who is entitled

²²⁸ Because authors have not conducted any field research in Cambodia, the discussion on the country’s land expropriation practice and recommendations provided for further reforms are based on the authors’ own research on Cambodian land expropriation laws and studies done by other researchers, including Cambodian consultants for the RETA 6091 project.

²²⁹ Russell, Ray. 1997. Land Law in the Kingdom of Cambodia. *Property Management*, 15(101).

²³⁰ Id.

²³¹ Beng Hong Socheat Khemro, and Geoffrey Payne. 2004. *Improving Tenure Security for the Urban Poor in Phnom Penh, Cambodia: An Analytical Case Study*. 181(28).

²³² Ramamurthy, Bhargavi, Sik Boreak, Per Ronnas, and Sok Hach. 2001. Cambodia Development Resource Institute, Cambodia 1999–2000: Land, Labour and Rural Livelihood in Focus 22–23. *Working Paper* 21.

²³³ Khemro and Payne, *supra* note 231(182).

²³⁴ Russell, *supra* note 229.

²³⁵ Khemro and Payne, *supra* note 231(182).

²³⁶ Id.

²³⁷ Cambodia Constitution, Art. 44.

²³⁸ The 2001 Land Law, Art. 5.

²³⁹ See Cambodia Constitution, Art. 44; see also the 2001 Land Law, Art. 5.

²⁴⁰ Id.

to compensation, the threshold requirement is the legality of possession or ownership. Due to many years of political turmoil and complete destruction of the land system and land records which existed before the Khmer Rouge's dictatorship, land system reconstruction was undertaken at a time of complete anarchy in regards to land possession. While recognizing the legality of some forms of physical possession, Cambodian laws explicitly preclude legalization of the following possessory acts: (i) entering into possession of state public land at any time;²⁴¹ (ii) entering into possession of state private land after the cutoff date, 30 August 2001 when the 2001 Land Law took effect; (iii) transformation of possessory rights to state private land into ownership not pursuant to relevant rules effective at the time of transformation; (iv) transformation of a land concession²⁴² into ownership before or after the cutoff date, except for concessions in response to social needs; (v) any land concession not in conformity with rules governing such concessions;²⁴³ and (vi) any occupation of privately owned land without a title after the cutoff date.²⁴⁴ Because these acts are categorized as illegal, the persons engaged in such acts are not entitled to any compensation or reimbursement.²⁴⁵ Based on these provisions, Table 2 summarizes the people who appear not entitled to compensation.

Table 2: People who are not Entitled to Compensation

Those who enter into possession of state public land	Anytime
Those who enter into possession of state private land	After the cutoff date
Those with ownership rights to non-social concession land	Anytime
Possessor of concession land obtained not in compliance with relevant rules governing land concessions	Anytime
Those with ownership rights to state private land obtained not in conformity with relevant rules governing transformation of possessory rights to ownership	Anytime

Source: Prepared by the author based on an analysis of various Cambodian laws.

²⁴¹ In Cambodia, state-owned land consists of state public land and state private land. The former is owned by the state and used by public institutions such as government organization, roads, ports, schools, etc. The state public land is not alienable. State private land, on the other hand, is owned by the state, but may be possessed and used by a private individual; such possessory rights are transferable, and may be legally changed into private ownership upon satisfaction of certain conditions.

²⁴² Land for concession is part of state private land, used for meeting social and economic needs. See the 2001 Land Law, Art. 49.

²⁴³ The 2001 Land Law, Art. 18.

²⁴⁴ Id., Art. 34.

²⁴⁵ Id., Art. 19.

Although there is a constitutional standard of “fair and just compensation” in Cambodia, application of this standard remains unsettled under the law. As to the form of compensation, Cambodian laws allow provision of social concession land owned by the state for resettlement of poor and landless families.²⁴⁶ Resettlers may not transfer social concession land within 5 years after resettlement. If they comply with the rules governing such land, they will be given ownership to such land after 5 years.²⁴⁷

Unlike most countries, Cambodia does not have any legal rules governing land expropriation procedures. As a result, private landowners and legal possessory rights holders, let alone squatters, have no reasonable opportunity to participate in the process, let alone appealing administrative decisions in a court of law.

B. Problems: Five Ws²⁴⁸

The Cambodian Constitution is well-crafted with respect to land expropriation. Unfortunately, this has not resulted in satisfactory land expropriation practice. The lack of constitutional force, coupled with apparently unbridled government expropriation practice, has resulted in ineffective implementation of the constitutional provisions concerning expropriation. These problems can be outlined in five Ws: Who is entitled to compensation? What compensation is made to APs? When is the compensation paid? What determines the amount of compensation? Finally, why do these problems emerge?

This subsection will discuss problems, legal and institutional, existing in the Cambodian land expropriation system, as indicated in the practice associated with the ADB-funded project Phnom Penh-Ho Chi Minh City Highway Project (Highway No.1). This was the first project financed by ADB in Cambodia that included involuntary resettlement and a resettlement plan. The Cambodian Government had no experience in applying ADB's Policy on Involuntary Resettlement and no comparable law or procedures of its own. Because of such lack of experience and national regulations and procedures, resettlement was not very well implemented on that. Despite recent improvements in practice on ADB-financed projects, the Highway 1 experience may still be the norm on government-financed projects.

²⁴⁶ Cambodian Sub-decree No. 19, 2003, Art. 3.

²⁴⁷ Id. Art. 18.

²⁴⁸ Discussions in this section are based on the facts as disclosed in the country report: RETA 6091: *Capacity Building for Resettlement Risk Management* (Cambodia), except otherwise noted.

1. Who is Entitled to Compensation?

As discussed above, the eligibility for compensation in case of a land expropriation depends on the legality of possession and ownership. If the rights to the property at issue were not obtained legally, no compensation would be awarded.

Further, the 2001 Land Law treats the land used for public infrastructure, such as road and its right of way (ROW),²⁴⁹ as state public property,²⁵⁰ and authorizes government to expand road as it sees fit, including announcing a new ROW or expanding the existing ROW.²⁵¹ Although the law requires compensation to owners of property located in the expanded portion of ROW,²⁵² all possessors farming and living within the original—but never enforced—ROW zone are not entitled to compensation even if they initially entered into the zone because of a government land redistribution program after the downfall of the Khmer Rouge. Moreover, these possessors are not even entitled to improvements they made on such land.²⁵³ It is even unthinkable when government redefined ROW as 30 meters from the road's centerline for Highway No. 1 and declined compensation to possessors of the expanded portion of the new ROW zone.²⁵⁴

Such laws and policies appear to be irrational in a sense that current possessors of land within the zone initially occupied the land with a de facto government permission. Under present law, these people within the ROW would even be unable to recover their loss of improvements made while government did not say no to them. Some of such sad stories told by these settlers within ROW are reproduced in Box 4 and Box 5.

Box 4: An Urban Informal Settler on the Side of a Railroad

A 35 year-old woman with two children lives beside the railroad track. She moved in the area in 1991 and purchased the land for building her house in informal market when the land was swampy. She made substantial improvements on land and the house, and her husband had a job as a taxi driver nearby in the city. When government announced the right of way of 25 meters from the centerline and demanded her to move without compensation, she was shocked. While agreeing to move, she demanded for compensation. Her request was rejected and she would have to face the harsh reality, that is, all her investments in the land and the house would be gone. Because they could not afford the land nearby, they had to move to a remote area. Living in a remote area would mean the loss of the source of income as a taxi driver. They would be forced into deeper poverty.

Source: Khemro and Payne. 2004. Improving Tenure Security for the Urban Poor in Phnom Penh, Cambodia: An Analytical Case Study. 28.

Box 5: A Farmer with Land within ROW

A male farmer had 0.5 hectare (ha) of very productive rice paddies located within the right of way (ROW). The land produced enough food for the family and generated sufficient income for their living. When the Highway 1 project started, his 0.5 ha of rice paddies was taken without any compensation. Although he had land located outside the ROW, he had to give up farming because irrigation was destroyed by the project. The farmer became a motorbike taxi driver.

Source: RETA 6091: Capacity Building for Resettlement Risk Management—Cambodia Country Report.

Another indication that the government probably acts beyond the Constitution is its arbitrary declaration of the ROW, thus nullifying entitlement to compensation of those who live within such ROW without awareness of its public property nature. In Cambodia, it is common for people to live on and use the land within the ROW of a highway or road. Because the government never publicly claimed the land located within the later-announced ROW, average Cambodians moved into the ROW zone, cultivating, opening business, and building houses. Since the state would not pay for AP's assets within the ROW, these people would have no recourse whatsoever. Even if the people within the zone do not have legal title, the government has never objected to their physical possession and use of the land until a sudden announcement later. By arbitrarily and summarily declaring certain land as an ROW and

²⁴⁹ A 50-meter right of way (ROW) was initially set under the Khmer dictatorship. Although the post-Khmer government assumes its legality, it had never enforced such ROW rules until possessors applied for title for the land within the ROW in 1989 when private ownership of land was reintroduced. Despite the fact that these possessors initially entered into the zone through a government land redistribution program without awareness of the ROW rules, government reinstated the ROW rule and declined compensation for assets located within such ROW zone. See RETA *Country (Cambodia Report)*, 39.

²⁵⁰ The 2001 Land Law, Art. 15.

²⁵¹ Id., Art 148.

²⁵² Id., Art 148.

²⁵³ Ministry of Economic and Finance Decree No. 961 (2000) "disallows any payment to be drawn from the national budget for structures and other assets located within the ROW." See *supra* note 248(9).

²⁵⁴ Prakas No. 6 of 2003. See RETA *Country (Cambodia Report)*, 9.

refusing to pay compensation to the people who rely on the land within the ROW zone, the government the government did not conform to internationally accepted law on adverse possession.²⁵⁵

Some improvements have been made in recent years, mainly on urban squatters' right. Before 2000, the Phnom Penh municipal government maintained a rigid policy of not recognizing squatters as legitimate inhabitants of the city and evicted squatters without compensation.²⁵⁶ Starting from the late 1990s, the city government began to offer to squatters free housing and free land about 20 km outside the city.²⁵⁷ However, because of the lack of employment and basic healthcare services, about 90% of evicted resettlers had returned to informal slum settlement within the city. In 2003, the Cambodian government shifted its policy on urban squatters and informal settlement to a "twin-track" approach, which focused on both creating new settlements that are close to employment opportunities and on-site upgrading of existing settlements, rather than coercive evictions.²⁵⁸

2. What Type of Compensation is Paid?

Based on the country report for RETA 6091: Capacity Building for Resettlement: Risk Management (Cambodia) [hereinafter referred to as "country report"], in land expropriation for Highway No. 1, three types of compensation were paid to legitimate landholders:²⁵⁹ compensation for land, compensation for main structures, and compensation for annual and perennial crops. A standard unit amount was provided for each subcategory of these three types of compensation.

Land was further grouped into farmland and residential land. Land located within the ROW was not compensated. The standard unit of compensation was \$0.50/m² for farmland and \$2.00/m² for other lands.²⁶⁰

Four categories of main structures were created, based on the construction materials used and the number of stories. The amount of compensation ranged from \$25.75/m² to \$185.00/m².²⁶¹ In addition, a unit cost was assigned to other types of structures like wells, tombs, and fences. For annual crops, only two categories were entitled to compensation: rice and home garden products. A unit compensation was assigned to each of six categories of common perennial crops.²⁶² APs were asked to harvest annual crops before the civil work started, and were entitled to compensation for annual crops only if they could not harvest the crop on time.

Determination of the unit price did not take the unique features of each property into account. For example, in terms of land, there were no adjustments for soil quality, terrain, or access to irrigation water. For perennial crops, a unit price was offered for each category of trees regardless of its productivity and how many years of useful life remained.²⁶³

While these standards applicable for the highway project had serious flaws on the surface, the implementation was even more problematic. During the resettlement audit under the ADB project (RETA 6091), many APs reported that the actual compensation they had received was either much lower than the standards or none at all. For example, an affected farmer was told to provide the valuation officer with a meal in return for more compensation.²⁶⁴ In another case, an affected farmer's 24 palm trees were cut down, and he received no compensation at all even though each palm tree generated \$2 of income per year for his household and was valued at \$5 per tree by official standards.²⁶⁵ However, in response to ADB's audit recommendations, the second payment was paid by the government and all lost properties were paid fully.

As reported above, Cambodian expropriation laws permit using social concession land to provide land for landless people including resettlers. For outstanding and ongoing projects, on the one hand, resettlement sites have been provided to landless APs with a land plot of 7m x 15m per household and a basic infrastructure. This approach is also applied in government-financed projects. On the other hand, landless APs can also be provided cash for their preference.

²⁵⁵ Countries like the US and the United Kingdom recognize claims on rights of adverse possession to public and private property under certain conditions. Some of these conditions include: (i) actual possession of the land in question (ii) continuously, (iii) exclusively, (iv) open and notoriously, (v) against the titled legal owner's willingness, (vi) for a statutory period of time. To establish the actual possession, the claimant must perform some physical acts of possession in connection with the land, such as using the land for farming or grazing, improving the land, or setting up an enclosure on the land. *Black's Law Dictionary*, Sixth Edition (1990).

²⁵⁶ Kingdom of Cambodia Council for Social Development. 2005. *National Poverty Reduction Strategy 2003–2005*. Dec. 86.

²⁵⁷ Legge, Michele, and Thor Savoenu. 2004. *Nine Years On: Displace People in Cambodia*. 14

²⁵⁸ Khemro and Payne, *supra* note 231(139).

²⁵⁹ As discussed in the text, legitimate landholders are those who have documents attesting to their rights to the land located outside of the discretionary ROW.

²⁶⁰ Country Report, *supra* note 248(22).

²⁶¹ *Id.*, 23.

²⁶² However, the trees considered to be growing naturally on affected farmers' land were not entitled to compensation.

²⁶³ Country Report, *supra* note 248(23–24).

²⁶⁴ Resettlement Audit: Phnom Penh to Ho Chi Minh City (Loan 1659-CAM), 61.

²⁶⁵ *Id.*, at 53.

3. When is Compensation Paid?

The Constitution and the 2001 Land Law require that compensation be paid before the expropriation process starts. Field visits indicated that these provisions were not universally followed in the Highway No. 1 project. The highway was built in 1999, but at the time of the 2004 resettlement audit, some APs who were legally entitled to compensation had not received compensation. Nor did they know when they would receive compensation. However, because of the audit, all outstanding compensation is being paid.²⁶⁶

No penalties are assessed for this failure to pay compensation on time as is required by existing laws and policies. Without timely compensation, APs face great difficulty in making a living during the transition period and beyond.

4. What Determines the Amount of Compensation?

Although the Constitution requires “fair and just compensation” for land takings for public interests, this standard is not defined either in law or in policy. In the Highway No. 1 project, the government claimed that compensation was based on market information obtained through the government’s land transaction records. The market for farmland, however, is not active and the information from land registration records is unreliable as it is common for parties to a land transaction to understate actual land prices.

The compensation amounts used in the Highway No. 1 project were, in fact, set by ADB consultant during the PPTA, based on some estimate of what was deemed to be replacement cost, however, the Cambodia Resettlement Implementation Plan (CRIP) that was revised by the government contained compensation rates that included depreciated rates for structures and reduced rates for land. The CRIP was approved by the Operations Department of ADB on the basis of which Loan 1659-CAM became effective.

It appears that government valuation officers had a great deal of discretion in applying the broadly formulated compensation standard and applied them inconsistently. Reports also indicate that APs who were educated and relatively well-off received much higher valuations than those who were poor and uneducated.

For example, one farmer complained to auditors that his shelter with a floor area of 31 m² had been valued at \$60, but his neighbor’s house of only 22 m² had been valued at \$1,100. The only difference was that his neighbor was influential in the local community.²⁶⁷ The audit highlighted these discrepancies and all outstanding compensation is now being paid at replacement cost for all Highway 1 project APs.

5. Why Do These Problems Emerge?

The lack of functional land expropriation laws and supporting institutions appears to be the primary cause for these problems. Although the Constitution mandates the state to provide “just and fair compensation”, the legal restrictions preclude a substantial number of people from receiving any compensation.²⁶⁸ Further, the government has issued additional rules and decrees announcing wider ROWs and thus expanding the scope of state public land, rendering more people at risk of losing their property without any compensation.

Second, the lack of a legal definition or guiding rules on the “fair and just compensation” standard has led to arbitrary determination of the compensation. The absence of guiding rules on compensation coupled with the lack of AP’s participation in the expropriation process results in the expropriating authorities having unchecked power to force APs to accept whatever compensation that is offered, how it is paid, and when it is paid. Moreover, the lack of a functional definition of “fair and just compensation” has further increased this power imbalance in the government’s favor. Despite the arbitrary valuation of assets referenced above, the government did conduct its own replacement cost or market survey as far back as 2000 and applied those rates on outstanding development partner-financed projects. However, the ongoing projects including the JICA-financed section of Highway 1, replacement cost study has been conducted by local consultant or NGOs to reflect current market price of affected assets. Recent ADB-financed projects have been applying units rates resulting from replacement cost surveys, although none are as high as the base rates used by the government for the ADB-financed Highway 1 project, which were validated by the resettlement audit as still being

²⁶⁶ On 17 November 2006, Inter-ministerial Resettlement Committee confirmed that outstanding compensation was completely paid in late October 2006.

²⁶⁷ *Supra* note 264(55).

²⁶⁸ As of 2002, about 20% of urban population alone are undocumented informal squatters, and thus, “illegal” residents under the law. Kingdom of Cambodia 2002. Council for Social Development, National Poverty Reduction Strategy 2003–2005. 88. Dec.

within market rates at the time of compensation and still generally valid in 2005. Even after the deductions and depreciation, the amount paid to APs along the ADB-financed section of Highway 1 was still higher than the government's 2000 rates or the more recent replacement cost rates conducted on ADB-financed projects. The variation reflects the need for a more scientific methodology for asset valuation.

Third, and perhaps more important, is the complete absence of procedural laws. In this procedural vacuum, the expropriating authorities are not obligated to consult with APs on compensation and resettlement, to hear their concerns about their future, to make adjustments based on such concerns, or to address grievances through additional support measures. The actual experience with the Highway No. 1 project clearly indicates that APs were completely excluded from the decision-making process. APs were not consulted before determining compensation standards. They were invited to meetings notifying them of the compensation standards, but they were told the standards were the government's fixed rates with no possibility for negotiation. The Highway 1 audit report contains a compilation of complaints raised by APs, and none of these complaints was addressed appropriately. More seriously, the report discloses that "discontent was suppressed; complaints brushed aside with contempt and arrogance." As a result, most APs were forced to accept whatever amount was given to them. As a result of the Highway 1 audit, all affected people are now being fully compensated and procedures have improved significantly on recent ADB-financed projects. The Government is also demonstrating its commitment to improved resettlement by developing, with ADB's technical assistance, a resettlement sub decree that will be applied to all projects, regardless of financing.

Fourth, institutional deficiency also contributes to the problems arising from land expropriation in Cambodia. Currently, the Inter-ministerial Resettlement Committee (IRC) under the Ministry of Economy and Finance (MEF) is assigned with nearly all the responsibilities concerning land takings for ADB, World Bank, JICA, and JBIC-financed projects. Those responsibilities include approving compensation rate, compensation, resettlement, and practically all other pertinent issues. While some efforts are being made to improve procedures for some development partner-financed projects, the practice on government-financed projects is unknown.

This institutional structure is problematic in that it involves inherent conflicts of interest. One of MEF's objectives is to appropriate funding for compensation and resettlement to minimize overall costs for the infrastructure project. As an organization under MEF, IRC is expected to follow instructions from MEF and comply with MEF's project guidelines. It would be difficult, if not very impossible, for IRC to stand on the side of APs and ask for adequate funding for compensation and resettlement. On compensation and resettlement issues, IRC acts as a "legislature" in determining rules and standards for valuation of affected assets and resettlement, as an "executive" in implementing these standards and delivering compensation and resettlement options, and as a "judiciary" in addressing AP's grievances and complaints. With all three major government functions in one body, it is difficult to avoid abuse of power. On recent ADB-financed projects, IRC indirectly participate as an observer in a working group consisting of implementing agency, international and domestic implementation consultants to conduct replacement cost study. In the future, professional asset valuers will be part of this team. However, there are no such procedures on government projects.

Finally, the lack of access by APs to impartial adjudication of expropriation disputes. Three contributing factors give rise to this problematic nature of the Cambodian dispute resolution mechanism. First, unlike in most countries, APs do not know how to put their complaints through independent judicial review for concerning compensation. As the auditor found, APs do not know a process to appeal the decision on their asset value. Second, as a new democracy, Cambodian judicial system is not ready to challenge the government's decisions. The authors' conversations with many legal scholars in Cambodia indicate that Cambodian courts do not function well to play the role of the arbiter in disputes between the government and its people. Third, the totalitarian legacy left by Khmer Rouge has left a huge imprint on many government officials, including judges. Many of these officials believe that government activities always advance the common good no matter how private individuals are adversely affected. On recent ADB-financed projects, a grievance mechanism has been established and is operational. A grievance committee is established comprised of provincial governor, deputy provincial governor, deputy provincial land use management official, chief of provincial department of public works and transport, and chief of bureau of state property. An

NGO representative is also to be included. However, it is not known that there is any grievance mechanism for government-financed projects.

C. Recommended Reforms

Cambodia's land expropriation laws and processes are fraught with problems and worse than those of the PRC and India. However, the situation can improve for several reasons. First, Cambodia's legal system is in an early development stage and can be influenced by constructive advice concerning reform. Second, international development agencies, such as ADB, are directly or indirectly involved in its policy-making process through their funded programs. This may provide these development agencies with important leverage to move the country to a positive direction regarding its compensation and resettlement policies. Third, the mere existence of many international NGOs indicates that the Cambodian Government permits, if not welcomes, the development of democratic process, which will inevitably lead to participation of citizens in the process, including the land expropriation process. This section will make several recommendations for immediate action with respect to compensation for loss of assets in government expropriations.

1. Conduct legal and policy reforms on compensation and resettlement regimes to protect poor people from being further marginalized

As discussed above, six groups of people, most of whom are poor and marginalized, are not entitled to compensation under the law. This raises a serious question on the rationality of such legal restrictions. Such rule and practice are also inconsistent with ADB policy that all APs are entitled to compensation and resettlement assistance. We strongly recommend the following legal and policy steps in lifting most, if not all, existing restrictions on eligibility for compensation and resettlement assistance.

First, the rule that the resettlers of concession land cannot receive compensation when state expropriates such land should be abolished. One of the purposes of concession land is to provide replacement land to APs when their original land is taken for public purposes. By law, they must unambiguously and continuously possess that land for 5 years before becoming owner of the land. Within these 5 years, there should be a

strong presumption that they have legal possessory rights to concession land, and should be treated as a de facto owners of such land. However, the 2001 Land Law's explicitly declines their eligibility for compensation when the state withdraws the land for any purpose before they upgrade their possessory rights into ownership rights. In many countries, rights to possess and use in the absence of ownership are entitled to compensation under the law. Tenants in Italy and the United Kingdom and use-right holders in the PRC are fitting examples. Protecting land users' right to compensation in case of land taking will not only help achieve an equitable distribution of burden as a result of land taking, but also encourage them to invest in land before the taking, which is essential to the increase of agricultural productivity and economic development.

Second, establish a cutoff date that clearly defines the eligibility for compensation in cases of squatting. Squatting on state public land is common in Cambodia. This can be traced back to the initial years after the Khmer Rouge dictatorship collapsed when the country was in anarchy and no law defined state land. These squatters have established existence by farming and building structures on the then unclaimed land, and thus, established their de facto property interests in such land. Undoubtedly, the burden of loss should not be borne by these squatters because of the government's failure to object to the occupancy. More important, many of these squatters are poor and primarily depend on this later-announced state public land for meeting their subsistence needs. For public policy concerns, it is socially insensible to wipe out completely their interests in land by a simple announcement from the government.

A proper balance should also be struck to discourage future squatting on state public land. The best mechanism is to establish a cutoff date and make subsequent entering into public property illegal, and therefore, ineligible for compensation. The 2001 Land Law has set up a cutoff date for squatting on state private property, while categorically denying the legality of possession of state public property. It appears rational that the cutoff date rule is extended to state public property. For example, government may apply its rules on social concession land to all state public property and require precutoff date possessors to obtain formal government permission to use that land and continuously use is 5 years before obtaining ownership rights.

Third, make resettlement assistance available to the APs who are not otherwise eligible for compensation. Although Cambodian expropriation laws apparently decline paying compensation to those six groups of people for the loss of their assets, no law or government decree prevents the government from providing resettlement assistance to these people even if they are not legally entitled to compensation under the law. We strongly recommend that in the absence of legal reforms, the government should actively pursue both social and economic measures to mitigate the APs' losses and sufferings.

2. Clearly define the “fair and just compensation” requirement

The experience in the expropriation for the Highway No. 1 project shows that the constitutional mandate of “fair and just compensation” is meaningless without a clear definition and a method for applying the standard. Most market economies define the amount of just compensation for expropriation of private land as the fair market value of that land achieved through free, open negotiation, and under no pressure between a willing buyer and a willing seller. For a country like Cambodia that has abandoned the planned economy under the Khmer Rouge and formally adopted a market economy,²⁶⁹ it is important to introduce this market-based standard for land expropriations because it helps reinforce the principles of a market economy.

If this definition were adopted, a full and faithful implementation by expropriating authorities would be essential. The government needs to establish rules against discretionary or arbitrary endeavors of valuing properties to be expropriated below the fair market value. Moreover, the field officers of the expropriation agency should be educated and trained to use this standard in asset valuation, whether it is land, structure, or standing crops.

The land-for-land option should also be pursued, but with caution. While giving a farmer a piece of replacement land of similar amount and quality is desirable, such land-for-land program should be conducted in such a way that it will not compromise the legitimate interests of other people in the land. If either the owner or holder of use rights to the replacement land is farming on that land, requiring them to give up the land compulsorily creates problems of their own.

Moreover, affected farmers under the land-for-land program should be offered with two choices at the same time: cash compensation based on the fair market standard, or the replacement land of comparable quantity and quality. In case affected farmers choose cash compensation, the determination of the land's value should be conducted through non-compulsory negotiations between the expropriation agency and affected farmers until both parties reach an agreement on compensation. In such a process, the government may make an offer based on its assessment of the land's market value, but such an offer should be nonbinding and should be subject to the affected farmers' rebuttal, substantiated with evidence that the government's offer is sufficient for purchasing a similar piece of land.

3. Do not let the lack of formal title be a bar to compensation

The Cambodian Government is conducting a land titling program with assistance from the World Bank and other international development agencies. The program intends to secure owner or holder's rights to their land through documenting and registering such rights. This is necessary for a market economy and this should be actively pursued. However, several points should be noted. First, a formal land title, or at minimum a formal permission to continuously possess the land, should be issued to all current possessors, including squatters, of state private land, as long as they can present evidence (including circumstantial evidence) that they had lived on the property long enough before the government announced its claim of ownership to that land. The Cambodian laws on social concession land explicitly include provision of residential land to homeless families and of farmland to poor families as one of the purposes for setting up social concession land from state private land.²⁷⁰ If the squatters are poor, which is usually the case, they are certainly qualified as beneficiaries and there is no legitimate reason to reject their request for title.

Even if a formal title is not available to such squatters, the lack of a formal title should not be an absolute bar to compensation. Informal possessors should have the opportunity to make claims for compensation and back up that claim with evidence showing that they have maintained possession for the required length of time.

²⁶⁹ Cambodian Constitution, Art. 56.

²⁷⁰ Sub-decree on Social Land Concession. 2003. Art. 3.

4. Establish an independent adjudication body to address AP's grievances

Combining the “legislative,” “executive,” and “judicial” functions of land expropriation into one government body, such as IRC, conflicts with the check-and-balance principle, and is detrimental to democratic development. The audit report shows profound negative consequences of this institutional failure to address AP's grievances properly when their rights to fair and just compensation are violated.

Clearly, this institutional structure should be reformed. It would be desirable to take the judicial function away from IRC and let courts adjudicate disputes over land compensation and resettlement. At a

minimum, AP should be given the right to seek judicial review of the compensation standards set by the international or local consultant during the PPTA, the compensation amount that IRC delivers, and the resettlement plan made by IRC.

Independent and impartial judicial review of government actions is the last line of defense that people rely on to enforce their rights against the government. In Cambodia, APs do not know the process to file complaints with the court in part because IRC is supposed to handle such disputes before any involvement from the court system. The Cambodian Legislature should address this deficiency by either establishing a special land tribunal or explicitly allowing APs to appeal to general courts.