법제교류 연구 12-21-⑨

Reforming the Private and Property Laws and Setting up the Securities Market in Cambodia

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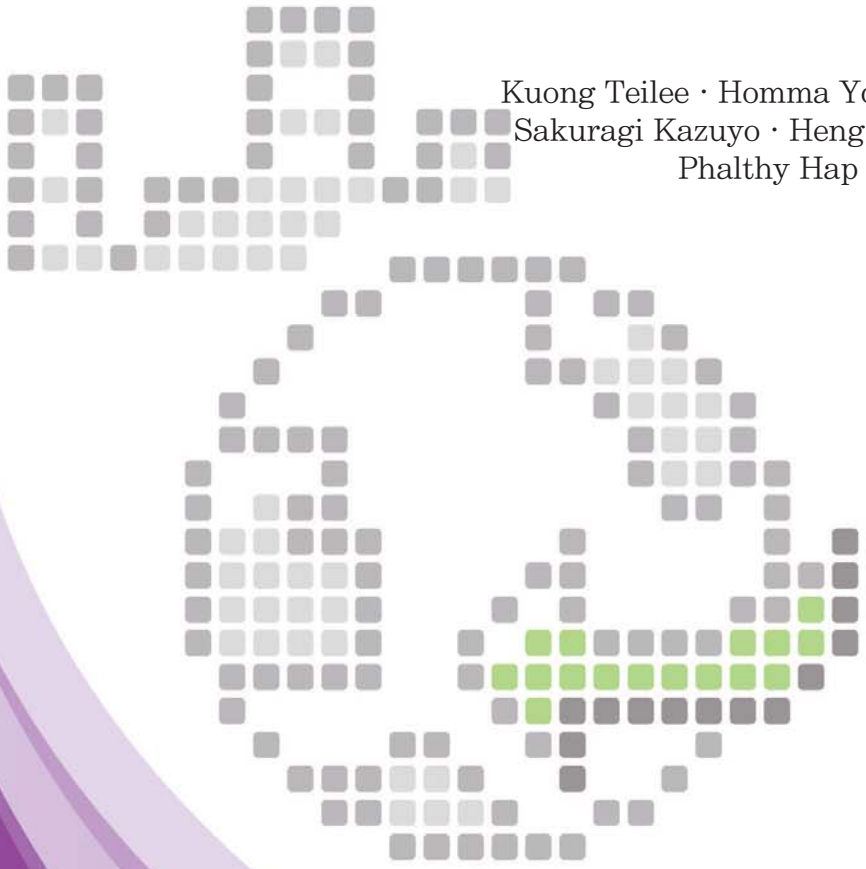
Phalthy Hap · Eonsuk Kim · Junseo Lee



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Dec. 21st, 2012

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ACKNOWLEDGEMENTS

Warmest thanks to the Chief Researchers Koung Teilee and Eonsuk Kim for working together. KLRI wishes to acknowledge the work of other authors as follows.

Chapter 1 - Introduction, Chapter 10 - Conclusions: *Koung Teilee, Junseo Lee*

Chapter 2 - Development of Japanese Legal assistance and the Cooperation in Cambodia: *Koung Teilee*

Chapter 3 - Drafting the Civil and Civil Procedure Codes in Cambodia: *Homma Yoshiko, Koung Teilee*

Chapter 4 - Japan's Legal and Judicial Development Project in the Kingdom of Cambodia: *Kanetake Emiko*

Chapter 5 - Legal Education and International Cooperation at Cambodian Universities: *Sakuragi Kazuyo*

Chapter 6 - Development of Securities Market in Cambodia: *Heng Chhay, Tiv Sophonora*

Chapter 7 - Social Land Concessions: *Hap Phalthy*

Chapter 8 - Secured Transactions in the New Cambodian Private Law Context: *Heng Chhay*

Chapter 9 - Settlement of International Civil and Commercial Disputes in Cambodian Private Law Context: *Eonsuk Kim*

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Abstract

Ⅰ. Background and Purpose

1. Background

Some international development aid agencies and donor countries came in to assist in Cambodia's efforts to establish the necessary legal infrastructures. Japan, being a well-developed market economy in Asia, also joined and officially launched its own legal assistance projects in 1998 to help Cambodia draft a Civil Code and a Civil Procedure Code. These two Codes play a central role in a civil law country in opening up and defining the scope of private autonomy in its market system.

2. Purpose

The first issue is about international cooperation in facilitating legal reforms, primarily focusing on the case of Japanese legal assistance in the drafting of the Civil Code, the Civil Procedure Code and other relevant laws and regulations in Cambodia. The second issue is related to human resources development in the field of law, including professional training activities and basic legal education assistance and reform schemes at the university level. The third is a preliminary review of the development of some new economic institutions which have emerged in Cambodia as a result of years of reform and international cooperation.

Ⅱ. Main Contents

The chapter 2 gives an overview of the historical background, the justification and motivation for Japan to become active in assisting Cambodia's reforms in the field of private law starting from the last decade of the 20th century. Although the chapter positively evaluates the comprehensiveness of the Japanese assistance, which incorporates human resources development into the institutional building aspect, it concludes with some cautious remarks on the remaining gaps between capacity building for individual experts and professionals and the institutional capacity building visions at large.

The chapter 3 follows by looking into the history and development of the Japanese legal assistance project in Cambodia. However, the chapter also examines the achievements and challenges of the assistance and suggests some critical questions for further deliberation regarding the evaluation of long-term impacts.

The chapter 4 gives a very vivid narration of the latest development of the Japanese project in Cambodia. It gives mostly first-hand account of the dramatic collaboration between individual experts and the counterparts and the challenges confronting them.

Following up with the discussions on the issue of human resources development and the long-term impacts of legal assistance, Chapter 5 focuses chapter five on the development of university-level legal education in Cambodia and some main challenges thereof.

Chapters 6 to 9 mainly look into some specific and challenging areas of legal development in Cambodia as a result of two decades of legal reforms

and accepting international assistance in promoting the development of private and property laws in particular.

Ⅲ. Expected Effect

The Chapters indeed give very detail substances and can be useful in different ways to different people. These introductory paragraphs do not suffice to do justice to their richness, objectives and intents. Readers are encouraged to read the details of these chapters and find for themselves the details and information that they need most. This short introduction will only serve the sear purpose of guiding readers to a summarization of the themes of this compilation and help them grasp a primary quick overview of the relationship between the chapters.

Key Words : Legal Assistance, Legal and Judicial Development Project, International Cooperation, Cambodia, Japan

CONTENTS

Chapter 1 - Introduction

In September 2000, the UN General Assembly came up with the Millennium Development Goals (MDGs) as part of its Millennium Declaration. Under the MDGs, countries all over the world started making even more diversified efforts for development and aid. In the ensuing period, international efforts have been made continuously to obtain more concrete ways of implementing such goals as showcased in the Doha Development Agenda (DDA), the Monterrey Consensus of the International Conference on Financing for Development, the Rome Declaration on Harmonization, the Paris Declaration on Aid Effectiveness and the Accra Agenda for Action, etc. In particular, the Paris Declaration presented five principles, i.e. ownership, alignment, harmonization, managing for results, mutual accountability, and established twelve indices based on the said principles. It is noteworthy that the declaration stressed the consideration of aid recipients' ownership and the mutual accountability of both donors and recipients. It shows that the international community has opened its eyes to the need for mutual accountability, including donors' consideration and recipients' sovereignty, instead of a one-sided provision or receipt of aid.

Amidst such abrupt changes in international conditions surrounding the Official Development Assistance (ODA) voices were raised over a need for a change in the ways support is provided in conjunction with the policies and legal systems of developing countries in Asia and other transitional countries over the past few years. Advanced countries started making positive efforts to provide support for legislation or revamp the legal systems in developing or transitional countries. Japan's Legal Technical Assistance Project is a good example. In this regard, it is only natural that

recipients' ownership and mutual accountability of donors and recipients should be stressed in matters concerning the revamping of legal systems in developing countries and transitional countries, in consideration of the close relationship between such an effort for revamping the legal systems and the ODA.

In a market economy, the role of the private sector is essential. Private autonomy of individuals and other stakeholders need be enhanced so that they can make choices, exchange goods, and enter into different contractual and other economic and social relationships on a voluntary basis. The capacity of the economic individuals and entities to establish, own, use and dispose of property freely is indispensable for the market to develop and to thrive. Cambodia started its transition towards a market economy officially in the early 1990s, without a satisfactory legal infrastructure in place to secure the necessary private autonomy for economic stakeholders. It simply did not have enough knowledge and resources to build up this legal infrastructure at that time.

Some international development aid agencies and donor countries came in to assist in Cambodia's efforts to establish the necessary legal infrastructures. Japan, being a well-developed market economy in Asia, also joined and officially launched its own legal assistance projects in 1998 to help Cambodia draft a Civil Code and a Civil Procedure Code. These two Codes play a central role in a civil law country in opening up and defining the scope of private autonomy in its market system.

For Cambodia, these are very important basic laws for its emerging market economy. But they are by no means sufficient in practice. Other technically specific laws and regulations on commercial interactions and operations of the economic, social and industrial sectors are equally necessary.

Different donors have been assisting Cambodia since the 1990s in preparing these technical regulations. Cambodia has over the years been seeking different sources of assistance in putting these separate pieces together and making them work in one integrated and functioning system. But information remains shattered with regard to how things have actually taken place on the ground.

This compilation is the first joint attempt by a group of Japanese, Korean and Cambodian scholars and legal practitioners to review and to keep record of the development of these reform and assistance projects. It is probably the first coordinated effort by experts to assess the outputs of some selected legal reform projects in Cambodia, by reviewing the legal and institutional infrastructures which have been built as a result of the successful implementation of these projects. This work will therefore examine how these separate cooperation projects are taking place and how they altogether form a national strategy to bring forth reforms in private and property laws. Moreover, marketization in Cambodia in the last few years is heading towards more depth and sophistication. One example is the creation of the first ever securities market in 2009, the others are related to the modernization of a legal system to promote secured transactions and to diversify the modes of access to the use of land. These are not easy tasks for a new market economy with limited financial and human resources like Cambodia, but nonetheless how the country fares in these new economic fronts is technically an important benchmark when evaluating the progress of market economy reforms.

For these reason, this compilation will be organized into eight main chapters and aimed at clarifying three main issues of interests. The first issue is about international cooperation in facilitating legal reforms, primarily

focusing on the case of Japanese legal assistance in the drafting of the Civil Code, the Civil Procedure Code and other relevant laws and regulations in Cambodia. The second issue is related to human resources development in the field of law, including professional training activities and basic legal education assistance and reform schemes at the university level. The third is a preliminary review of the development of some new economic institutions which have emerged in Cambodia as a result of years of reform and international cooperation.

The first two issues are reflected in the first four chapters of the compilation.

The chapter 2 by Teilee gives an overview of the historical background, the justification and motivation for Japan to become active in assisting Cambodia's reforms in the field of private law starting from the last decade of the 20th century. Although the chapter positively evaluates the comprehensiveness of the Japanese assistance, which incorporates human resources development into the institutional building aspect, it concludes with some cautious remarks on the remaining gaps between capacity building for individual experts and professionals and the institutional capacity building visions at large.

The chapter 3 by Yoshiko and Teilee follows by looking into the history and development of the Japanese legal assistance project in Cambodia. However, the chapter also examines the achievements and challenges of the assistance and suggests some critical questions for further deliberation regarding the evaluation of long-term impacts.

The chapter 4 by Emiko gives a very vivid narration of the latest development of the Japanese project in Cambodia. It gives mostly first-hand account of the dramatic collaboration between individual experts and the

counterparts and the challenges confronting them. Finally, the chapter concludes by emphasizing on the importance of maintaining mutual respects and a two-way communication of knowledge and professional trusts in performing legal assistance on the ground.

Following up with the discussions on the issue of human resources development and the long-term impacts of legal assistance, Kazuyo focuses chapter five on the development of university-level legal education in Cambodia and some main challenges thereof. She points out the serious weakness of current legal education in Cambodia in the field of private laws and proposes several important issues to be considered seriously in order to find better ways to execute legal assistance or legal cooperation in the field of legal education in general.

Chapters 6 to 9 mainly look into some specific and challenging areas of legal development in Cambodia as a result of two decades of legal reforms and accepting international assistance in promoting the development of private and property laws in particular.

Sophonnora describes in Chapter 6 the current state of regulations regarding securities transaction in Cambodia. He looks into the laws and regulations systematically and analyzes some of the remaining challenges and technical weaknesses to be examined more carefully in this new system.

In Chapter 7, based on his previous research on a similar issue regarding the evolving trend in the implementation of Cambodian Land Law, Phalthy examines the implementation of the social land concession policy of the Cambodian government, which is trying to make use of the State's private land to the benefits of the poor and therefore to help combat poverty in Cambodia. His argument shows that despite the well-intended social land concession mechanism of the Land Law to reduce poverty and to promote

a more equitable social development, the weaknesses in other relevant regulatory systems particular regarding land management and statistical records have time and again led to low efficiency in the development and application of the social land concession policy of the government.

Chhay follows in Chapter 8 to look into another very complicated but important issue in the new Cambodian Civil Code, namely the system of secured transactions in Cambodia. He starts with an introduction to the current situation of a transition featuring some potential tensions between the pre-Civil Code practices of secured transactions which continue to be applied to some extent and the new systems of secured transaction put into force by the new Civil Code. After describing in some details the nature and contents of the new system of secured transactions stipulated by the new Civil Code, Chhay concludes by pointing to the need to cope with the transitional issues tactfully and suggests further research and reviews into the possible conflicts and their solutions in the process of implementation and enforcement as a result of the legal transition.

In Chapter 9, Eonsuk looks into the situation of legislating and implementing private international law in Cambodia. She examines some relevant provisions of the new Civil Procedure and Civil Codes and refers to some situation of conflicts of law which have happened in Cambodia. She concludes the Chapter by drawing the readers' attention to the importance of establishing and observing the principles and rules of private international law not only in the matters of marriage and divorce, but also in other private legal relations, and therefore the need to take questions of private international law seriously in designing and implementing a legal assistance project.

The Chapters indeed give very detail substances and can be useful in different ways to different people. These introductory paragraphs do not suffice to do justice to their richness, objectives and intents. Readers are encouraged to read the details of these chapters and find for themselves the details and information that they need most. This short introduction will only serve the sear purpose of guiding readers to a summarization of the themes of this compilation and help them grasp a primary quick overview of the relationship between the chapters.

Chapter 2 - Development of Japanese Legal assistance and the Cooperation in Cambodia

Ⅰ. Introduction

The Japan International Cooperation Agency (JICA) officially started its legal assistance project abroad in the mid-1990s. The first landmark case was launched in 1996 to help Vietnam revise its Civil Code. Japanese involvement then expanded rapidly to other countries in Southeast and Central Asia. It is becoming an important player in this field, particularly as the first Asian country to have responded to the increasing requests for assistance in promoting legal and institutional reforms. To examine how Japanese legal assistance is being delivered, one need to understand how Japan was drawn into this area, what has been the particular context accompanying the development of its efforts to respond to the requests from its neighbor, and what are the distinctive features of its activities.

Historically, Japanese development aid program started soon after the Second World War as part of the compensation package for countries damaged by acts of the pre-War Japan. Article 14 of the San Francisco Treaty requires Japan to pay “compensations to the Allied Force for damage and suffering caused by it during the war”.[1] However, Since it was recognized that “resources of Japan” at that time were “not sufficient to make complete reparation of such damage and suffering”, Japan was allowed to “enter into negotiations with Allied Powers so desiring, whose present

1) Treat of Peace with Japan, signed in San Francisco on September 8, 1951 (hereinafter San Francisco Treaty)

territories were occupied by Japanese forces and damaged by Japan, with a view to assisting to compensate those countries for the cost of repairing the damage done, by making available the services of the Japanese people in production, salvaging and other work for the Allied Powers in question".[2] Article 25 of the Treaty defines the Allied Powers as "the States at war with Japan, or any State which previously formed a part of the territory of a State named in Article 23, provided that in each case the State concerned has signed and ratified the Treaty". Cambodia was then one of the French colonies and among the original signatories of the Treaty. But according to Ikeda Tatsuhiko, Cambodia was one of the 6 signatories together with Laos that either dropped or did not exercise their claims.[3] Japan then entered into economic cooperation treaties with these countries and territories, with the addition of Malaysia and Singapore etc., which only gained independence after the San Francisco Treaty, to offer development assistance as an alternative to compensations.[4]

Japan became one of the top aid donors in late1980s and most of the 1990s.[5] Official explanations state that Japan extended its technical

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2) Article 14(a)(1) of the San Francisco Treaty.

3) Ikeda Tatsuhiko, "Kaihatsu Enjyo no Rekishi (History of Development Assistance)" in Morikawa Toshitaka, Ikeda Tatsuhiko, and Koike Osamu (eds.) *Kaihatsu Kyoryoku no Hou to Seiji – Kokusai Kyoryoku Nyumon (Law and Politics of Development Cooperation – Introdution to Research on International Cooperation)*", Japan International Cooperation Publishing, Tokyo, 2004, p.76.

4) *Ibid*.

5) David Seddon, "Japanese and British overseas aid compared", in David Arase (ed.) *Japan's Foreign Aid – Old continuities and new directions*, Routledge, 2005, pp.52-54. More details are given by Kohama, citing the 1956-2004 DAC data that shows the total amount of Japanese aid money actually outdid those of Germany, France and Britain in 1986 and 1987 to become the only rival top runner competing with the United States until 2000. It then declined rapidly but retained its second position. See Kohama Hirohisa, *nihon no kokusai kouken* (Japan's Role for the World Peace and Prosperity), keiso shobo, 2005, pp.59-65.

cooperation programs to Asian countries after Japan join the Colombo Plan in 1954, which was originally aimed at facilitating economic and technical cooperation among member countries of the British commonwealth of nations.[6] Training programs in Japan for trainees from developing countries and dispatch of Japanese experts overseas also started as a result of this Japanese participation in the community of technical assistance providers.[7] However, Sato Hideo also points out that Japan's focus on Asia has been attributed to different reasons, including economic interests, geo-political considerations, as well as historical and cultural factors.[8]

Despite these early engagements with its Asian neighbors, Japan's official assistance in legal reform promotion in these countries has been a relatively recent phenomenon. This incident needs to be understood in the new post-Cold War context of official development assistance, not only of Japan but also of the larger community of donors. David Trubek compares the differences between the Law and Development movement initiated by the US in the 1960s and the recent Rule of Law initiative led by the World Bank, arguing that the collapse of the Soviet Union gave rise to re-emergence of the kinds of neoliberal economic policies earlier solicited by the Reagan and Thatcher administrations. This post-Cold War trend of thought about economic development emphasized on "a fully open global economy with minimal state involvement and free flows of goods and capital across national boundaries" and created "a new development para-

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6) See Japanese Ministry of Foreign Affairs website, http://www.mofa.go.jp/policy/oda/summary/1994/1.html (last access date: December 26, 2012).

7) Ikeda Tatsuhiko, *op.cit.* pp. 76-77.

8) Sato Hideo, *shin ODA no sekai－gurobaruka jidai no "ninken no anzen hosho" gud gabananseron to nihon no gaiko senryaku wo kangaeru* (The World of New ODA－Considering Theories of Good Governance, "Human Security" in the Era of Globalization and Japan's Diplomatic Strategies), Aoyamasha, 2006, pp.252-254.

digm" with important implications for the national legal reform agenda.[9] Alvaros Santos defines the emergence and development of World Bank's Rule of Law assistance in three consecutive periods. The first period of "structural adjustment" running from 1980 to 1990 was not really known as the Rule of Law assistance era, but it exemplified the Bank's earlier attempts to assist developing countries in introducing some legal changes deemed necessary to implement specific macroeconomic policies.[10] The second period between 1990 and 1999 was known as the "governance" period, when the Bank assisted legal reforms in some developing countries and helped them transform into "market economies".[11] The third period started in 1999 as the "comprehensive development" phase.[12] In this period, legal and judicial reform projects were aimed at not only promoting economic growth, but also fostering poverty reduction, facilitating broader access to justice, and promoting human rights to achieve sustainable and equitable development.

As a major Asian player in development assistance, Japan could not ignore these changing trends. But Japan was skeptic about the World Bank's structural adjustment loan policies in the 1980s and 1990s. For reasons which will be further explained below, Japan took a reluctant approach to the issue of aid conditionality and attempted in the early 1990s to promote the relevancy of the East Asian model of growth and development as a potential alternative to the neo-liberal approach to economic

9) David M. Trubek, "The "Rule of Law" in Development Assistance: Past, Present, And Future", in David M. Trubek and Alvaros Santos (eds.) *The New Law and Economic Development – A Critical Appraisal*, Cambridge University Press, 2006, pp.82-83.

10) Alvaros Santos, "The World Bank's Uses of the "Rule of Law" Promise in Economic Development", in David M. Trubek and Alvaros Santos (eds.) *The New Law and Economic Development – A Critical Appraisal*, Cambridge University Press, 2006, p.267.

11) *Ibid*. pp.267-268.

12) *Ibid*.

development promoted by some Western aid agencies that favored the stricter use of conditionality for economic development assistance during the time.[13)]

However, at the end of the Cold War, the flow of international development assistance increased rapidly and there were a revival of the interests on the relationship between law and development, human rights and economic development and the question of good governance. Japan, being a leading donor of the time also had to look into these issues. It had to increase its practical and academic focuses on the question of good governance and the increasing international rules and norms with regard to provision of ODA abroad[14)], while at the same time trying to draw attention to the uniqueness of Japan's aid and Japanese potential roles in the region and the world.[15)]

This paper will first examine the formation and operation of Japan's assistance to Cambodia's drafting of the Civil and Civil Procedure Codes, by tracing the beginning and development of this phenomenon within the broader context of Japan's changing ODA philosophy and practices. It looks into the paradigm shifts in Japan's foreign aid policies, particularly in the 1990s to include legal assistance into its ODA principle and practices. It then reviews Japan's legal assistance practices on the ground and, on the

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13) *Ibid*., pp.275-276.

14) Sato Hideo, *op.cit*. pp. 272-289.

15) See David Arase's "Introduction" to David Arase (ed.) *Japan's Foreign Aid – Old continuities and new directions*, Routledge, 2005, pp.1-19; Shimomura Yasutami, Nakagawa Junji, Saito Jun (eds.), ODA taiko no seiji keizai gaku – Unyo to enjo rinen (The Political Economy of the ODA Guidelines – Operations and the Philosophy of Aid), Yuhikaku, 1999, pp.29-30, citing Japan's reaction to the neo-classical economic structural adjustment approach urged by the World Bank and the IMF in the 1980s and Japan's efforts to promote the East Asian development model as an alternative approach to be introduced to some less-developed markets.

bases of these reviews, analyzes the strength and weakness of Japan's legal assistance as part of the country's ODA to an Asian neighbor.

Ⅱ. Commencement of Japanese legal assistance abroad

1. Shifts in the philosophy of development aid

Before Japan introduced the 1992 ODA Guidelines into its development assistance to a foreign country, it did not seem to have a clear philosophical statement of objectives or practical guiding principles.[16] Commentators had frequently attributed Japan's development assistance to the realist desire to pursue narrow national economic interests and to support the US geostrategic and ideological interests during the years of the Cold War.[17] The 1992 ODA Guidelines and subsequent revisions open up new windows for the public to take a look into the Japanese explanation about the country's immense spending on its ODA programs abroad. Japan's interests in assisting legal transition in some of its Asian neighbors emerged in the early 1990s. after the adoption of the ODA guidelines. There was no indication as to what change in policy terms led to Japan's interests in assisting legal transition. This session will review in some general terms the circumstantial context and the paradigm shift in Japan's aid philosophy that led to the emergence of Japan's interests in legal assistance projects, in apparent deviation from its early aid practices.

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16) The first ODA Charter was adopted on June 30, 1992.

17) Kevin Morrison, "The World Bank, Japan and aid effectiveness", in David Arase (ed.) *Japan's Foreign Aid – Old Continuities and new directions*, Routledge Contemporary Japan Series, Routledge, 2005, p.25.

Sato Hideo divides the development history of Japan's ODA into six different periods. In his views, the third period (1964-1976) was marked by a rapidly expanding ODA. Throughout this period, the total amount of ODA reportedly increased ten-fold, from 115,800,000 dollars in 1964 to 1,104,900,000 dollars in 1976.[18] JICA was officially established in August 1974 as one ODA executing organization to manage the largest portion of development aid for developing countries. Japan's aid was reportedly "heavily focused on infrastructure" for more than two decades after this third period.[19] Commenting on the features of Japan's aid philosophy, David Arase states that there existed "an underlying Japanese assumption that development means the growth of industrial production and trade in a state-driven process that can be advanced through the construction of production-related projects and the acquisition of related technologies".[20] Implicated in such comments upon development aid policy is the once dominant criticism against an apparent lack of attention to the development of social and administrative infrastructure.[21]

At the end of the Cold War, peace and democracy gradually loomed large in all parts of the world. Japan saw the importance of sending a new image of being a country that can contribute to the peace of the world. In

18) Sato Hideo, *op.cit*., p.262.

19) Keven Morrison made this statement citing the unchanging percentage of Japan's bilateral aid committed for economic infrastructure between 1977-78 and 1997-98, comparing that to the trends of the World Bank and the International Development Association (IDA) during the same period. Kevin Morrison, "The World Bank, Japan and aid effectiveness", in David Arase (ed.) *Japan's Foreign Aid – Old Continuities and new directions*, Routledge Contemporary Japan Series, Routledge, 2005, p.26.

20) David Arase, "Conclusion", in David Arase (ed.) *Japan's Foreign Aid – Old Continuities and new directions*, Routledge Contemporary Japan Series, Routledge, 2005, p.268.

21) Kevin Morrison, op. cit., p.27. In this context, Kevin however argues that some changes took place in the 1990s to refocus on the 'soft' type of aid.

terms of international cooperation, this was manifested in at least two major moves inside Japan. First was the adoption of the Law Concerning Cooperation for United Nations Peace-Keeping Operations and Other Operations in 1992[22], and second was the establishment of the ODA Charter. Most commentators on the development of Japanese ODA argued that until the issuance of this ODA Charter, the Japanese ODA had been tied to the economic interests of Japanese business and security arrangements with the US and other allies in the Western camp. Use of ODA as a tool of foreign policy emerged gradually in the 1980s and consolidated in the 1990s. However in practice, Japan remained to be very conservative in its approach to rendering foreign assistance for fear that it would be accused of interfering into the domestic affairs of the recipient countries particularly in the context of its relationship with some Asian neighbors. The embarrassment of January 1974, when Prime Minister Tanaka Kakue was received in Indonesia and Thailand by waves of anti-Japan demonstration, left a durable scar in the Japanese talk about foreign assistance.[23] Any sensitive issue that might lead to accusation of internal interference or return of Japanese imperialism would not be accepted in the foreign assistance package.

However, in response to the general paradigm shift in development aid to take in political conditionality and emphasis on good governance and other not purely economic issues, Japan as one of the top donor countries also felt the need to adjust its aid policy and practice to the emerging trend.[24]

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22) For more details about this Law, see Shunji Yanai, "Law Concerning Cooperation for United Nations Peace-Keeping Operations and Other Operations – The Japanese PKO Experience", *The Japanese Annual of International Law*, no.36, 1993, pp.33-75.

23) Shimomura Yasutami, Nakagawa Junji, Saito Jun (eds.), op.cit.,p.64.

24) Junji Nakagawa, "Legal Problems of Japan's ODA Guidelines – Aid and Democracy, Human Rights and Peace", *The Japanese Annual of International Law*, no.36, 1993, pp.76-99.

According to Shimomura Yasutami et al., Japan's "knowledge-based assistance" was gradually developed as a result of this adjustment. The first significant "knowledge-based assistance" was provided by JICA to Vietnam in the form of policy advisory services under the "marketization assistance project", in which Professor Ishikawa Shigeru and several Japanese scholars participated.[25] Although this was not yet really the beginning of the legal assistance project, the groundwork for it was actually formed by these earlier moves.

2. Introducing legal assistance program into the ODA

Reviews of the history and development of Japan's legal assistance programs have to start from the discussions on how current legal assistance is understood. In the Japanese context, since the early sixties, the Ministry of Justice has been working with the United Nations Asia and Far East Institute for the Prevention of Crime and the Treatment of Offenders (UNAFEI) in organizing different regular training programs for legal and law enforcement officials from developing Asian and African countries.[26] These are undoubtedly an important part of the legal assistance activities. However, they are not the same as current legal assistance programs in two ways. First, despite the fact that Japanese legal professionals were directly involved in the training, the activities were carried out as Japanese contri-

25) Shimomura Yasutami, Nakagawa Junji, Saito Jun (eds.), op. cit., p.30. See also Ishikawa Shigeru and Hara Yonosuke, *Vietnam no shijo keizai ka* (Vietnam's Marketization), Toyo Keizai Shinposha, Tokyo, 1999.

26) This experience is sometimes referred to as an example of legal assistance that does not necessarily cause any controversy regarding national sovereignty of the recipient country. See for example, Yamashita Terutoshi, "Houseibi shien ga motarasu mono", *in Houritsu Jiho*, Nihon Hyoronsha, vol.82, no.1, January 2010. For more details on the activities of UNAFEI, see http://www.unafei.or.jp/ (last access November 21, 2012).

bution to multilateral efforts to promote legal development in these developing countries. It is not a bilateral program clearly reflecting the official position of the donor state in providing such assistance. Second, current Japanese legal assistance program is far more comprehensive and policy-oriented than these past trainings. They differ from each other both in terms of objectives and impacts.

Current legal assistance activities implemented by JICA started after the adoption of the 1992 ODA Charter, which can be most conveniently used as a technical reference to the issue of principles and objectives of Japan's foreign development aid policy. The ODA Charter was actually issued by the Cabinet in 1992, after continuous efforts of the Diet to enact a law to regulate international technical cooperation failed between 1975 and 1990.[27] Judging from the historical background of the creation of this Charter, it is apparent that the effort was to put together a concentrated instrument to clarify the philosophical and strategic principles and to guide the actual implementation of Japanese foreign development aid as a tool for the performing country's foreign policy.

At the time of the adoption of the ODA Charter, the concept of "good governance" as a central element in development assistance has drawn increasing attention in the mainstream philosophy of aid community of the World Bank and some other international aid programs. Most rule of law assistance projects of the World Bank were initiated as a relevant part of the promotion of good governance. But legal assistance was not explicitly incorporated into Japan's 1992 ODA Charter, neither was there any explicit

27) For more discussions about the history of Japan's ODA Guidelines in the second half of the 20th century, see chapter 2: "Background of the formation of the 'ODA Guidelines'", in Shimomura Yasutami, Nakagawa Junji, Saito Jun (eds.), op. cit., pp.57-104.

recognition therein of the relationship between legal assistance and promotion of good governance.[28] This might have been partly due to the circumstantial context of Asia at that time. One may easily recall that the early 1990s was the time when Asianization of some universal values took place strongly in some leading East and Southeast Asian countries.[29] There were hot debates about an Asian way of human rights and democracy, and for the same reason a very strong argument about "good governance" in the Confucian cultural context. Promoting a rule of law or good governance agenda, based on the modern Western or "universal" model, might logically provoke sensitive reactions from proponents of these Asia values.

Therefore, despite the fact that the "good governance" and rule of law assistance entered into foreign development aid programs elsewhere, Japanese aid bureaucrats were quite reluctant in introducing rule of law or democratization assistance, as new initiative in international cooperation, into technical assistance programs of JICA to the Asian neighbors. Japan did not start legal assistance programs automatically after the adoption of the 1992 Guidelines. It took Japanese bureaucrats a few more years to give in to pressing calls from individual scholars and lawyers to start incorporating legal assistance into the ODA program for the promotion of good governance in Asia. It was a process initially led by people outside of the official aid community in Japan, seeking to change the conservative bureaucratic attitude regarding development aid beyond hardware infrastructural supports.

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28) The concept of good governance came into the last 2003 revision of the Charter and has since been upheld in most legal assistance projects.

29) For some background analyses and details of these debates, see Yash Ghai "Human Right and Governance: The Asia Debate", *Australian Yearbook of International Law, vol.15*, 1994, pp.1-34.

The historical occasion underlying this gradual process of change probably started in the early 1990s when Japanese SDF were officially dispatched for the first time to Cambodia. The move was well perceived as a positive change in Japanese approach to foreign assistance. It marked an important break from the long-alleged faceless Japanese development assistance policy. Japanese people then discovered that there was something which Japan could contribute to the world of foreign assistance in the field of good governance and the building of peace in a post-conflict society. The SDF, the civilian police, lawyers, university professors and all Japanese citizens can be part of this "world peace" movement.

Having witnessed in early 1990s a serious lack of legal infrastructure for the country's transition, some Japanese lawyers saw the role for Japan to be involved in helping Cambodia rebuild its legal system, particularly in the training of lawyers and reforming of the criminal legal system.[30] The environment surrounding Japanese engagement in the legislative support for Cambodia gradually became mature for several reasons in the early and mid-1990s. First, requests for such assistance came from the high-level officials of the potential recipient countries, specifically asking for Japan's assistance in the field of law-drafting. Second, in line with the adoption of the 1992 ODA Charter, leading jurists in Japan started lobbying strongly for Japan's commitment to legal assistance abroad. Third, eager to promote the East Asian development model, Japanese official aid community saw another

30) Individual Japanese lawyers initiated cooperation activities with universities in Cambodia to hold moot court sessions on criminal procedure at the University of Phnom Penh Faculty of Law and Economics in early 1990s and conduct special lectures on criminal law and criminal procedure law for several years in the public and private universities, even before JICA officially started its assistance to Cambodia in drafting the Civil and Civil Procedure Codes. For some details, see Sakuragi's Chapter in this volume.

way to offer knowledge-based support for the development of an Asian transitional country. They finally agreed to provide legal assistance to "transitional economies" in the field of "civil and commercial laws", focusing in particular on the transition to market economy of these countries in Asia. These factors together marked a relatively humble departure of Japan to join the "good governance" promotion and legal assistance activities. Whereas almost all "good governance" assistance promoters during those days were from developed countries in the West and selling a multiple-item menu of the legal assistance abroad, Japan opted for a much narrower concept of good governance or legal assistance which was tailored to mean simply the help for transitional countries to start their marketization process.

There has been wide consensus that Japan has something unique to contribute to the ongoing legal development of transitional and developing countries in Asia, in particular, thanks to Japan's long history of introducing and tailoring foreign legal models and systems to its domestic needs. The past experience of being a relatively successful recipient of modern legal systems would be a useful reference for contemporary recipients of diverse sources of legal assistance. This Japanese approach of combining different legal models into a hybrid national legal system marks a post-modernist approach towards legal reception, which does not necessarily take for granted any single dominant legal model in totality. Selection, adoption and relevant adaptation of a particular foreign model for domestic application is technically based on the comparative advantages that particular model can offer to the recipient context, not only in theory, but also in a pragmatic sense. Legal reception based on this post-modernist comparative law approach is a specific feature of the Japanese history of legal development. Transfer of legal knowledge based on this approach could be an advantage

of the Japanese model of legal assistance. The following section will look into how the Japanese legal assistance operates in practice.

Ⅲ. The Cambodia Project

The Cambodian Project was the second legal assistance project officially provided by JICA to an Asian neighbor. Comparing to the first legal assistance project in Vietnam, this second one had some very distinctive features. Like any other JICA development aid projects, it was a Japanese response to specific request made by the Cambodian Government in early 1990s to assist in drafting a Civil Code.[31] Having had the history of being a civil law country, modeling after the French legal system, the Cambodian Government found it necessary to enact a Civil Code for the ongoing market and legal reforms. However, at least at that time, it was believed that Cambodia was in dire need of professionals in legal drafting and legal implementation. To expect Cambodian legal officials or practitioners to draft a comprehensive civil code on their own was impossible.[32] But, drafting a civil code on their behalf may end up in alleged interference in the legislative sovereignty of the country. Moreover, the final draft would most likely be considered a foreign imposition without sufficient domestic inputs in the drafting and legislative process. The solution was then to organize a joint working group approach involving Japanese and Cambodia legal drafters, through which Japanese legal knowhow could be transferred and incorporated into the new draft Codes, and Cambodian legislative drafters would be able to contribute their knowledge about Cambodian law and

31) Drafting of the Civil Procedure Code was included at a later stage.

32) For more details, see chapters by Homma Yoshiko and Teilee Kuong, Kanetake Emiko in this volume.

practice and the real situation inside Cambodia to the draft. Under this joint working group model, the drafting process would take place rather slowly and in a form of experts' dialogues.[33] But asymmetry in legal knowledge and information between the Japanese and Cambodian groups of drafters, particularly with regard to the legal system in a market economy and the Western modern legal concepts, created certain limits to the quality of the dialogues. To mend this technical asymmetry, training and other forms of technical cooperation programs to promote the quality of these dialogues were developed and implemented side by side with the legal drafting assistance program.[34]

The Project therefore had to start not in a form of pure assistance in the draft of the Codes, but in a more comprehensive scheme which would include also an aspect of technical capacity building and human resources development. Several issues emerged in this combination. First, to ensure effectiveness and consistency between the ongoing legislative drafting assistance and the capacity building for officials involved in this drafting, it was necessary to ensure that the trainees in these training programs and the members of the drafting committee had to be the same persons. Second, implementation of legislative drafting assistance in combination with intensive training and capacity building in this way would require not only financial resources and time-consumption in the drafting itself, it would also demand tremendous amount of high quality translation work in legal concepts and terminology. Securing the necessary human resources in translation and interpretation work was not an easy task on the part of assistance provider. The translation work was mainly done by a pool of Japanese-Cambodians

33) See Homma Yoshiko and Kuong Teilee.
34) Homma Yoshiko and Kuong Teilee.

who were living in Japan for decades and spoke both Japanese and Khmer fluently. But the translation was hampered by a lack of Cambodian expertise in the highly sophisticated technicality of the concepts and terminologies used in the world of Civil and Civil Procedure Codes. A lot of these concepts and terminologies either had not existed in the Cambodian law or was simply not familiar to Cambodian translators.

To address this problem, a legal terminology working group was formed in Phnom Penh. The Group consisted of core members of the Cambodian Working Group and the Japanese coordinator who spoke Khmer and was based in the project office in Phnom Penh. As a result of these deliberate arrangements, the project was featured by a combination of technical assistance and foreign-local partnership. The niceties of a comprehensive modern Civil Code was originally drafted by Japanese scholars in Japanese then translated by Japanese-Cambodians who know both languages but are not necessarily familiar with the delicacies of the legal concepts and terminologies. When the Khmer version of the draft was translated, it had to be reviewed by the Legal Terminology Working Group again for further technical adjustments by Cambodian experts who, although not being able to understand the original Japanese text, had participated in the pre-drafting discussions and the drafting process and possessed practical knowledge about Cambodian legal concepts and terminologies used in the field.

This “joint working group” model not only enabled the assistance provider to receive technical feedbacks from the local counterparts before the final product was completed, but also assisted the local counterparts to benefit technically from the project by having access to the detail discussions before the draft was made and finalized, and let them gain access to the exclusive technical training which was particularly tailored to

the specific needs of legislative drafters. In the process of the technical training, seminars and workshops were frequently organized in Cambodia and Japan to enable members of the working groups to discuss details of specific issues encountered during the drafting. These seminars and workshops took place in two forms: technical lectures by Japanese scholars and exchange of information and views between Cambodian and Japanese working group members. In so doing, the training by means of regular seminars and workshop could work as important immediate and long-term complements to the legislative drafting assistance of the Civil and Civil Procedure Codes. By the time the two drafts were completed, there were already 51 meetings of the two working groups respectively, 17 workshops on the Civil Code and 13 workshops on Civil Procedure Code in Cambodia, and 7 training sessions in Japan.[35)]

The training aspect was particularly emphasized in the second and the third phases of the project. The second phase saw inclusion of the Royal School for Training of Judges and Prosecutors (RSJP), and in the second half of the same period the Training School of Lawyers (TSL), into the Cambodian institutions nominated as official counterparts of the Project. Japanese judges, prosecutors and lawyers were dispatched to these institutions to help prepare teaching materials on the new Civil and Civil Procedure Codes. Although the drafting assistance for the two Codes had already been technically finished at the end of the first phase, training seminars continued to be organized in Japan to train outstanding young Cambodian judges and prosecutors selected from the graduates of the RSJP to be future core trainers who would undertake the task of training new

35) Homma Yoshiko and Kuong Teilee.

generations of trainee judges and prosecutors at the RSJP on the new Civil and Civil Procedure Codes.

As a result of this model of legal assistance, not only were two sophisticated modern codes, together with some relevant complementary laws produced but also a number of leading jurists and legal officials were trained. Some prominent members of the Cambodian Working Group was later promoted to key positions in the Ministry of Justice and the judiciary and actually became key trainers for younger legal professionals at the RSJP in the following years.[36] These key persons have continued to work with the Japanese project in drafting subordinate laws and regulations necessary for the implementation of some specific provisions of the two Codes and in developing the latest curriculum for civil law subjects at the RSJP.

Ⅳ. Conclusion

Consolidation of Japan's legal assistance as part of the country's ODA contributions abroad went through complicated interactions between Japanese legislative and legal development experience in the field of private law and the dramatic geopolitical changes in Asia at the end of the 20th century. The cooperation in Cambodia has given Japan an important experience in defining the strength and limits of Japan's legal assistance activities and identifying a technical borderline between technical assistance and undue interference into the domestic legislative sovereignty of the recipient country.

Legal assistance in the Japanese way is considered as a means of transferring knowledge from one context to the other, the questions of what

36) Homma Yoshiko and Kuong Teilee.

knowledge, to what extent and how to transfer automatically become relevant. In the context of Japan-Cambodia cooperation, these questions have been attached to another set of issues pertaining to the field of development assistance, namely partnership, ownership (over the project) and effectiveness. Human resources development for the recipient is deemed one important element in the cooperation. But in the case of Cambodia in particular, although it is unquestionable that human resources development in relation to the making of the Civil and Civil Procedure Codes has contributed to the enactment of the two comprehensive and contextually relevant Codes for Cambodia, it is still unclear to what extent the achievements in human resources development will ultimately lead to effective institutionalization (as opposed to nurturing of mere individuals specialized in these Codes) of Cambodia's national capacity in the long-term guarantee of the progressive implementation and application of the new Codes.

Individual experts or professionals come and go in a market system. There is no guarantee that institutional development will naturally result from capacity building for individual professionals or the public servants. It requires a separate institutional design with sufficient incentives and favorable environment for individual participations, in order to make sure that individuals will be willing or able to contribute their acquired knowledge and capacity to the general course of institutional development. Lacking that workable institutional design, human resources development may sometimes end up in a fragmented enterprise which can show quantitative results but not qualitative gains in long-term institution-building. Technically, there is a limit to what foreign legal assistance projects can accomplish. Following the principle of partnership, an appropriate division of labor between external assistance and internal self-efforts is an indispensable element for realizing this institutional design.

Chapter 3 - Drafting the Civil and Civil Procedure Codes in Cambodia: History, Achievements and Challenges

Ⅰ. Introduction

Japan has been offering legal assistance to several developing countries in Asia since the mid-1990s under the Official Development Assistance (ODA) scheme implemented by the Japan International Cooperation Agency (JICA). The assistance focuses on helping legal reforms in countries which are transiting from a socialist economic system to a market economy or countries where the socialist national system collapsed at the end of the Cold War.[1)]

As will be further elaborated below, Japanese legal assistance bears some particular features which can be partly summed up as follows: (1) It is strictly request-based and not accompanied by any conditionality; (2) It emphasizes upon joint endeavors with counterparts in the recipient country, and through these endeavors it focuses on the aspect of human resources building; (3) It incorporates a multi-actors approach in the assistance implementation by selecting experts among scholars and legal professionals. The legal professionals are dispatched by the Ministry of Justice, the Supreme Court and the Japan Federation of Bar Associations. (4) The assistance is well followed up after the end of the drafting endeavors.

This Chapter examines the case of Japanese legal assistance to Cambodia, where the Project has been implemented in different phases to reflect these features in different stages of the donor-recipient relationship development.

1) Vietnam represents the former and Cambodia and Mongolia belong to the latter category.

The Chapter will also single out some positive achievements derived from this Japanese experience in promoting legal reform in Cambodia. Finally, some selected issues and challenges are also provided in the subsequent part of the Chapter for further evaluations.

Ⅱ. Japan's Legal assistance to the Kingdom of Cambodia

1. The scope of this Chapter

When one refers to Japan's legal assistance projects to the Kingdom of Cambodia, it is necessary to bear in mind that there have been various projects conducted by different groups and institutions. Assistance for drafting of the Civil and Civil Procedure Codes as well as other related laws and regulations under JICA's "Legal Technical Assistance" project may have drawn most attention, but there have also been several other important drafting assistance projects initiated by individual lawyers or NGOs, such as assistance in the drafting of the Law against Human Trafficking and Law on Juvenile Justice, etc. However, this Chapter will only examine the representative case of legal assistance in the drafting of Civil and Civil Procedure Codes and other related laws and regulations under JICA's assistance scheme.

2. Initiation of Japanese Project in Cambodia

Cambodia between 1975 and 1979 was under the rule of the Khmer Rouge. Laws were abolished and a large number of intellectuals lost their lives as a result of purges and political suppression. Others left the country

to live in exile. It is generally said that less than 10 jurists actually survived the regime and remained part of the core human resources for the post-1979 Cambodian reconstruction.[2] The country then also fell into years of civil wars which again took away the lives of many potential talents or made it impossible for those in exile to come back. It was only under temporary rules of the the United Nations Transitional Authority in Cambodia (UNTAC) that political and legal transitions started a radical turn and elections of a constituent assembly were organized with the help of the international community in 1993. The new Constitution was finally adopted in the same year. But the existing resources were far from sufficient for promoting legal development of the country. Comprehensive Civil and the Civil Procedure Codes could not be drafted without supports and assistance from outside resources.

Japan's legal assistance to the Kingdom of Cambodia started as a result of the specific request for Japanese assistance in the drafting of the Civil and Civil Procedure Codes. The request was made by His Excellency Chem Snguon, the late Minister of Justice of the Kingdom of Cambodia, to Professor Morishima Akio, who was then initiating efforts to assist Vietnam in revising its 1995 Civil Code. As a former French colony, Cambodia used to have a Civil Code before the Khmer Rouge abolished the pre-1975 legal system. The Minister of Justice, who was a high ranking diplomat during the Sihanouk regime in the 1960s, knew very well the importance of the Civil Code in a country which adopted the continental European legal system. He had access to French legal cooperation at that time.[3]

2) Yotsumoto Kenji (1999), *Camboja Kenpo Ron*, Keiso Shobo publishers, p.19.

3) The Ministry of Justice had access to French legal advisors in the early 1990s and the Kingdom's new Criminal Code and Criminal Procedure Code was drafted with French technical assistance.

Nonetheless, he chose to approach Japan for the assistance in drafting of the Civil Code.

3. The First Phase – Drafting Assistance

After a few years of feasibility studies, JICA started the first phase of its "Legal Reforms" Assistance for Core Policy Project in March 1999. The first phase was originally intended to end by March 2002, but it was extended for one more year. As a result, assistance in drafting of the Civil and Civil Procedure Codes continued until March 2003.

The activities started with the organization of working groups, both in Japan and in Cambodia, to take charge of drafting the Civil and the Civil Procedure Codes. On the Japanese side, the Civil Code Working Group was chaired by Professor Morishima Akio and attended by Professor Nimi Ikufumi and other leading Japanese law professors and judges. The Civil Procedure Code Working Group was chaired by Professor Takeshita Morio, and also attended by other leading scholars, judges and a few Ministry of Justice officials specialized in the field of civil procedure law. The Working Groups on the Japanese side were therefore mainly made up of prominent scholars representing the respective fields of expertise in Japan, and highly experienced legal professionals from the courts and the Ministry of Justice. Several members of the Civil Procedure Code Working Group were earlier sitting on the Legislative Council of the Ministry of Justice to take charge of revising the Japanese Civil Procedure Code. Similarly, many members of the Civil Code Working Group were later selected to participate in the revision of the Japanese law on obligations.[4)]

4) As of the time of this writing in January 2013, these former members of the Civil Code Working Group continue to play central roles in the ongoing revision of the Japanese

On the Cambodia side, the Minister of Justice was the official in charge of the whole project. A working group consisting of Secretaries and Under-Secretaries of State, a few leading judges (with subsequent inclusion of a judge who was well versed in Sanskrit and Pali languages which were the roots of the official Khmer language of the country) and several staff of the Ministry of Justice was established under his leadership. One practicing attorney and one coordinator (having good command of the Khmer language and being well familiar with Japanese law) were also dispatched from Japan as long-term advisors to the Cambodian Ministry of Justice to operate the Project Office in Cambodia. These long-term experts were due to be replaced every one or two years.

The drafting process started with joint considerations by both the Japanese and the Cambodian Working Groups on the basic drafting policies to be pursued by each Group. The Cambodian Working Group made clear of its desire to prepare a Civil Code and a Civil Procedure Code that could help rebuild the Kingdom of Cambodia as a democratic state and enable the country to be confident in its position in the 21st century. The Japanese Working Group proposed a drafting approach that would introduce to Cambodia some common international rules and fundamental principles of the Civil and Civil Procedure Codes that could be recognized by many of the developed countries in the world today, but focusing the drafting not only on legislative development in Japan but also developments of the Civil and Civil Procedure Codes detectable in other parts of the world. After these considerations, the two Working Groups were able to calve out a general framework for the two drafts, and agree on a proposed composition of books and chapters for each Code.

Civil Code provisions relating to the law on obligation.

Afterwards, the Japanese side would decide on the drafters for each of the proposed chapters or sections. The drafters started drafting all the relevant provisions assigned to them in Japanese and submitted the draft provisions for discussions at the Working Group concerned. A group of Japanese-Khmer translators translated the draft provisions compiled by the Japanese side into Khmer and forwarded them to the Cambodian side. The Cambodian side would then invite Japanese drafters to come to workshops organized in Cambodia to explain about the Japanese drafts and participate in discussions and exchange of views regarding them not only with participants from the Working Group but also relevant ministries and NGOs whose representatives were invited to these workshops. Results of these Workshops were taken back to Japan and reflected in the revised draft provisions, which would then be translated into Khmer again and sent back to Cambodia for further considerations.

Besides these workshops in Cambodia, regular training sessions were also organized in Japan several times a year for invited representatives from the Cambodian Working Groups to undertake intensive lectures and observe the operations of Japanese courts and other judicial institutions, etc. These sessions were aimed at building the capacity of core members of the Cambodian Working Groups.

Draft provisions finalized by the Japanese side and translated into Khmer would then go through article-by-article reviews by the Cambodian Working Groups (at the Terminology Group Meetings) to examine the accuracy and appropriateness of the Khmer translation before they would be finalized as the official draft provisions of the Cambodian Ministry of Justice. These were difficult tasks as they demanded also creation of some legal termino-

logies which were not used or available in the existing Cambodian legal documents. Long-term Japanese experts (lawyers, etc) dispatched to Cambodia also joined in these Terminology Group Meetings organized by the Cambodian side, to provide real time explanations about the legislative aims of the drafters and the manners in which similar provisions in Japan were interpreted and applied in practice.

As a result of the project, a draft Civil Code and a draft Civil Procedure Code (in Khmer and translated into Japanese, and English) were handed over to the Cambodian counterpart, i.e. the Ministry of Justice, in March 2003. The Cambodian Ministry of Justice then conducted final checks of the drafts and proceeded to preparing the statement of legislative objectives necessary for official submission of the drafts. The two draft Codes were submitted to the Council of Ministers in June of the same year. This represented the preliminary completion of the drafting project of the Civil and Civil Procedure Codes.

By then, the Japanese side had already held 51 meetings of the Cambodia Civil Code Working Group and 51 meetings of the Cambodian Civil Procedure Code Working Group in Japan. Seventeen workshops had been organized in Cambodia on the draft Civil Code and thirteen on the draft Civil Procedure Code. Training sessions for Cambodian officials had also been conducted 7 times in Japan.[5)]

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5) Based on the final project report by Homma Yoshiko (Yasuda Yoshiko) in English. For details relating to the drafting work in Cambodia, see Takeshita Morio, "Cambodia minsohouten kiso shien to houseibi shien no kongo no Kadai (Assistance in Drafting of the Cambodian Civil Procedure Code and the Future Challenges Facing Legal Assistance)" in *Hou no Shihai*, vol.129, April 2003; Yasuda Yoshiko, "Camboja ni okeru houseibi to hou no shihai (Legal reforms and the Rule of Law in Cambodia)" in *Hougaku Shinpou*, vol.112, nos. 1 and 2, 2005.

4. The Second and Subsequent Phases – Legislation And Dissemination Assistance

At the end of the first phase, the JICA project entered into a one-year preparatory period, running from April 2003 till March 2004, for the subsequent phases. The second phase started in April 2004 and ended in March 2008, and the third phase started in April 2008 and ended in March 2012.[6)]

In the second phase, besides the Cambodian Ministry of Justice which had been the original counterpart since the very beginning of the project, and the Royal School of Judges and Prosecutors (RSJP) which was established in 2003 and had since been added as another recipient counterpart in the project, JICA also included Cambodian Bar Association as a recipient counterpart from the latter half of the second phase till 2010.[7)]

Pursuant to the drafting assistance for the Civil and Civil Procedure Codes, assistance to the Ministry of Justice was refocused on "legislation assistance" activities. They included advisory services to the Cambodian Ministry of Justice to assist its officials to prepare technical explanations to be made in front of the Council of Ministers as well as the Council of Jurists; to arrange for the submission of the drafts to the National Assembly; and, to present the Statement of Legislative Objectives and to

6) A new project was started at the end of the third phase. Although the new project is not officially called the fourth phase, it substantially builds upon the achievements of the previous phases and can be seen as the beginning of the "fourth" phase. For more details of this new project, see Kanetake's chapter in this volume.

7) During the period of the project's first phase, the Japan Federation of Bar Associations provided assistance to the Bar Association of the Kingdom of Cambodia by using JICA's small scale funding schemes. In the second phase, the assistance was expanded and put under the larger umbrella of JICA's legal assistance project.

answer questions at the National Assembly. At the same time, JICA also assisted the Ministry of Justice in its dissemination of the drafts by supporting local seminars organized in different places for the information and training of judges and other court officials, etc.

Usually, the National Assembly reviews all draft laws article by article at the plenary sessions. But given the lengthy contents of the two Codes, this approach would take the Assembly much more than one year to pass them. To facilitate a smoother enactment process, the Project also supported preparation of Khmer lexicons for the two Codes mainly by the Ministry of Justice, and compilation of the article-by-article commentaries for the new Civil Procedure Code. The Project also prepared the Ministry of Justice with better capacity to present the draft and to respond to technical questions which might possibly be raised at the parliamentary debates. These efforts together with other related endeavors initiated by the Ministry of Justice and the Cambodian government themselves finally enabled some important flexibility and adjustment in the National Assembly's approach to reviewing these Codes. As a result, examination and adoption of the two drafts by the National Assembly was unusually swift in the Cambodian legislative context of the time. The Civil Procedure Code was adopted and promulgated by the National Assembly in July 2006 and the Civil Code in October 2007.

Assistance at the aftermath of the promulgation of the two Codes was aimed at securing the implementation and proper application of the Codes in court practices. Activities therefore included assistance for the drafting of related laws and regulations (such as the Law on Procedure of Civil Fines, the Law on Bailiff, the Civil Code Implementation Law, the Law on Personal Status Litigation, the Law on Non-Contentious Civil Cases, the Law on Bailment, etc), and training of judges and lawyers, refocusing on dissemination

of the Codes and human resources development for the application and development of the Codes.

Ⅲ. Evaluating the Approach and Achievements

It may still be too early to start fair evaluations of the achievements made so far, without having first developed reliable indicators and references. This Chapter will however try to single out some positive aspects of the approach taken in these initial phases and to point out some circumstantial indicators that may testify to potentially significant achievements that may have resulted from the implementation of the Project over the years.

It is perhaps safe to argue that the achievements of Japanese assistance to Cambodia's drafting of the Civil and Civil Procedure Codes went well beyond the mere provision of draft articles. It was the joint collaboration with members of the Cambodian side who participated actively in the implementation of the project from beginning till end, and the investment of tremendous amount of time and energy into the building of the capacity of drafting members of the Cambodian Working Group. As a result, one core member of the Cambodian Working Group was later promoted to the position of Secretary of State in the Ministry of Justice and became the key person in charge of drafting all civil and criminal bills for the Kingdom of Cambodia. Another member was promoted to the position of chief justice of the Appeal Court. Among some young judges in their 30s who had been dispatched on short-term training missions to Japan for a few times as members of the Working Group, two were later selected as justices of the Supreme Court and have since played important roles in the judiciary of the

Kingdom of Cambodia. The only young female member of the Working Group, who participated in the overseas trainings, etc, organized by Japan, was swiftly promoted from the Head of Civil Law Department through the Under-Secretary of State in the Ministry of Justice and lately the Secretary of State. She has also become one of the core members in legislative drafting for the Kingdom of Cambodia together with the other Secretary of State mentioned above. These individuals are now the core members in the partnership and have been facilitating further development of the technical cooperation activities with the Cambodian Ministry of Justice in the subsequent phases of the ongoing Project.

This method of "joint working group" cooperation initiated by Japan has been highly considered by the Cambodian side and is leaving some substantial impacts on technical assistance or cooperation activities in the country. As a result of this experience, Cambodia also requested donors of other legal assistance projects to employ this "joint working group" approach at the technical level. Needless to say, the experience is equally significant for Japan. Not only will it be an important reference for any future endeavors to offer legal assistance to a similar recipient context, but also an important food for thought for Japan's own legal reforms. In fact, several substantial debates regarding the ongoing revision of Japanese law on obligation now are capitalizing on the substance of technical discussions and considerations which took place during the drafting of the Cambodian Civil Code.

Ⅳ. Reviewing Some Challenges

1. Coordination with Other Donors and Their Legal Assistance Projects

The most serious problems that emerged in Japan's legal assistance to Cambodia were related to technical conflicts and contradictions with relevant laws or legislative drafting assisted by other donors. In particular, there had been some serious conflicts between the draft Civil Code and the Land Law, the draft Civil Code and the draft Law on Secured Transactions, the draft Civil Procedure Code and the draft Law on Commercial Courts.[8)]

For the purpose of this Chapter, the following paragraphs will only review the case of conflict between the draft Civil Code and the Land Law to exemplify the problem of coordination among donors. The conflict between the draft Civil Code and the Land Law was mainly related to the question of whether registration of an immovable should be made the requisite for assertion of title against a third party or should it be made the requisite for transfer of ownership/title over the immovable. At the time of drafting the Civil Code, the Japanese side conducted extensive reviews over the relevant provisions of the Land Law and the old Civil Code of Cambodia. Members of the Cambodian Working Group also conducted several hearings at the Ministry of Land Management, Urban Planning and Construction. As a result of these reviews and hearings, the drafters decided to adopt the principle of "requisite for assertion against the third party" and put in place the draft Civil Code provisions that would make registration of

8) For more details, see Homma Yoshiko (2007), "Camboja minji soshohou to shouji tokubetsu saibansho (Cambodian Civil Procedure Code and the Special Commercial Court)" in *Houseibi Shien Ron*, Minervashobo Publisher, p.106.

an immovable transaction the requisite for assertion of title against the third party. But in 2002, the ADB and other donors who had been assisting the implementation of the Land Law complained that these provisions of the draft Civil Code would hinder the proper implementation of the Land Law, as the latter was indeed incorporating the so-called Torrens system which requires consistency in legal status between the actual land ownership and the registration records. This technically caused serious controversies. Finally, the Cambodian Government at that time suggested that the donors work out the coordination among themselves. As a result, representatives from the Japanese Working Group joined in a consultation among donor stakeholders at the World Bank Headquarters in Washington D.C. and worked out a compromise. The relevant provisions of the Civil Code had to be revised accordingly.[9)]

Since different donors are providing assistance to the drafting of various laws in one single country, there could be cases of lack of coherence in the created legal system. This may be related to the policy-making power of the recipient countries as well. When the recipient countries do not possess sufficient capacity to make the final judgment on what direction to go, the coordination among donors, at the aid policy and aid technical levels, becomes extremely important.

2. Filling up Institutional Gaps in the Implementation of the Codes

Implementation of the two comprehensive Codes requires regulatory updates of existing institutions and establishment of hitherto non-existent

9) Sakano Issei (2007), "Camboja Minpoten to Tochihou (Cambodian Civil Code and the Land Law)" in *Houseibi Shien Ron*, Minervashobo Publisher, p.118.

ones. For instance, the second paragraph of Article 336 of the Civil Code states that "…a contract in which one of the parties bears a duty to transfer or to acquire ownership on an immovable, shall come into effect only when such contract is made by notarial document". But the legal foundation underlying the institution of public notary has not been sufficiently established. The Civil Code also provides for "tender and deposits" with regard to the obligor's performance of obligations, but a system of deposits has not been properly established. Likewise, the Civil Procedure Code contains an Article on "Security for Ruling of Preservative Relief"[10], but the system of security for this purpose has not yet been put in place. Neither is the office of bailiffs properly established to operate pursuant to the provisions of Article 384 of the Civil Procedure Code regarding execution in cases related to movable property. To enable proper operation of the Civil and Civil Procedure Codes, each of the institutions envisaged therein must be established and put in full operation. This unquestionably demands active engagements by the Cambodian Government and its competent officials to ensure that all necessary institutions be established in a timely and effective manner. Building the capacity of Cambodian officials in charge of these tasks remains an important aspect of legal assistance projects to be offered by donors.

3. Other Remarks

In addition to the remarks made above, there may be a few more challenges to be considered as follows:

First, legislation is a way of exercising sovereignty. Without delicate considerations for the recipient countries to hold their ownership sufficiently

10) Article 542 of the Cambodian Civil Procedure Code.

in the legislative process, donors may risk infringing upon the sovereignty of the recipient countries or engaging in a disguised colonial rule. It is obvious that legal assistance provided by some other countries and international organizations was tied to some kind of conditionality. They provide assistance with a clear policy objective. In contrast, there have been discussions recently about legal assistance by Japan. There have been questions if Japanese legal assistance has been too idealistic, and whether or not, as a part of the ODA which is based on tax-payers' money, legal assistance should take into account Japanese national interests or advantages for Japanese enterprises. But, there must not be misconception about any potential disguised infringement upon the recipient countries' sovereignty simply as a result of the quest for short-term Japanese national interests.

Second, there is a need to promote the capacity of the recipient countries and ensure that they will have their own way forward at the end of the assistance projects. The ultimate goal of legal assistance is to create an environment where assistance will no longer be necessary. For this reason, it is important to plan for a fading-out strategy in the long run.

Ⅴ. Conclusion

Following the strictly request-based principle, Japan's legal assistance to Cambodia started as a positive response to the invitation by the latter in the early 1990s. As the Project developed on the ground, a history of mutual learning and cooperation developed on its own right. For Japan, the experience in Cambodia has been unique due to the lack of Cambodia's internal capacity to initiate necessary actions and the challenges caused by an absence of adequate exchange of visions and resources among external

donors who often happened to be assisting closely related fields of legal reform in Cambodia. The results have been occasional technical conflicts and overlapping of work, and for these reasons, have sometimes hindered the efficiency and effectiveness of respective activities on the ground. However, in the end, it should be the Cambodian counterparts who have to lead the technical coordination among donors as well as between donors and the recipient itself. In the current situation, Cambodia should be given the necessary resources and capacity to perform this function well. Legal assistance by the donors can become a source of external resources and knowledge to be used to an extent technically necessary to support and complement these internal tasks of the recipient.

As argued in this chapter, Japanese legal assistance to Cambodia seems to have produced a few noticeable results and managed to address some of the challenges in a reasonable way. But several questions remain to be answered with regard to the impacts of these immediate achievements in the long-term. What are the real impacts which the new Civil Code and the new Civil Procedure Code will have upon the evolving Cambodian society in twenty or thirty years down the road? Will the spirits of these Codes be upheld in practice and will they bring to Cambodian society anticipated results of better civil justice and court procedures in settling disputes? To what extent will the emerging human resources, developed as the direct result of the Japanese legal assistance, play an important role in the training of future Cambodian legal professionals who will be able and willing to take part in upholding the spirits and provisions of the two Codes? Will Japanese law and legal cooperation with Cambodia remain relevant and to what extent? Japanese Codes have been developed based on decades of dynamic applications and interpretations to keep them relevant to the

evolving society throughout the period of a whole century, will Cambodian Codes be coming along the same path and be continuously polished up by sound legal interpretations and applications initiated by the emerging generation of legal professionals? Will the Codes gradually develop into something uniquely Cambodian and relevant to the particular context of the evolving Cambodian society from now until the next century?

Perhaps these questions are not really relevant to evaluating the achievements of the legal assistance project under review. And, perhaps neither do they have a good place in this chapter on the history, achievements and challenges of Japanese legal assistance to Cambodia. It is arguable that these questions should better be answered by the Cambodian legal community in the future, who are supposed to be among the real owners and beneficiaries of these Codes. However, for two specific reasons the questions deserve mentioning here, albeit only in passing. First, at least some of these questions might have sometimes been the concerns or curiosities of people who worked directly for the Japanese legal assistance project in Cambodia or have strong belief in the long-term impacts of the task which they were trying to complete in their position as Japanese experts of the project. Second, these questions are not completely irrelevant so long as they may constitute the basic objectives to be taken into consideration when specific legal assistance projects are being designed and conceptualized at the first place. It would not make good sense if a project is established only for the purpose of producing or letting produce a piece of law with no regard as to what the future of that law will become. Much less sensible it is if legal assistance does not have a vision that looks beyond the few years of the drafting and the final promulgation of the law thus produced.

However, to answer these questions requires constant reviews of the implementation of the Codes in Cambodia and continuous exchange of legal knowledge, interpretational techniques and information updates on the concurrent situation of implementation and development of the Codes, preferably on the basis of mutual learning and cross-fertilization between legal systems of different nations.[11] These are time-consuming endeavors and for pragmatic reasons, single legal assistance projects can hardly survive the test of time and see through these developments. But, in pursuit of knowledge regarding the pros and cons, or the strength and weaknesses, of legal assistance to a country in transition in particular, the significance of a more systematic research into such long-term impacts should not be overlooked.

11) The fact that Japan is now pursuing reforms of its law on obligations by referring to some aspects of the Cambodian experience is one obvious indication of the importance of these mutual learning effects of legal assistance projects.

Chapter 4 - Japan's Legal and Judicial Development Project in the Kingdom of Cambodia

- Focusing on Activities Implemented in the Last Two Years of the Phase Ⅲ -

Ⅰ. Prologue: Commencement of the Legal and Judicial Development Project

The Civil Code of the Kingdom of Cambodia enacted by the Parliament in 2007. It had been drafted by the Working Group on Drafting of the Cambodian Civil Code led by Morishima Akio, Professor Emeritus of Nagoya University, who then chaired the Working Group.

One may wonder how Japan got involved in the technical assistance of drafting laws. The paragraphs below will briefly review the historical and other backgrounds of Japan's engagement in this assistance.

In 1997, Vietnamese Minister of Justice, His Excellency Nguyen Dinh Loc, introduced Professor Morishima[1] to His Excellency Chem Snguon, the Cambodian Minister of Justice. By then, Cambodia had just adopted a new constitution but did not have other basic laws, including the Civil Code and the Criminal Code, in place. In addition, the country was facing a reality where there was a serious lack of people who could draft these laws. The Cambodian Minister of Justice knew very well that for Cambodia to develop as one member of the international community, it would need to have a Civil Code as one of its basic laws for the society. In his meeting with Professor Morishima, the Minister asked him to assist in drafting a Civil Code for Cambodia. Upon returning to Japan with the requests from

1) Professor Morishima had already started technical assistance activities in Vietnam

the Minister, Professor Morishima started to look for cooperation from different sectors in Japan and put in place a roadmap for the commencement of technical assistance. It was then agreed that the assistance should be based on "cooperation with Cambodian jurists and respect for Cambodian ownership over the project". As a result of subsequent consultations with the Cambodian side, the Cambodian Ministry of Justice was chosen the official counterpart in JICA's Legal Assistance Project in Cambodia. The first phase (1999 – March 2003) of the project was launched in 1999 to assist Cambodia in drafting of the Civil Code (as well as drafting the Civil Procedure Code). Thereafter, the project went through the second phase (April 2004 – April 2008: Assistance in the Legislative Process of the Civil and Code of Civil Procedure) and the third phase (April 2008 – March 2012: Assistance in Drafting of Regulations Related to the Civil Code and the Code of Procedure). The fourth phase is now being implemented (April 2012 – March 2017: Assistance in the Dissemination of the Civil and Code of Civil Procedure).

Ⅱ. Drafting and Dissemination Activities During the Third Phase

1. The Law on Application of Civil Code

As mentioned above, the Cambodian Civil Code was promulgated in 2007 but it was yet to be harmonized with other existing laws and regulations. Although the Constitution states the law signed by the King for its promulgation shall go into effect in Phnom Penh ten days after the its signing and throughout the county twenty days after its signing, Civil Code's application did not start until the Law on Application of Civil Code.

Discussions about this Law in Cambodia were rather delayed, and were still being drafted when I came to Cambodia. (The Japanese side submitted the final draft to its Cambodian counterpart in July 2009). Reviews of this draft were then conducted jointly between the Japanese and Cambodian parties, until the Law was enacted in May 2011. This Law became applicable side by side with the Civil Code on December 21, 2011.

Before that, Japanese scholars who helped draft the Civil Code at the first place were invited to Cambodia in the months of August, September and November of 2011 to conduct "Dissemination Seminars on the Civil Code and Law on Application of Civil Code" for a total period of three weeks. About 2,500 participants jointed in these seminars. They consisted of officials from the Ministry of Justice and the Ministry of Land Management, Urban Planning and Construction (MLMUPC), judges, lawyers, and students from the law faculty of different universities.

2. Inter-Ministerial Ordinance on Real Property Registration Related to Code of Civil Procedure (Group 1)[2)]

This Inter-Ministerial Ordinance was drafted not only by the MoJ, which is the counterpart in JICA's Legal and Judicial Development Project, the Drafting Group 1 consisting also of officials from the MLMUPC, which have authority on the Real registration, and two Legal Advisers.

When I was first dispatched to Cambodia, a draft joint Ordinance related to Code of Civil Procedure was already completed. But since that earlier draft consisted of provisions representing misinterpretation of the Cambodian

2) This Drafting Group was made up of members from the MoJ and MLMUPC. Internal meetings among members from the Ministry of Justice were conducted every Wednesday morning, whereas joint meetings between members of the MoJ and those of the MLMUPC took place every Thursday afternoon. The Joint Proclamation was issued on May 3, 2011.

Code of Civil Procedure, the first task for me was to correct them. I therefore had to set about working on the revisions with another JICA Legal Adviser, Attorney Harada Masayoshi. We were first caught by surprise to learn that members of the Drafting Group 1 (hereinafter, members of the Group 1) thought that "attachment", "provisional attachment" and "provisional disposition" are all the same acts of disposition. Since this Ordinance was in fact regulating Real-related procedures with regard to compulsory enforcement of final and binding judgment (attachment), enforcement of security interest (attachment), preliminary injunction (provisional attachment) and enforcement of provisional dispositions, we therefore had to make it a priority to demonstrate to the Cambodian counterparts the differences among these three categories of enforcement. However, members of the Group 1 were very critical against these efforts, claiming that they had been told during the earlier drafting process that these three types of enforced dispositions were all the same and that it was not acceptable to point to the differences after the draft had been finalized. They asked for clarifications as to why the distinctions were not made known earlier. They would even refuse to join the lectures. Since we were not aware of the reasons why the distinctions had not been explained to the counterparts earlier, a satisfactory response to this question was not available. Nonetheless, we decided to insist strongly on the importance of making these distinctions and at the same time prepared and distributed a flowchart that could enable the Group 1 members better comprehend the process from the submission of petition to the compulsory enforcement. We therefore endeavored to offer as much as possible all detail clarifications that might be needed.

In parallel with these lectures, we also urged revision of the draft provisions. But there were strong resistance against revision of provisions that

had been drafted. We therefore had to patiently recommend as many revisions as they could convince the counterparts (by keeping parts which were unnecessary but posed no harm by their mere existence and revising only parts which were crucially mistaken).

In fact, these tasks were undertaken by members from the MoJ alone. Due to several reasons, only members from the MoJ were present at the Group 1 meetings which were originally planned to take place with the participation of officials from the MLMUPC on every Thursday afternoon. It was by no means a desirable situation for the establishment of an Inter-Ministerial Ordinance. We therefore consulted the Secretary of State at the MoJ, who was the official team leader for members from the MoJ, to organize a one-week July seminar in Siem Reap. Until all members arrived at the meeting hall in Siem Reap, we were worried whether members from the MLMUPC would actually come. But it turned out to be that all members of the MLMUPC under the leadership of the member of Council for Land Policy of the Ministry participated at the gathering. The seminar took the form of discussions among members for over 8 hours during the day with regard to the draft Inter-Ministerial Ordinance, but it also enabled participants, i.e. officials from the MoJ, the MLMUPC and the Japanese legal advisors including me, to have frank communication together in the evenings in order to get to know each other better. It became an occasion for participants to see future prospects for mutual cooperation. Since then, the Group 1 meetings were held regularly every Thursday to discuss about the Inter-Ministerial Ordinance on Real Property Registration Related to the Code of Civil Procedure.[3)]

3) The meeting went on until March 2011.

As such, it took more than 3 months after I assumed my duty in Cambodia, to build up a relation of trust with members of the Group 1. But this might be the most important period for the drafting activities afterwards. The relation of trust built up during this period became more solid during the course of the Drafting Team meetings. This development continued also at the drafting of the Inter-Ministerial Ordinance on Real Property Registration Related to the Civil Code.

In addition, a seminar was organized in Ratanakiri in the second half of March 2011 to spread knowledge about the Inter-Ministerial Ordinance on Real Property Registration Related to the Code of Civil Procedure at the time of its completion. Registrars and court clerks from Ratanakiri as well as Mondulkiri, Steung Treng and Kratie were invited to this seminar, where members of the Group 1 delivered an excellent lecture on the issues of "attachment", "provisional attachment" and "provisional dispositions", based on their perfect comprehension of the issues. The lecture was extremely impressive and unforgettable.

3. Inter-Ministerial Ordinance on Real Property Registration Related to the Civil Code[4)]

With regard to some of the real rights stipulated by the Cambodian Civil Code, such as ownership, perpetual lease, usufruct, easements, statutory liens, pledge, hypothec, revolving hypothec, their registration constitutes the precondition for their legal effects in some cases or precondition for resistance against the third-party claims in other cases. However, since the Civil Code

4) Group 1, consisting of the Drafting Team from the Ministry of Justice who met on Wednesday mornings and the Joint Drafting Group between the Ministry of Justice and MLMUPC, which was convened on Thursday afternoons.

is a substantive law and does not provide for relevant registration procedures, drafting of other laws or regulations to define the registration procedures for the proper operation of these rights became an urgent task. But this task did not commenced at the time when I was dispatched to work in Phnom Penh. In addition, members of the Group1 were not even given proper knowledge inputs about the Civil Code.

In order to draft laws or regulations related to Real property registration, it is certainly indispensable that the Civil Code as the fundamental law be well comprehended. It is also necessary to think of a way to apply the knowledge about the Civil Code real properly in the real property registration system. And in order to do so, it is imperative to deliberate on the proper way to update the existing Cambodian legal practices with regard to real property. Following the same approach mentioned in section (2) above, we newly appointed to be in charge of this work, had to first start the process by delivering lectures on the Civil Code, which would become the basis of all subsequent endeavors.

As a matter of fact, the special feature of the third phase of the Project is to shift the main role of legal drafting to the Cambodian side. In other words, unlike the previous phases where the original drafts were prepared by the Japanese side and submitted to the Cambodian side for discussions and considerations, the initial drafting is now conducted by the Cambodian side and then commented by the Japanese. The project has therefore been implemented in a way completely different from the previous phases. Therefore, in assisting the drafting process in the third phase, although we had drafted an Inter-Ministerial Ordinance for their personal reference, which incorporated all minimum necessary provisions, this draft was not shared with the Cambodian counterparts. To follow the project policy, we

had to first of all consider how to enable the Cambodian side to initiate the draft provisions by themselves. They chose to apply the "homework" approach, by which the experts would first of all brief the Cambodian counterparts on the kind of provisions which they thought would be necessary for the draft and then deliver lectures on the laws (mainly the Civil Code and the Law on Real Property Registration) relevant for the initiation of the draft. After the Cambodian potential drafters had built up the necessary understanding about the issue through a series of questions and answers in the discussions at the lectures, they were made to prepare draft articles on their own by using the acquired knowledge before the next Drafting Team meeting. The draft would certainly not be perfect at once. It would be a continuous process of lectures by us; self-efforts in initiating the first draft provisions; joint discussions with us on the draft; additional lectures by us; self-efforts in revising the initial draft provisions; and, further joint discussions with us, etc. It was finally possible to start discussions on the complete draft of the Inter-Ministerial Ordinance on Real Property Registration Related to the Civil Code at the Group 1 meeting on Thursdays in April 2011 - nine months after the "homework approach" had been taken. In these subsequent meetings, members from the MoJ were asked to explain about the essence of the provisions that they had drafted, and the underlying legal provisions of the Civil Code, etc, necessary for the justification and comprehension of the draft, to members from the MLMUPC. We would assist them with additional explanations, but members from the MoJ had indeed achieved remarkable improvement in their knowledge and understanding of the issues in comparison with what had been the case at the earlier periods of the drafting. This might have been resulted from repeated combination of lectures by Legal Advisors

(inputs), drafting exercises (outputs); and moreover, the intensive lectures delivered to the Cambodian members at the training seminars organized in Japan in February 2011 by Japanese scholars who had participated in the earlier drafting of the Cambodian Civil Code. The necessary knowledge has obviously taken root in the work of the Cambodian drafters.

Thereafter, the draft was further developed at the internal meetings of the Drafting Team members from the MoJ every Wednesday, and then submitted for reviews and discussions again at the Thursday Group 1 meetings with members from the MLMUPC. It became a regular cycle of work till the conclusion of the third phase in March 2012. Members of the MLMUPC have also made eye-opening progress in their knowledge and understanding of the Civil Code.

Unfortunately, since the Inter-Ministerial Ordinance has not been completed during the third phase, the drafting had to continue into the fourth phase. I remain involved in this new stage. The drafting has completed in December 2012. The target is to enable its issuance in early 2013.

4. Ministerial Ordinance on Registration of Juristic Persons[5)]

In the Cambodian Civil Code, there are provisions on juristic persons. Juristic persons need to register their establishment. In addition, since the Law on Application of Civil Code provides that registration of the juristic persons belongs to the jurisdiction of the Ministry of Justice, drafting of this Ordinance is also an important task to be done in the third phase of the Project. However, at the time of the author's arrival in Cambodia,

5) Drafting Team 5, convened on every Thursday morning.

Drafting Group 5 (hereinafter, the Group 5) had seldom been convened. For that reason, the newly arrived Japanese legal experts, I and Mr. Harada had to call on the Under-Secretary of State in the Ministry of Justice, who was the leader of the Drafting Group, and other core members of the Group, several times to insist on the importance of this drafting work. Finally, the issue was brought to the attention of the Secretary of State in the Ministry of Justice, who then made up the decision to convene the Drafting Group every week starting from July 2010. However, another serious hurdle also existed here. The Group 5 consisted of almost only young officials who had had no previous experience in legislative drafting and were not familiar with the concept of juristic persons. I then discussed with the other Japanese Legal Advisor (Mr. Harada) and came to a common conclusion that, since registration of juristic persons was different from the Real property registration and there were fewer legal issues to be taken into account, the drafters would only need to be given sufficient inputs of knowledge regarding juristic persons and the drafting process would not be so long. The first three months were therefore mainly spent on supplying inputs on outline knowledge regarding juristic persons. Then we also prepared a draft Ordinance specifically for our own reference and let the Group 5 to compile a draft ministerial Ordinance outline (only the title of each article) following the referential draft prepared by us. In December 2010, intensive lectures on juristic persons by Japanese scholars who were previously involved in drafting the relevant provisions of the Cambodian Civil Code and the Law on Application of Civil Code were conducted via the JICA-NET (TV conference system) for members of the Group 5. The proceedings of these lectures at the JICA-NET seminars were compiled and

distributed to all members of the Group 5. Meanwhile, drafting of the provisions for the Ordinance also started. During the process, there were also several occasions where additional lectures were organized on the topic of juristic persons and we had to assist the members in choosing the appropriate terminologies for some provisions. But the members also learned remarkably fast and were able to finish the draft Ministerial Ordinance in December 2011. In parallel with the drafting, I also solicited cooperation from members of the Japan Federation of Shiho-Shoshi Lawyer's Associations to help prepare a detail manual related to this Ordinance within a period of five months. Then in March 2012, Shiho-Shoshi lawyers who cooperated in this scheme were all invited to Cambodia to conduct seminars on the compiled manual for officials of the Ministry of Justice, who were potentially assigned the duties of registrars in the future. The Ordinance has not been issued yet. But, once the Ordinance is issued, registration should be free from a lot of problems if it is conducted based on the detail manual.

5. Ministerial Ordinance on the Registration of Matrimonial Property Contracts[6)]

The Drafting Group 6 (hereinafter, the Group 6) had been established shortly before I assumed her position in Cambodia. This Ordinance is based on the provisions of the Cambodian Civil Code regarding property contracts between spouses. Since the Ministry of Justice was mandated to be in charge of this registration in accordance with the Law on Application of

6) Drafting Team 6, convened on Tuesday afternoons.

Civil Code, the Ordinance had to be completed before the application of the Civil Code. Following the same approach mentioned above, the two Japanese experts first prepared an internal draft for reference which would then serve as the basis for the actual drafting process. Members of the Group 6 were almost the same members of the Group 1. Therefore, it was possible to omit in general the supply of inputs related to knowledge on the Cambodian Civil Code and the Law on Real Property Registration. Moreover, since this Ordinance did not have a large scope of coverage, the drafting was able to proceed smoothly. The draft was completed in July 2011.

6. Drafting and Dissemination of Other Draft Laws

(1) Law on Bailiffs

The Draft Law on Bailiffs based on the Civil Procedure Code was first submitted by the Ministry of Justice to the Council of Ministers in January 2012. But since the Council demanded further revisions, the Ministry of Justice had to review the draft internally and submit a revised Draft Law on Bailiffs to the Council of Ministers again in August of the same year. This second draft is still being debated at this moment.

(2) Law on Deposit

The Law on Deposit which provides for the deposit procedure stipulated in the provisions of the Civil Code has been drafted to a certain extent by the Drafting Group 4. But the draft was not completed in the third phase of the Project.

Ⅲ. Commencement of the Application of the Civil Code and Related Issues

1. The Commencement Ceremony

As already mentioned above, Cambodian Civil Code has applied on December 21, 2011. In celebration of the application of one of the basic laws of the country, Professor Morishima Akio and Professor Nimi Ikufumi, who were the initial drafters of the Cambodian Civil code, were invited to Cambodia to attend a ceremony on the application of the Civil Code on that same day inside the Council of Prime Ministers building. The ceremony was presided by His Excellency Sok An, the Deputy Prime Minister of the Kingdom of Cambodia. About 700 participants from different relevant institutions participated in the ceremony. It was a memorable day even for Japan, which has been offering assistance in the drafting, legislating and disseminating of the Cambodian Civil Code for more than a decade. As an expert in this Project, I was grateful for the occasion.

2. The Post-Application Issues

With the commencement of the application of the Cambodian Civil Code, the first problem is related to the issue of real security, as was earlier predicted. Under the Land Law of Cambodia, gage is generally practiced.[7] Nevertheless, Article 55 paragraph 1 of the Law on Application of Civil Code considers gage as a form of hypothec. Paragraph 3 of the same Article provides that registered gage holders (generally the banks) shall

7) “Gage” is considered one type of pledge. However, the gage holder does not possess the land concerned but possesses the certificate of rights over the land.

return the land right certificate (including that showing ownership or other special forms of possession right) to the gage creator (the debtor). Reacting to these provisions, the banks argue that "since the Inter-Ministerial Ordinance on Real Property Registration has not been issued, there is no procedure related to registration of hypothec" and ask whether "it is possible to hold the land right certificate by entering into a contract with the debtor, as it is a matter of concern not to be able to keep hold of the certificate". In response, the MLMUPC issued an instruction on procedures for registering hypothec in February 2012 and enabled the registration of hypothec to take place. In practice, registration of hypothec is taking place in conformity with this instruction. With regard to the holding of land right certificate by contract, the contract might be valid at the first place, but it is possible that the contract will turn out invalid as a result of the contractual contents or a subsequent circumstance. In a seminar on hypothec organized in September 2012, the Japanese scholar who helped drafted the Civil Code argued that "with regard to a contract on holding of certificate, the agreement to return the certificate only after a complete return of the debts can be considered a typical form of breaching public order and good customs. In addition, the registration procedure to be practiced when the hypothec creator (the debtor) disposes of the land concerned (by sale or creation of a new security) requires the land owner (the debtor) to submit the land right certificate to the department in charge of land registration. If the certificate is not returned to the debtor in this case, the contract between the bank and the debtor has to be considered invalid".

There have also been several other queries about the Cambodian Civil Code. But the details will not be elaborated in further length here.

Ⅳ. Project on Dissemination of the Civil and the Code of Civil Procedure (Legal and Judicial Development Project Phase Ⅳ)

The current Project which was launched in April 2012 for a period of five years will mainly focus on organization of working groups made up of 20 members each from the four institutions, namely the MoJ, the Royal Academy for Judges and Prosecutors, the Bar Association of the Kingdom of Cambodia, and the Royal University of Law and Economics, to initiate continuing discussions on the Civil and the Code of Civil Procedure. Japanese experts will be assisting each of the working groups. But knowledge inputs about laws and regulations from these experts will be kept to the minimum. The central focus will be discussions by the members themselves. However, since it was initially difficult to acquire consents from the four institutions, the actual activities only started in August. The future of these activities is much anticipated.

Ⅴ. Conclusion

For more than 2 years and 9 months working in the Kingdom of Cambodia as a Legal Adviser for JICA in providing legal assistance to the country, I have always taken seriously an attitude of “mutual respects”. I happened to be born in Japan and almost automatically learned to live abiding by law. Then in order to acquire the national qualification for a career as the Shiho-Shoshi lawyer, I had to study the Civil and Civil Procedure laws, the law on real property registration, and the law on commercial registration, etc. In pursing these studies, I had unquestionable

access to numerous compilations of court cases, basic textbooks and other materials for reference. After acquisition of the national license to practice, I have had no problem in practicing my profession in assisting different kinds of registration and other legal services related to court proceedings. I was able to take many things for granted. After assuming the assignment in Cambodia, I have been able to realize how difficult it is to take the same things for granted here. Law books exist because there are authors who wrote them. Laws and regulations exist because there are legislative drafters who drafted them. Legal services based on these laws and regulations can be performed without troubles only because these services have been inherited from well-informed predecessors. But in Cambodia, publications related to the current Civil Code and Code of Civil Procedure do not exist besides the few materials issued by the Secretariat of the Legal and Judicial Development Project. Not a single book on Cambodian real property registration is available anywhere. Laws and regulations are still very anew, therefore there are hardly any services which have been inherited from predecessors. In this context, members of the Group 1, Group 5 and Group 6 had to study hard, think for themselves and draft the ministerial Ordinances which could visualize and respond to the future of the country. These members took Japanese experts' lectures on the Civil Code and other laws seriously, and in return the experts also respected the Drafting Team members' knowledge about Cambodian law and actual practices. It was due to these mutual respects that several ministerial Ordinances have been completed. As members of the Japanese team of experts, Attorney Harada and I had to go through some tough times. But members of each Drafting Team, who have been open to Japanese experts' eagerness and lectures, have gone through harder times. It is their efforts which deserve gratitude.

It will take just another final step to complete the Inter-Ministerial Ordinance on Real Property Registration Related to the Civil Code, which is one of the most important Ordinances for the operations of the Civil Code. The fundamental principles to be embedded in this Ordinance will last for many decades ahead. It is necessary to bring this work through its final stage consistently. Last but not least, the words of Her Excellency Chan Sotheavy, Secretary of State in the Ministry of Justice, are worth quoting here: “These laws and regulations live on even after we die”.

Chapter 5 - Legal Education and International Cooperation at Cambodian Universities

Ⅰ. Introduction

Japan has been implementing legal assistance in the civil legal field to the Kingdom of Cambodia since 1999. It assisted in legislative drafting of the Civil Code and the Civil Procedure Code. The Civil Code was adopted in December 2007 and the Civil Procedure Code in 2006. The Civil Code entered into force in December 2011 and the Civil Procedure Code in July 2007.

Conclusion of the Paris Peace Agreements in 1991 ended the long internal conflicts in Cambodia and finally put the country on route to peace. Soon afterwards, a few domestic laws were enacted to implement the spirits of the Peace Agreements. They included the Constitution of the Kingdom of Cambodia established in 1993 and the Decision of September 10, 1992, adopted by the Supreme National Council, on “Provisions Relating to the Judiciary and Criminal Law and Procedure Applicable in Cambodia During the Transitional Period”, and a Criminal Procedure Law established by the State of Cambodia faction in 1993. However, the law on civil matters that is most deeply involving the civil society was not legislated. Instead, the Decree-Law no.38 on “Contractual and Non-Contractual Responsibilities” (1988) existed as one of the specific legal normative instruments related to civil matters. But it was hardly compatible with the Paris Peace Agreements and the new Constitution. To enact a Civil Code that would be compatible with these basic laws therefore became an urgent task essential for the rehabilitation of Cambodia. It was in this particular context that Japan

started the aforementioned legal assistance to the Kingdom of Cambodia in the field of private law.

With regard to the field of criminal law, a criminal procedure law was adopted in 1993, but the Criminal Code was adopted only in November 2011. Drafting of this Code was assisted by the French government. The Criminal Code entered into force for the whole national territory in 2010.

New laws may be adopted and applied to meet the needs of a new era, but a related question remains whether there are sufficient legal professionals qualified to practice these new laws. This is undoubtedly a relevant issue in the context of Cambodia given the historical background of the country. With regard to training of legal professionals in Cambodia, the Royal School for Training of Judges and Prosecutors has been established for judges and prosecutors and the School for Training of Lawyers has been established for lawyers. The institutions for training of professionals have therefore been put in place to provide education to these practitioners in the application of the new laws. In this respect, Japan has also been providing assistance in civil litigation training under the "Project on Improvement of Civil Litigation Training for Cambodia's Royal School for Training of Judges and Prosecutors", whereas training for lawyers has been assisted by the Japan Federation of Bar Associations.

But are the newly adopted laws sufficiently reflected in the teaching curriculum for legal education in Cambodian universities where most of the human resources are being produced for future admissions into the training institutions for legal professionals? This has been pointed out as highly problematic. A huge gap seems to exist between the legal institutions and the actual legal education and research in contemporary Cambodia.

This Chapter will first review the historical background of universities in Cambodia to understand their current status and identify the challenges they

are facing. Among the new laws, the Civil and Civil Procedure Codes were adopted subsequent to assistance given by Japan whereas establishment of the Criminal Code was assisted by France. Moreover, training of practitioners by the legal professional training institutions has been benefited from international assistance. Therefore, it may be essential to discuss about legal education and research at universities also in the context of international cooperation and assistance from external sources.

Besides, since universities are not only educational institutions but also places for "finding of facts and creating knowledge", there is the question of whether international assistance in university legal education and research should also be reviewed within the same framework of legal assistance which consists of assistance to legislative drafting and assistance to legal professional training institutions mentioned above. It is also desirable here to consider whether there are limits to overseas assistance for legal education.

Based on these viewpoints, this Chapter will examine the contents of legal education from the perspective of the new laws, and identify problems of legal education (particularly related to the new laws) that are facing Cambodian universities today. It will also discuss about the prospects of foreign assistance or international cooperation in legal education at Cambodian universities.

Ⅱ. Legal Education in Cambodian Universities

1. History of Universities That Have the Law Faculty

Together with the Lao People's Democratic Republic, the Socialist Republic of Vietnam, the Republic of the Union of Myanmar, and the

Kingdom of Thailand, the Kingdom of Cambodia is a nation state located in the continental Southeast Asia. The three Indochinese countries, including Cambodia, Laos and Vietnam, together emerged as modern states after surviving a period of French colonization in the 19th century. For that reason, higher education or academic research institutions were established within the particular context of former colonies of the French Indochina. This constitutes one major feature of these institutions.

Cambodia gained independence from the French colonial rule in 1953. But struggles among political powers inside the country intensified afterwards, ending up in the 1975 victory over the whole territory by the Khmer Rouge under Pol Pot. Since the Pol Pot regime rejected all existing Cambodian institutions and culture, it destroyed all previously existed laws, legal studies and legal culture both physically and in terms of human resources. Continuity of achievements from education and research in Cambodian universities was terminated by this period of vacuum. Cambodia is therefore featured by negative legacies of this period, making it very different not only from experiences of other Indochinese but also other Southeast Asian countries.

Even at the end of the Khmer Rouge rule, internal wars continued until the conclusion of the 1991 Paris Peace Agreements. The political regime led by the Cambodian People's Revolutionary Party, which ruled most parts of Cambodia until then, initially attempted to bring the State towards socialism, but Cambodia had to shift to democracy based on a free market economy as a result of the Paris Peace Agreements, subsequently putting the State into a transition. Due to the long period of internal wars in Cambodia, rehabilitation and reconstruction of the higher education and research

institutions under the Cambodian People's Revolutionary regime had not been completed when the institutions had to transform again as a result of the new transitions. For this reason, rehabilitation and reconstruction of the higher education and research institutions in Cambodia has had to cope with different types of difficulties not found in other countries pursuing economic or other forms of transitions.

2. History of universities in Cambodia

(1) The Royal University of Law and Economics (RULE)

The RULE was originally established as a higher education institution in 1948[1)], as a training school for local government officials under the French colony. It later also served as training school for judges. It was then converted into a law faculty attached to the University of Phnom Penh. In contemporary terms, the University of Phnom Penh is the oldest university in Cambodia having a law faculty under its supervision. It has survived all the years of drastic turbulence together with Cambodia, since the latter's emergence as a modern nation state. After its integration into the University of Phnom Penh, the institution was renamed the Faculty of Law and Economic Sciences. In 1961, the campus of the Faculty was moved to the current site, where the RULE is located today.

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1) Based on the author's 1993 and 1994 interviews with Leung Chhay, the late Dean of the Faculty of Law and Economics, who re-established the Faculty as a part of the University of Phnom Penh in 1982, and according to the speech made by the Dean of the Faculty of Law and Economics in 1995, the establishment date was said to be in 1948. There was also an argument that the year of establishment was 1949. For more details, see Teilee Kuong, "Legal Education in Cambodia – Shunning the Course of History", in Steele Stacey and Kathryn Taylor eds., Legal Education in Asia, p. 8 and infra footnote 24.

The Faculty of Law and Economic Sciences was closed down in 1975 when the Khmer Rouge ruled Cambodia. The closure continued until 1979 after the fall of the Khmer Rouge.

It was re-opened in 1982 after the end of the Khmer Rouge regime. However, it was put under the jurisdiction of the Council of Ministers and the Ministry of Justice. The Department of Politics and the Department of Criminal Law was established exclusively for the training of public servants, including administrative officials and judges. As Cambodia lost a great many public servants during the Khmer Rouge regime, training of public servants for national rehabilitation was an urgent task. Initially, two five-month courses were organized every year with a two-month interval in between the courses. These courses continued until 1986. In between, there was also a period when a special two-month course was organized for graduates from the five-month courses. There were altogether 2350 graduates from the five-month courses and 350 graduated from the special two-month courses. In 1986, the five-month course was upgraded to two-year course and the special two-month course was upgraded to five-month course. The new five-month course was then aimed at training of public servants.

The very few survivors who became practicing bureaucrats in the post-Khmer Rouge era served as lecturers. Cambodia at that time aimed at becoming a socialist state and was receiving assistance from Vietnam. At the training school for public servants, many Vietnamese and East German experts came to give lectures. Moreover, some of the graduates from the special courses were sent to study in the socialist countries.[2] Many of them came back to serve as bureaucrats at the central administration and judges.

2) *Id*, p.17.

In 1992, after the conclusion of the Paris Peace Agreements, Cambodia received French assistance in reorganizing the Faculty of Law and later renamed the Faculty of Law and Economics. It was initially commenced with a five-year degree program.[3] The number of annual enrolments was two hundreds. There were a large number of applicants, up to 3600 seeking to take the exams. The Faculty therefore organized an additional preparatory program, which allowed two years preparatory students status to the examination challengers. In 1995, there were 2000 students registered to the preparatory courses. The tuition fee for preparatory course students in that year was set to be 25,000 riels per year. Meanwhile, the jurisdiction over the Faculty was also transferred back to the Ministry of Education.

Among the lecturers of the Faculty, professors remained non-existent. Apart from lectures given by a large number of practitioners, French lecturers also gave lectures in French. As mentioned earlier, although the new Constitution was enacted in 1993, there were not yet appropriate laws on civil matters. In terms of legal norms, there were perhaps merely norms left from the socialist days, such as the Decree-Law no.38 on "Contractual and Non-Contractual Responsibilities", the Law on Family and Marriage (a part of which was procedural law), the 1992 Land Law, whereas the civil procedure law was represented by a 1984 Ministerial Proclamation. Lectures were delivered against this factual background.

On the other hand, with regard to the department of economics, enrolments restarted in 1984 for the Faculty of Economics of the University of Phnom Penh. In 1992, the Council of Ministers issued a decision to separate the Faculty of Economics and removed it from the University of

3) *Id*, p.18.

Phnom Penh to be combined with the Faculty of Law to make the Faculty of Law and Economics.[4)]

The Faculty of Law and Economics went through several reforms and was enabled to collect tuition fees for the university level education. Universities expanded rapidly. Even national universities started looking for ways to be economically self-sustainable to some extent in 1997-1998. The Faculty of Law and Economics discarded the entrance exam in 1998 and allowed admission of students based on their choices and applications. In 2001, national universities officially set their target number of students who would be enrolled by paying tuition fees. This marked the beginning of parallel enrollments of students who were exempted from tuition fees and those who paid fees.[5)] In 2003, the Faculty of Law and Economics was separated from the University of Phnom Penh and upgraded to the Royal University of Law and Economics.[6)]

(2) The National University of Management (NUM)

Originally established as one faculty of the University of Phnom Penh in 1949, this University was reorganized as a college that offers bachelor programs in economics, including business, agriculture, industry and finance in 1983 and was located on the site of the former French school of Lisee Decarte. It later became a college specialized in economics and business.

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4) Integration of the Department of Economics was mentioned in the speech by the Dean of the Faculty of Law and Economics in 1995.

5) Before admission, applicants were ranked from categories A to F based on the "results of their second term examinations at the high school level". Depending on the ranking that the applicants acquired at the examinations mentioned above, they would be grouped into those singled for full exemption, half exemption or non-exemption of tuition fees.

6) As of 2011, apart from the Faculty of Law and Faculty of Economics and Management, RULE also has a Faculty of Public Administration and a Faculty of Informatic Economics.

After the conclusion of the Paris Peace Agreements, the college was renamed the National Institute of Management in 1994 to respond to the national reforms towards democracy and market economy. Finally, it was upgraded to the status of National University of Management in 2004 and continued until today. It has altogether seven faculties, including the Faculty of Law.

Like RULE, NUM does not require entrance exams. There are students financially supported by the State and self-supporting students.

(3) Panhasastra University of Cambodia (PUC)

Panhasastra University of Cambodia was set up in 1997 by a group of Cambodians living in the United States, in order to contribute to the development of Cambodia and human resources. It actually started operating as an educational institution in 2000, but was officially recognized as a university in 2002. Lectures are mainly conducted in English.

3. Current Situation

(1) Administration of Higher Education Today

In the last 10 years, several regulations have been issued, including the "Royal Decree on Establishment of the Accreditation Committee of Cambodia (ACC)", "Royal Decree on Accreditation of High Education Institutions", "Sub-Decree on Establishment of Universities", etc. By means of these regulations, higher education institutions, such as universities have emerged rapidly in the last few years in Cambodia. In 2009, there were 60 higher education institutions[7], but in the 2011 "Statistics of Higher Education Institutions", the Ministry of Education reported that the total number of

7) 2009 Study Report on the RSJP Project as part of the legal assistance by JICA.

higher education institutions (universities, academies, etc) went up to 91 (34 national universities and 57 private ones). The number became 101 in October 2012 (among them were 39 national universities and 62 private ones).[8] Therefore, in the period of two years between 2009 and 2011, 32 institutions, and in during the last year 8 institutions (four national and four private) were established.

The Ministry of Education, Youth and Sports has jurisdiction over higher education institutions. However, depending on their natures and specialties (for example, medicines, agriculture, arts, vocational training, military, etc), some national universities may be under the joint jurisdiction of the Ministry of Education, Youth and Sports and the ministry in charge of the special fields concerned. In these cases, it is a kind of dual administration. But even among specialized private colleges and research institutions, about ten are under the jurisdiction of the Ministry of Labour, Vocational Training and Youth Rehabilitation. Currently, there is no university under the jurisdiction of the Ministry of Justice.

According to the Decree on Establishment of Accreditation Committee of Cambodia (ACC), the ACC was established inside the Office of the Council of the Ministers to check on some universities once in a year or once every three years on others. Here again, universities are place under a dual or at times triple administrative monitoring.

National universities were established by the State and basically operate on national revenues, whereas private universities received no supports from the national coffer.

In Cambodia, people who want to enter into the universities have to take the “second high school graduation test” (a certification test that combines

8) Report dated October 19, 2012, by the Ministry of Education, Youth and Sports.

the "graduation from the secondary education" and "entrance qualification for higher education"). Students are ranked from A to F based on the total scores and appraisals for each subject reflected in the results of the test. However, since different faculties place different importance on the subjects, the way of evaluating test results for each subject differs and the total scores are also different. Particularly for national universities, students are ranked from A, B, C down to F, categorized by a quota (X) of students who will be financially supported by the State for their studies, and a quota (Y) of students who will be partially supported by the State and the rest will all be self-supporting students.

Some private universities also make use of the academic evaluation of the "second high school graduation test". The top ranking A-class students may also be exempted by some private universities from paying tuition fees.

(2) Current Situation of Universities

1) RULE

Currently, there is no entrance examination for admission into RULE. Admission is based on reviews of the applications. At Rule, students may choose the faculty at the time of application. However, it is permissible to shift to a different faculty at the end of the first year under certain conditions.

At the Law Faculty, two special courses are organized with foreign assistance. One course is organized in cooperation with the French counterpart (hereinafter the French course) and the other is law program conducted in English (hereinafter the English program). For admission into the French program, screening examinations take place before the end of the first year

to select qualified students for the special program starting in the second year. These students will not need to attend classes organized by RULE. At the graduation, the graduates from the French course are given a degree by the Lyon II University. Even though these students have not taken classes organized by RULE since the second year onwards, they are also given a degree by RULE at the same time. As for students enrolled into the English course, they do not have to take classes organized by RULE from the second year onwards, but are given a degree by RULE upon graduation.

Both the French and the English programs pick up 50 to 60 first year students respectively. Therefore, every year about 120 of the first year students are qualified for enrolment into these two programs. They will begin their studies under these two programs from the second year onwards. Even students financially supported by the national scholarship will have to pay for attending these special courses after they are admitted in the second year.

Students not enrolled in these courses after the second year will continue to take classes under the Khmer program organized by RULE Faculty of Law.

There are two semesters for each year. Four years make eight semesters. Graduation is conditioned by acquisition of enough number of credits. The curriculum of the Faculty of Law as of November 2012 is reproduced in the appendix below. With the exception of introductions to law and constitution in the first year, law subjects are taught from the 2 year onwards. Considering the subjects of Civil and Civil Procedure Law, Civil Law I is taught in the first semester of the second year, and Civil Law II in the second semester. The first semester of the third year offers classes on law on obligations whereas laws on family and succession are taught in the

second semester. The law on civil procedure is taught in the first semester of the fourth year.

According to the survey conducted by JICA's RSJP assistance team in 2009, classes on civil law were organized as Civil Law I in the first semester and also Civil Law I in the second semester of the second year. This has been reorganized in 2012 into Civil Law I for the first semester and Civil Law II for the second semester (without changes in the conference of credits). The two credits for special law on contracts and two credits for family and succession law reserved for the first and the second semesters of the third year in three-and-a-half year ago have been modified. In 2012, subjects of family and succession law remain to be taught in the second semester of the third year, whereas the law on obligations is taught both in the first and the second semesters of the same year. Credits acquired from these subjects are increased to 3.5. The subject on civil procedure law continues to be taught in the first semester of the fourth year. Only classes on the civil law have been increased.

Unlike the 1990s or early 2000s, among the lecturers of RULE in recently years are former Cambodian students graduated from RULE, University of Lyon II and Nagoya University Graduate School of Law. In addition, there are also lectures given by part-time external practitioners who have been involved in the drafting of the new Codes. Students who take these classes are given lectures based on the new Civil Code and the new Civil Procedure Code. Besides, in spite of being few in number, some lecturers who were never involved in the drafting work but had studied the new Codes would teach by citing some provisions of the new laws while doing lectures based on the old civil legal provisions. However, generally

speaking, it is hardly possible to argue that university lecturers have necessarily acquired sufficient knowledge about the new laws.

Feeling the danger caused by a great of law lecturers still confused by the remaining memories of the past socialist law in their lectures, some Japanese lawyers who used to work as JICA legal experts in Cambodia and Japanese university professors who participate in legal education assistance projects implemented by a Japanese NGO have been initiating special lectures for students and workshops for lecturers on basic legal thoughts and concepts underlying the new Civil and Civil Procedure Codes. But continuity of these initiatives is difficulty. Or, in some cases, the initiatives have been conducted only sporadically.

Under these difficult circumstances, JICA decides to start a five-year project on studies of the Civil and Civil Procedure Codes, partnering with RULE lecturers in charge of civil law related subjects.

2) NUM Faculty of Law

The undergraduate program consists of four years with two semesters per year. The four years make eight semesters in total. Graduation is conditioned by acquisition of sufficient credits. Unlike RULE, NUM does not have parallel law programs organized by foreign partners.

After admission, students are not grouped into different faculties in the first year. Curriculum used in the Faculty of Law as of November 2012[9] is reproduced in appendix II of this Chapter. According to this curriculum, introduction to law is taught in the first semester of the first year and English legal terminology is taught in the first and second semesters of the same year. Basically, law subjects start in the second year. Considering

9) Based on information available in the pamphlet of the National University of Management.

subjects related to civil and civil procedure law, only contract law and civil procedure law are offered in the first and second semesters of the second year.

There are about 40 lecturers at the Faculty of Law.[10] However, only 9 of them are full-time professors. Among them, 6 are teaching law subjects while the other 3 are teaching business-related, non-law subjects. Non-full time lecturers include bureaucrats from the Ministries of Economy, Industry, Education and Sports, etc, and legal practitioners such as judges, lawyers and prosecutors. Some of them are also teaching at RULE.

Preparation of the curriculum is the task of the Board of Professors. Teaching methods are also discussed at the Board meeting. But the University is not taking any measure with regard to incorporation of the new laws. Lecturers are expected to conduct lectures based on the new laws. All depends on the lecturers. Among lecturers who are teaching civil law subjects, some have undergone short training programs organized by JICA on and off for four years. With regard to the criminal subject, some lecturers participated in seminars organized by the Ministry of Justice and others used to studied at the University of Lyon 2.

Salaries for full-time professors are paid from the national coffer, whereas those for part-time professors are paid by tuition fees which the University collect from students.

3) PUC

Students are admitted by entrance examinations not at the faculty level but at the university level for all first year enrolments. Each year, there are

10) Information hereinafter is based on the author's interviews with the Rector of NUM on November 1, 2012.

three semesters, namely the first semester, the summer semester (intensive courses) and the second semester. Graduation is based on acquisition of over 128 credits.

In the first year, lectures on introduction to legal studies and the basic legal studies are given to students who intend to join the Faculty of Law. Subjects on Constitutional Law and business law are taught in the second year. Law subjects are mainly taught to students who continue to the third year. But with regard to the civil law, only the family law (civil law I) is taught in the third year. Subjects on the law of property is taught in the fourth year, consisting of law on contracts (civil law II), torts (civil law III) and property law (civil law IV). Procedure laws are also taught in the fourth year.

To set the subject on business law in the second year is to emphasize on the special nature of a private university.

According to insiders' information, actions related to the incorporation of new law subjects have been taken since the commencement of the drafting of both the Civil and the Civil Procedure Codes.

Choice of faculties takes place in the fourth year. Students join the Law Faculty only in the fourth year. However, some students may leave PUC before entering the fourth year, and move to the law faculty of a different university. Law students in the fourth year may sometimes be as few as 4 or 6 students. Students moving in from a different university may formally submit sufficient credit requirements, but their admission is based on a case-by-case consideration before the decision on admission can be given. But PUC does not accept students moving from a different university to enter into the fourth year.

Negotiations on changing the curriculum are subject to discussions by the Board of Professors once in a year.

Besides the regular checks by the ACC and other relevant institutions, the Ministry of Education and Sports also conduct its separate checks in PUC once every three years.

Lecturers at the Law Faculty are made up of two full-time professors and 7 part-time professors. Six of the nine were graduates from the Nagoya University. Graduate School of Law.

Payments to lecturers all come from students' tuition fees. Full-time lecturers are paid in terms of salaries and part-time lecturers are paid by the number of hours they deliver their lecturers.

Ⅲ. The problems and Their Causes

1. The gap between existing law and education contents at educational sites

As part of its continued assistance to the Kingdom of Cambodia, Japan worked out an agreement with RULE in March 2012 to enable lecturers from RULE to join in the establishment of a working group to discuss about the new Cambodian Civil and Civil Procedure Codes. Under the program, long-term JICA experts have already started organizing lectures on the Civil Code for members of this working group. As already mentioned in section I above, Japan has been providing assistance to the training programs at the Royal School for Judges and Prosecutors (RSJP) in the subject of civil litigation, under the "Project on Improvement of the Civil Law Education Assistance at the Cambodian Royal School for Training of Judges and Prosecutors". However, it is acknowledged that there exist relatively serious weaknesses on the part of law faculties to give law students

some basic foundation knowledge in law.[11] It is from these faculties that future judges and prosecutors will graduate, before they can pass the exam and join the RSJP. Therefore, one can understand that this new attempt to assist law lecturers in RULE was a result of the appreciation of the needs for legal education improvement at the law faculty level.

As already reviewed in paragraph 2(3) of section II above, former JICA experts and members of Japanese NGO (the Japan Jurists League for Cambodia), etc, have been organizing civil law workshops with private law lecturers of RULE on volunteer basis. But these activities were nothing more than based on an unusual sense of danger caused by the understanding that there had been a lack of university legal education based on the new Civil and Civil Procedure Codes.

These problems about university legal education are not confined to RULE. Rather, RULE was privileged by more foreign assistance in legal education than other universities since earlier days. Therefore, it is discernable just how much more serious is the situation of conveying knowledge and understanding about the new laws at other universities.

Originally, for the purpose of preparing this chapter, interviews were conducted with representatives from RULE, NUM and PUC, etc. All representatives of the universities that responded to these requests for interviews did not seem to acknowledge satisfactions with the current level of legal education at their own universities. But they seem to agree on one common point that as education institutions, these universities need to make some necessary arrangements with regard to the new laws.

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11) Report by Uesaka Kazuo, "The 9th Training Seminar to Assist Cambodian Legal Professionals", ICD News, issue no.48; and Kamiki Atsushi, "Report on Surveys of Court Judgments in Cambodia", in the same issue.

PUC invited graduates from Nagoya University who used to be involved in the drafting process of the new codes to teach as part-time lecturers at PUC even before the new laws were adopted. Rule increased the number of courses on the Civil Code. Both RULE and MUM also made efforts to invite members of the working groups on the drafting of the two codes to teach as lecturers at these universities. It shows an understanding about the needs since the early stage.

The reality is that a small number of members of the working groups who were directly involved in the drafting of the two codes are now running around from one place to another just to teach at the school for judges and prosecutors, school for training of lawyers, and a number of universities that have a law faculty. This situation testifies to the real story of a serious lack of human resources to enable delivery of lectures on the new codes to the students.

All universities are trying their best to invite bureaucrats, judges and lawyers, etc, who are practitioners mainly in other specialized fields to come and teach at the universities as part-time lecturers. The inevitability of reliance on practitioners is a result of the fact that universities have not been able to produce real legal scholars. It is hardly deniable that a major cause of this phenomenon can be traced back to the early years of the establishment of universities in Cambodia. RULE itself is a good example. Its predecessor was established under the French colonial rules to train bureaucrats and practitioners. It then went through the Khmer Rouge rule and survived long period of internal wars. This history has not enabled the university to fully function as an academic research institution.

As such, the problem of legal education in Cambodia is summarily attributable to an absolute lack of human resources. But, if one looks at the

law curriculum, one will detect a strong effort of RULE to incorporate new laws by increasing the number of lectures on the civil law in the last few years, whereas the curriculums of other universities have remarkably less classes on the civil law. This may draw one's attention to the problems of basic attitude in legal education. It is perceivable that some universities in Cambodia are treating the three basic laws, particularly the Civil Code, at the level as other laws such as the Labor Law and the intellectual property related laws.[12)]

In Cambodia, the Constitution, the Civil Code and the Criminal Code are codified. In such codified system, it seems usual for law faculties to focus relatively strongly on the subjects of constitutional, civil and criminal laws. By putting a weight on these three basic subjects, legal education is aimed at training students' capacities to think legally, to be familiarized with legal interpretations, and to learn about legal thoughts; and as a result enabling them to apply other laws more skillfully. In Japan, lectures on the Civil Code take a relatively large amount of time. Attitudes and approach towards legal education therefore seem to be quite different between Japanese and Cambodian universities.

The Civil Code is an important law highly related to the basic norms of a modern civil society. However, in Cambodia, it is rather questionable whether courses on the Civil Code have been given the necessary attention in legal education in Cambodia. This may be one special feature of a country which used to pursue socialism but is now seeking transition towards a different system. This may not be just a problem for the subjects of civil

12) Interviewees running private university programs pointed out that for a private university to enroll more students, a curriculum showing availability of various law subjects and courses would serve the purpose of advertisement.

or civil procedure laws, but the problem of understanding about legal education itself. This problem deserves serious deliberation in the context of establishing the mission for each university. A university must not lose sight of its own mission.

2. International Assistance

Facing such problems, the current situation of legal education in Cambodia is nothing easily overcome by the efforts of this one country alone. In this regard, there has been international cooperation related to the field of legal education, either through legal assistance or education assistance programs. What have been the contributions from these programs?

(1) The French government, French universities and individuals

Interviewee Hisham Mousar, who is in charge of the French Embassy/ RULE Project at RULE, provides the following information regarding the Project:

French engagement in Cambodian university legal education started in the 20th century, by dispatching French lecturers to the law faculty of the University of Phnom Penh and getting involved in the making of education programs. However, this engagement was terminated due to deterioration of the political situation in 1970.

After the conclusion of the Paris Peace Agreements, France immediately assisted in the re-organization of the Law Department of the Faculty of Law and Economics of the University of Phnom Penh. It began with the field visit by a professor from the University of Lyon II, who then felt the need to assist and pushed for full-fledged assistance in the later stage.

Academic exchange initially started at an inter-university level between the University of Lyon II and the Faculty of Law and Economics of the University of Phnom Penh. The French Government participated to a certain level only at the later stage.

Today, assistance to universities in Cambodia does not occupy a position of priority in the overseas assistance program of the French Government. There are increasing arguments in France that after 20 years of assistance, the project should be terminated. There are also criticisms of a seeming legacy of the colonial rules. However, the French Ministry of National Education thinks that Cambodia is not yet ready to sustain the development of legal education by itself. In any case, it is not possible to expect an endless continuity of the project. There is a general understanding that the project will have to come to an end at a certain point. This is because the assistance is originally aimed at promoting self-sustainability of Cambodia and the RULE.

French assistance for university education in Cambodia started in 1992 with efforts to send Cambodian university lecturers to join some study programs in France. Admission of Cambodian students to universities in France started later. The first group of Cambodian students to graduate from the Master course in France returned to Cambodia in 2002. In Cambodia, the French program has been developed for the benefits of undergraduate students. Courses under this program are taught by French lecturers dispatched from France. Most of them are from the University of Lyon II. These French lecturers teach in French. Besides, there are also lectures given by Cambodians who are graduates from this French program.

The French program also helped established a Master course inside RULE as a part of the French cooperation project. At the beginning there were

difficulties gathering students for this program and it almost collapsed. However, new efforts were introduced in 2005 to save the program. Batches of students have graduated from this Master program since 2008. Students who graduate from this Master program will be able to obtain a Master Degree conferred by one of eight French Universities including the University of Lyon Ⅱ.

Nowadays, the French cooperation center inside RULE (the Center) is functioning as a hub institution, not belonging to any single university. The Project with RULE is based on a contract signed by four factions, namely RULE, Cambodian Government, University of Lyon Ⅱ and French Government. The French Government financially pays for dispatch of professors from the University of Lyon Ⅱ, but not for dispatches from other universities. The Center and RULE keep on consulting with different universities for cooperation. There is no restriction on the Center's entering into contracts with other sources. Actually, several contracts exist between the Center and other lecturers in Cambodia, including Cambodians and non-Cambodians. Lectures on the current Criminal Code and Criminal Procedure Code under the French program are conducted by actual magistrates and bureaucrats who graduated and returned from France 2 years ago. Teaching on the new laws is well in progress.

Students at the French program have to pay tuition fees. The money so collected goes to a joint coffer and is used under the joint monitoring of RULE and the Center.

The Center is not dispatching any lecturers to teach at the criminal and criminal procedure law classes of RULE, and not extending any cooperation in the training or lecturing for RULE lecturers. The Center is aware of the fact that lecturers at RULE are not necessarily ready to handle the new

Civil Code and the new Civil Procedure Code, however it is not intervening in the business of RULE by any means in the field of civil law. This is because the Center is also aware of the serious difficulties in making elderly lecturers of RULE to learn and absorb knowledge about the new laws.

Currently, the majority of graduates from France are getting jobs as government officials or bureaucrats, or employed by businesses or organizations that are paying them well. But once these vacancies are filled up, future graduates from France will have to join the teaching force in RULE. French assistance should continue until that starts to happen.

(2) The US Government, American Universities and Individuals

The US Government is not directly offering any assistance in this field. Margaret Lyan is an American scholar who personally helps RULE set up an English program. Just like the French program, students who join this program do not have to register for classes provided by RULE's ordinary program, but they will be conferred a Bachelor's Degree by RULE. In addition, this English program is also open to students from other universities.[13] The English program is like the French program as they both require students to pay for tuition fees.

As of now, there are no overseas study options under the English program. However, students enrolled to this program have been given the opportunity to participate in an annual international law competition outside of Cambodia. They have made good results in recent competitions.

13) In case of students coming from a different university, they will have to take classes at the other university as well if they want to obtain a degree from that university. In Cambodia, it is not unusual that a student can be enrolled to university A's morning courses and university B's afternoon courses at the same time, and thus actually admitted into two or more universities at one time.

(3) The Japanese Government, Japanese Universities and Individuals, etc

The Japan Jurists League for Cambodia

Since 1994, the Japan Jurists League for Cambodia, and NGO established in Japan, has been implementing different activities at the Faculty of Law and Economics of the University of Phnom Penh. Initially, it provided moot court trials to students at the Faculty and later dispatched Japanese scholars and practicing lawyers to deliver lectures on criminal law, criminal procedure law, civil law, civil procedure law and intellectual property law to the students once or twice every year. In addition, it has organized several workshops together with RULE lecturers on the civil-law related subjects. Apart from these lectures and workshops, it has also produced teaching materials which are Khmer translation of textbooks on Japanese criminal and civil laws written by Japanese scholars.

Former JICA Legal Experts

Some Japanese lawyers who used to work as JICA legal experts in Cambodia have been initiating workshops with civil law lecturers at RULE on individual and volunteer basis.

Nagoya University Graduate School of Law

In 2002, the Center for Asian Legal Exchange (CALE) was established by an ordinance of the Japanese Ministry of Education to serve as a center for legal assistance and research in laws and politics of Asian countries. CALE was therefore set up as a national center for legal education assistance initiated by Japanese universities. CALE and Nagoya University Graduate School of Law (GSL) have been playing important roles in the

provision of legal education assistance. To facilitate admission of foreign students and training of foreign legal scholars in Japan, the Graduate School of Law introduced education program in Japanese law to be taught in English for the convenience of foreign students. But, "if we consider law as a system which includes also people who operate the law itself, we see the emergence of a philosophical question whether it is possible to understand law without being able to know the society, culture and language of the country concerned."[14] Therefore, with a view to realizing "Japanese law education through Japanese language" for non-Japanese students, the GSL and CALE have in recent year strengthened cooperation with universities at the transitional countries to establish locally a "Center for Education and Research of Japanese Law", which provides education in Japanese language and Japanese law. In Cambodia, such Center was established inside RULE in September 2008, as the fourth center of its kind having been established up to that point of time.[15] At the Center inside the host university, education of Japanese language and Japanese law takes place in parallel with the courses offered at the host university. Japanese language classes start in the first year and Japanese law classes start in the third year. Some students are given the opportunity to participate in the Summer seminar for students from the Center for Education and Research of Japanese law (currently in four countries). Nagoya University will give priority to the admission of the top students graduated from these Centers so as to enable their pursuance of further education at the Graduate School of Law of Nagoya University.

14) Cited and unofficially translation of the Japanese version written by Aikyo, supra, p.149.

15) Other centers had been established in Tashkent State Institute of Law in Uzbekistan in 2005, Mongolian National University School of Law in 2006, and Hanoi Law University in 2007.

This is aimed at training foreigner scholars who will excel in Japanese law in the future.

Even though no entrance exam is required for admission into RULE, students wanting to enroll in the courses offered by the Center are required to pass an entrance exam designed exclusively for the admission into the Center. For four years, those who pass the exam successfully will then have to attend lectures at the Center in parallel with their participation in other lectures organized by the Faculties of RULE. Students will get only a Bachelor Degree from RULE after their graduation from this Japanese program.

The Center does not collect tuition fees from students who participate in its courses.

(4) South Korea

In recent years, together with collection and analyses of legal information of Asian countries mainly by the Korea Legislative Research Institute (KLRI),[16] South Korea is also actively developing assistance projects in the field of law.

The Korea Legislative Research Institute is engaging in legal assistance together with 12 other institutions, including the Supreme Court of Korea, the Korean International Cooperation Agency (KOICA), the Korean Stock Exchange (KSE), etc. Apart from its projects in Cambodia, including the policy-making assistance in the field of IT and the drafting assistance for a Radio Law, as well as invitation of trainees from Cambodia into training programs for regional legislative experts, etc, it is hosting an Asian infor-

16) This is a research institute funded by the Korean Government. It is a research institution, not educational.

mation networking project, known as the Asia Legal Information Network (ALIN), established for the purpose of legislative cooperation and exchange among countries in Asia. Since 2008, ALIN has been promoting projects to facilitate exchange; collecting, filing and digitalizing information about laws and regulations of Asian countries; translating, analyzing some main Asian laws and regulations to make them available for use by governments, public institutions, entreprises, universities and the general public. The efforts are not confined to provision of information on laws and regulations, they also develop supporting projects for research on the Korean and other Asian legal systems for the purpose of promoting cooperation with other countries.

3. Legal Education and Foreign Assistance

(1) Many former students of RULE who graduated from the French courses or came back from the Master courses in France are now working as officials in the central governmental offices or major Cambodian businesses. It is therefore understandable how important these courses are for Cambodian society. France started its involvement in Cambodia's legal education earliest among other foreign donors and restarted its presence in this field soon after the Paris Peace Agreements. As a result it has sent many lecturers to legal education institutions in Cambodia. However, as described in Section II above, the fact that problems remain deep-rooted in Cambodia nowadays just obviously points out how difficult it is to build human resources by means of legal education.

The French project now chooses not to become a kind of training of the trainers program for lecturers in RULE may be understood as a conclusion they finally came to after years of experience. With regard to the end of

French assistance for legal education, Mousar argues that it should last until the graduates have filled up job vacancies elsewhere which offer higher incomes and the excellent graduates would therefore have to choose to be recruited by legal education institutions full-time. It is arguable that as a product of their experience, the French experts learn of a definite principle that a recipient's will cannot be changed just because of the donor's efforts. For those who are thinking of terminating such assistance, it is necessary to take this point seriously into consideration.

In contrast to the French assistance which seeks to introduce continental legal thoughts into Cambodia, the English courses introduce common law way of thoughts into Cambodian legal education. It is arguable that scope of legal education has been expanded. If we consider universities as being not only a place for education but also a platform for the pursuit of truth, the English course may lead to diversity of knowledge in Cambodia. This deserves compliments for the important role it has been playing in legal education.

In either of the courses, students of RULE enrolled in the programs are not affected by the curriculum of RULE. Since these programs have their own curriculums to follow and are not subjected to interference from the host university, it is hardly possible to claim that these programs render sufficient respects to the culture of the recipient institution or that they create no feeling of inappropriateness with regard to the autonomy of the host university. In contrast, the Japanese Law Center program carried out by Nagoya University seems to be observing these effects better due to its requirement that student take Japanese courses as part of, or in parallel with, the curriculum of the host university.

The Japanese law courses run by Nagoya University do not put extra financial burden on enrolled students. Therefore, it offers the advantage of an expanded education not only to excellent students or students who are financially supported by the State, but also other students. However, since enrolled students have to take courses at the Center at the same time as they are completing course requirements of RULE, they have to accept a physically and mentally exhausting study program. It may be a laborious program for students.

Compared to students enrolled to the French courses, students graduated from the Japanese program currently have very limited opportunity to pursue further education in Japan. Although this is because of budgetary capacity of the program, it may reduce future students' incentive to join in the program.

(2) Since legal education and research also enables pursuit of truth and creation of views, assistance to legal education and research will naturally end up in assistance to the pursuit of truth in the field of law. Can foreign assistance in legal education and research therefore become assistance for "education and research for truth and creation of views"? It is inevitable that a serious challenge exists for two closely related reasons. First, the "search for truth and creation of views" mainly emerges from internal endeavors of the recipient; and second, assistance is usually carried out with an inevitable aspect of a specific pattern or nature of value judgment borne by the donor. These are the challenges confronting international assistance in legal education and research.

If one has to deliberate on foreign assistance in this real context, it is necessary to turn away from the element of internal mindset and pay more attention to some objective elements in the relationship between the recipient and the donor. The most important subjective element, i.e. the recipient's

willingness to acquire knowledge, is closely related to the internal state of mind of the recipient and there is no genuine way for external interference. However, when one looks into the causes leading to the present situation, there is one external cause to refer to, namely the concentration of all assistance projects on a single institution RULE. As a result of this concentration, RULE is in a position to receive constant assistance from different foreign sources that flow into Cambodia. This "favored" position therefore may have compromised its sense of urgency in competing with other institutions in developing academic contents. Due to the active foreign assistance, improvement of education contents is made substantially possible. Therefore, the institution feels not urgent need to exercise the so-called "entrepreneurial endeavors" with regard to improvement of education contents. The single concentration of foreign assistance on RULE has forestall the thriving of other universities. It may have left out the chance for a positive rivalry as genuine competitors between RULE and other universities.

In this context, it is not only a problem of lack of assistance to other national universities. If one considers the important roles which private universities are there to play, it is necessary to point out the problems caused by foreign assistance not having given a part of the favorable chances to the development of private universities.

Ⅳ. The Way for International Assistance in University Legal Education

1. Difficulties in Legal Education and Research

There may be no objection to the argument that the key to success for an assistance project is based on the active will and efforts of the recipient to

make the best use of the assistance provided by the donor. However, since it is most relevant to the internal mindset of the individuals, assistance in legal education and research has its own difficulties. It is arguable that the sophisticated attitude shown by the French counterpart in the French courses project mentioned above is suggesting a very important approach.

Moreover, proper evaluation of foreign assistance in legal education is not possible if it is required to be done soon after the assistance project has just started or soon after the project ends. Although evaluation at an early stage is desirable for the sake of securing government's accountability towards the citizens whose tax-money has been used for ODA projects in a foreign country, the government should also make better efforts to inform the tax-payers society of the meaning of assistance in legal education and the difficulty or problems in making early evaluations. Since technically speaking, assistance in this field cannot be properly evaluated at an early stage, there should not be a rush for decisive actions based on early project evaluation.

In response to the issues mentioned in Section III above, the previous two paragraphs are leading us to the following point of views:

As mentioned in (2) above, universities are educational institutions and at the same time a place for "search for truths and creation of views". In legal studies, in order to convey such message, the contents of the studies cannot escape from some philosophical issues, including the questions of human right and democracy. One should say that assistance in legal education is an area of its own right and should not be simply a part of the legal technical assistance project based on a narrowly established value judgment.

This being said, this is not to deny the substantial importance of the "training of trainers" approach which Japan is taking in its ongoing joint project with RULE. Given the current lack of qualified human resources in

the legal field, there is no question that such project is urgent and necessary within the framework of legal assistance.

2. Elements to be Considered with regard to Foreign Assistance

(1) Securing the Diversity inside the Recipient's Context

The current concentration of foreign assistance on RULE is creating a hindering effect. Therefore, it is advisable to consider ways to offer chances for the development of educational quality and academic research in other universities as well, in order to enable inter-university competitions. It is desirable to build up a system through which foreign assistance will have impacts not only on national universities with a law faculty but also on private universities which have a law faculty.

Private universities play an important role as institutions that are self-reliant and independent from the State, enabling proliferation of educational institutions inside Cambodia. It is rational to secure multiple beneficiary universities among the recipients of assistance. The need of private universities to enjoy the fruits of assistance is not less than that of public universities. Since private universities need to gather more students for business purposes, they may have no choice but to compile a curriculum that can attract students. It is more important for them to be able to compete with other university in terms of education contents. For this reason, there is stronger need for private universities to share the benefits of legal education assistance.

It is not without question for ODA to target private universities directly, as a matter of offering foreign aid. There is a need for further deliberations in this problem.

It may be possible to try to create chances for multiple universities having a law faculty to receive foreign assistance by means of establishing a national center inside one national university of Cambodia, to serve as the hub for all aid recipients. This will help substantially expand the number of target institutions for assistance and increase the number of target institutions that can benefit from the fruits borne by the assistance.

(2) Diversity on the Part of the Donor

Based on what has been mentioned in (1) above, there is a question of whether it is possible for a cooperation partner to provide assistance in the field of legal education and research. If yes, what are the issues to be taken into consideration in order to enable successful operation of such type of legal education and research assistance project? As a problem on the part of the donor, there must not be a unilateral imposition of values on the recipient. Although this rule has generally been stated with regard to the provision of legal assistance, its application should be emphasized even more here. Imposition of any specific culture or thoughts on the recipients has been a matter of concern and there is a need to construct a system of guarantee to ensure that it would not happen.

In order to make this possible, assistance projects for education and research should be independent from the legal assistance projects of the past and be put exclusively under the jurisdiction of a different institution. In the case of Japan, it should not be within the jurisdiction of the Ministry of Justice which has been in charge of implementing legal assistance projects, but placed within the jurisdiction of the Ministry of Education, Culture, Sports, Science and Technology.

In addition, there is a risk that the donor would subjectively believe it is doing a favor to the recipient. This self-righteousness of having done something good must be avoided by all means. To do that, it is primarily necessary to secure multiplicity and diversity in sources of information for the recipient. It is hardly possible to get rid of self-righteousness if the donor is the only one to develop exclusive assistance project. It is necessary to set up a platform in the environment of mutual collaboration or mutual checks among multiple donors.

In order to secure multiplicity and diversity of values and to avoid self-righteousness, coordination inside the donor country is necessary, i.e. by soliciting cooperation from the numerous universities, education institutions and NGOs and securing their chances of intervention into the core institutions of the donor countries that carry out assistance projects. Then, at the international level, there is a need to build up international cooperation among donors. Mostly, in international cooperation, multiple donors work together in separate activities of one single area of assistance. This can be a cause of confusion for the recipients. It is true that in order to avoid this problem, the donors need to spend much time and make enormous efforts for the sake of coordination. Considering the advantages of this international coordination and the difficulties in practice, donors may try to set up a system that enables information disclosures among themselves with regard to their respective foreign legal assistance, and enables confirmation checks at all time. This system may help achieve, to a certain extent, the goals indicated above.

From these discussions, one has to admit that establishment of the Center for Asian Legal Exchange (CALE), by Nagoya University based on an ordinance of the Japanese Ministry of Education as a national center for

legal education assistance is extremely significant in the Japanese context. It is further expected that in its function as a national center, CALE will invite many more Japanese universities and other relevant institutions to join in the provision of assistance to promote legal education elsewhere.

In addition, viewing from an international perspective, the Asian Legal Information Network (ALIN) which is being developed in recent years will also become a means to strengthen the development of members mutually, as a reliable institution to serve the duty of mutual collaborations and checks.

Chapter 6 - Development of Securities Market in Cambodia: Practitioners' Notes

Ⅰ. Introduction

Taking benefit from the recent relentless economic growth of the country, the Royal Government of Cambodia, only recently, decide to launch its very first stock exchange. Moreover, the Royal Government of Cambodia sees the establishment of a stock exchange as an opportunity to not only set a benchmark of Cambodia's entrance into the modernized world economy and trade but to also help the country, in addition to the current investor-friendly-business environment, to attract more foreign investors, including FDI and private equity funds, and large scale corporations, into Cambodia.

Furthermore, investors have encountered serious difficulties in term of searching for capital to finance their investment project in Cambodia. Traditionally, banks have been the main source of funding, despite the fact that bank loans are costly (commercially lending rates range from 9% to 15%) and very restrictive and selective (security in the form of immoveable property as collateral is required). Hence, the establishment of the Kingdom's bourse will certainly create numerous opportunities for commercial ventures to access capital financing and mobilize funding more easily.

Providing that Cambodia is relatively new to the world of securities market, there are undeniably a lot of works to do in order to develop a proper of securities market for Cambodia. With the assistance from various development partners, more particularly our Korean counterpart in the setting up of a

securities market operator for Cambodia, and by learning from experiences of our neighboring countries, Cambodia is confident and optimistic that she can develop a safe and sound environment of securities trading for the investors.

This research paper aims to provide a general overview of the environment surrounding the newly established Cambodian securities market by looking at its emergence (Section I), the participations of the keys players (Section II) and the challenges encountered at the present time and in the future to come.

Ⅱ. Emergence of the Securities Market

This section aims to provide a general understanding of the environment surrounding the Cambodian securities market by firstly looking briefly at the history and certain important dates in relation to the establishment of the market (A) and secondly, the existing major laws and regulations which have been adopted so far (B). Lastly, this section also highlights certain difficulties encountered in term of conflicting legal issue as well as issues during the practice (C).

1. Setting Up of Cambodian Securities Market:

The genesis of the establishment of capital market for Cambodia was dated as far as year 1995 under the initiative of the Second Prime Minister of the Royal Government of Cambodia on its first mandate. The plan of establishing Cambodian capital market was materialized by the draft law on capital market.[1] However, this plan was disrupted and abandoned due to

1) HASH Veasna, *Toward the Establishment of Stock Exchange in Cambodia: Achievements*

the political instability in the country and the financial crisis in the Asian region in 1997. Moreover, this plan was further delayed due to the fragility and immaturity of the Cambodian banking system; however, the establishment of capital market had been a priority in the government's agenda. In view of introducing a securities market for Cambodia, the Royal Government of Cambodia needs to strengthen its banking system and construct a firm legal infrastructure. In 1998, the Royal Government of Cambodia took one monumental step in making an important reform to Cambodian banking system. One of the main reforms was to steeply increase the minimum capital requirement of commercial banks from USD 5 (Five) million to USD 12.5 (Twelve Decimal Five) million, which greatly affect numerous banks being forced into liquidation. However, beside the decrease in number of banks, the banks became financially more stable and independent. As a result, Cambodian banking system as a whole became more solid and gradually developed.

In 2000, the idea of establishing capital market was introduced again in the Government's Financial Sector Blueprint for Year 2001-2010[2] prepared by the Royal Government of Cambodia with the assistance of Asian Development Bank ("ADB"). According to this Financial Sector Blueprint, the capital market development plan consists of 03 (Three) sequenced development goals: (i) preparatory work to enable suitable environment for capital market, (ii) establishment of foundation for capital market by putting in place necessary infrastructure related to securities trading as well as necessary legal and procedural framework, and (iii) systematic development

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and Challenges, First Edition, Phnom Penh, 2007, p. 4.

2) Financial Sector Blueprint 2001-2010 was also referred to as "Vision and Financial Sector Development Plan for 2001-2010", which was adopted the Council of Ministers at its plenary session meeting on August 24, 2001.

of capital market. This Financial Sector Blueprint was updated for the first time in 2007 and replaced by the Financial Sector Development Strategy for Year 2006-2015 ("FSDS 2006-2015")[3], focusing on the development of banking sector (banking and microfinance) and non-banking (insurance and financial markets). The FSDS 2006-2015 was updated once again in 2012 and was replaced by the Financial Sector Development Strategy for Year 2011-2020 ("FSDS 2011-2020")[4], which reiterates once again the importance of securities market by developing strong legal framework to ensure the solvency of the market, good corporate governance, and dispute resolution. This policy also looks into promoting public awareness through educations, and trainings; and examines the possibility of introducing new financial products, including bonds, commodity, future, etc., to the Cambodian securities market.

Prior to the adoption of FSDS 2006-2015, on May 24, 2006, the Deputy Prime Minister, Minister of Economy and Finance of Cambodia entered into a Memorandum of Understanding (MOU) with the Minister of Finance and Economy of Korea at the ASEAN+3 Economic Ministers' Meeting in India. This MOU contemplates the agreement of both parties to cooperate in order to promote the development of securities sector in Cambodia. On November 20 of the same year, the Deputy Prime Minister, Minister of Economy and Finance of Cambodia entered into another MOU with the Korea Exchange (KRX) on the cooperation in establishing a securities exchange for Cambodia. The "Plan to Establish Securities Market in Cambodia" was official put to an implementation on September 06, 2007 by Samdech Akka Moha Sena Padei

3) FSDS 2006-2015 was adopted at the plenary session meeting of the Council of Ministers on March 26, 2007.

4) FSDS 2011-2020 was adopted at the plenary session meeting of the Council of Ministers on November 25, 2011.

Decho HUN Sen, Prime Minister of the Kingdom of Cambodia. One month after the official announcement, the Law on the Issuance and Trading of Non-Government Securities was promulgated (see point B below). On July 23, 2008, the Securities Exchange Commission of Cambodia[5], being the securities regulator, was established; while the official inauguration ceremony took place on April 29, 2009.

On March 23, 2009, the Joint Venture Agreement on the Establishment of Cambodia Securities Exchange Co., Ltd. was entered into between the Ministry of Economy and Finance of Cambodia and Korea Exchange. Cambodia Securities Exchange (CSX) was licensed to operate as the securities market operator, securities depository operator and clearance and settlement facility operator of the Cambodian bourse by the SECC on February 28, 2011 whereas its official inauguration came five months later in July.

2. Existing Legal Infrastructure:

The securities market of Cambodia is currently governed by two major laws: (i) the Law on Government Securities dated 10 January 2007 (the "Law on Government Securities")[6] and (ii) the law on the Issuance and Trading of Non-Government Securities dated 19 October 2007 (the "Law on the Issuance and Trading of Non-Government Securities").[7]

The Law on Government Securities offers a framework for efficient issuance and management of government securities in order to ensure the repayment of Government's financing at the lowest cost possible of securities

5) The SECC was initially known as "Cambodia Securities and Exchange Commission" (CSEC).

6) Law on Government Securities promulgated by law no. NS/RKM/0107/001 dated 10 January 2007.

7) Law on the Issuance and Trading of Non-Government Securities promulgated by law no. NS/RKM/1007/028 dated 19 October 2007.

having medium or longer term, and to contribute to the development of securities market of Cambodia. On the other hand, the Law on the Issuance and Trading of Non-Government Securities governs the transactions of non-government securities i.e. equity securities in the Kingdom of Cambodia. At this point in time, we do not see any development on the part of government securities as the Royal Government of Cambodia is focusing more on developing and promoting the equity securities market.

The Law on the Issuance and Trading of Non-Government Securities constitutes the core and main pillar of the development of securities market in Cambodia. Firstly, it establishes and empowers the SECC as the sole securities regulator, and it regulates the conduct of the market including the securities market operator, facilities operators, and agents. Secondly, it prescribes the general principles on the mechanism and process of issuing and offering of securities through initial public offering (IPO) and/or public offering. Thirdly, the law prescribes for requirement for licensing of securities intermediaries (securities firms and representatives) and accreditation of other professionals involving in the public offering process including the accounting firms, lawyers, and valuation companies. The law further provides for the principles of corporate governance, prohibition of behaviors such as insider trading, false trading, and market manipulation. Lastly, this law also provides for mechanism for dispute resolutions, sanctions and penalties in the event of breach.

The Law on the Issuance and Trading of Non-Government Securities is further implemented by the Sub-decree[8] on the Implementation of the Law on the Issuance and Trading of Non-Government Securities dated 08 April

8) Law on Organization and Functioning of the Council of Ministers, art. 13 (1994): A "sub-decree" is an executive regulation adopted by the Council of ministers of the Royal Government of Cambodia and signed by the Prime Minister being the head of the Government.

2009 (the "Sub-decree on Implementation").[9] The Sub-decree on Implementation provides in further details of the mechanism and process of doing public offering and issuance of securities by the issuance company. In its chapter 3, the Sub-decree on Implementation details the conduct and the functioning of the securities market in Cambodia including the condition, the qualification and the licensing of such securities market. It further sets out the details requirements and criteria of securities firms and representatives for obtaining requisite licenses before they can provide their services in relation to securities market. Moreover, the Sub-decree also develops in more details about the corporate governance and control in relation to the issuing companies, the prescribed forms and fees in relation to the application for public offering and registration of disclosure documents as well as the penalties in the event of breach.

On top of the above described Law and Sub-decree, in order to ensure the effectiveness and the proper operation of the market, the SECC, as a sole regulator of securities market, has progressively adopted and issued important regulations to specifically govern various aspect of the market such as follows:

- Prakas[10] on Public Issuance of Equity Securities dated15 January 2010[11] : this Prakas provides for a very comprehensive procedure and mechanism for the purpose of obtaining approval for the registration of disclosure document and issuance of equity securities to the public.

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9) Sub-decree on the Implementation of the Law on the Issuance and Trading of Non-Government Securities no. 54 ANKr. BK dated 08 April 2009.

10) Law on Organization and Functioning of the Council of Ministers, art. 28 and 29 (1994): A "prakas" (proclamation) is an executive decision made at the ministerial ranking institution and signed by relevant minister. Prakas is hierarchically inferior to the Constitution, law and sub-decree to which it refers.

11) Prakas on Public Issuance of Equity Securities no. 001 SECC dated 15 January 2010

- Prakas on Corporate Governance for Listed Companies dated 15 January 2010[12] : the purpose of this Prakas is to set out requirements and an acceptable standard of corporate governance for companies listed on the exchanges to ensure the transparency and accountability vis-à-vis the stakeholders.
- Prakas on the Prime Principle of the Operating Rules of a Securities Market, a Clearance and Settlement Facility, and a Securities Depository dated 18 March 2010[13] : this Prakas was adopted for the purpose of setting out the major principles of the operating rules of the securities market operator, the clearance and settlement facility operator and the securities depository licensed by the SECC to undertake their activities in Cambodia.
- Prakas on Corporate Governance for Listed Public Enterprises dated 15 December 2010[14] : Regardless of the fact that the public enterprises are to a certain extend owned by the State, this Prakas requires the practice of corporate governance within such entities once they go public or get listed on the exchange in order to ensure – as good as that of the listed private companies – the transparency and accountability toward its own stakeholders.
- Prakas on the Implementation of the Membership Rules dated 03 May 2011[15] : the purpose of this Prakas is to endorse the rules setting out

12) Prakas on Corporate Governance for Listed Companies no. 002 SECC dated 15 January 2010

13) Prakas on the Prime Principle of the Operating Rules of a Securities Market, a Clearance and Settlement Facility, and a Securities Depository no. 004 SECC.PrK dated 18 March 2010

14) Prakas on Corporate Governance for Listed Public Enterprises no. 013/10 SECC.PrK dated 15 December 2010

15) Prakas on the Implementation of the Membership Rules no. 003/11 SECC.PrK dated 03

by the Cambodian securities market operator in relation to the application for membership, types of membership, membership fees, qualification of members, revocation of membership, rights and obligations of members, control and sanction of members, etc.

- Prakas on the Implementation of the Listing Rules dated 03 May 2011[16] : the purpose of this Prakas is to endorse the listing rules required by the Cambodian securities market operator; the rules of which the listing companies need to abide in order to be able to list their issued securities at the Cambodian exchange.
- Three (03) Prakas on the Implementation of the Operating Rules of each operator (all of which dated 03 May 2011): Securities Clearance and Settlement[17], Securities Depository[18], and Securities Market.[19]
- Prakas on the Code of Conduct of Securities Firms and Representatives dated 27 June 2011[20] : this regulation prescribes for the code of conduct according to which the securities firms, including underwriter, broker, dealer and investment advisor, and their representatives shall operate or conduct their business activities in order to ensure the maximum of integrity and protection of their clients' interest.

May 2011

16) Prakas on the Implementation of the Listing Rules no. 004/11 SECC.PrK dated 03 May 2011

17) Prakas on the Implementation of the Operating Rules of the Securities Clearing and Settlement Operator no. 005/11 SECC.PrK dated 03 May 2011

18) Prakas on the Implementation of the Operating Rules of the Securities Depository Operator no. 002/11 SECC.PrK dated 03 May 2011

19) Prakas on the Implementation of the Operating Rules of the Securities Market Operator no. 006/11 SECC.PrK dated 03 May 2011

20) Prakas on the Code of Conduct of the Securities Firms and Representatives no. 008/11 SECC.PrK dated 27 June 2011

- Prakas on Corporate Disclosure dated 27 April 2012[21] : this Prakas was recently passed for the purpose of promoting and strengthening the standard of corporate governance of the listed company as well as to ensure the transparency to public investors with respect to information and business activities of the company. This Prakas provides for requirements, mechanism, procedure and obligations of the listed company and relevant persons to disclose the corporate information to the public.

Further to the above listed regulations, the SECC has issued various Prakas on the licensing, granting of approval, registration and accreditation of various key players participating in the market including (i) securities firms and representatives[22] ; (ii) securities market and other facilities operator i.e. securities clearance and settlement operator and securities depository[23] ; (iii) other agents providing services in relation to securities i.e. securities registrar, securities transfer agent, and paying agent[24], and cash settlement agent[25] ; and professional accounting firms[26] ; (iv) valuation companies[27] ; etc.

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21) Prakas on Corporate Disclosure no. 002/12 SECC.PrK dated 27 April 2012

22) Prakas on the Licensing of Securities Firms and Securities Representatives no. 009 SECC dated 18 November 2009

23) Prakas on the Grant of Approval to the Operator of a Securities Market, the Operator of a Clearance and Settlement Facility, and the Operator of a Securities Depository no. 011 SECC dated 01 December 2009

24) Prakas on the Registration of Securities Registrar, Securities Transfer Agent and Paying Agent no. 009/10 SECC.PrK dated 30 June 2010

25) Prakas on the Accreditation to the Cash Settlement Agent no. 008/10 SECC.PrK dated 28 June 2010

26) Prakas on the Accreditation of Professional Accounting Firm Providing Professional Services in the Securities Sector no. 005 SECC/PrK dated 18 March 2010

27) Prakas on the Accreditation of Valuation Company Providing Services in Securities Sector no. 012/10 SECC.PrK dated 15 December 2010

On 25 March 2009, the Ministry of Economy and Finance established a technical working group to study the possibility and strategy in relation to tax incentive policy in order to promote securities sector development in Cambodia.[28] On 22 April 2011, the Royal Government of Cambodia issued a sub-decree[29] implementing the tax incentive policy for the benefits of the issuing and listing companies and public investors. This tax incentive policy is for the purpose of promoting and encouraging more companies to get listed in the securities exchange and the public investors to actively participate in the Kingdom's bourse.

Apart from securities-specified laws and regulations, the Royal Government of Cambodia has tried to establish a strong legal infrastructure in order to support as well as to promote the development of securities market. Strong legal infrastructure helps providing not only the listing companies but also public investors, including foreign investors, more confidence in participating in Cambodian securities market. So far, Cambodia has adopted certain essential laws related to the securities market, namely, law on commercial arbitration[30], law on secured transactions[31], law on insolvency[32], law on anti money laundering and terrorism financing[33], law on anti corruption[34], law on financial lease[35], etc.

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28) Prakas on Technical Working Group For Studying on Tax Incentive Policy to Develop Securities Sector in Cambodia no. 288 MEF/SHV dated 25 March 2009

29) Sub-decree on Tax Incentives in Securities Sector no. 70 ANKr./BK dated 22 April 2011

30) Law on Commercial Arbitration promulgated by law no. NS/RKM/0506/010 dated 05 May 2006

31) Law on Secured Transaction promulgated by law no. NS/RKM/0507/012 dated 24 May 2007

32) Law on Insolvency promulgated by law no. NS/RKM/1207/031 dated 08 December 2007

33) Law on Anti Money Laundering and Terrorism Financing promulgated by law no. NS/RKM/0607/014 dated 24 June 2007

34) Law on Anti Corruption promulgated by law no. NS/RKM/0410/004 dated 17 April 2010 amended by law no. NS/RKM/0811/017 dated 01 August 2011

35) Law on Financial Lease promulgated by law no. NS/RKM/0609/008 dated 20 June 2009

3. Difficulties Encountered and Harmonization with Existing Laws and Regulations:

The establishment of Cambodian exchange as well as the emerging of new legal framework pertaining to the securities sector undoubtedly brings certain difficulties to the implementation. Generally, the most common concern with any new emerging laws and regulations would be whether or not they are inconsistent and contradictory to the existing laws and regulations. An important amount of work of harmonization needs to be done in the event that such laws and regulations are found to be inconsistent or contentious with the existing ones, and more particularly when new laws or regulations are established failing to take into consideration of the existing legal framework which includes not only the hard law but also the soft law. The issue would be even more controversial and polemic when the law is not clear and incomplete which leaves space for various interpretations.

That being said, the legislator and the securities market regulator, the SECC, have been doing a very great job in architecting one complete and very comprehensive legal framework for Cambodian securities market. Moreover, the SECC has been working closely with other governmental authorities in charge of other area of financial sectors, i.e. banking and insurance, in coordinating and harmonizing with their respective existing legal frameworks in order to build one strong legal infrastructure for Cambodian financial system having banking, securities and insurance as the main pillars.

Notwithstanding the above, the implementation of certain provisions is undeniably found to be difficult or controversial with the existing norms or way of practice of certain public authorities with respect to their area of law.

To illustrate the first case of difficulties, there has been an objection from the Bar Association of the Kingdom of Cambodia ("BAKC") on the requirement of having registered lawyers to obtain further approval from the SECC in order for them to be able to provide legal services in the securities sector. Such registered lawyers are required to pass an accreditation exam and to satisfy other additional conditions on knowledge and experience on securities; while the Law on Bar[36] provides for the freedom of lawyers to practice law in their full capacity in any area of law *(see more discussion on this in Section II. B. 5 on Lawyers)*.

Another case of controversy is the determination of par value of shares to be offered to the public in the IPO. According to the Law on Commercial Enterprise, the law specifies that "in the event that the company's memorandum and articles of association ("M&A") fails to specify the number and the price of shares, the company shall issue a minimum of 1,000 (One Thousand) shares with a par value of not less than KHR 4,000 (Four Thousand Khmer Riels) being equivalent to USD 1 (One US Dollar) per share".[37] It is clear from this provision that the company is free to determine the par value of its share. However, not withstanding the foregoing, it has always been the practice of the Ministry of Commerce ("MOC"), being in charge of the registration of business companies in Cambodia, that the company who wish to incorporate and register shall

36) Law on the Bar (Statute of lawyers) promulgated by law no. NS/RKM/0895/06 dated August 22, 1995

37) Law on Commercial Enterprise (2005), art. 144.

have a number of shares of not less than 1,000 (One Thousand) with a par value of not less than KHR 4,000 (Four Thousand Khmer Riels). The MOC at its full discretion interprets the above provision as the minimum requirements of the amount and par value of shares. The company who wishes to go public finds this requirement as arbitrary and unacceptable because with an initial par value of shares of USD 1, the company will have to sell the issued securities at a very high price at IPO. Given the current economy of the Cambodian people, the company will face problems in selling the shares.

Issues also arise with respect to the restriction of foreign ownership over land in Cambodia.[38] In order to ensure the genuineness of the IPO and the strong and honest commitment of the listing company to the project and to the public, it is of the SECC duty and responsibility to examine and scrutinize each application of IPO. The SECC need to make sure that the investment made by the public with the company is safe and secured, and that the company does not take benefit from the market to the detriment of the public. In order to address this concern, the SECC demands the company to have strong attachments to its business in Cambodia. The SECC often in time requires the company to provide proofs that it has a lot of asset, more particularly immoveable property, in Cambodia, which the SECC believes to tie the company tight to its commitment on the promised project. However, this policy from the SECC causes issue for companies that do not have Cambodian nationality.[39] This might possibly be an

38) Constitution of the Kingdom of Cambodia, art. 44: "all persons, individually or collectively, shall have right to ownership. Only Khmer legal entities and citizens of Khmer nationality shall have the right to own land".

39) Law on Commercial Enterprise (2005), art. 101: a company is deemed to have Cambodian nationality on the condition that more than 51% (fifty one percent) of shares having voting

undesirable slow down to the SECC main agenda, which is to promote the development of Cambodian securities by encouraging more companies to get listed, especially foreign companies as the majority of local companies are still family-type businesses and are not ready to transform themselves into public companies. To alleviate the difficulties, the SECC agrees to accept long-term leasehold rights (or also known as finance lease) instead of free-hold(ownership) rights. However, the SECC requires the company to have such long-term lease registered with the land office albeit such registration is not compulsory according to the Cambodian Civil Code.[40)]

Additionally, for reason that Cambodia is new to securities exchange, it is very challenging for the company to fully satisfy all the requirements and qualifications as prescribed for by securities laws and regulations. Moreover, it is rather unreasonable for the SECC to strictly implement all the requirements to its fullest extent. As a matter of fact, the SECC has been very understanding and accommodating as well as cooperative in helping the company with the legal and regulatory requirements.

Ⅲ. Participations of Key Players in the Market

The success of a securities market does rely on various key players who respectively contribute to the proper conduct of the market. These key players are: the SECC, as the regulator (A); various professionals (B); the listing companies (C); and public investors (D).

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right is held by natural or legal person of Cambodian nationality and that such company have place of business or registered office in the territory of the Kingdom of Cambodia.

40) Civil Code of Cambodia (2007), art. 246.

1. Securities and Exchange Commission of Cambodia

The Securities and Exchange Commission of Cambodia was established on the 23rd of July 2008 by the Sub-decree no. 97 ANKr. BK dated 23 July 2008[41] pursuant to the Law on the Issuance and Trading of Non-Government Securities. As the regulator of the market, the Law vests the SECC with the power to regulate and supervise the securities market (both for the government and non-government securities) in the Kingdom of Cambodia; to enforce policy with respect to the market; to set out the requirements and conditions for the granting of approvals to the operators, for the licensing of the securities intermediaries and representatives, to act as supervisory institution to examine and resolve any complaints made against decisions made by licensed entities, as well as to determine and adopt policies in order to promote development of securities market of Cambodia.[42]

According to the Law and the sub-decree on its functioning and organization, the SECC comprises of six (06) departments[43] and an internal audit unit which report directly to the Chairman of the SECC, being the Minister of Economy and Finance of Cambodia.[44] The roles of the six (06) departments are as follows: (ⅰ) department of administration and finance, (ⅱ) department of research, training, securities market development and international relations, (ⅲ) department of securities issuance supervision, (ⅳ) department of securities market supervision, (ⅴ) department of securities

41) Sub-decree on the Functioning and Organization of the Securities and Exchange Commission of Cambodia no. 97 ANKr. BK dated 23 July 2008

42) Law on Issuance and Trading of Non-Government Securities, art. 7 (2007)

43) Sub-decree on the Functioning and Organization of the SECC, art. 5 (2008)

44) Sub-decree on the Functioning and Organization of the SECC, art. 12 (2008)

intermediaries' supervision, and (vi) department of legal affairs.

In order to have a strong, organized and reliable market, the SECC, as a sole regulator, has been playing vital role in approving, licensing and accrediting operators, securities firms, and professionals who are all taking important part in the conduct of the market as a whole. SECC is the only entity who has the full authority, vested by law, to make decision and to regulate the market.

Having the responsibility to develop the securities market in Cambodia, the SECC has been very active in promoting public awareness about the securities market. For instance, the SECC has regularly organized workshop and conferences pertaining to any newly issued regulation in order to educate the public as well as concerned professionals. The SECC further encourages and cooperates with the higher educational institutions in including courses on securities market into their syllabus.

In addition, the SECC is fairly open to constructive criticism as it involves public opinion in the process of elaborating new rules and regulations. Evidently, prior to issuance of any regulation (i.e. Prakas), public consultations were organized by the SECC whereby the drafts of the regulations were put for discussion, comments and feedbacks. The SECC will then take into consideration of the criticisms and make rectification and improvement on the said draft regulation. This approach taken by the SECC in establishing securities regulations is welcomed and applauded by the concerned professionals and public.

As a matter of practice, the SECC has been very helpful and cooperative with the professionals during the course of assisting companies preparing for IPO. For instance, understanding the immaturity of the Cambodian market, the SECC has been very understanding in accommodating the

listing companies' request with respect to the fulfillment of certain legal and regulatory requirements. Moreover, the SECC has been very responsive in providing comments, clarifications and advices to the professionals' requests. The SECC is working voluntarily hand-in-hand with our professionals toward the success of the listing of the companies as well as the development of Cambodian securities market.

2. Professionals

Apart from the regulator, the conduct and the on-going operation of the Cambodian securities market are due to the participation of other professionals in the sector as well. The below provides for the description of the qualification and requirement for licensing and accreditation of professionals by the SECC; and the roles and responsibilities of these professionals under the Cambodian law.

(1) Securities Market Operator and Facilities Operators:

According to Cambodian law and regulation on securities, there are three types of "operator"[45] which are the core players of the Cambodian securities market: the Securities Market Operator, the Clearance and Settlement Facility Operator and the Securities Depository Operator.

The Sub-decree on the Implementation of the Law on the Issuance and Trading of Non-Government Securities defines the "Securities Market Operator" as a person who carries out securities market operation such as:(a) providing services to facilitate the market participants in the trading

45) The word "operator" is defined as any person who is approved by the SECC to conduct securities market operation, clearance and settlement facilities and securities depository operation: Sub-decree on the Implementation of the Law on the Issuance and Trading of Non-Government Securities, definition 19 (2009).

activities or in the matching of offers to buy and sell of securities through a place, system or means for the trading of securities either physically or electronically; and (b) any other business activities to be prescribed by the SECC.[46]

Meanwhile, the definition of "Clearance and Settlement Facility" operator is provided in the Law[47] as a person who operates a system that enable the parties to a transaction of sale or purchase of securities to meet their reciprocal obligations, by verifying the details of the transaction and securing the payment of the purchase price to the seller in exchange for the transfer of ownership over the securities to the buyer.[48] Thus, the clearance and settlement facility includes the clearance and settlement of securities, being the transfer and register of title over the transacted securities, and cash, being the settlement of payment of the purchase price.

The Law also defines the "Securities Depository" operator as a person who agrees with another person being the client, to provide the following services, whether or not such client is acting on its own or another person's behalf: (a) to hold or register the legal interest over the securities or other financial instruments on behalf of the client or any other persons to be nominated by the client; (b) to keep/deposit, on behalf of the client or any other persons to be nominated by the client, the securities or any other financial instruments, either in the form of certificate of title or in dematerialized form pursuant to the operating rules of securities depository; or (c) to provide any other services and facilities which are in connection with the provision of services as mentioned in (a) and (b).[49]

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46) Sub-decree on the Implementation of the Law on the Issuance and Trading of Non-Government Securities, definition 20 (2009).

47) Law on the Issuance and Trading of Non-Government Securities (2007)

48) *Ibid*, definition on clearance and settlement facility

49) *Ibid*, definition on clearance and settlement facility

According to the Law, one shall not be allowed to operate as the securities market operator, clearance and settlement facility operator or securities depository operator if such person is not approved by the SECC pursuant to this Law or any other applicable laws (with the exception of the National Bank of Cambodia which may also operate as a clearance and settlement facility or securities depository).[50] The applicant who wishes to operate as securities market operator, clearance and settlement facility operator or securities depository operator, shall submit the application in the prescribed form and pay the regulated application fees to the SECC. The application will be forwarded to and reviewed by the Chairman and members of the board of the SECC . The Director General of the SECC[51] will decide on the grant of approval following the decision of the plenary session of the board of the SECC.[52]

The approval to operate as securities market operator, clearance and settlement facility, and securities depository may be granted by the SECC for either a specified or unspecified period of time. In the event that the SECC grants an approval to an operator for a specific period of time, the approval shall be expired and subject to renewal prior to the expiration of such approved timeframe.[53] However, according to the Prakas, the validity of the approval is not limited for a specific period of time.[54]

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50) Law on the Issuance and Trading of Non-Government Securities, art. 23 (2007)

51) *Ibid*, art. 24

52) *Ibid*, art. 25, para. 1

53) Sub-decree on the Implementation of the Law on the Issuance and Trading of Non-Government Securities, art. 20, para. 1 (2009)

54) Prakas on the Grant of Approval to the Operator of a Securities Market, the Operator of a Clearance and Settlement Facility, and the Operator of a Securities Depository, art. 12 (2009)

In order to obtain the approval from the SECC, the applicant shall fulfill the requirements as set forth in the Sub-decree[55] and the Prakas[56], and certain of which are listed as follows:

a. The applicant shall be a company, which has an appropriate articles of incorporation, and appropriate ownership and shareholder structure. According to the Prakas, the applicant shall be in the form of limited company incorporated and registered in accordance with the Law on Commercial Enterprises or in the form of company, which is governed by the Law on the General Statute of Public Enterprises.[57]
b. The articles of incorporation of the applicant shall be in the form as prescribed by the SECC and shall contain the requisite contents as set forth in article 19 of the Sub-decree, including the corporate nomination and juridical form; business objectives; classifications and number of shares as well as the par value of the share by also specifying the procedure and criteria for evaluating the capital contributed by each shareholder; name, complete address, and the shareholding of each founding shareholder and shareholder holding substantial interest; rights and obligations of shareholders, more particularly, those of the minority shareholders; rules and mechanism provided for controlling and addressing the issues of conflict of interests which possible arises within the company; procedure for disclosing of relevant information to the public; and procedures with respect to the meeting of board of directors and general assembly of shareholders.[58]

55) Sub-decree on the Implementation of the Law on the Issuance and Trading of Non-Government Securities, art. 19 (2009).
56) Prakas on the Grant of Approval to the Operator of a Securities Market, the Operator of a Clearance and Settlement Facility, and the Operator of a Securities Depository (2009).
57) *Ibid*, art. 4.
58) *Ibid*, art. 4.

The Prakas also requires that the registered office of the applicant company be located within the Kingdom of Cambodia.[59)]

It should also be noted that the Prakas requires that the applicant company who wishes to operate as the securities clearance and settlement facility operator or securities depository shall: (i) have an absolute majority of its shares owned by the operator of a securities market; and (ii) have the rest of the shares owned by securities companies, financial institutions or other persons approved by the SECC in the event that the securities market operator is the absolute shareholders.[60)] In addition, the Prakas further restricts the transfer of shares of such applicant company. The transfer of such shares can only be done amongst the securities market operator, the securities companies, financial institutions or other persons approved by the SECC. In any case, the securities market operator shall at all time maintain its minimum shareholding ownership at absolute majority in the applicant company.[61)]

With respect to the capital requirement, the applicant company shall have the minimum capital as follows[62)] :

ⅰ. Not less than KHR 40,000,000,000 (Forty Thousand Million Khmer Riels) being equivalent to USD 10,000,000 (Ten Million US Dollars) in the case of securities market operator;

ⅱ. Not less than KHR 20,000,000,000 (Twenty Thousand Million Khmer Riels) being equivalent to USD 5,000,000 (Five Million US Dollars) in the case of securities clearance and settlement facility operator;

59) *Ibid*, art. 4, point 2
60) *Ibid*, art. 7 para. 1
61) *Ibid*, art. 7 para. 2
62) *Ibid*, art. 4, point 4

iii. Not less than KHR 20,000,000,000 (Twenty Thousand Million Khmer Riels) being equivalent to USD 5,000,000 (Five Million US Dollars) in the case of securities depository operator; and

iv. Not less than KHR 80,000,000,000 (Eighty Thousand Million Khmer Riels) being equivalent to USD 20,000,000 (Twenty Million US Dollars) in the case of the three operators jointly.

Moreover, the Prakas further requires that the member of the board of directors of the applicant company shall comprise of at least 05 (five) members; the organization and functioning, including the roles and responsibilities, of which shall be clearly specified in the company's articles of incorporation.[63)]

c. The applicant shall have sufficient resources, including financial, technological, and human resources, as well as the abilities to oversee the relevant business in relation with the operation.

This requirement is further specified in the Prakas which requires that the applicant company shall possess: adequate and properly equipped and managed premises for the purpose of relevant business operation; human resources with appropriate qualifications and experiences to their respective positions/works within the company; relevant system and mechanism to conduct its proposed business operation; and proper back-up systems in order to ensure the safety and efficiency of the conduct of the operation.[64)]

d. The applicant shall have effective mechanism to supervise the business operation in relation with the securities market, securities clearance and

63) *Ibid*, art. 4, point 8

64) Prakas on the Grant of Approval to the Operator of a Securities Market, the Operator of a Clearance and Settlement Facility, and the Operator of a Securities Depository, art. 5, para. 1 (2009)

settlement, and the securities depository.[65]

A proper management structure shall be put in place in order to ensure the accountability, transparency, efficiency, and good governance. In the event that one applicant company wishes to operate the three operations (securities market operator, clearance and settlement facility, and securities depository) at the same time, the applicant company shall provide proof of separate management structure for each operation.[66] Moreover, the applicant company shall put in place the internal audit committee with clear discipline and procedure of such auditing process.[67]

The Prakas further specifies the conditions and requirements in order for a person to be appointed as the director or senior officer of the applicant company. Such candidate shall fulfill the following requirements[68] :

ⅰ. Be of good personality and character as prescribed in article 42 of the Sub-decree[69] ;

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65) Description and specifications of the mechanism are further specified in article 19 of the Sub-decree (2009).

66) Prakas on the Grant of Approval to the Operator of a Securities Market, the Operator of a Clearance and Settlement Facility, and the Operator of a Securities Depository, art. 5, para. 2 (2009)

67) *Ibid*, art. 5, para. 3

68) *Ibid*, art. 6

69) Sub-decree on the Implementation of the Law on the Issuance and Trading of Non-Government Securities, art. 42: To consider whether a person is of good personality and character, the Director General of the SECC shall consider the following facts:
1. The person has never been successfully convicted of any crime.
2. The successful exercise of sanction against the person of any misdemeanor, including theft, fraud, breach of trust, and forgery.
3. The person has previously held a license issued by the SECC and such license has been revoked or suspended, or has committed any infringement as prescribed by the Law.
4. Any other issues determined by the SECC.

ii. Has never been declared bankrupt or has never caused any company or companies to go bankrupt within or outside of Cambodia within the last 05 (five) years as of the date of submission of the application;

iii. Has never committed any act that adversely affects the operation of the securities market or of the financial sector in general;

iv. Has never been removed or dismissed from his/her position or from the market pursuant to the law, the sub-decree, and any other relevant regulations;

v. Has never committed any act that adversely affects the public interest.

e. The applicant shall have a business plan for at least 03 (three) years counting from the date of submission of application.

f. The applicant shall have adequate operating rules and procedures in order to, with its best efforts, ensure that the operation will be carried out in a fair, effective, transparent and orderly manner. The prime principles of the operating rules and procedures are determined by the SECC;

g. The applicant shall have an updated plan in order to manage all the risks which possibly arise during the operation; and

h. The applicant shall have the competent to fulfill its obligations pursuant to this law and regulation.

In general, the securities market operator, the clearance and settlement facility, and securities depository are possibly operated by different operators as the Sub-decree provides for separation of approvals for the three operators. The Sub-decree provides that “applicants shall apply only for securities market operator, clearance and settlement facility, or securities

depository operator, unless otherwise permitted by the Director General of the SECC[70]". However, to date, the SECC has granted these three approvals to the Cambodia Securities Exchange Co., Ltd., a jointly-owned public enterprise established between the Royal Government of Cambodia represented by the Ministry of Economy and Finance (55%), and the Korea Exchange (45%) pursuant to the Joint Venture Agreement dated March 23rd, 2009; and incorporated in February 2010, to operate as a sole market operator, clearance and settlement facility operator, and securities depository operator since February 2011.

(2) Agents Participating in the Securities Market Activities:

In addition to the abovementioned operators, one cannot overlook the importance of the agents participating in the conduct and ongoing of the securities market as a whole. These agents help ensure the safety, efficiency, transparency, and timing-effectiveness of the securities market. This section will describe who these agents are, what roles or involvements do they have in the market, and what qualifications are required in order for them to be able to practice in the Cambodian securities market.

According to the Cambodian securities laws and regulations, there are four (04) type of agents: (ⅰ) the Cash Settlement Agent, (ⅱ) the Securities Registrar, (ⅲ) Securities Transfer Agent, which all are qualified as the "participants"[71] of the CSX, and (ⅳ) the Paying Agent.

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70) Sub-decree on the Implementation of the Law on the Issuance and Trading of Non-Government Securities, art. 20, para. 2 (2009)

71) Prakas on the Implementation of the Operating Rules of Securities Clearing and Settlement (2011), art. 2, definition: "Participant" shall refer to Cash Settlement Agent, Securities Registrar, Securities Transfer Agent, Listed Company, etc. which have been allowed to use only one part of the Securities Clearance and Settlement Facility of the

The Cash Settlement Agent is referred to the commercial banks accredited by the SECC to operate as the cash settlement agent in accordance with the securities laws of Cambodia.[72] The term is self-explanatory; the cash settlement agent is the place where the securities buyers and purchasers settle their account of the purchase/sale price of the securities by transferring of cash or other compensation from the buyer account to the seller account, which normally takes place two business days (02) after the trading day (T+2).[73]

In order to obtain the requisite accreditation from the SECC to operate as a cash settlement agent, first of all, the applicant shall be a commercial bank duly incorporated and licensed to operate by the National Bank of Cambodia in accordance with the Cambodian banking laws and regulations and shall obtain a letter of "non-refusal" from the NBC to operate as a cash settlement agent in the securities sector.[74] The applicant shall further fulfill all the requirements as set forth in article 5 of the Prakas, including a good and sound corporate governance framework and procedure, a strong financial health and high operational capacity, qualified human resources, safe and reliable information systems and back-up systems, etc. Having reviewed the applicant's qualification and all the documents, the SECC shall have a period of three (03) months, counting from the date of receipt of full and complete information and documents by the SECC, to respond whether or not the accreditation is given.[75] According to the Prakas, the accreditation

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CSX.

72) *Ibid*, art. 2, definition of Cash Settlement Agent.

73) Prakas on the Implementation of the Operating Rules of Securities Clearing and Settlement (2011), art. 3

74) Prakas on the Accreditation to the Cash Settlement Agent (2010), art. 4

75) *Ibid*, art. 8

given to a cash settlement agent is unlimited in time.[76]

While the transfer of cash in relation to the sale and purchase of securities is made with the Cash Settlement Agent, the transfer of ownership of securities is made with the Securities Transfer Agent. The securities transfer agent is defined as persons who are registered with the SECC to provide certain services, on behalf of the issuance company after the allotment, including (i) maintaining and managing securities ownership books which include the detail information of the securities owners in order to be consistent with the record of the Securities Depository Operator; (ii) administering the changes of ownership over the securities, establishing the report, statistics and any other information in relation to the activities of the Securities Transfer Agent; (iii) performing corporate works in relation to the securities owners to be provided by the issuance company including notification on the distribution and payment of dividends, etc.; (iv) providing notifications and information of the issuance company to the securities owners, and resolving matters/issues related to the ownership over the securities and the services provided by the Securities Transfer Agent; and (v) any other relevant services approved by the SECC.[77]

The Securities Registrar is defined as persons who are registered with the SECC to provides the following services, on behalf of the issuance company after the allotment: (i) managing a proper conduct of the subscription process and the securities allotment process in accordance with the public offering procedure; (ii) keeping record of the ownership of securities after the completion of the securities allotment at the primary market; (iii) preparing a report to the issuance company and the SECC on the

76) *Ibid*, art. 9

77) Prakas on the Registration of Securities Registrar, Securities Transfer Agent, and Paying Agent (2010), art.2, definition of Securities Transfer Agent.

completion and the success of the securities depositing; (iv) notifying the securities owners to confirm their ownership over the subscribed securities of the issuance company; and (v) any other relevant services approved by the SECC.[78]

The SECC furthermore define the Paying Agent as person who are registered with the SECC to provide the following services, on the issuance company's behalf after the allotment: (i) calculating dividend, interest, principle, or other payment to be provided to the securities owners or any other relevant persons as instructed by the issuance company; (ii) making payment to the securities owners or any other relevant persons on behalf of the issuance company; (iii) sending the necessary information in relation to the payment or any other information to the securities owners and preparing the report related to such payment to the issuance company and the SECC if necessary; and (iv) any other relevant services approved by the SECC.[79]

According to the Prakas, the person who wishes to be registered as the Securities Registrar, Securities Transfer Agent, or Paying Agent, shall be duly registered with the commercial registration in accordance with the laws and regulations of the Kingdom of Cambodia.[80] The applicant company may be a Security Depository Operator approved by the SECC, a commercial bank licensed by the National Bank of Cambodia, or a limited company duly registered in accordance with the Law on Commercial Enterprises of Cambodia.[81] However, in the event that the applicant company applying for a registration as a Securities Transfer Agent is not a Securities Depository

78) *Ibid*, art. 2, definition of the Securities Registrar.
79) Prakas on the Registration of Securities Registrar, Securities Transfer Agent, and Paying Agent (2010), art.2, definition of the Paying Agent.
80) *Ibid*, art. 3
81) *Ibid*, art. 4, para. 1

Operator, the SECC requires that such applicant company shall have a contract with the Securities Depository Operator which allows for the furnishing of information in relation to the changes of records on the ownership of securities that are managed by such Securities Depository Operator.[82]

As financial measures, the Prakas requires that the applicant company shall have a minimum capital requirement of[83] :

i. KHR 200,000,000 (Two Hundred Million Khmer Riels) being equivalent to USD 50,000 (Fifty Thousand US Dollars) in the case of Securities Registrar;
ii. KHR 200,000,000 (Two Hundred Million Khmer Riels) being equivalent to USD 50,000 (Fifty Thousand US Dollars) in the case of Securities Transfer Agent;
iii. KHR 500,000,000 (Five Hundred Million Khmer Riels) being equivalent to USD 125,000 (One Hundred and Twenty Five Thousand US Dollars) in the case of Paying Agent.

This minimum capital requirement shall be exempted in the event that the applicant company is a commercial bank or a securities depository operator.[84] However, should the applicant company is a limited company carrying out a business operation, such limited company shall increase its capital, in addition to its share capital, in the above specified amount.[85]

Moreover, the SECC further requires the applicant company to provide a reserve deposit in the amount of 10% (Ten percent) of the minimum capital requirement in the account of the SECC at the National Bank of Cambodia.

82) *Ibid*, art. 4, para. 2
83) *Ibid*, art. 5, para. 1-1
84) *Ibid*, art. 5 para. 2
85) *Ibid*, art. 5, para. 3

This reserve deposit can be withdrawn for perusal upon necessity and after obtaining prior approval from the SECC.[86]

Other than the above quantitative requirements, the Prakas also requires the applicant company to have a proper set of operating rules in relation to the respective services it wishes to provide, in accordance with the applicable securities laws and regulations.[87] The applicant company shall also set up a proper and adequate technology system to support its operation in order to ensure the safety, the efficiency, and the continuity of the operation.[88] This Prakas also allows one applicant company to apply for the approval of all the 03 (three) operations, i.e. the Securities Registrar, the Securities Transfer Agent and the Paying Agent, at the same time provided that such applicant company has appropriate premises and adequate human resources to set up 03 (three) separate departments to be responsible for each service. These 03 (three) departments shall be completely separate and independent from each other for the sake of efficiency, accountability, transparency and responsibility.[89] Each department shall be headed by an Operation Manage r[90], which shall possess both knowledge and experience of at least 03 (three) years in the securities trading.[91]

Unlike the accreditation of the cash settlement agent, the Director General of the SECC shall only have a period 02 (two) months, counting from the date of full and complete application, to notify the applicant company of its acceptance or refusal of the application.[92] Once approved, the applicant

86) *Ibid*, art. 5, para. 1-2
87) Prakas on the Registration of Securities Registrar, Securities Transfer Agent, and Paying Agent (2010), art.5, para. 1-3
88) *Ibid*, art. 5, para. 1-4
89) *Ibid*, art. 5, para. 1-5
90) *Ibid*, art. 5, para. 1-6
91) *Ibid*, art. 8
92) *Ibid*, art. 17

company shall be able to provide the approved service(s) for an unlimited period of time.[93]

(3) Securities Intermediaries

The Cambodian securities market is an indirect market whereby the public investors can only place their sale or purchase orders of securities through licensed securities intermediaries. The public investors do not have direct access to the market. Only licensed securities intermediaries who are members of the CSX are allowed to place sale or purchase orders of the securities on the market platform.

According to the Law on the Issuance and Trading of Non-Government Securities (2007), Securities Firms are companies or partnerships licensed to conduct "securities business" which is discussed as below. The Securities Firms are represented by the Securities Representatives, natural persons who are employed by the Securities Firms to perform or conduct any activities in accordance with the functions of the firms as licensed by the SECC. In order to carry out their duties in relation to securities business, such Securities Representatives are required to further obtain separate licenses[94] from, but subordinate to, the licenses of the respective Securities Firms that they work for. In other word, even though the Securities Representatives hold separate licenses from the firms, they are not allowed to carry out their activities in their personal capacity; they have to be subordinated to a Securities Firm. In the event that the Securities Representatives quit the company, the license will be automatically revoked. The Securities Representatives includes the chief executive officer, senior officers, or employees; or the

93) *Ibid*, art. 18

94) Law on the Issuance and Trading of Non-Government Securities (2007), art.31, para. 1

partner, of the Securities Firms, who carry out the securities business activities on behalf of the firm.

There are 04 (four) types of securities business provided by the Cambodian securities law which are as follow: (ⅰ) the act of buying or selling securities on behalf of other person (securities brokerage); (ii) the act of buying or selling securities with its proper fund and on its own behalf (securities dealing); (iii) the act of providing professional advice or publishing analysis, in relation to the investment in securities, to the public investors (investment advisory); and (iv) the act of entering into an underwriting agreement (or sub-underwriting agreement) with a company making public offering for the sale or purchase of securities (securities underwriting).

The securities underwriters (or referred to as the "Underwriter") (ⅰ) provides important advices on the public issuance of securities such as on the pricing, the amount of issuance, the number of securities to be issued, and the determination of timeline for the public issuance, etc.; (ii) purchases all or part of the issued securities from the issuance company for the purpose of redistribution or reselling; (iii) purchases the securities which are not subscribed to ensure the success of the public offering, and (iv) assists the listing company in the process of doing public offering of securities, or directly or indirectly involve in the process of public offering.[95]

In Cambodia, the Underwriter plays a major role in the IPO process; its role is not limited to only preparing the IPO application and documents for the listing company, but also to ensuring the success of IPO. Cambodian law requires the underwriter to acquire all shares/securities, which are not subscribed by the public investors during the public offering. For this purpose, the underwriter assists and accompanies the listing company, hand-

95) Prakas on Licensing of Securities Firms and Securities Representatives (2009), art. 5

in-hand, throughout the whole IPO process. Moreover, the underwriter is entrusted with the role as the IPO team leader whose responsibility is to coordinate between various professionals of the team, including the professional accounting and auditing firm, lawyers, appraisal company, and the listing company. Providing that the IPO process is a time consuming and complicated process, the underwriter makes sure that all professionals' work against the schedule as initially agreed amongst them.

The securities dealers (or referred to as the "Dealers") trades the securities for its own account on its own behalf and at its own risk[96] while the securities brokers (or referred to as the "Brokers") can only buy or sell securities on behalf of and at the instruction of its clients for a commission fee.[97] Unlike the Dealers, the Brokers are not allowed to place sale/purchase orders for its own account.

The investment advisors' business activities, however, are not related to the trading of securities. The Investment Advisors can only provide advice and analysis about investment in securities to public investors for a fee; and publish investment analysis on securities investment to public investors.[98] The investment advice to be made by the licensed investment advisory firms or its representative, to the client shall be carried out on 02 (Two) basis: (i) scientific basis which are reasons, accuracy and reliability; and (ii) Know-Your-Client Principles by taking into account of a) financial situation and financial need of the client, b) client's purpose of investment, c) client's risk behavior and attitude toward potential risks, and d) client's knowledge and experience in investing on securities.[99]

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96) *Ibid*, art. 6

97) *Ibid*, art. 7

98) *Ibid*, art. 8

99) Prakas on the Code of Conduct of Securities Firms and Securities Representatives

In spite of the classification of 04 (Four) types of securities business activities, when referring to "securities firms and/or representatives", the SECC refers to those persons who obtain the following licensesnn[100] :

ⅰ) Securities underwriting license;
ⅱ) Securities dealing license; and
ⅲ) Securities brokerage license

Meanwhile, the persons who provide advisory services are specifically referred to as the "investment advisory firms and/or representatives".[101]

It should be noted that there is a particularity of hierarchy behind the order of above listed licenses. The securities firms who hold license as a securities underwriter are allowed to carry out all the four (04) securities business activities i.e. securities underwriting business, securities dealing business, securities brokerage business and investment advisory[102] without having to obtain separate licenses on each respective activity. The firms who hold license to act as securities dealer are allowed to carry out securities dealing business, securities brokerage business and investment advisory[103] ; while the licensed securities brokers are allowed to carry out securities brokerage business and investment advisory.[104] A separate license for the business of investment advisory is not required for the securities firms which already obtained licensed for other securities business; however, such securities firms shall have a separate department in charge of inve-

(2011), art. 8
100) Prakas on the Licensing of Securities Firms and Securities Representatives (2009), art. 3
101) *Ibid*, art. 38
102) *Ibid*, art. 9
103) *Ibid*, art. 10
104) *Ibid*, art. 11

stment advisory activity, run by the licensed investment advisory representatives.[105]

Moreover, for securities firms who operate more than one securities businesses, Chinese walls shall be put in place between each department in order to avoid conflict of interest and to prevent leaks of corporate information, which could have influence on the advice given on the clients' investments, and allow staff to take advantage of certain facts that are not yet made known to the general public.[106]

In order to lawfully provide services in relation to securities business, the securities firms and securities representatives shall apply for and obtain relevant licenses from the SECC pertaining to specific business activities.[107]

This section will provide an overview of main requirements and qualifications of securities firms and representatives in order to obtain relevant license to their respective activities. In order to obtain license to operate as securities firms, the securities firms shall fulfill the following requirements[108] :

ⅰ) The applicant company shall be in the form of limited company or partnership incorporated pursuant to the Law on Commercial Enterprise or any other applicable laws and regulations; or in other form as permitted by the SECC;

ⅱ) The applicant company shall be member and participant of the securities market or shall meet the qualification to be member and participant of the market, or otherwise permitted by the SECC;

105) Prakas on the Licensing of Securities Firms and Securities Representatives (2009), art. 4

106) Source: http://www.investopedia.com/terms/c/chinesewall.asp#axzz2Ak3cp68H

107) Law on the Issuance and Trading of Non-Government Securities (2007), art. 31

108) Sub-decree on the Implementation of the Law on the Issuance and Trading of Non-Government Securities (2009), art. 40

iii) The director, in the case of limited company, or partner, in the case of partnership, of the applicant company shall:

a. Has not been declared bankrupt within the last 05 (Five) years as of the date of application;

b. Has never been a director or partner of company or partnership, which has already been declined/refused for the application of license to conduct securities business, by the SECC or authority of other jurisdiction with similar qualification to the SECC, unless otherwise permitted by the SECC;

c. Has never been a director or partner of company or partnership, which has been revoked of license to conduct securities business, by the SECC or authority of other jurisdiction with similar qualification to the SECC, unless otherwise permitted by the SECC;

iv) The director or partner and employee who carries out the duties entitled to under the license shall be "fit and proper"[109] ; and

v) At least one of the director or partner and one employee of the applicant company has sufficient qualification to obtain license as securities representative of the applicant company.

Furthermore, the securities firms shall fulfill the following requirements on minimum capital and security bond or security instrument to be made at the National Bank of Cambodia to secure the business activities[110] :

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109) The qualification of "fit and proper" is specified under article 42 of the Sub-decree (2009). To determine whether a person is qualified as "fit and proper", the Director General of the SECC considers the following facts: (i) the person has never been convicted of any felony, (ii) the carry-out of sanction in relation to act of misdemeanor which includes theft, fraud, breach of trust as well as forgery, (iii) the person has previously held license issued by the SECC, the license of which was cancelled or suspended, or the person has committed any act of infringement as prescribed by law, and (iv) any other issues determined by the SECC.

110) Prakas on the Licensing of Securities Firms and Securities Representatives (2009), art. 17

i) In the case of securities underwriter: a minimum capital of KHR 40,000,000,000 (Forty Billion Khmer Riels) being equivalent to USD 10,000,000 (Ten Million US Dollars) in which KHR 2,000, 000,000 (Two Billion Khmer Riels) being equivalent to USD 500,000 (Five Hundred Thousand US Dollars) shall be in cash and the security bond or security instrument in the amount of KHR 4,000,000,000 (Four Billion Khmer Riels) being equivalent to USD 1,000,000 (One Million US Dollars);

ii) In the case of securities dealer: a minimum capital of KHR 25,000,000,000 (Twenty Five Billion Khmer Riels) being equivalent to USD 6,250,000 (Six Million Two Hundred and Fifty Thousand US Dollars) in which KHR 1,250,000,000 (One Thousand and Two Hundred Fifty Million Khmer Riels) being equivalent to USD 312,500 (Three Hundred and Twelve Thousand Five Hundred US Dollars) shall be in cash and the security bond or security instrument in the amount of KHR 2,500,000,000 (Two Thousand Five Hundred Million Khmer Riels) being equivalent to USD 625,000 (Six Hundred and Twenty Five Thousand US Dollars); and

iii) In the case of securities brokers: a minimum capital of KHR 6,000,000,000 (Six Billion Khmer Riels) being equivalent to USD 1,500,000 (One Million and Five Hundred Thousand US Dollars) in which KHR 300,000,000 (Three Hundred Million Khmer Riels) being equivalent to USD 75,000 (Seventy Five Thousand US Dollars) shall be in cash and the security bond or security instrument in the amount of KHR 1,000,000,000 (One Billion Khmer Riels) being equivalent to USD 250,000 (Two Hundred and Fifty Thousand US Dollars).

In addition, the securities firms shall have proper building and premises with adequate space area, equipped with the information system, back-up systems as well as protection system, and technological facilities in order to support the purpose of its securities business activities.[111] The SECC further specifies the detail requirements and qualification of human resources, including directors, senior officers, and heads of departments, as well as employees in order to ensure the good corporate governance of the firms.[112]

For the purpose of licensing the securities representatives, the applicant shall fulfill the following requirements[113] :

ⅰ) Be a natural person who is "fit and proper[114]", having full legal capacity and residing in the territory of Cambodia[115] ;
ⅱ) Provide a letter of consent from the securities firm for which the applicant is engaged to be act as securities representative; and
ⅲ) Be authorized to participate in the securities market on behalf of the securities firm which is member and participant of the market.

The applicant shall be knowledgeable and experienced in the field of securities, by satisfying certain level of education and training. Moreover, the applicant is required to take the exam which is organized by the SECC. Plus, the applicant shall further respect the incompatibility of function[116] as specified by the securities regulations.

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111) Prakas on the Licensing of Securities Firms and Securities Representatives (2009), art.17 and art. 27.
112) *Ibid*, art. 17 to 26.
113) Sub-decree on the Implementation of the Law on the Issuance and Trading of Non-Government Securities (2009), art. 41
114) *Supra 100*.
115) Prakas on the Licensing of Securities Firms and Securities Representatives (2009), art. 33
116) *Ibid*, art. 33

With respect to investment advisory firms, the requirements for the obtainment of license for investment advisory business are quite similar to the requirements for securities firms. Evidently, the applicant company shall be incorporated in the form of limited company or partnership pursuant to the Law on Commercial Enterprise or any other applicable laws. The applicant company shall have licensed investment advisory representatives[117] to carry out the advisory activities pursuant the Cambodian securities regulations. The applicant company shall satisfy other requirements such as qualification of director or partner, human resources, building and premises, etc.

However, unlike securities firms, the SECC requires lower minimum capital which is of KHR 400,000,000 (Four Hundred Million Khmer Riels) being equivalent to USD 100,000 (One Hundred Thousand US Dollars) and lower amount of security bond or security instrument being of KHR 80,000,000 (Eighty Million Khmer Riels) being equivalent to USD 20,000 (Twenty Thousand US Dollars) to be put at the National Bank of Cambodia.[118]

The license for securities firms and representatives and for investment advisory and representatives is valid for an initial period of 02 (Two) years. This license is renewable and the validity of such renewal period is 03 (Three) years counting from the expiration of the previous license. Until present, the SECC has given licenses to 07 (Seven) underwriters, 02 (Two) securities dealers, 04 (Four) securities brokers, and 02 (Two) investment advisory firms.

117) Prakas on the Licensing of Securities Firms and Securities Representatives (2009), art. 41

118) *Ibid*, art. 40

(4) Accounting Firms

The accounting and auditing firms is another indispensable player contributing to the success and the quality of the securities market as a whole. The securities market operators, the clearance and settlement facility operators, the securities depository operator, the securities agents, the issuance companies as well as the SECC all rely on the professional accounting and auditing firms to ensure the financial transparency and accuracy of the market. Evidently, the accounting firms not only help the issuance company who wish to go public but also other key professional providing financial related activities in the securities sector, to prepare their financial report and other necessary financial documents as well as to provide the auditing services. Furthermore, for the purpose of IPO, the professional accounting firms are required to conduct a due diligence on the issuance company to check, verify, and certify all financial figures of the company. A due diligence report with this respect will be provided and issued for submission to the SECC along with other required documents.

However, in order to be able to perform the abovementioned roles in the securities sector, the accounting and auditing firms shall obtain prior accreditation from the SECC. The accreditation of the accounting firm and the external auditor is valid for 03 (three) years and the application for renewal shall be made within 45 (forty five) days prior to its expiration.[119)]

In order to obtain the accreditation from the SECC, the professional accounting firm shall fulfill all the requirements as prescribed in art. 3 of the Prakas[120)] :

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119) Prakas on the Accreditation of Professional Accounting Firm Providing Professional Services in the Securities Sector (2010), art. 7

120) Prakas on the Accreditation of Professional Accounting Firm Providing Professional

- Operate its professional services in accordance with the law on corporate accounting, corporate auditing, and accounting profession, and any other applicable regulations;
- Have a minimum capital requirement of at least KHR 500,000,000 (Five Hundred Million Khmer Riels) being equivalent to USD 125,000 (One Hundred and Twenty Five Thousand US Dollars);
- Have at least 05 (Five) external auditors who are accredited by the SECC;
- Have a professional indemnity insurance for the company and the independent auditors accredited by the SECC;
- Have been established and carried out its business activities in the Kingdom of Cambodia for at least 05 (Five) years as of the date of application for accreditation;
- Have a good reputation in the accounting and auditing activities;
- Have financial reports audited by the independent auditor for the last 03 (Three) years; and
- Have at least 30 (Thirty) customers per annum, 50% (Fifty percent) of which shall be provided with the auditing service by the company.

With regards to the accreditation of the external auditor, such external auditor shall respect and fulfill the following requirements:

- Be registered as active members of Kampuchea Institute of Certified Public Accountants and Auditors (KICPAA) and residing in the territory of Cambodia;
- Have at least 05 (Five) years of experience in external auditing;

Services in the Securities Sector (2010)

- Have never been convicted of any felony or any act contravening the code of ethics; and
- Have never been convicted of any misdemeanor within the last 10 (Ten) years as of the date of application of accreditation.

To date, the SECC has so far given accreditation to 05 (Five) professional accounting firms and approximately 29 (Twenty Nine) external auditors.

(5) Lawyers

Lawyers are one of the crucial players to contribute to the success of the IPO process. Together with other professionals, lawyers assist and help the listing companies to be ready for the IPO. According to the Cambodian securities laws and regulations, the Listing Company is required to obtain a legal due diligence report issued by a law firm, accredited by the SECC, and attach such due diligence report along with the disclosure document and other required documents to be submitted to the SECC.[121)]

The Cambodian securities laws and regulations do not clearly specify the roles and responsibilities of lawyers in the IPO process. As per above, article 30 of the Prakas on the Public Issuance of Equity Securities (2010) merely provides that law firm accredited by the SECC shall produce a legal due diligence report which shall be submitted to the SECC for review together with the fundamental document of the application for public offering being the disclosure document. Albeit such absence of clarity with respect to the duties of the lawyer in the process, one could presume that, by issuing a legal due diligence report, lawyers may be called upon to

121) Prakas on the Public Issuance of Equity Securities, art. 30.

check on the Listing Company's compliance of legal and regulatory matters as well as to assist the Listing Company with legal matters in the process of going IPO; that includes (i) to evaluate the company's organization structures as well as working the tax advisors on the corporate structure, (ii) to assist and work with other professionals in the preparation of the disclosure document, (iii) to help the Listing Company satisfy the legal and regulatory requirements set forth by the SECC pursuant to the Cambodian securities laws and regulations, (iv) to issue legal opinions on certain legal aspect and comfort letters to underwriters, where required, and (v) to evaluate the disclosures as provided for in the disclosure document.

In most cases, in order to help expedite the actual IPO process, it is recommended that lawyers be engaged at an early stage – being the pre-IPO stage – to help getting the company ready for IPO. The lawyers' assignments at this stage would be to evaluate the company with respect to the legal status, the organizational structure, the corporate structure of the company or group company, if applicable, as well as to advise on and resolve various legal issues prior to the company entering the IPO gear.

As mentioned above, the legal due diligence shall be produced by law firms, which are accredited by the SECC. Thus, not all law firms are allowed to provide legal services in this respect. It is important to note that there have been discussions and controversies with regard to the accreditation of lawyers who wish to practice law in the securities sector. What are the requirements for such accreditation? Why are law firms required to obtain accreditation from the SECC in order to be able to practice law in the securities sector? Aren't law firms registered with the bar *per se* allowed to practice law in the Kingdom of Cambodia?

The Bar Association of the Kingdom of Cambodia (BAKC) strongly objects to the requirement of having lawyers further obtain accreditation from the SECC in order to be able to practice law in the securities sector. BAKC claims that such a requirement is in violation of the Law on the Bar[122], article 2[123] and article 3.[124] BAKC asserts that these articles state that lawyers registered [with the bar] shall be able to freely practice law in their full capacity in any domain of law within the Kingdom of Cambodia without being subject to any further requirements.

For reason of this objection from the BAKC, the draft of Prakas on the Accreditation of Lawyer Providing Legal Services in the Securities Sector, which was prepared by the SECC in 2010, has never gone through. Failing to reach any solution between the BAKC and the SECC, this issue had been stalled for a while which had probably also caused the delay for getting the first IPO of the Kingdom out back then.

However, not until the last quarter of 2011 has a compromise been reached; and some of the conditions and requirements as set forth in the above disputed draft Prakas were transcribed in the form of the "Book of Commitments on the Accreditation of Law Firms and Lawyers Providing Legal Service in the Securities Sector" (herein referred to as the "Book of Commitments"), a written contract to be entered into between the lawyers, who wish to provide legal services in the securities sector, and the SECC.

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122) Law on the Bar (Statute of lawyers), NS/RKM/0895/06, 22 August 1995.

123) Law on Bar, op. cit., article 2, para.1: "Lawyers may represent the clients upon their consent or defend them in all competent jurisdictions and all stages of the legal procedure particularly in civil, commercial, administrative, labor and social matters, unless otherwise provided by other laws".

124) *Ibid*, article 3, para.1: "Lawyers may advise and prepare all kind of documents pertaining to the legal field".

According to the Book of Commitments, lawyers who wish to provide to their legal services in the securities sector, shall fulfill the following qualifications:

a) Be registered with the BAKC;
b) Have good reputation in the legal profession;
c) Have experiences as a lawyer practicing in Cambodia of at least 03 (three) years as of the date of accreditation;
d) Have never been convicted of any act of felony or misdemeanor;
e) Have never been banned from practicing law;
f) Have never been declared bankrupt by the court;
g) Possess of certificate or diploma in the securities sector;
h) Possess of the Professional Liability Insurance prior to being engaged to provide legal services in the securities sector.

Moreover, this Book of Commitments further provides for the accreditation of a law firm as an entity, provided that such law firm comprises of and is represented by at least 02 (two) individual lawyers accredited by the SECC.

To date, the SECC has officially provided accreditations to 07 (seven) law firms and approximately 14 (fourteen) individual lawyers to practice law in the securities sector.

(6) Appraisals (Valuation Companies)

Naturally, for the purpose of going public, the listing company shall conduct a proper valuation of its total business value and assets. The market value of the company is quite fundamental to the listing, as it will affect the size of the IPO to be authorized by the SECC, the structure of the proposed IPO, the pricing of the offering shares, etc. The SECC requires that such

valuation shall be done by the valuation companies or agents, having obtained the accreditation from the SECC.[125] The valuation report is crucial to the application of the company for IPO because this report will be used as one of the basis for the SECC to make its decision whether or not to allow the company to make the proposed public offering. The value of the company will, in a way, reflect the potential and the genuineness of company for the market, which is the reason why the valuation is required to be conducted in a fair and honest manner by complying with the valuation standards, the guideline on valuation standards issued by the SECC, the code of ethics, and any other applicable regulations pertaining to the valuation profession.[126]

Indifferent from other professionals, only valuation companies, which are accredited by the SECC are allowed to providing their professional services in the securities sector. In order to obtain such accreditation, the applicant company shall fulfill the following requirements[127] :

- Be a commercially registered company, duly incorporated and registered with the Ministry of Commerce of Cambodia;
- Obtain a license to operate as a valuation company by the Ministry of Economy and Finance of Cambodia;
- Have been established and operated its activities within the Kingdom of Cambodia for at least 03 (Three) years as of the date of application;
- Have been engaged to provide appraisal services on at least 02 (Two) assignments on asset valuation, having value of not less than KHR 8,000,000,000 (Eight Thousand Million Khmer Riels) being equivalent

125) Prakas on the Public Issuance of Securities (2010), art. 13 and 15

126) Prakas on the Accreditation of Valuation Company Providing Services in the Securities Sector (2010), art. 11

127) *Ibid*, art. 3

to USD 2,000,000 (Two Million US Dollars) within the last 12 (Twelve) months as of the date of application;

- Have a minimum capital of KHR 500,000,000 (Five Hundred Million Khmer Riels) being equivalent of USD 125,000 (One Hundred and Twenty Five Thousand US Dollars);
- Have at least 02 (Two) independent valuers who are accredited by the SECC;
- Have good reputation in the valuation profession; and
- Have a proper mechanism and internal control procedures to ensure that the requirements as prescribed by the relevant regulations are complied with and the valuation process is conducted in a complete and diligent manner.

Meanwhile, as per above, the independent valuers are required to obtain a separate accreditation from the SECC by fulfilling the following requirements[128] :

- Obtain a professional certificate/diploma issued by the Ministry of Economy and Finance;
- Have at least 03 (Three) years of experience in the valuation sector; and
- Have a good reputation in the valuation profession.

In both case of accreditation of valuation company and independent valuer, the SECC has a period of 45 (Forty Five) days, counting from the date of full and complete application, to answer whether or not the accreditation is given.[129] This accreditation is valid as long as for the validity of

128) Prakas on the Accreditation of Valuation Company Providing Services in the Securities Sector (2010), art. 5

129) *Ibid*, art. 7

the license which is issued to respective valuation company or independent valuer by the Ministry of Economy and Finance. Within 45 (Forty Five) days prior to the expiration of the accreditation, the application for renewal shall be made with the SECC.[130)]

So far, there is only 01 (One) valuation company and 02 (Two) independent valuers, which have been accredited by the SECC to provide service in the securities sector.

(7) Other players:

Beside the above-described professionals, the SECC also provides accreditations or recognitions to other important players who wish to provide their respective services in the securities sector, such as translation service provider, printing service provider, and media broadcasting service provider.

3. Listing Companies

Other than the securities regulator and the professionals providing services in the securities market, another fundamental component of the market is the listing company, being actually the main pillar of the existence of the whole securities market, both the primary and secondary market.[131)] A

130) *Ibid*, art. 8, para. 1

131) The classification of "primary" and "secondary" market refers to two aspects of the securities market. Primary Market is referred to issuance of new shares by the issuance companies (listing companies) through the IPO process. The newly issued shares are put on sale at the subscription process before they are officially listed at the market platform. The prices of the share are determined by the underwriter and the listing company. On the other hand, the Secondary Market is referred to the trading (sale and purchase) of the ready listed securities. The trading of the securities at the secondary market no longer involves the issuance company. It is basically between the seller (investors who own securities and wish to sell) and the buyer (investors who wish to buy). The prices of securities, at this stage, are determined by the market - the supply and demand.

listing company refers to company who seeks external financing from the public by way of IPO (hereinafter referred to as the "List Co.").

According to the Cambodian securities law, there are only 02 (Two) types of entities that are allowed to make public offering of securities in Cambodia. The List Co. shall either be (i) a public limited liability company, duly incorporated and registered under the laws of the Kingdom of Cambodia ("PLC."), or (ii) a permitted entities[132] that are prescribed in accordance with the laws and regulations provided by the SECC. This notion of Permitted Entity is put in place by the SECC for the purpose of future admission of other entities than the PLC (i.e. foreign companies) when deemed fit. At this time, the only permitted entity authorized by the SECC to go public is the state-owned enterprise, which is allowed by the Sub-decree No. 71 ANKr. BK dated 22 April 2011 on "the Addendum to the Sub-decree No. 41 ANKr. BK dated 06 August 1997 on the Implementation of the Royal Kram on the General Statutes of Public Enterprises".

Without going into detail about all the legal and regulatory requirements for obtaining the approval on the public offering, this section will briefly provide the main preliminary conditions. First of all, the List Co. shall (i) have a shareholders' equity of not less than KHR 5,000,000,000 (Five Thousand Million Khmer Riels) being equivalent to USD 1,250,000 (One Million Two Hundred and Fifty Thousand US Dollars) as of the date of the filing of application for IPO[133], and (ii) have a net profit of not less than KHR 500,000,000 (Five Hundred Million Khmer Riels) being equivalent to USD 125,000 (One Hundred and Twenty Five Thousand US Dollars) for

132) Law on the Issuance and Trading of Non-Government Securities (2007), art.16, para. 1; Sub-decree on the Implementation of the Law on the Issuance and Trading of Non-Government Securities (2009), art. 7 and definition section; Prakas on the Public Issuance of Equity Securities (2010), art. 5.

133) Prakas on the Public Issuance of Equity Securities (2010), art. 4-1.

the latest full financial year prior to the date of application and the aggregation of the net profit of not less than 1,000,000,000 (One Thousand Million Khmer Riels) being equivalent to USD 250,000 (Two Hundred and Fifty Thousand US Dollars) for the latest 03 (Three) financial years prior to the date of the application.[134)]

Moreover, the size of the proposed offering shall not be less than 20% (Twenty percent) of shareholders' equity at the latest balance sheet in the event that the shareholders' equity of the List Co. is less than KHR 20,000, 000,000 (Twenty Billion Khmer Riels) being equivalent to USD 5,000,000 (Five Million US Dollars). However, in the event that the shareholders' equity of the List Co. is equal or more that KHR 20,000,000,000, the restriction of the issuance size is lowered to not less than 15% (Fifteen percent) of the shareholders' equity.[135)]

Having confirmed on the fulfillment of the abovementioned criteria, the List Co. shall obtain prior approval from the CSX on the listing eligibility[136)] as well as the pricing of the issued securities[137)] after the book building process[138)]. Most of important of all, the List Co. shall obtain the approval and the registration of the "Disclosure Document[139)]" from the SECC.[140)]

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134) *Ibid*, art. 4-3

135) *Ibid*, art. 4-2

136) *Ibid*, art. 4-4

137) *Ibid*, art. 4-5

138) The book building process refers to the process by which an underwriter attempts to determine at what price to offer an IPO based on demand from institutional investors (source: http://www.investopedia.com/terms/b/bookbuilding.asp#ixzz2AhSzzPRa) by way of generating, capturing, and recording investors demand for shares during an IPO in order to support efficient price discovery (source: http://en.wikipedia.org/wiki/Book_building)

139) The Disclosure Document is defined, by the law on the Issuance and Trading of Non-Government Securities, as an informative written notice or statement about the background of the company, the company's financial statement; an invitation to subscribe for or purchase securities; or a declaration of offering or offer to sell the securities. It shall also

Until present, there is so far only one company listed in the Cambodian bourse, which is the state-owned enterprise, Phnom Penh Water Supply Authority. Initially, in order to get the ball rolling, the Royal Government of Cambodia has been pushing for the three state-owned enterprises (SOEs) comprising the Sihanouk Ville Autonomous Port, Phnom Penh Water Supply Authority, and Telecom Cambodia, to take lead by getting themselves listed first in the Kingdom's bourse. By having the SOEs listed in the exchange, it is believed to assure public confidence as well as to stimulate the energy of this new market. Unfortunately, the other 02 (Two) SOEs, being the Sihanouk Ville Autonomous Port and the Telecom Cambodia, are still not ready and are not expected to be listed anytime soon. Despite the tardiness of these 02 (Two) SOEs, private companies from various sectors, including garment factory, commercial shopping center, insurance, etc., are preparing themselves to involve in the market.

4. The Public

Last, but not less important, key player of any market is the pubic investor. Public investor is defined as the public, including both natural person and legal entity, within the Kingdom of Cambodia who has the right to invest in the trading of securities issued and made public offering in Cambodia by the issuance company. Public investor shall not be an associate

include the supplemental or replacement of disclosure document. The Disclosure Document is the consolidation of works prepared by the IPO team. It shall be made in accordance with Article 9 of the Sub-decree on the Implementation of the Law on the Issuance and Trading of Non-Government Securities; and contain all information as set forth in article 7 of the Prakas on Public Issuance of Equity Securities. In other jurisdiction, the Disclosure Document is also known as prospectus, offering circular, offering memorandum, or offer document.

140) Praks on the Public Issuance of Equity Securities (2010), art. 6

company, subsidiary, or related legal entity of the issuance company.[141] The Cambodian laws and regulations do not prejudice the nationality of public investor – any person, including foreigner, is allowed to invest in Cambodian securities market as long as residing within the territory of the country. The only exception to this is that the List Co., during the subscription of securities at the IPO, shall reserve 20% (Twenty percent) of the total issued securities to public investor with Cambodian citizenship; and the remaining 80% (Eighty percent) of the securities will be open to all public investor regardless of citizenship. This prescribed proportion is subject to revision by the Director General of the SECC, should the situation required.[142]

An attention should be drawn with respect to the difference between "public investor as an institution" and "institutional investor". The former refers to any public investor being in the form of legal entity and not natural person. The latter, however, refers to banks, funds manager, finance company or investors with specialized investment skills and experience or having large amount of asset or portfolio size, to be regulated and governed by specific laws and regulations. Until present, the SECC has yet to authorize the participation of institutional investors in the Cambodia market for reason of its immaturity and lacking of experience.

According to the SECC's Guidelines on the Provision of Investor Identification Number no. 001 SECC/Guideline dated February 06, 2012, public investor, who wish to trade in the securities market, shall register and obtain the investor identification number from the SECC. According to source from the SECC, currently there are approximately 4,000 public

141) Law on the Issuance and Trading of Non-Government Securities (2007), definition of public investor.

142) Prakas on the Public Issuance of Equity Securities (2010), art. 37

investor registered to trade on the Cambodian market and this number is expected to increase importantly in the near future when there are more companies listed in the exchange.

Ⅳ. Challenges: Practitioners' Notes

Since its inception, the CSX and the securities industry as a whole have received a mixture of observations touching on the achievements and the challenges ahead. At its early stage, the challenges of the CSX are quite different from those of a more mature and developed market.

1. Getting More Companies on the CSX

(1) More SOEs and Companies

CSX is currently comparable to the Lao Securities Exchange for being the smallest and newest in the region. It therefore also has strong appetite for more companies so as to boost the trading activities and familiarize the local investors with its functions and the trading process.

Getting more companies to list is seen as one of the biggest challenges. Since its official launch in July 2011, the CSX has only listed one state owned enterprise in April 2012 which is Phnom Penh Water Supply Authority (PPWSA). With the government's commitment to stimulate the market, three state owned enterprises (including PPWSA) were slated to go public by the end of this year. Notwithstanding that, market observers and experts alike seem to become pessimistic of this timeline for the other two state owned enterprises (Telecom Cambodia (TC) and Sihanouk Autonomous Port (PAS)).

Additionally, with the government's recent push, another state owned enterprise (Phnom Penh Autonomous Port) has publicly expressed its intention to float on the CSX.

Apart from the state owned enterprises, private and public companies are also expressing intentions in participating in the market. The IPO work for two garment factories are said to be underway while Foreign Trade Bank and Bonna Realty are quoted to be negotiating with professionals in relation to the IPO work.

(2) Qualification and Strength of Companies Going Public

Until recently, the access to capital market in Cambodia has been limited to the banking industry which, although has been seen as substantially more developed and enhanced, is still a restricted source of funding taking into account the much higher interest rate compared to other ASEAN counterparts and the usual requirement of security against loan facilities. Most loans provided by Cambodian banks are secured; registration of security is required, is time consuming and is not as straightforward as the one-room all-parties meeting for perfecting security registration commonly seen in other more developed countries.

This lack of a more broad and efficient capital market structure and the above restriction in relation to the bank loan facilities have formed basic foundation for some analysis to support the positive prospect of the newly set up CSX and the motivation for investment companies, local and foreign, to mobilize funds for their business projects by way of going public.

Notwithstanding the above, one major hurdle in the preparation of mobilizing funds by going public or doing the IPO can be argued as the

qualifications of the companies intending to get listed. In general, the legal compliance with the regulatory requirements, the transparency of the accounting and financial management, and the acceptability and efficiency of the general corporate governance are points, which most likely need to be revisited, adjusted, or rectified in order for such companies to meet the minimum eligibility requirements of the regulator and the market.

For instance, a large number of companies still do not apply a stringent standard of compliance with the regulatory requirements such as licensing, corporate and tax filings, and internal board and management decision-making procedures. This can be evidenced by the usual need to make such rectification when a required action in relation to the corporate management or other types of amendments is impeded by requirement of the competent authorities for the companies to be up to date and in full legal compliance.

Except for banks and similar financial institutions and as part of annual tax return filing, there is no requirement for companies to file their annual financial statements. Due to the absence of such legal requirement, many business enterprises appear to be reluctant even in preparation of their financial statements. In some instances, many corporate entities view the preparation of financial statements as merely ritual, and mainly necessary either for taxation purposes or obtaining bank financing.

Furthermore, there is also a lack of legal requirement for group of companies to prepare consolidated financial statements. For the companies with subsidiaries in Cambodia, there is no legislative requirement for consolidation. This represents a serious shortcoming in the regulatory framework as non-consolidated financial statements provide an incomplete view of company's financial performance and position. Furthermore, it also

reflects the practice, which is also shortcoming in meeting the requirement of the securities regulator for listing.

Although there is the Prakas from the Ministry of Economy and Finance dated 26 July 2007 specifying on the audit threshold for companies and all Qualified Investment Projects, not many companies and QIPs comply with this requirements and attend to the audit only if it is specifically so requested by the tax authority. As a result many companies seldom submit their financial statements for audit.

The change of the accounting system from Cambodian Accounting Standards to Cambodian Financial Reporting Standards and the introduction of the new rules in relation to corporate governance both for companies and public enterprises mean that companies which intend to get listed need to make proper preparation before attending to the IPO process.

The concept of independent directors, although being familiar to privately held companies such as banks and financial institutions, is not conversant to most other companies in particular family businesses in which control is centralized at the board whose members are in most instances owners or shareholders. We however recently have seen the transparent practice of public selection process of independent directors conducted by the sole player of the market (PPWSA). Generally, attention is also paid in the case of State Owned Enterprise whereby the possibility of senior management officers appointed by the government from its officials can be seen as having a conflict or wearing two hats when performing the management role of the issuing company and thus causes the perceived imbalance and bias in the eyes of the public investors.

In sum, given that the IPO work is complicated, involves interrelated aspects of the company, requires utmost transparency and clarity for the

public interest, and needs to be up to date, the need to conduct a pre-IPO due diligence is mostly needed, but should vary greatly based on the pre-IPO conditions of such company. Experts and regulators view this as a need in order to avoid wasting resources and time in working on companies, which are not eligible or qualified enough to get listed.

(3) Quality vs. Quantity:

In some specific sense and circumstance, Sutat Chew, Executive Vice President at Singapore Exchange, says that the post-IPO performances matter more than the quantity of IPOs listing in Singapore.[143] However, this cannot be generalized or broaden to fit with the situation of the emerging market like Cambodia where the stock market has a need for stimulation at the start.

Morten Kvammen, a director at SBI Royal Securities, says the CSX needs more companies to list in order to be successful.[144] Kvammen, a graduate of the Wharton School of Finance and a former fund manager in the Middle East, makes the case that investors want exposure to any economy that underlies the stock exchange in any market. He raises examples of companies from the private sector in areas such as banking, finance, mobile telecommunications and agriculture, including both plantations and processing like rice millers as the ideal areas for Cambodian market.

While the quality of the issuing company or to put in another word, its post-IPO performance is of crucial importance and can be the determinant of the success or strength of the market, the presence of more participants in the market is usually seen as the provision of more alternatives and

143) CNBC news Monday 16 July 2012,08:45 PM ET, Singapore's IPO market: Quality or Quantity

144) New Releases http://www.csx.com.kh/news/news/viewPost.do

attractions for investors and the general public to pay more attention and get involved therein. With too little issuing companies, investors generally have difficulty in analyzing, comparing, and selecting the stocks they would want to purchase or to diversify their investment portfolio. Such diversification is currently not possible given the sole participant in the current market.

Additionally, one conventional rule of an efficient market based on the efficient market hypothesis requires a market to be both large and liquid.[145] Although additional factors including availability of the information, funds, and transactional costs will also need to be taken into account, the CSX will need to have more listed companies before its efficiency can be properly assessed.

The CSX Index created by the CSX is also currently corresponding to only the performance of the current sole participant (PPWSA). Industry and any other type of index are currently not available given such limited number of participants. In view of not only the quality but also the quantity of the IPO work so that more companies can get listed in the CSX, the regulator is seen to have taken a balanced approach in setting a standard for which all listing companies need to comply and assisting the companies applicants in all their hurdles and providing advices, comments and conduct workshops and training in view of familiarizing the interested companies with the process and encouraging them to go public.

2. Trading

Trading on the CSX began on the 18 April when PPWSA IPO was complete and PPWSA is granted final approval for listing on the CSX.

145) investopedia: what is market efficiency.

Although trading did not start after 9 months from the official opening of the market in July 2011 while waiting for the first company to be listed, the successful listing of this first SOE on the CSX has seen the trading during the first several weeks very active with the share prices surging after the book building was 17 times over-subscribed.

With the par value of KHR1,000 (approximately USD0.25), 13,045,975 shares were listed and traded at KHR6,300 (approximately USD1.57) on the CSX. The trading volumes and prices fluctuated greatly during the first one week of trading and began to stabilize after approximately four weeks of trading with the price about 16% higher than the initial price and the trading volume fluctuated at approximately half a percent of the listed shares. However, to date the share price has dropped significantly to almost the same IPO price with only small trading volume can be seen.

Online trading is currently not available and all trading orders will need to be put through a security firm licensed by the SECC. Before that can be done, an investor is required to select a security firm of their choice and set up a trading account. After the trading account is approved, the investor can start putting their order to the CSX through the security firm. The investors can make orders only if they have at least 100% of the amount of cash (for bid order) or 100% of the quantity of securities (for ask order). These cash and securities will be frozen once the orders are submitted, for the settlement purpose or until the orders become invalid. Trading hours are currently from 9am to 11:30am from Monday to Friday except public holiday with the execution to occur twice a day at 9am and at 11:30am.

One common issue with emerging market and the new introduction of the securities market is the sophistication and level of understanding of the local investors and their decision to get involved and their manner of

investment. With the lack of knowledge and experience in securities trading and the ability to analyze stocks and investment portfolios, local investors are usually reluctant to participate and would be very sensitive to the immediate trend and fluctuation of the stock prices. Short position is also very commonly seen due to the above factors despite the fact that Cambodian people are usually cashed up and not sensitive to bank loan interest which usually factors the short position.

Chapter 7 - Social Land Concessions

Ⅰ. Introduction

After the collapse of the Pol Pot regime in 1979, Cambodia has been nationwide known that the milestone of land privatization was first available in 1989 responding to the Constitution of the State of Cambodia.[1] Since then, most people were believed to receive a fair land distribution. The first Cambodian land law was promulgated in accordance with this privatization policy in 1992. Yet, political turmoil and fighting resulting from the existence of the civil war prevented most of the people returning from the Cambodian-Thai border camps in the early 1990s from receiving any land. In addition, demographic pressures have increased making newly formed families become landless because no more land was redistributed.[2] As a result, rural household landlessness has risen to 20 percent among the total number of rural households and it was believed that the rural landlessness may be increasing by 2 percent every year.[3]

It is noted that landlessness tendency has impelled the government to include land redistribution in the form of social land concessions in the 2001 Land Law. It is believed that this second land law will allocate state

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1) The Constitution of the State of Cambodia was promulgated on April 30, 1989 requiring a mixed economy while the Instruction on the Implementation of Land Use and Management Policy, No.03SNN dated June 03, 1989 provided private ownership to Cambodian citizens.

2) Sophal Chan and Sarthi Acharya, *Land Transactions in Cambodia: An Analysis of Transfers and Transaction Records*, Working Paper No. 22 (Phnom Penh: Cambodia Development Resource Institute, July 2002), 5 ("The Oxfam Study on land shows that of the new families that were formed during the 15 years prior to 1999, about half were landless from the very beginning because there was no land to redistribute.").

3) Ministry of Planning, *Cambodian Human Development Report 2007: Expanding Choices for Rural People* (Phnom Penh: Ministry of Planning, 2007), 48.

property with a fair and equitable manner to poor landless people. Following the 2001 Land Law, the Sub-decree on Social Land Concessions was adopted in 2003 in order to provide legal procedures of distributing land to poor and landless people in the whole country. Interestingly, the Civil Code of Cambodia promulgated in 2007 allows the land concessions to be implemented by the special law[4] that is the 2001 Land Law.

This article mainly focuses on the experience of land redistribution and raises propositions for a future success of land redistribution. The first focus of this article tells the reasons why social land concessions are needed in the current Cambodia's situation, and then the second focus describes the mechanisms of land redistribution through social land concessions. The third focus necessarily refers to challenges arising from the social land concessions. The last focus proposes possible needs for successful social land concessions.

Ⅱ. Social Land Concessions in Cambodia

1. Purposes of Social Land Concessions

Land is a fundamental resource for poor landless people to develop their way of life. A lack of access to land as experienced in India is correlated with a high poverty rate.[5] In Cambodia where the poverty rate was 35 percent of the total population in 2004,[6] a vigilant government policy in

4) Civil Code of Cambodia, No.NS/RKM/1207/030, December 8, 2008, art. 307.

5) Robin Mearns, *Access to Land in Rural India: Policy Issues and Options*, World Bank Policy Research Working Paper No. 2123 (World Bank, May 1999), 1, at http://ssrn.com/abstract=636208, last visited February 2, 2008.

6) World Bank, Cambodia Halving Poverty by 2015?: Poverty Assessment 2006, Report No. 35213-KH (World Bank, February 7, 2006), i. See also UNDP Cambodia, *Land and Human Development in Cambodia*, Discussion Paper No. 5 (Phnom Penh: UNDP Cambodia,

order to provide fair and equitable state property redistribution is urgently needed. With this regard, social land concessions equipped with basic infrastructures and necessary public services require a well-designed policy and applicable laws and regulations. Setting clear purposes of the social land concessions and fulfilling those purposes are the main task that the government should take into account. The 2001 Land Law which requires the Sub-decree on Social Land Concessions has the main purposes to improve social development through fair and equitable redistribution of state private land,[7] and to develop national economy by encouraging economic land concessions to build plantations. Sustainable environmental protection should also be taken into account.

One of the main purposes of social land concessions is to improve social development. Poverty alleviation is expected to happen when poor landless people have an opportunity to receive fair and equitable land redistribution. With this regard, the Sub-decree on Social Land Concessions issued on March 19, 2003 requires that social concession land be provided for non-residential poor families to build houses, poor families to conduct subsistence agriculture, displaced families caused by public infrastructure development to resettle in, families suffering from natural disaster, repatriate families, and demobilized families and dead or disable soldier families.[8] It seems that this sub-decree intends to share state property to every poor citizen. All affected people by the government's action such as infrastructure development or by natural disaster will be provided land for their daily life

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2007), 5.

7) UNDP Cambodia, Land and Human Development in Cambodia, Discussion Paper No. 5 (Phnom Penh: UNDP Cambodia, 2007), 15 (according GTZ survey in 2006, state private land consists of 14 percent of the total land).

8) Sub-decree on Social Land Concessions, No.19ANK/BK, March 19, 2003, art. 3.

sustainability. As such, it is believed that social welfare will be improved if the Sub-decree on Social Land Concessions is implemented well.

Another purpose of social land concessions is to improve economic development. The 2001 Land Law attempts to develop national economy not only through economic land concessions, but also social land concessions. The Sub-decree on Social Land Concessions will distribute state private land for the purposes of facilitating economic development, facilitating economic land concessions by providing land parcels for plantation workers to build houses or conduct subsistence agriculture, and developing areas that have not been appropriately developed.[9] In Cambodia, it is remarkably known that there are a lot of remote areas which are not developed yet. The Sub-decree on Social Land Concessions allows the government to prepare a proper master plan for developing those areas. Also, the policy providing residential and subsistence agricultural land for workers of plantations in economic land concessions encourages large investors to invest more in remote areas because workers are always available.

Although the purposes of social land concessions stated in Article 3 of the Sub-decree on Social Land Concessions does not directly mention environmental sustainability, social and environmental impact is taken into account when social land concession programs are made.[10] More importantly, prevention measures of the social and environmental impact are also described in social land concession programs. This sub-decree therefore seems to provide harmonious life of social land concession holders. However, the sub-decree does not provide financial mechanisms to maintain environmental protection in social land concession areas.

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9) Sub-decree on Social Land Concessions, No.19ANK/BK, March 19, 2003, art. 3.

10) Sub-decree on Social Land Concessions, No.19ANK/BK, March 19, 2003, art. 9.

2. Social Land Concession Mechanisms

Social land concessions are the sole government policy to redistribute state private land legally to poor and landless people for residential or/and subsistence agricultural purposes. Landlessness and land scarcity which are a major contributor to poverty and vulnerability in Cambodia would be expected to be resolved when the implementation of the Sub-decree on Social Land Concessions is effective. Yet, difficulties in identifying and registering state land may be an eminent hindrance for responsible authorities. The well-done implementation, however, depends foremost on the political commitment to release suitable land in order to respond to the urgent needs. It is noted that there are two main implementation mechanisms which consist of a national level and local levels. Remarkably, local levels are divided into provincial level, district level and commune level responsible for social land concession programs at the local levels. The success from the implementation procedures may however depend mainly on the real power of decentralization.

At the national level, the national social land concession committee is an institution determining the national social land concession policy but it is under the control of the council of land policy. It is amazingly noted that the chief of the national social land concession committee and that of the council of land policy is same person, the minister of Land Management, Urban Planning and Construction.[11] Moreover, there is no clear provision

11) Sub-decree on Social Land Concessions, No.19ANK/BK, March 19, 2003, art. 21; Sub-decree on Revising Article 4 of Sub-decree No.68ANK/BK dated October 18, 2004 on the amendment of Article 4 of Sub-decree No.88ANK/BK dated December 1, 2000 on the Establishment of Council of Land Policy, No.35ANK/BK, February 06, 2009, art. 1.

to state the procedural control of the council of land policy. This complicated requirement may lead to time-consuming procedures of social land concessions at the national level. Not only the national social land concession committee has the duties to initiate national social land concession programs, other ministries or institutions also have the right to initiate the concession programs. In this respect, the Sub-decree on Social Land Concessions requires that the social land concession programs be submitted to the national social land concession committee for the examination. However, the sub-decree is silent whether the committee has the right to reject the plan. It looks a bit tricky to say that the national social concession committee can initiate national social land concession programs but this committee does not hold state private land. Therefore, it is necessary that all national social land concession programs be done at the only one responsible institution that is the national social land concession committee in order to ease the national social land concession programs.

At the provincial level, the provincial land use and allocation committee is the institution determining the provincial social land concession policy. It is however seen that this provincial committee has the duties only to accept or reject or revise the social land concession programs proposed by commune councils. The Sub-decree on Social Land Concessions does not provide the power to the provincial committee while the social land concession programs are beyond the authorities of commune authorities and district authorities. For example, in case the number of applicants for a social land concession program in one commune is too much, the selection criterion is needed to select the applicants in order of priority.[12] The remained unselected applicants can propose to the provincial land use and

12) Sub-decree on Social Land Concessions, No.19ANK/BK, March 19, 2003, art. 11.

allocation committee for social concession land. The sub-decree does not give a clear instruction how those applicants can be decided by the provincial land use and allocation committee since this committee is not entitled to initiate the social land concession programs.

At the district level, the district working group has main duties to provide technical assistance for commune councils in order to identify, classify and plan land use as well as to select social land concession holders and implement the social land concession programs.[13] District working groups are also required to ensure effective and transparent distribution of local social concession land. However, the Sub-decree on Social Land Concessions has no guidance how these working groups fulfill the task. Moreover, how district working groups provide technical assistance for commune council remains unclear. As such, district authorities may have poor capacity and resource availability compared to the role mentioned in the sub-decree. At least, it should be stated that district working groups have the right to allocate social concession land where it is beyond the capacity of commune council. Clear guidance on the role of district working groups, together with capacity building, will be required.

At the commune level, a commune council has the role to initiate and implement local social land concession programs. The council is also responsible for the selection of social land concession applicants and the fair and effective land allocation.[14] Interestingly, the local social land concession program initiated by the commune council has to be submitted to the provincial land use and allocation committee through the district working group for approval. The approval by the provincial land use and

13) Sub-decree on Social Land Concessions, No.19ANK/BK, March 19, 2003, art. 26.
14) Sub-decree on Social Land Concessions, No.19ANK/BK, March 19, 2003, art. 28.

allocation committee is not an ultimate decision; the local social land concession program must be submitted to the national social land concession committee for revising or rejecting that concession program within 60 days.[15] Noticeably, whether the submitted documents considered to be approved or not, if no response from the national social land concession committee after the period of 60 days, remain unclear. Therefore, in order to benefit from the decentralization, it is necessary that local social land concession programs be made and responsible only at the local levels.

3. Challenges of Social Land Concessions

The outcome of social land concessions has so far been a dream for poor and landless people in terms of their poverty alleviation. Legal tools to implement the Sub-decree on Social Land Concessions dated March 19, 2003 have not entitled local authorities to fully benefit from the decentralization in order to achieve the purposes of social land concessions. The final decision in order to create social land concession programs from local to national must be approved by the Council of Land Policy[16] under the supervision of general council of state reform.[17] The long bureaucratic legal procedures lead to slow pace of social land concession programs. Also low living standards of concession holders will never be improved through social land concessions because of the uncertain role of responsible competent authorities. Moreover, the abandonment of new relocated places is a sign to show that the relocation areas are not yet ready for living

15) Sub-decree on Social Land Concessions, No.19ANK/BK, March 19, 2003, art. 6.
16) Joint Circular on Mechanism to Provide Agricultural Dissemination Services for Social Land Concession Peasants, No.507PK/KSK, December 26, 2006.
17) Sub-decree on the Establishment of the Council of Land Policy, No.88ANK/BK, December 01, 2000, art. 3.

places. With this regard, it can be seen that school dropout rate of concession holders' children is high making more future misery. Poor land management also leads to booming informal sales which cause future landlessness again.

Slow pace of land redistribution to poor and landless people through social land concessions remains much problematic.[18] A lack of clarity on the legal procedures and intricate approval processes are the main causes. Moreover, accompanying guidelines and relevant regulations make it impossible to match the current urgent needs. For example, the Sub-decree on Social Land Concessions states a vague definition of social concession land[19] thereby causing commune councils or the national social land concession committee uncertain to prepare social land concession programs. In 2005, the Sub-decree on State Land Management requires that state land subject to social land concessions be registered. Yet, the way to speed up the registration process of state land whether through sporadic land registration or systematic land registration remains silent in this sub-decree. As such, the competent authorities have nothing to do with social land concession programs if state private land remains unregistered. More remarkably, systematic land registration projects under the support from World Bank, German and Finnish governments have been done slowly. In addition, the Proclamation on Financial Criteria of Social Concession Land Applicants was issued in July 2007 making competent authorities impossible to select social land concession applicants although state land was already registered before 2007. Therefore, many poor and landless people remain everywhere in Cambodia.

18) Circular on the Illegal Occupation of State Land, No.02SR, February 26, 2007.
19) Social concession land is "the land subject to social land concessions."

It is noted that the livelihoods of social land concession holders have so far been miserable. The purposes of social land concessions are not fulfilled due to the fact that actual implementation has not followed the rule of law. Displacement had been made before the existing necessary legal procedures concerning social land concessions leading to the implementation without complete requirements. For example, the Sub-decree on Social Land Concessions requires that the possibility of basic infrastructures be evaluated in order to implement the concession plans,[20] but the basic infrastructures have not been established in actual practice.[21] Without basic infrastructures, it is hard for people to communicate from one area to another, thereby exacerbating business transactions. Moreover, the government does not make more efforts to create job opportunities in the relocation areas making displaced people jobless. It is impossible for people to live in one place without having jobs to support their livelihoods.

Abject livelihoods arising from the failure of displacement policy lead to the abandonment of relocation places.[22] Personal interview made in November to December 2008 and March 2009 showed that 20 percent out of 149 respondents became jobless in the new relocation areas which are far from the central city.[23] More remarkably, 42 percent of them remain sellers in

20) Sub-decree on Social Land Concessions, No.19ANK/BK, March 19, 2003, art. 9.

21) It can been seen that relocation areas, such as Trapaing Anhchanh Village, Trapaing Andong Village and Damnak Trayeung Village are the relocation areas which are not equipped with basic infrastructures when displacement is made. Although passable roads in Damnak Trayeung Village were established, but drainage system, water supply and electricity were not fully available.

22) The Cambodian Human Rights and Development Association, *Human Rights Situation 2008* (Phnom Penh: The Cambodian Human Rights and Development Association (ADHOC), January 2010), 2 (stating that 70% of forced eviction victims have either abandoned or sub-let their relocation houses outside the city in order to return to Phnom Penh where they can look for work and access schools for their children).

23) The new relocation areas are usually 20-25 kilometers from the former places. See

the new places where their sales cannot fulfill the basic needs because the clients are only the poor. As such, some of them leave their houses for some period of time for one day, one week or one month in order to find new jobs. Also, for those who work in the former places rented rooms nearby those places for continuing their work, as such they leave their new houses in relocation areas for a long period of time. When time permits, they come to their houses like visitors only. Poverty continues when relocation areas are far from job centers.[24] These long-distance areas are also the cause of expenses for communication from those areas to market places and work places thereby discouraging them from living in those areas.

School dropout of the children of relocated people is a bad impact on social development. As already mentioned, relocation areas, which are far from central city, always face a lack of schools. So children have difficulties in going to farther schools thereby feasibly giving up those schools. Moreover, when relocated people are facing poor livelihoods, they do not concentrate on their children's schooling. With this regard, children with absence of education are likely to be persuaded to commit bad things. Consequently, the future families' livelihoods become more miserable since when the children becoming adult cannot financially support their families. The government should pay more attention to the education of relocated people's children, otherwise the government will face a more serious future burden.

Appendix 2 for more information.

24) Bernadette Atuahene, "Legal certificate to Land As an Intervention Against Urban Poverty in Developing Nations," *George Washington International Law Review* 36 (2004): 1111.

Another challenge of social land concessions is informal sales of the land parcels which have just been received. The Sub-decree on Social Land Concessions prohibits social land concession holders from selling, exchanging, renting, or donating the social concession land during the first 5 year implementation period because the social land concession holders can only claim for ownership certificates after 5 years of their enjoyment.[25] The sub-decree also indicates that all social land concession holders who fail to follow necessary requirements, their land must be returned to the state. This policy prevents landlessness soon after concession landholders receive the land. In actual practice, however, concession landholders still sell their land although the sale contracts are informal. It is unclear for the future whether the buyers of social concession land can claim for ownership if time of their occupation passes for more than 5 years. Yet, the continuance of this practice arising from the poor land management will have social problems in the future because landless people will availably abound. The government should therefore take an urgent action against with this wrongdoing.

4. Needs for Successful Social Land Concessions

A vigilant plan which ensures the fulfillment of all legal procedures leads to successful social land concessions.[26] Albeit the slow pace of social land concession programs in accordance with the Sub-decree on Social Land Concessions, displacement of people arising from development projects has been done long time before the existence of the sub-decree. The aftermath

25) Sub-decree on Social Land Concessions, No.19ANK/BK, March 19, 2003, art. 18.

26) For the success of displacement through the development plan by the government, see Phalthy Hap, "The Implementation of Cambodia's Laws on Land Tenure: Squatters on Private Land" (Master's thesis, Nagoya University Graduate School of Law, 2007), 35-36.

of the displacement, which is considered to be under the social land concession policy, has remarkably exacerbated the livelihoods of the relocated people. It can be therefore said that social land concession programs have so far failed to improve the daily life of the social land concession holders. Experiencing from this failure, the establishment of basic infrastructures before starting social land concession programs is necessary. Also, professional trainings in order to allow social land concession holders to make their businesses by themselves are of fundamental importance. The creation of jobs in or nearby relocation areas is another way to provide an opportunity for the social land concession holders to sustain their livelihoods. Providing long term loans is also crucial for starting up businesses. The social land concession policy should include the children's schooling in order to maintain future social development.

Basic infrastructures are vital for poverty alleviation in relocation areas leading to successful social land concessions. Experience has evidenced enough that fast-track resettlement plan is flawed because relocated people will not be provided with basic infrastructures necessary for their daily life needs. The perpetuity of poverty exists when access to basic infrastructures is not granted for social land concession holders.[27] For example, several relocation areas such as Trapaing Andong Village, Trapaing Anhchanh Village, and Anlung Krangan Village have not been developed yet. Those areas look like squatter areas because shanties are in a mess and flood-prone with sewage. Yet, in Damnak Trayeung Village although flats have been built, sewer pipes are very poorly established and there is no sewage reservoir to receive the sewage from that place causing flooded especially during rainy seasons. Moreover, water and electricity has not been provided

27) Supra note 23.

before the relocation was made. Also, schools, health centers and markets are not available, making relocated people deter from living at the new relocation areas.

Vocational trainings are necessarily conducted for social land concession holders before the implementation of social land concession programs in order to achieve the social land concession purposes. People have different skills and desires in which the improvement of those skills should be included in the government policy for social land concessions. For those who want to work as farmers should be provided with agricultural trainings. For those who want to work in other fields such as barbering, hair dressing, carpentering, painting and tailoring should be trained in those fields.[28] Although training programs may be costly and the government may be unable to provide by the government budget, a call for NGO cooperation and international assistance will be a possible option. The outcome of the training programs will be worth because trainees are able to survive by themselves thereby contributing to the improvement of social development.

Creation of jobs in relocation areas contributes to the success of social land concessions. As discussed earlier, the main challenges of social land concession holders are the impossibility of having jobs to do. Encouragement of investors to invest nearby relocation areas is very crucial to create jobs for social land concession holders. For relocation areas where social land concession holders are farmers, small processed enterprises are necessary to make agricultural products into processed food. The government should also encourage investors to build garment factories near

28) For more information, see Phalthy Hap, "The Implementation of Cambodia's Laws on Land Tenure: Squatters on Private Land" (Master's thesis, Nagoya University Graduate School of Law, 2007), 38-39.

relocation areas in order to absorb workforces from social land concession holders. If social land concession holders have jobs to do in new relocation areas, it is not therefore necessary where those areas are because they can fulfill their livelihoods.

Another need for successful social land concessions is to provide long-term loans with low interest rates.[29] Usually, poor and landless people hardly access loans from private institutions. With this regard, the assistance from the government in order to allow an opportunity for those people to receive loans for starting up businesses is very necessary to make their sustainable income. As mentioned earlier, vocational trainings only do not necessarily mean that trainees can successfully receive fruit from the trainings unless knowledge obtained from the trainings is able to be utilized. Budget for trainings is needed in order to make sure that trainees will have jobs resulting from the trainings. However, loan policy management is necessary to be carefully taken into account. The background of social land concession holders who require loans should be aware clearly so that they will not escape from paying the loans back. The government plays also a vital role in finding suitable market for the products produced by social land concession holders.

Sustainable social development cannot exist with the absence of education of the children of social land concession holders.[30] As mentioned in "Challenges of Social Land Concessions" above, dropout rates become a big

29) For more information, see Phalthy Hap, "The Implementation of Cambodia's Laws on Land Tenure: Squatters on Private Land" (Master's thesis, Nagoya University Graduate School of Law, 2007), 39-40.

30) Personal interview in November-December 2008 and March 2009 shows that 72 percent out of 149 interviewed relocated people have not completed primary school and only 2 percent completed university.

hindrance for future social development. In this respect, government regulations on a minimal requirement of children's schooling[31] are crucial. Because illiteracy is very difficult for development purposes, for example, illiteracy of agricultural populations is an obstacle to improving agricultural sectors.[32] An incentive of encouraging children to school should therefore be included in the government loan policy. Through receiving loans, it is expected that people can improve their living standards, and then they send their children to school thereby increasing literacy. Local authorities play a crucial role in controlling dropout rates through school teachers. This policy should be therefore taken urgently into account because the continuance of dropout rates will have social problems soon in the future.

Providing residence for the poor and landless is a way that leads to success in social land concessions. So far, the Cambodian government has distributed 194,817 hectares for 33,400 families in which 4,590 houses were provided.[33] However, the quality of houses should be seriously taken into account because if the houses have no quality then the poor will face more poverty. For example, social land concession holders received houses less than one year and they become scary of staying inside the houses when there is wind because of the poor quality of houses.[34] Therefore, the government should take action to ensure quality of life of the social land concession holders.

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31) At least, children are required to attend school until grade 9.

32) Joel M. Ngugi, "Re-examining the Role of Private Property in Market Democracies: Problematic Ideological Issues Raised by Land Registration," *Michigan Journal of International Law* 25 (2004): 497. (467-527)

33) Ministry Land Management, Urban Planning and Construction, *Report on Achievement of Social Land concession* [September 5, 2012].

34) Free Radio Asia broadcast July 1, 2012.

Ⅲ. Conclusion

Social land concessions have played an important role in distributing state private land to the poor or landless Cambodian people. Since the inception of land privatization in 1989, the government still remains so some vacant land which crucially contributes to poverty reduction. However, the clear frame work with a very effective strategic policy is very necessary. For example, the construction of infrastructure including roads, water supply, electricity, school, hospital, and market are a tool to make social land concession holders stay in the land. Witness has shown that without equipped infrastructure, the success is far to come.[35)]

Good state land management is a way to make sure that the government has enough land size statistics to have a proper land use plan. So far, the accurate number state land size remains impossible making it ambiguous for the government to develop the land. Poor and landless people have been struggling with the lack of source of income due to their capability and skills. Therefore, the distribution of state private land to the poor and landless people is a way to provide jobs for the unskilled citizens to cultivate in land so that they are able to have income.

Survey for the accurate number of the poor and landless is a good way to have social land concession programs. The experience has witnessed that during the social land concession programs, the real poor people sometimes receive no land. This improper implementation causes a lot of complains from the civil society and non-governmental organizations. Past experience evidence that the number of people in Sambok Chab Village has increase

35) People left Sambok Chab Village to live at Andong Village and Trapaing Anhchanh Village have continued to be miserable.

almost three times from 2006 to 2008. Also, in Deikraham community, 48 families out of the total of 289 families had overlapped names. It means that the statistics can be exaggerated.

Chapter 8 - Secured Transactions in the New Cambodian Private Law Context

Ⅰ. Introduction

Before the adoption of the Law on Secured Transaction in May 2007, Cambodia was left without a mechanism to provide and record a security interest in movable and intangible collateral. Immovable properties, land in particular, were the common collateral used to secure loan for reason of the registration mechanism available for such type of collaterals. The adoption and entry into force of the Law on Secured Transaction was welcome and seen as a significant development in the legal framework making possible for the first time the use of movable and intangible assets as collaterals which have since substantially facilitated the lending process and requirements of all magnitudes.

Ⅱ. Current Regimes of Secured Transactions under Cambodian Law

Currently, there are two laws which essentially govern the establishment of security interest to ensure the fulfillment of obligations in transactions in Cambodia: the regime provided under the Law on Secured Transactions (hereinafter referred to as "the Law on Secured Transactions")[1] ; and that under the current Civil Code of Cambodia[2] (hereinafter referred to as the

1) Law on Secured Transactions promulgated by Royal Kram No. NS/RKM/0507/012 dated May 24, 2007

2) Civil Code of Cambodia promulgated by Royal Kram No. NS/RKM/1207/030 dated 2007

"Civil Code"), which was promulgated in 2007 and recently came into effect on the 21st of December 2011 per the power of the "Law on the Implementation of the Civil Code of Cambodia" (hereinafter referred to as the "Law on Implementation").[3)]

Prior to the application of the Civil Code of Cambodia, the security interest over moveable properties has been governed by the Law on Secured Transactions, leaving the Land Law[4)], which is partially abrogated by the Civil Code, to govern the security interest over immoveable properties. The entry into force of the Civil Code does not abrogate the existing Law on Secured Transactions. The two regimes co-exist, leaving the freedom to the parties of the transaction to choose whether they want to submit themselves to the regime offered by the Law on Secured Transactions or that offered by the Civil Code.[5)] However, the provisions of the Civil Code will prevail for the transactions which are established after the application of the Civil Code and only when the parties to the transactions are uncertain on whether their transactions are made pursuant to the Law on Secured Transactions or the Civil Code.[6)]

However in the event of challenge between a security interest established under the regime of the Law on Secured Transactions and a security interest established under the regime of the Civil Code over the same property, priority between those transactions shall be determined based on the time of the transaction which is enforceable against third parties.[7)]

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3) Law on the Implementation of the Civil Code of Cambodia promulgated by Royal Kram No. NS/RKM/0511/007 dated May 31, 2011

4) Land Law promulgated by Royal Kram no. NS/RKM/0801/14 dated August 30, 2001

5) Law on Implementation, article 74 and 75

6) Law on Implementation, article 75

7) Law on Implementation, article 76

Ⅲ. Security Arrangements Provided for under the Law on Secured Transactions and the Civil Code

1. Security interest provided under the Law on Secured Transaction:

The purpose of the Law of Secured Transactions is to modernize and open up Cambodia to new secured lending opportunities by providing a clear legal framework for the creation, registration and enforcement of security interest over moveable property subject to certain limitation.

What is security interest? According to the Law on Secured Transactions, the security interest is defined as the real rights over the collateral being used to secure performance of obligations.[8] Moreover, the law also provides that any person may provide or accept a security interest as long as it is not made over the collaterals which are consumer goods (primarily used for personal, family or household purposes).[9]

What can be used as collateral? The properties being subject to security interest (hereinafter referred to as "the collateral") may take the following form[10] :

- Goods and all kind of moveable properties;
- Intangible property including real rights, claims, and any other rights;
- Fixtures;
- Properties in existence or that may arise in the future;

8) Law on Secured Transactions, article 4, para. 1
9) Law on Secured Transactions, article 4, para. 2
10) Law on Secured Transactions, article 6

- Properties located within or outside of the Cambodian territory;
- Account and secured sale contract of the sold goods, consigned goods, leased goods and the proceeds of the collateral; and
- A simple description of "all assets" or "all moveable properties" shall be considered as sufficient if reasonably identified.

Securable obligations. Securable obligations can be as follows[11] :

- One or more, specific or general, obligations;
- Monetary or non-monetary obligations;
- Obligations either governed by Cambodian law or foreign laws;
- Future obligations regardless of whether the obligations are optional and, certain or conditional; and
- Pre-existing obligations upon the agreement of the parties.

Establishment of security agreement. A security agreement is required to be made in writing and may also be in the form of collection of multiple written records.[12] The agreement shall be binding between the parties pursuant to the terms and conditions agreed by the parties; and shall inure to the purchaser of the secured property (collateral).[13] Furthermore, the security agreement may also specify more than one secured obligations.[14]

Perfection. The perfection of security interests over moveable properties under the Law on Secured Transactions varies according to the type of the properties. Most commonly, they are perfected by way of filing of notice[15] at the SeTFO.[16] The filed notice is effective for a period of five (5) years

11) Law on Secured Transactions, article 5
12) Law on Secured Transactions, article 7, para. 1
13) Law on Secured Transactions, article 7, para. 2
14) Law on Secured Transactions, article 7, para. 3
15) Law on Secured Transactions, article 10, para. 2
16) Law on Secured Transactions, article 29

from the date of filing.[17] The effectiveness of the notice will be lapsed within five (5) years and in order to maintain the continuity of the notice, a "notice of extension/continuation statement" shall be filed on a rolling five-year basis within the six-month period prior to the expiration of the existing notice.[18] Otherwise, the notice shall become ineffective and any perfection resulting thereof shall be lost – any security interest in relation therewith shall be considered as if it has never been perfected.[19]

However, there are also certain types of collateral which only require a physical possession of such collateral in order to perfect the security interest over them. Hence, the perfection of such security interest shall be effective from the time of such physical possession. For example the security interest obtained from the lending of money to purchase shares in a company can be perfected by the beneficiary taking possession over the share certificate without having to file the notice.

Filing of notice of security.

In order to register or file the notice of security, the secured party/creditor or its representative may do the physical filing at the SeTFO or online filing at SeTFO's website. According to the Law on Secured Transactions, there are five (05) types of notices to be filed with the SeTFO:

a. The Initial Notice of Security which shall be valid and effective for a period of five (05) years from the date of filing. The initial notice of security shall be considered as sufficient for the purpose of filing if it contains the following information:

17) Law on Secured Transactions, article 36, para. 1
18) Law on Secured Transactions, article 38, para. 2
19) Law on Secured Transactions, article 36, para. 4

- The identity and detail address of the debtor;
- The identity of the secured party/creditor or its representative and detail address; and
- The description of the collateral to be covered by the notice in both Khmer and Latin characters as well as Arabic number. Moreover, the notice shall also provide the description of the relevant immoveable assets if it covers timbers to be cut, minerals to be extracted or fixtures.

b. The Notice of Amendment may be filed for the purpose of change of information specified in the initial notice or the previous notice of amendment. In the event of addition of collaterals or addition of debtors, this notice of amendment shall only be effective with respect to the collaterals or debtors added from the date of filing of such amendment. It should be noted that the filing of notice of amendment does not extend the period of effectiveness of the initial notice.

c. The Notice of Extension/Continuation Statement shall be filed on a rolling five-year basis in order to obtain the continuity of protection. Such extension shall be filed within six (06) months prior to the expiry of the existing notice.

d. The Notice of Correction may be filed by the interested parties for the purpose of correcting information specified in the notice of security. The notice of correction shall specify the following statement:
   - The filing number of the initial notice of security;
   - Clear indication of “notice of correction”; and
   - The inaccurate/incorrect information, the basis for such correction, as well as the correction.

It should be noted that the notice of correction does not in any case affect the effectiveness of the notice.

e. The Notice of Termination shall be filed, within twenty (20) days after the receipt of the debtor's written requested, at the SeTFO by the secured party/creditor in the event that there is no outstanding secured obligation and no future commitment.

Documents to receive from SeTFO:

After each filing, the SeTFO will issue the following items:

a. A confirmation statement of each filing recorded. Such confirmation statement:
   - Identifies the person who file the notice;
   - Reports all data submitted to the SeTFO;
   - Provides a serial number of filing for the initial notice of security and subsequent filings of amendment, and number of frequency of filing;
   - Provides time and date of filing;
b. A written statement of reasons in the event that SeTFO refuses to record the filing;
c. Report of account of the fees owed;
d. Receipt for the amount paid;
e. Report of the search indicating all information in relation to the notice including the amendments, extension, termination and others information requested by the searcher.

The Search of the security interest filed with the SeTFO:

The search of record of security interest filed with the SeTFO can be easily done at the SeTFO or online based on one of the following infor-

mation: filing number; name of the debtor, individual or corporate entity, etc.

Priority. The Law on Secured Transactions provides a number of rules to govern the competing security interests over the same collateral. These rules may be briefly described as follows[20] :

- A perfected security interest has priority over an unperfected security interest;
- In the case of perfected security interests, the rule of priority is based on the time of their perfection: an earlier perfected security interest having priority over a later perfected security interest;
- In the case of unperfected security interests, the rule of priority is based on the time of their creation: an earlier unperfected security interest having priority over a later unperfected security interest.

In the event of challenge between the interest of a secured party under the Law on Secured Transactions and the interest of a lien holder, the security interest holder shall have the priority over the lien holder unless the later has filed for a notice of its right at the SeTFO[21] :

- Before the perfection of security interest.
- Before the security interest holder files the notice.

Enforcement of security agreement. The Law on Secured Transactions offers various types of rights and remedies in favor of the creditor (including the right to take possession and control of the collateral conclusively or by way of an expedite judicial order; the right to sell, lease, license or otherwise dispose of any or all part of the collateral; the right to request to retain the

20) Law on Secured Transactions, article 12
21) Law on Secured Transactions, article 13

collateral in order to obtain settlement of obligations in full or in part) depending on the types of collateral. In addition to the legal remedies provided by the laws, the Law on Secured Transactions allows the parties to the security agreement to determine the agreed remedies or rights entitled to the creditor in the event that the debtor fails to fulfill or satisfy its obligations.

Specifically in the case of account or intangible property, the creditor is entitled to exercise its right conclusively over the account or such intangible property without having to go through the court.[22] In other cases, in the event of default by the debtor, the secured party can directly self-enforce its right to take possession or control over the collateral without having to petition to the court for enforcement if the debtor so agrees in writing after such default.

Termination. The Law on Secured Transactions requires the creditor/ secured parties to file, within twenty (20) days after the receipt of the debtor written request, a termination statement with the SeTFO in the event that there is no outstanding secured obligation and no future commitment.[23] The purpose of this obligation is to ensure that the SeTFO's register remains current and up to date.

2. Security interest provided under the Civil Code:

In order to provide certain security in favor of the creditor, the current Civil Code provides five (5) types of security rights over properties: (a) right of retention, (b) preferential right, (c) pledge, (d) hypothec, and (e) transfer [of title] as security.

22) Civil Code, article 46 para. 4

23) Law on Secured Transactions, article 39

(1) Right of retention:

According to the Civil Code, the right of retention is one type of security rights which allows a person, having possession of goods to which the obligations are related, to retain such goods until the obligations are fully satisfied provided that such obligations are due.[24] However, the right of retention shall not apply in the event that the possession of goods is a result of unlawful act.[25]

Unlike any other types of security rights, the right of retention is applicable to all types of goods regardless of the nature of goods – whether or not they are transferable.[26] Moreover, the Civil Code does not restrict the nature of property being subject to the use of right of retention. Hence, the right of retention could be used against moveable or immoveable; tangible or intangible property.

It should be noted that the creditor of the right of retention over a property does not benefit from the preferential right (priority) to obtain the settlement [fulfillment of obligation by the debtor] against other creditors; the only right provided by the Civil Code is the obtainment in priority of "the yield" of the property in its possession in order to off-set first the interest resulting from the obligations due and then the principal.[27] In the event of challenge from other creditors, the creditor of the right of retention shall have the right to refuse to release the property until its own obligations are fully satisfied.

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24) Civil Code, article 774, para. 1
25) Civil Code, article 774, para. 2
26) Civil Code, article 768
27) Civil Code, article 775

Furthermore, the creditor does not have the right to use, lease, or encumber the property in retention unless otherwise approved by the debtor (being the owner of the property). In retaining the property, the creditor shall have the obligation to manage the property in a good manner and with the duty of care to the extent that keeps the property from deteriorating/ destructing.[28] Any expenses made by the creditor for the aforementioned purpose in the favor of the debtor shall be fully reimbursed to the creditor by the debtor.[29]

The right of retention shall be extinct upon the debtor's request for an exchange with other adequate type of security.[30] It may also be extinct in the event that the creditor loses possession of the property.[31]

(2) Preferential rights:

The preferential right is defined as the right of the creditor to obtain in priority [to other creditors] the settlement or satisfaction of obligations from the property/asset being subject to the preferential right.[32] The Civil Code provides three (3) types of preferential rights[33] :

- General preferential right which applies to all properties/assets of the debtor as a whole;
- Specific preferential right over moveable property which applies only to moveable properties of the debtor; and

28) Civil Code, article 776
29) Civil Code, article 777
30) Civil Code, article 779
31) Civil Code, article 780
32) Civil Code, article 781, para. 1
33) Civil Code, article 781, para. 2

- Specific preferential right over immoveable property which applies only to immoveable properties of the debtor.

The preferential right is a statutory lien meaning a lien established by law independent from the parties' intention. This statutory lien is automatically established when certain events provided by law arises. Evidently, a general preferential right is established in favor of the creditor in the event that the following occurs: expenses for common benefit; claims from employees; funeral expenses; and supplies for daily uses.[34] For a specific preferential right over moveable properties, the triggering events are: lease of immoveable property; transporting of passengers or goods; bailment of goods; and sale of goods.[35] In the case of specific preferential right over immoveable properties, the triggering events are: bailment of immoveable properties; works made on the immoveable properties, and sale of immoveable properties.[36]

In principle, the preferential rights of a creditor over a property shall not be enforceable against a third party to whom such property has been transferred[37] for the reason that the debtor no longer has possession or ownership over such property.

(3) Pledge:

The Civil Code defines a pledge as when the creditor ("pledgee") is entitled to hold in possession of the properties received from either the debtor or a third party as a security over the claim ("pledgor"), and to

34) Civil Code, article 783
35) Civil Code, article 788
36) Civil Code, article 799
37) Civil Code, article 807

obtain the settlement/satisfaction of its claim out of such properties in priority.[38] Unlike the above right of retention and preferential right, pledge is established by way of agreement between the parties: pledgor/debtor and pledgee/creditor.

The Civil Code provides the following rights to the creditor/pledgee:

- Right to retain the properties under pledge until the debtor's obligations have been fully satisfied[39] (including the principal, interest, penalties for breach of obligations, expenses on the enforcement of pledge, expenses for taking care of properties under retention, and indemnifications for losses or hidden defect of the properties under pledge[40]);
- Right to demand for an auction sale of properties under pledge when the debtor fails to fully perform its obligations[41] ;
- Right to sub-pledge the properties with the prior consent of the initial pledgor/debtor being the owner of the properties.[42]

However, the pledgee is prohibited from acquiring the ownership over the pledged properties in the event of default by the pledgor.[43]

Indifferent from the right of retention as specified above, the pledgee also has the right to obtain in priority "the yield" of the properties under pledge, if any, to off-set first the interest resulting from the obligations due and then the principal.[44] The pledgee shall also bear the duty of care managing the pledged properties in its possession.[45]

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38) Civil Code, article 816
39) Civil Code, article 821
40) Civil Code, article 820
41) Civil Code, articles 816 and 826, para. 3
42) Civil Code, article 826
43) Civil Code, article 827
44) Civil Code, article 822
45) Civil Code, article 823

Moreover, it should be noted that, according to the Civil Code, a pledge shall only be established when the debtor or a third party hand in the property to the creditor as a security over the obligations[46] *meaning that the pledgee/creditor shall have an actual possession over the properties. The properties under pledge shall not in any case be in direct possession of the pledgor.*[47]

Pledge is not only applicable to moveable properties[48] but it also applies to immoveable[49] and intangible properties i.e. rights.[50] The pledge over moveable properties is the substitution of a "secured personal property contract" provided in the Decree Law no. 38 on "Contract and other liabilities"[51] which was almost completely abrogated by the Civil Code whereas the pledge over immoveable properties substitutes "antichrèse" under the Land Law.

A pledge over immoveable properties shall not be for more than five (5) years renewable but the duration of such renewal shall not in any case exceed five (5) years from the date of renewal.[52] Moreover, in order to be held enforceable against third parties, the pledge shall be made under the form of authentic act (notarized document) and registered in the land registry with the Land Office.[53]

With respect of the pledge over the rights of claim, the creditor shall not be able to assert this pledge against the 3rd debtor (end debtor) and any

46) Civil Code, article 818
47) Civil Code, article 819
48) Civil Code, article 829 *et s*.
49) Civil Code, article 834 *et s*.
50) Civil Code, article 840 *et s*.
51) Decree Law no. 38 D.L dated October 28, 1988
52) Civil Code, article 838
53) Civil Code, article 845

other third parties if such pledge was not notified to or approved by the end debtor. Such notification or approval cannot be held against any other third parties beside the end debtor if it is not made in a date-certified document.[54)]

(4) Hypothec:

Hypothec is referred to the same regime of "hypothec" under the Land Law. According to the Civil Code, hypothec is defined as when an immoveable property is put as a security to secure the debt by the debtor or third party without the transfer of possession of such property[55)] nor the transfer of document of title over such property. The hypothec may also apply to the right of perpetual lease and usufruct[56)], and any other types of properties if so allowed by the law.[57)]

Hypothec shall be established by a written agreement between the creditor and the debtor or third party[58)] and it shall not be asserted against any other third parties beside the involving parties in establishing such hypothec, if it is not made in the form of authentic act and registered in the land registry with the Land Office.[59)] A creditor who has hypothec over an immoveable property is entitled to receive in preference of other creditors[60)] the payment from the proceeds of the auction sale[61)] of the property under the hypothec in the event that the debtor fails to perform its obligations.

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54) Civil Code, article 841
55) Civil Code, article 843, para. 1
56) Civil Code, article 843, para. 2
57) Civil Code, article 843, para. 3
58) Civil Code, article 844
59) Civil Code, article 845
60) Civil Code, article 843, para. 1
61) Civil Code, article 853

It should be noted that there is no time limit for hypothec and a creditor of a hypothec is allowed by law to sub-hypothec in order to secure its own debt or that of another person.[62] Moreover, it may also transfer to or surrender its right over a hypothec in favor of another creditor(s) of the same debtor.[63]

It should also be noted that the Civil Code creates a new system of "revolving hypothec" being a hypothec created to secure unspecified claims which shall have a limitation to a specified maximum amount that may occur from a long and continuous transactional relationship.[64]

(5) Transfer As Security:

Transfer As Security is defined as a transfer of ownership over moveable properties by the debtor or a third party ("transferor") to a creditor ("transferee") in order to secure their obligations; and the ownership over the secured property will be transferred back once the debtor or the third party who creates the security fulfills the due obligations.[65]

Moreover, the Civil Code allows the transferor to collectively put multiple moveable properties, the specification (i.e. the type or location) of which shall be clearly determined, as a security under a Transfer As Security even though there are changes with respect of the individual moveable property therein.[66]

A Transfer As Security shall be made by an agreement between the parties: the creditor (the transferee) and the debtor or a third party giving

62) Civil Code, article 859
63) Civil Code, article 860
64) Civil Code, article 867
65) Civil Code, article 888, para. 1
66) Civil Code, article 888, para. 2

the properties out for security (the transferor).[67] It should be noted that unlike the pledge, the creditor is not required to actually hold in possession of the properties being the object of security. However, in order to be able to assert Transfer As Security against third parties, the creditor shall have possession of the properties otherwise such Transfer As Security shall only be enforceable against the debtor or third parties who establish it.[68]

In the event that the obligations are not fully performed or satisfied, the creditor of Transfer As Security over the collaterals shall have the following rights:

- To directly convert the properties in its possession to cash or to conclusively obtain the ownership over the properties by providing notice to the transferor in the event that the creditor of Transfer As Security has possession of the properties.[69] By enforcing the afore-mentioned rights, the creditor shall however pay back the transferor the difference in the event that the value of the properties exceeds the amount of payable debt ("the settlement").[70]
- To demand to the transferor to surrender and deliver the properties accordingly in the event that the creditor does not have possession of the properties.[71]

Ⅳ. Foreclosure of Secured Assets

Code of Civil Procedure imposes very little restriction on properties which cannot be used as the secured property against any kind of obligation

67) Civil Code, article 889
68) Civil Code, article 890
69) Civil Code, article 898, para. 1
70) Civil Code, article 898, para. 3
71) Civil Code, article 898, para. 2

and recognizes a broad range of properties to be used for the same purpose. Such properties allowable for use as secured properties include the following:

a. Immovable property which includes land, building and any fixtures attached thereto;
b. Movable properties;
c. Claims and other Proprietary Rights ; and
d. Vessels.

It is of great importance to take note that although any of the above properties can be used as a secured property against the performance of an obligation, there is a registration requirement before a security interest can be established against such secured property. Therefore, for the avoidance doubt and confusion, the word "Secured Property" is hereinafter employed to refer to the property which is used as a security against a non-registered obligation/transaction, and the word "Collateral" to refer to the property used to secure a registered obligation/transaction, and over which a security interest is established.

The Code of Civil Procedure subjects these two types of security arrangements to different enforcement procedures. While the foreclosure of a Secured Property is enforced by the normal compulsory execution procedure, the foreclosure of a Collateral is governed under the specific rule in relation to the enforcement of the security interests.

To provide a clear example, if a lender accepts a vehicle as a secured property but has never taken further action to register such security arrangement and establish a security interest in its favor, the enforcement in relation to the foreclosure of this property will be subject to the normal

compulsory execution procedure. However, had the same lender taken action to register such security arrangement, the foreclosing procedure over the Collateral will be the specific enforcement procedure of a security interest.

1. Compulsory Execution

(1) General:

Compulsory execution is a separate and independent procedure from the action procedure where the existence or non-existence of certain claims is crossed examined and determined. Therefore, the compulsory execution process does not require principally the cross-examination process and determination as to whether a claim exists, unless objected in accordance with the procedure by the defendant of the execution. The Execution Entity is also different from that in the action procedure.

Compulsory execution is further classified into two types of compulsory execution of claim with monetary payment purpose and compulsory execution of claim with non-monetary payment purpose.

(2) Execution Letter:

Given that the Execution Entity is not required to recheck on the existence of the claim, the Execution Entity will substantially rely on the Execution Letter to be submitted by the plaintiff of the execution in determining such existence.

The Execution Letter is a letter indicating and certifying a right to claim for the performance of a particular obligation under private law based upon which the law provides the compulsory execution force in order to make

good such claim by way of compulsory execution. The Execution Letter includes the following:

(i) A final judgment or verdict ordering the obligation performance;
(ii) A judgment or verdict ordering the obligation performance accompanied by the provisional execution writ;
(iii) A ruling ordering payment;
(iv) A ruling demanding payment accompanied by a declaration of provision execution;
(v) Disposition by a court clerk in relation to the court tax;
(vi) Authentic letter prepared by a notary public indicating the demand for payment;
(vii) A foreign court judgment or verdict accompanied by the conclusive endorsement writ;
(viii) A foreign arbitral award accompanied by the conclusive endorsement writ; or
(ix) A record in relation to a written compromise.

(3) Execution Entity:

The execution entity can be the execution court or the bailiff attached to that execution court. If the execution entity is the execution court, then the execution court is the competent court of first instance. The competence and jurisdiction of the execution court varies depending on the types of Secured Property.

(4) Parties to the Execution:

Apart from the execution entity, the parties to the execution are the plaintiff to the execution (usually, but not always, the creditor who

submitted the petition for compulsory execution) and the defendant of the execution (usually, but not always, the debtor or the obligor or the holder of the Secured Property). Both the plaintiff and the defendant of the execution can have their respective legal representatives provided that such representatives meet certain requirements as stated in the law.

(5) Conditions for the Commencement of Compulsory Execution:

The compulsory execution is initiated when the plaintiff to the execution submits the petition for compulsory execution. The petition is required to be in writing and submitted to the competent Execution Entity. The petition must indicate the following:

(ⅰ) Name and address of the parties to the execution and the details of their respective legal representatives;
(ⅱ) Description of the Execution Letter;
(ⅲ) Indication of the type of compulsory execution requested;
(ⅳ) In the case of direct enforcement, a description of the property subject to the execution and the method of execution; and
(ⅴ) In the case of substituted execution and indirect enforcement, the substance of the judgment requested by the plaintiff to the execution.

The petition shall be accompanied by a number of other required certified documents, tax, and the necessary expenses for the compulsory execution. The certified documents include most importantly the valid Execution Letter. With a number of exceptions, the Execution Formula is also required to be submitted. The Execution Formula is the annotation provided by the court clerk or the notary public on the certified copy of the Execution Letter indicating the existence of the claim and the meaning of the compulsory execution power of that Execution Letter.

(6) Compulsory Execution for Multiple Claims:

Cambodia adopts the principle of equality meaning that with the exclusion of the holder of the Security Interest, all creditors to a secured property being subject to the same compulsory execution shall receive the proceeds from the execution in equal proportion to their claims.

(7) Compulsory Execution for movable Secured Properties

a) Petition: The Petition shall be submitted to the Execution Entity which in this case is the bailiff (currently not in existence but is in the process of being set up) further indicating the location where the property is kept.
b) Confiscation: The execution method for this type of Secured Property is the confiscation by the bailiff who will have the authority to further determine what the subject of the confiscation should be if not clearly indicated in the execution letter. The confiscation can be done from three different holders:
    i . From the debtor: In this case the bailiff will only base on the fact that the property is currently under the possession of the debtor without having to further look into whether the same is owned by other third party. However, if there is clear evidence that the property is owned by the third party, the confiscation of such property shall not be made. As a method of confiscation, the bailiff can use force by entering into the premise of the debtor and take actions like opening a closed door or a safe. However, in selecting the movable property for confiscation, the bailiff is required to

consider the interest of the debtor if doing so does not affect the interest of the creditor.

ii. From the creditor: in this case the creditor can voluntary relinquish the property subject to the confiscation to the bailiff.

iii. From the third party: in this case, the confiscation can only be done if the third party agrees voluntarily to relinquish such property as the confiscation cannot be done by way of presenting the Execution Letter indicating the name of the debtor from a third party. In the event of objection from the third party to the confiscation, the only available means for the creditor is to request the bailiff to confiscate the right to demand the return of the property.

c) Custody of the Confiscated Property: In principle the custody is vested with the bailiff, especially in the case whereby the property is valuable and is easy to be transported. However, in the event where there would be many issues in managing, maintenance or transportation and if too costly, the bailiff can retain the property under the care of the debtor. In this case, the confiscation is valid if the property is labeled confiscated or other similar indication.

d) Distribution of Proceeds: the creditors entitled to the proceeds from the sale of the secured property include the plaintiff to the execution, the creditors having the recognized rights to demand a split and those creditors who have petitioned for a split. The division of proceeds is vested with the bailiff or the court of first instance to which the bailiff is attached.

In the event there are one or more creditors and the proceeds from the sale can fully cover all the claims and the expenses for the execution,

the remainder of the proceeds after such division shall be returned to the debtor.

In the event the proceeds cannot fully cover all the claims from the creditors and there is an agreement between all the creditors in dividing the amount of the proceeds, the bailiff is required to accept such agreed division reflected in the agreement without having to further refer the case to the court.

However, in the event such agreement is not reached between the creditor, the bailiff will report and forward the issue to the court of first instance for its decision on the sharing.

2. Enforcement of Security Interests

The holders of the security interests such as hypothec or pledge are entitled to convert the Collaterals into cash through the execution entity and to obtain the repayment before other creditors. The applicable procedure in relation to the enforcement of such security interests is *the specific rules on the enforcement of security interests* which is also part of the compulsory execution discussed above. There are certain specific rules corresponding to each type of Collateral. Regardless, one of the general rules is in relation to the execution letter which in this case shall be a final and binding judgment or verdict proving the existence of the security interest, or a document having the same effect; or a certificate prepared by a notary public proving the existence of the security interest.

(1) Enforcement over Movable Properties:

a) General: Principally, the enforcement is done by way of sale of the movable Collateral except for in the case of pledge and in the case

where the plaintiff of the execution petitions for a ruling to take the Collateral for the repayment.

The procedure applicable to the compulsory execution over movable property is also applicable to the enforcement of the security interest over movable property to a large extent with a few exceptions.

b) The commencement of the enforcement: As in the process for compulsory execution, the commencement of the enforcement of security interest over movable property commences when the holder of the security interest submitted the written petition in the name of the plaintiff of the execution to the to the competent execution entity which in this case is the bailiff attached to the court having jurisdiction over the location where the Collateral is kept.

The petition shall include the following:

- a description of the plaintiff of the execution, the owner of the movable who is the debtor in execution, the debtor of the secured claim and the representatives of the aforementioned persons;
- a description of the security interest and the secured claim;
- a description of the movable that is the subject-matter of the security interest and the location thereof; and
- if the security interest is being enforced against only a portion of the secured claim, a statement to this effect and a statement of the scope thereof.

c) Procedure: The procedures in relation to the confiscation of the movable, the sale of the movable, the demand for distribution, and the distribution procedure in the enforcement of security interest are the same as those in the compulsory execution over movable property.

Particularly in relation to the enforcement of a pledge, a summarized

procedure is available to the holder of the pledge whereby such holder can apply for taking possession of the movable as a method of repayment.

(2) Enforcement over Claims and other Proprietary Rights:

a) General: The procedure applicable to the compulsory execution over claims is also applicable to the enforcement of the security interest over claims and other proprietary rights.

b) The commencement of the enforcement: As in the process for compulsory execution, the commencement of the enforcement of security interest over claims commences when the holder of the security interest submitted the written petition in the name of the plaintiff of the execution to the to the competent execution entity which in this case is the execution court being the court of first instance having the jurisdiction over the location or address of the debtor or its head office, or if without such address, the address of the third party debtor.

The petition shall include the following:

- a description of the plaintiff of the execution, the defendant of the execution, the debtor of the secured claim, the third party debtor and the representatives of the aforementioned persons;
- a description of the security interest and the secured claim;
- a description of the claim that is the subject-matter of the security interest; and
- if the security interest is being enforced against only a portion of the secured claim, a statement to this effect and a statement of the scope thereof.

c) Procedure: The procedures in relation to the enforcement of the security interest over claims and other proprietary rights, the same as that in the case of compulsory execution over claims, commences when the execution court issues a ruling for confiscation of the claim and other proprietary rights. The procedure in relation to the conversion into cash of the claims and other proprietary rights confiscated is the same as that in the case of compulsory execution over claims.

Ⅴ. Issues of Note:

Although the Civil Code has come into force to provide more secured transaction vehicles in addition to those provided under the Law on Secured Transactions, there are still a number of issues of note particularly those in relation to the priority between the vehicles and the enforcement.

There is currently a silence on the part of both Laws in the event there is a clash between for example the right of retention and the pledge. Determining the priority will therefore become an issue.

The issue of enforcement is critical. As highlighted above, although a security interest is properly created and registered, enforcing such right will inevitably need to go through court process which as matter of practice is time consuming and the result of which is unpredictable.

These issues should therefore be the focus of the next writing in this area.

Chapter 9 - Settlement of International Civil and Commercial Disputes in Cambodian Private Law Context

Ⅰ. Introduction

Since the mid-1990s, Foreign Investment to Cambodia has been gradually increased as foreign governments, institutions and NGOs started to assist the construction of its social infrastructure and of legal framework. When it comes to legal reform in Cambodia, it is a very famous story that legal assistance of Japanese government has played an important part of drafting Cambodian Civil Code of 2007 and Civil Procedure Code of 2006.[1] The latter has already entered into force at the same year of its legislation in 2007 and the former entered into force in 2011 with Law on Implementation of the Civil Code. Also, as for security market, since 2007, Korean government, the Korea Exchange(KRX) and several Korean law firms have been supporting to establish new security exchange regime in Cambodia, and finally, the Cambodia Securities Exchange(CSX) has begun operating in Phnom Penh city on April 2012. Along with these changes, international cooperation is becoming one of the most important Motto in recent Cambodian society.

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1) For more details, see Yasuda Yoshiko, “Cambojia ni okeru houseibi to hou no shihai (Legal reforms and the Rule of Law in Cambodia)” in Hougaku Shinpou, vol.112, nos. 1 and 2 (2005); Takeshita Morio, “Cambodia minsohouten kiso shien to houseibi shien no kongo no Kadai (Assistance in Drafting of the Cambodian Civil Procedure Code and the Future Challenges Facing Legal Assistance)” in Hou no Shihai, vol.129, 2003; Mong Monichariya, Kazuko Tanaka, ”Drafting a New Civil Code and Code od Civil Procedure in Cambodia with Japanese technical Assistance” Uniform Law Review 2002-4.

From this current situation in Cambodia, International relationship, especially in the private sector, is expected to be gradually deepened from now on, which means that there would be a high increasingly possibility of international private law disputes.

However, in Cambodian private law context there are no express and concrete private International law rules except for some choice of law provisions of law on the marriage and family which are still effective after Civil Code came into force.[2] It means that when international civil law cases arise in Cambodia, we cannot easily predict which law should be applied to the cases having foreign elements and whether or not Cambodian Court has its jurisdiction in that cases.

This paper, reflecting this situation, aims to reconfirm the importance of Private International Law rules in Cambodia and to urge to legislate the rules on Private International Law. For this purpose, it is necessary to research current Cambodian civil law system concerning international civil and commercial matters. And also, other Asian countries' experience in drafting private international law rules would be good lessons. And also this paper will address what should be considered at the time of the drafting of International Private Law rules in Cambodia

In the case of Cambodia, not only Civil Code and Civil Procedure Code but also other related laws were drafted or are now drafting under legal assistance project initiated by foreign governments including Japan as mentioned at the outset. But the issues regarding how to deal with the international civil and commercial cases in Cambodia might not sufficiently be discussed at the stage of drafting civil code. In this regard, another purpose of this paper is to examine the importance of drafting private inter-

2) For more details, see Chapter Ⅲ(2).

national law rules in the context of legal assistance and legal cooperation.

Ⅱ. Short overview of Private International Law

The private international law covers three questions; Jurisdiction, Choice of Law, and Recognition and Enforcement of Foreign Judgments.[3)]

The first point which may have to be decided in a case having foreign element, is whether the court where a plaintiff brought an action can deal with the case. Each country can determine whether or not it can exercise its jurisdiction in the case pursuant to its own jurisdictional provisions or rules based on case laws.[4)]

After the court determined its jurisdiction, the next step is to decide the applicable law to the case. Sometimes the court has to apply foreign law other than its own law. Some cases like contract are governed by the law chosen by parties. But a court is the most important player to decide the ultimate law applicable to the case, because the court has to sometimes apply the mandatory rules of forum or of the third country in case[5)], and sometimes exclude foreign law chosen by the parties when it is contrary to the public policy of forum country.[6)] These kinds of matters are dealt

3) For more details, see, Dicey, Morris & Collins, The conflict of Laws, 15th ed., Sweet & Maxwell, 2012C;M.V. Clarkson, Jonathan Hill, The Conflict of Laws, 4th ed., Oxford 2011; J.H.C. Morris, The Conflict of Laws,7th ed,, Sweet & Maxwell, 2009.

4) Each country has its own jurisdictional rules. For American approach, see, Symeon C. Symeonides, American Private International Law, Kluwer 2008, pp 23 and for European approach, Dicey, Morris & Collins, supra note 2, Vol. 1, nos.11-001; COUNCIL Regulation (EC) No 44/2001of 22 December 2000 on Jurisdiction and the recognition and enforcement of foreign judgments in civil and commercial matters (Brussels I), Latest Amendment of Brussels I was published on 25 Sep. 2012.

5) Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I) Art.9.

6) For more details about the public policy in private international law, see, Cheshire, North & Fawcett, Private International Law, Oxford 2008, pp.139.

with in each country's choice of law rules.

Last issue concerned with private international law is the recognition and enforcement of foreign judgments. For instance, when a foreign claimant having a judgment against a Cambodian defendant in his country, wishes to have the judgment satisfied out of the defendant's asset in Cambodia, will the judgment be enforced in Cambodia? Rules on the recognition and enforcement of foreign judgments are concerned with this kind of situation. Foreign judgments which meet some requirements regulated in the rules of enforcing country would be enforceable in that country. Actually Cambodia has its own rules to be applicable to this situation in Civil Procedure Code as shown Chapter Ⅲ of this paper.

The private international law rules basically differ from country to country even though there are some conventions adopted by Hague Conference on private international law[7] and EU regulations for harmonization in the field of private international law in EU.[8] It means that if international civil and commercial cases were brought to the forum country, the private international law rules of the forum country should be first examined. However, in the case of Cambodia, any explicit statutory provision and established rules regarding this area do not exist at the moment, except for enforcement of foreign judgments above mentioned and some insufficient choice of law provisions on marriage and divorce matters, which leads to the lack of legal predictability.

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7) For instance, convention on civil procedure of 1954, convention on the service abroad of judicial and extrajudicial documents in civil and commercial matters of 1965, convention on the civil aspect of international child abduction of 1980, convention on choice of court agreements of 2005 etc.

8) M.V. Clarkson, Jonathan Hill, supra note 3,p 4-6.

In this paper, I would like to first examine what approaches other Asian countries took in drafting their own private international law rules so that we can learn some lessons from their experience. And then, I will reflect on Cambodian current situations and confirm the needs for enactment of private international law.

Ⅲ. Other Asian Countries' Approach

1. Japanese Approach

(1) Jurisdictional Rules

As for international jurisdictional rules, new provisions have been recently enacted in Japan. That is, the Act for Partial Revision of the Code of Civil Procedure and the Civil Provisional Remedies Act which involved the new jurisdictional provisions on international civil and commercial matters was promulgated on May 2, 2011 and has entered into force since April 1, 2012. The full text of the new provisions on international civil and commercial jurisdiction is incorporated into the Japanese Code of Civil Procedure and the Civil Provisional Remedies Act.[9)]

Before the new rules on international civil jurisdiction was implemented in 2012, there has been no explicit jurisdictional provisions in Japan. Until then Japanese rules on international jurisdiction have been based on case laws. There are two leading Supreme Court cases which made great influences on formulating the general rule on international jurisdiction in civil and commercial matters. One is the Malaysian Airlines case of October 16,

9) English version of New Provisions can be found Japanese Yearbook of International Law Vol. 54 (2011) pp.723.

1981[10] and the other is the Family Company case of November 11, 1997.[11] In the former case, Japanese Supreme Court held as follows;

> "there is no customary international law nor generally accepted international rules of law regarding jurisdiction in civil and commercial matters; since there is no provisions regarding international jurisdiction in Japanese law, the determination of international jurisdiction should be made in accordance with the principle of justice which requires the fairness between the parties, and a proper and prompt trial; the provisions in the Code of Civil Procedure addressing the venue of local courts reflect, in principle, the above principle of justice."

According to the above Supreme Court decision, a defendant should be, in general, subject to the jurisdiction of a Japanese court when any one of Japan's courts would have jurisdiction in accordance with provisions of the Japanese Code of Civil Procedure.

Since the Supreme Court decision of 1981, many lower courts have added another rule called the "special circumstances consideration" to the

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10) 35 Minshu (7) 1224 [1981]. In this case, a Japanese man who purchased an air ticket in Kuala Lumpur, Malaysia for his local trip died of an airplane accident there, his wife and family members brought an action in Japan against a foreign airline company which had an office in Japan. The Nagoya District Court dismissed the case for lack of jurisdiction on March 15, 1979. On November 12, 1979, the Nagoya High Court, however, reversed the lower court's judgment, holding that Japanese lower court had jurisdiction based upon Article 4, (v) (Article 4, Para. 3 at that time) which provides that venue lies where a branch of the foreign company is located.

11) 51 Minshu (10) 4055 [1997]. Japanese automobile importing company X and a Japanese national Y residing in Germany more than 20 years, made a contract in which Y purchases automobiles from Europe and sends them to X. Later, X gradually doubted his management of the funds X had transferred to Y, asked Y to repay the funds. But Y refused to do. Therefore, X brought an action for repayment of the rest of the funds and interest in Japan. Japanese Supreme Court determined Japan don't have jurisdiction in this case, adopting the "special circumstances consideration" task.

jurisdictional rules formulated by the Supreme Court decision.[12] The doctrine of special circumstances consideration means that Japanese Court can decline its jurisdiction if its exercising of jurisdiction in international civil or commercial cases in accordance with provisions of the Code of Civil Procedure is found to be contrary to the principle of justice such as fairness between the parties and a proper and prompt trial, taking the special circumstances of such cases into consideration. This doctrine was finally admitted by Japanese Supreme Court decision in the Family Company case of November 11, 1997.

To sum up, the general rules on international civil and commercial jurisdiction prior to new jurisdictional provisions, is first to refer to domestic provisions on jurisdiction in the Code of Civil Procedure and to determine its jurisdiction, and then apply the doctrine of special circumstances consideration to decide whether to decline the jurisdiction or not in that case. This general rules formulated by above-mentioned leading Supreme Court cases are adopted in the new provisions on jurisdiction entered into force in 2012.[13]

(2) Choice of Law Rules

To be surprised, the First Japanese Choice of Law rules were enacted late in the 19th century. At the time Japan had been forced to conclude unjust international conventions with Western Powers where foreigners enjoyed extraterritorial rights in Japan. In order to get out of such kind of situations and to become a member of the modern nations, Japanese Government tried

12) Tokyo District Court May 27 1984 H.J.no.1113 p. 26; Tokyo District Court Nov. 14 1989 H.T.no. 735 p.238.

13) Article3 (9) of revised Japanese Code of Civil Procedure.

to make a modern civil law system. One of the result was the enactment of the general rules on choice of law, Horei of 1893.[14] The Horei was highly appreciated in that it had thoroughly pursued "conflicts justice" in the traditional conflict-of-laws approach which was established by F. C. Von Savigny in the 19th century.[15]

The Horei had been once revised in 1989. But harmonization and unification trend in conflict of law rules has completely abolished the Horei regime in the long run and gave a birth to new rules on choice of law in Japan. That is the Act on General Rules for Application of Laws which entered into force on January 1, 2007.[16]

(3) Recognition and Enforcement of Foreign Judgment rules

With regard to Recognition and Enforcement of Foreign Judgment rules, the Article 118 of Japanese Code of Civil Procedure prescribes as below:

A final and binding judgment rendered by a foreign court shall be effective only where it meets all of the following requirements:

(ⅰ) The jurisdiction of the foreign court is recognized under laws or regulations or conventions or treaties;

(ⅱ) The defeated defendant has received a service (excluding a service by publication or any other service similar thereto) of a summons or order necessary for the commencement of the suit, or has appear without receiving such service.;

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14) Kazunori Ishiguro, kokusai-siho(Private International Law), shinsesha (2007) p.18.

15) For more details about Savigny's traditional approach, F. C. von Savigny, System des heutigen römischen Rechts, Bd. 8(1849). William Guthrie(translated with notes), A treatise on the conflict of laws, and the limits of their operation in respect of place and time/ by Friedrich Carl von Savigny (Edinburgh:T. & T. Clark, 1880)

16) English version of New Act can be found Japanese Yearbook of International Law Vol. 51 (2008) pp.731.

(iii) The content of the judgment and the court proceedings are not contrary to public policy in Japan;
(iv) A mutual guarantee exists.

This provision made a direct influence on Civil Procedure Code of Cambodia which had received Japanese technical assistance for drafting the code. Current Cambodian Civil Procedure Code has almost the same provision with Japanese rules concerning recognition and enforcement of foreign judgment. Therefore Japanese way to interpret and operate this provision could be referred to Cambodian approach to the provision on it.

2. Korean Approach

(1) Jurisdictional Rules

Unlike Japan whose jurisdictional rules are incorporated in Code of Civil Procedure, Korean jurisdictional rules on international civil and commercial matters are incorporated in Korea new choice of law rules, Private International Act of 2001.[17)]

Article 2 of Private International Act of 2001 provides for International Jurisdiction. It lays down that; (1)In case a party or a case in dispute is substantively related to the Republic of Korea, a court shall have the international jurisdiction. In this case, the court shall obey reasonable principles, compatible to the ideology of the allocation of international jurisdiction, in judging the existence of the substantive relations; (2) A court shall judge whether or not it has the international jurisdiction in the light of jurisdictional provisions of domestic laws and shall take a full consideration

17) This is the first Act in Korea to have the express provisions on international jurisdiction.

of the unique nature of International Jurisdiction in the light of the purport of the provision of paragraph (1).

From the Article 2 (2), we can easily grasp that it follows Japanese rules which are formulated based on Japanese Supreme Court cases[18] and also Japanese "special circumstances consideration" task was expressly adopted as an express provision before Japan did.

(2) Choice of Law Rules

It was 1958 when Civil Code of Korea was enacted for the first time. 4 years later of the legislation of Civil Code, the First choice of law rules of Korea was legislated as well. First choice of law rules called Private International Act of 1962 accepted Japanese Horei's approach as it is. Some provisions were completely the same.

The 1962 Act was dramatically revised to Private International Act of 2001, affected by European approach which started to focus on substantive value in the conflict of laws system under the influence of the American revolutionary choice of law approach.[19]

(3) Recognition and Enforcement of Foreign Judgment Rules

With regard to Recognition and Enforcement of Foreign Judgment rules, Korea has similar provisions with Japan in Article 217 of Civil Procedure Act. It provides as follows;

a final and conclusive judgment by a foreign court shall be acknowledged to be valid, only upon the entire fulfillment of the following require-

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18) *footnote* 10,11.

19) For difference between traditional approach and American revolutionary approach, see, Kazunori Ishiguro, supra note 14, pp. 69.For difference between traditional approach and American revolutionary approach, see, Kazunori Ishiguro, *supra note* 14, pp. 69.

ments: (i) that an international jurisdiction of such foreign court is recognized in the principles of an international jurisdiction pursuant to the Acts and subordinate statutes of the Republic of Korea, or to the treaties; (ii) That a defeated defendant received, pursuant to a lawful method, a service of summons or a document equivalent thereto, and a notice of date or an order, with a time leeway sufficient to defend (excluding the case pursuant to a service by public notice or similar service) or that he responded to the lawsuit even without being served; (iii) That such judgment does not violate good morals and other social order of the Republic of Korea; and (iv) That there exists a mutual guarantee.

General approaches on recognition and enforcement of foreign judgment between Korea and Japan are quite similar even though the interpretation of the related provisions might be different in actual cases.

3. Vietnamese Approach

(1) Jurisdiction

As for jurisdictional rule, any explicit rules on international civil and commercial matters may not be found In Vietnamese Civil Procedure Code of 2004. But it just has some jurisdictional provisions concerning enforcement of foreign judgment.

For example, Article 30 (2) of Civil Procedure Code provides that the requests to recognize and enforce in Vietnam foreign courts' judgments or decisions on business or commercial matters, or not recognize foreign courts' judgments or decisions on business or commercial matters which are not required to be enforced in Vietnam fall under the jurisdiction of

Vietnamese courts.[20] However, these rules concerning enforcement of foreign judgments are not international jurisdictional rules in a strict sense.

In the case of Vietnam, international jurisdiction would be determined by the interpretation of Article 25 concerning domestic civil disputes falling under the courts' jurisdiction.

(2) Choice of Law Rules

When it comes to choice of law rules, it is notable that Vietnam has the provisions for choice of law in Civil Code and its related law. As for the choice of law rules on general rule and property matters, part 7 (Art. 758-777) of Civil Code of 2005 provides some provisions titled Civil Relations Involving Foreign Elements. On the other hand, as for rules on marriage and family matters, Chapter 11 (Art. 100-106) of the Marriage and Family Law of 2001 prescribes some choice of law rules titled marriage and family relations involving foreign elements.[21]

Vietnam has also received legal assistance, like Cambodia, from Japan in revising its Civil Code.[22] However, in term of conflict of laws there are some differences. Namely, unlike Cambodia, Vietnamese Civil Code and its related law have choice of law rules. It should be highly appreciated in that choice of law rules was examined at the stage of drafting Civil Code and its related law.

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20) Article 26 (5) civil requests falling under the courts' jurisdiction

21) Toshihiro Kasahara,"betonamu-kokusai-kazokuho-ripponikansuru-kenkyu-no-to" (A Notes on Vietnamese International Family Law) Doyo-hogaku Vol.47 No. 1 pp.142.

22) Akio Morishima, "Betonamu-minpotenno-kaiseito-nihonno-hoseibisien" (Revision of Vietnamese Civil Code and Japanese Legal Assistance) ICD news no.27 (2006) p. 16-21; Betonamu-minpo-kaisei-sien(Legal Assistance to Revision of Vietnamese Civil Code) ICD news no.51(2012), p.165-169.

However, there are some inconsistencies between provisions. For instance, Article 2 (2) of Vietnamese Civil Code provides for "effect of the Civil Code". It is laid down that the Civil Code shall apply to civil relations involving foreign elements, unless otherwise provided for by treaties to which the Socialist Republic of Vietnam is a contracting party. This provision sometimes might be misleading because it could be interpreted like the case involving foreign elements shall be governed by only Vietnamese Civil Code. But judging from the choice of law rules prescribed in Civil Code and the marriage and family law, this provision should be interpreted as Vietnamese Civil Code can be applied to the cases involving foreign elements.

(3) Recognition and Enforcement of Foreign Judgment Rules

What is notable concerning recognition and enforcement of foreign judgment rules is that Vietnamese Civil Procedure Code of 2004 provides for not only foreign judgment but also foreign arbitral awards. The part 6 of Civil Procedure Code provides for procedures for recognition and enforcement in Vietnam of civil Judgment or decisions of foreign courts and/or foreign arbitral awards. However, unlike other Asian countries mentioned above, it has no requirements for recognition and enforcement of foreign judgment and/or foreign arbitral awards in Vietnam except for 'Reciprocity' principle.[23)]

23) Article 343(3) of Civil Procedure Code of Vietnam provides that civil judgments or decisions of foreign courts or arbitral awards of foreign arbitrators may also be considered by Vietnamese courts for recognition and enforcement in Vietnam on a reciprocal basis without requiring Vietnam and such foreign countries to sign or accede to international treaties on such matter.

Ⅳ. Recent Cambodian Approach and its Scope

1. Jurisdiction

As mentioned above, there are no international jurisdictional rules in Cambodian Civil Procedure Code. There is only jurisdictional provision for a foreign juridical person. Article 8 (c) of Civil Procedure Code provides as follows;

> actions against the following types of persons shall be brought in the court of first instance that has jurisdiction over the location indicated below:
> (c) A foreign juridical person;
> [1] The location of the entity's administrative Headquarters or business office in Cambodia, or
> [2] the location of the domicile of the entity's representative or other principal person in charge of the operations of the entity in Cambodia, where there is no administrative headquarters or business office within Cambodia.

This provision derived from article 4(5) of Japanese Code of Civil Procedure providing for general jurisdiction. This article 4(5) which has been often criticized of its broad scope of jurisdiction was quoted by Japanese Supreme Court Case, Malaysian Airlines case of October 16, 1981[24] to determine its jurisdiction.

Cambodia also might make use of this provision to determine its broad jurisdiction in international civil and commercial cases.

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24) *Footnote* 10.

2. Choice of Law

Cambodian Civil Code has no choice of law rules in it. It has only some provisions dealing with foreigner such as Article 7 containing limitation on capacity of foreign nationals to acquire rights[25], Article 48 for limitation on capacity of foreign juristic persons and etc.

Among those provisions concerning foreigner, the most unique point of Cambodian civil law may be that if the successor or person acquiring property under a will does not hold Cambodian nationality, such person shall be unable to succeed to land nor to acquire land by testamentary gift.[26] This provision seems to be reflecting Cambodian land law system.

Furthermore, With regard to the cases where a person has no residence within Cambodia, Article 36 provides that if a person has no permanent residence in Cambodia, the place of abode in Cambodia shall be deemed to be the person's permanent residence, regardless of whether the person is a Cambodian citizen or a foreign national. And then, it addresses that this rule shall not be applied to the cases where the law of the person's domicile applies. However, the problem is that we cannot find any provisions addressing the application of foreigner’s domicile.

On the other hand, as for the marriage and family law cases, there are some provisions related to choice of law rules. That is, some provisions of law on the marriage and family of 1989 are still effective after Civil Code came into force pursuant to Article 78 of the Law on Implementation of the

25) Article 7 provides that Foreign nationals are not entitled to acquire or maintain certain rights if so provided by law or treaty.

26) Article 1155 of Civil Code.

Civil Code.[27] Some of them are related to choice of law rules. Article 79-81 of Chapter 4 provides as follows;

> Article 79: Marriage between a Cambodian citizen and Cambodian citizen or between a Cambodian citizen and foreigner living in a foreign country must be held before the registrar of the embassy or consulate of the State of Cambodia which is located in the country where both party reside.
> Marriage between a Cambodian and Cambodian or Cambodian citizen and foreigner, which is formally held according to marriage procedure described by the law of the marriage, shall be recognized as being valid in the State of Cambodia as long as such marriage is not against the provisions of the laws of the State of Cambodia. A marriage certificate or a copy of the marriage certificate must be registered in a registration book of the embassy or consulate of the State of Cambodia.

The State of Cambodia shall enter the marriage certificate or copy of the marriage certificate in the registration book of the Commune or Section in the jurisdiction where both spouses reside.

> Article 80: Marriage between a Cambodian citizen and foreigner in Cambodia shall be held according to laws of the State of Cambodia.
> Article 81: Dissolution of marriage between a Cambodian citizen or Cambodian citizen and foreigner residing in a foreign country is recognized as being valid in the State of Cambodia.

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27) Article 78: Abrogation of Some Provisions of Law on Family and Marriage
Law on Family and Marriage shall become ineffective from the Date of Application, except the provisions of Article 76 and 77 and provisions from Article 79 to 81 of that law which shall remain effective after the Date of Application until otherwise provided by other laws.

> Dissolution of marriage between a Cambodian citizen and foreigner or dissolution of marriage between foreigners in the State of Cambodia shall be dissolved according to the laws of the State of Cambodia.
> The People's Court of the State of Cambodia has the competency to decide on the dissolution complaint of any one of the spouses who reside in the State of Cambodia.

From these 3 provisions, we can deduce which law can be applied to marriage and divorce between a Cambodian citizen and foreigner in Cambodia or residing in a foreign country. If they are in Cambodia, Cambodian law will be applied while if they are in foreign country, the foreign law will be applied. However, it is too simple to cover all the marriage and divorce cases which are getting more complicated. Moreover, from a general point of view, the laws applicable to marriage are divided into the law applicable to formal validity and essential validity of marriage. From above Cambodian provisions, it is difficult to judge the scope of the governing law.

With relation to choice of law rules, Cambodian Labor Law of 1997 also provides a provision with foreign element which can be considered as choice of law rule. The Article 1 of labor law prescribes as follows;

> This law governs relations between employers and workers resulting from employment contracts to be performed within the territory of the Kingdom of Cambodia, regardless of where the contract was made and what the nationality and residences of the contracted parties are.

Under this provision, the case where the labor contract was made between Japanese people in Japan and performed within Cambodia might be

governed by Cambodian labor law, irrespective of where the lawsuit is brought. If this provision is considered as a choice of law rule and interpreted as above, it might be unacceptable provision in the context of conflict of laws because it does not address any party autonomy principle which is admitted by most of the country. On the other hand, this provision can be interpreted that the overriding mandatory provisions of Cambodian labor law shall be applied to any labor contract performed in Cambodia for the protection of the weak (in this case, employee) of forum country (in this case, forum should be Cambodia).[28)]

At any rate, this provision is not clear enough to be interpreted as a conflict of laws rule, rather sometimes it might be misleading.

3. Recognition and Enforcement of Foreign Judgment

Concerning this issue, Cambodia follows the same approach with Japan as mentioned above. Article 199 of Civil Procedure Code of Cambodia provides for the effect of final judgment of foreign court. It stipulates as follows;

> A final judgment of a foreign court shall be valid only where all of the following conditions are fulfilled: (a) jurisdiction is properly conferred on the foreign court bylaw or by treaty; (b) the losing defendant received service of summons or any other order necessary to commence the action, or responded without receiving such summons or order; (c) the contents of the judgment and the procedures followed in the action do

28) For the application of overriding mandatory rule of forum and Individual employment contracts, see Article 9(2), Article 8 of Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I).

not violate the public order or morals of Cambodia; and (d) there is a guarantee of reciprocity between Cambodia and the foreign country in which the court is based.

For the operation of this provision, Japanese case laws and its interpretation would be a good reference for Cambodia. But it is notable how this provision is going to be operating by Cambodian courts from now on, reflecting its legal reality.

Ⅴ. Private International Law Cases in Cambodia

Cambodian approach to private international law rules in the existing Cambodian private law context have been examined in chapter Ⅲ. Under this legal situation, what kind of private international law cases are arising in an actual Cambodian society?

So far, not a few cases involving foreign elements have been caused in Cambodia and such cases must be much more increasing in the near future. Most notable cases in current Cambodia are the ones between foreign corporate and Cambodian company or government acting as private individual. Most of the disputes between them seem to be concerned with land purchase and nonpayment.[29] Most of cases having international elements tend to be settled by non-judicial method – sometimes by making use of political tools- rather than referring to the Court. And unfortunately it seems that Cambodian courts tend to make decisions in favor of Cambodian party in the cases where foreign party brings an action in Cambodia, even with a big confidence of victory. Also it tends to apply Cambodian law in conflict

29) The analysis in this chapter is based on Author's Interview with Cambodian practitioners and academics, held in early November 2012 in phnom penh, Cambodia.

of laws cases, which is often criticized as "homeward trend[30]" in the field of private international law.

In this reason, many international commercial cases are being referred to arbitration center located in Singapore and Hong Kong rather than Cambodian court. It should be an urgent task for Cambodia to establish a liable and transparent judicial system rather than referring to arbitral tribunal for settlement of the disputes.

With regard to choice of law, it seems to be thought in Cambodia that most of contract cases could rely on parties' agreement on the governing law so that the issues on conflict of laws would not happen. In other words, any further debate as to problems arising after the parties' choice of the governing law may not be found in Cambodia. Actually, many issues should be solved even after parties' choice of governing law. For instance, the issues to be solved would be these kind of problem as to whether or not the overriding mandatory rules of forum or of the third country should be applied, whether or not, for the protection of the week (in the case of consumer or employment contracts) the mandatory rules of otherwise applicable law should be applied[31], when the foreign law can be excluded, and when public policy doctrine can be invoked to exclude the foreign law.

Moreover we also encounter many tort cases and family law cases like marriage, divorce and succession other than contract cases in conflict of laws context. However even though Cambodia has some choice of law rules for marriage and divorce cases, that is too simple to cover all family law cases which are getting more complicated.

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30) Forum country usually tends to apply its own country's law even in the international private law cases. but it is the prerequisite that foreign law can be applied in forum country in the context of Conflict of law.

31) *Footnote* 26.

As for Conflict of laws cases, there are many issues to be discussed such as classification, party autonomy in the context of conflict of laws, application of foreign law in forum country and public policy.

Among them, one of the most importance issues relating choice of law in the international civil and commercial cases would be the 'classification' issue which is about how to classify the factual situation into legal category. Sometimes it is necessary to classify it into several legal categories like formal validity and essential validity of marriage. Nonetheless, classifying one factual circumstance into too many legal categories would not be desirable since it often causes a fragmentation of the governing law. And when it comes to party autonomy, it was originally not allowed in a traditional conflict of laws context because it allows excessive power to the parties to circumvent mandatory rules of otherwise applicable law, but now most of country adopted party autonomy doctrine as a choice of law rule in contract cases and in some jurisdictions it is allowed, even in tort and family law cases.

Those kinds of issues mentioned above should be discussed relating to private international law rules. For more discussions, drafting of the rules should come first as a springboard.

Legislation is for legal predictability and legal certainty. However, as a matter of fact, especially in terms of private international law or conflict of laws issues, the flexibility of interpretation is also a very important issue because all the cases dealt with in the conflict of laws context are having foreign elements and are different from purely domestic cases. Therefore, at the time of the drafting and operating of new private international law, balance between Predictability and Flexibility should be taken into consideration.

Ⅵ. Private International Law in the Context of Legal Assistance

Japan has offered legal assistance to Asian countries in economic transition including Cambodia, Vietnam since the 1990s. Generally, it is said that the purpose of legal assistance is to establish Rule of Law in recipient country. So, what is Rule of Law in the context of legal assistance?

Rule of Law has many diverse meanings depending on what is Law and what is Rule. Usually it is said that conceptions of rule of law can be divided into two general types in the USA.[32] One is the formal or thin rule of law which means any legal system allegedly must possess to function effectively as a system of laws, regardless of whether the legal system is part of a democratic or non-democratic society, capitalist, liberal or theocratic and the other is substantive or thick rule of law which incorporates elements of political morality such as particular economic arrangements, forms of government or conceptions of human rights. According to the latter, particular political value such as liberal democracy would be more stressed on.

From the traditional approach of conflict of laws, the law of any country, regardless of whether it has thin or formal rule of law or thick or substantive one, could be applicable to the international civil cases. However, some present a doubt as to whether or not the law of the thin or formal rule of law country can be the applicable law in the context of conflict of laws. It means that under this opinion the countries where rule of law

32) Randall Peerenboom,"Varieties of Rule of law:An introduction and Provisional Conclusion", in Routlede Curzon (ed.), *Asian Discourse of Rule of Law* (2004), pp2-5.

doesn't exist or only thin rule of law exists should be outside the framework of conflict of laws system. This kind of opinion would be definitely against the traditional approach.

However, apart from conceptions of thin and thick rule of law, private international law rules involved with the application of foreign law and the respect of foreign judgment would be criteria of Rule of Law from a global perspective. Therefore, the legislation of private international law is necessary as shown by Japanese experience in drafting its first choice of law rules to prevent unfair conventions with West Powers in the19th century[33] and in the context of legal assistance, private international law rules should be examined from the first stage of it.

Ⅶ. Conclusion

In today's globalized economy, international civil and commercial disputes have been increasing yearly. Cambodia in economic transition cannot be an exception. As described in this paper, Cambodia has no explicit and concrete statutory provisions on private international law except for some insufficient choice of law provisions regarding marriage and divorce. In most cases, the disputes involving foreign element are being or tend to be referred to arbitral tribunal rather than Cambodian court in the reason of lack of predictability in the outcome. From a legal assistance perspective, however, the establishment of domestic judiciary system is much more important for the recipient country, rather than relying on international arbitration system. Therefore private international law rules should be examined from the first stage of legal assistance.

33) *Footnote* 14.

From a viewpoint of legal assistance, as its purpose is said to be to establish Rule of Law in recipient country, the establishment of express private international law rules in a country might be good criteria of the evaluation of Rule of Law from a global perspective, because private international law basically contains the concepts of the respect of foreign judiciary system through the application of foreign law and the recognition of foreign judgment.

Thus, each country first needs to have its own private international law rules which can be applied to conflict-of-laws situation such as jurisdiction, choice of law, enforcement of foreign judgment to prevent the lack of legal predictability. Furthermore the legal flexibility is also required when international cases are brought to the court and judge has to interpret the provisions involved because of its international characteristics.

Chapter 10 - Conclusions

Since its official commencement in the early 1990s, market economy in Cambodia has grown rapidly in scope, size and capacity and it has gone a long way towards seeking more substantial depth and diversity. Such structural growth and development of the market is continuously defined by new laws and regulations which also help facilitate the operations of the private sector. These new laws and regulations came about as a result of various efforts to initiate, implement and develop law-related reforms and international cooperation or assistance projects to promote these reforms. As already mentioned in the introductory chapter, this compilation is aimed at achieving three main objectives: (1) to review in concrete details the practice of international assistance in the field of private law focusing in particular the process of project development and implementation on the ground; (2) to examine the question of human resources development in the Cambodian context; and, (3) to look into the development and current status of some new economic legal frontiers focusing in particular on the areas of securities market, the social land concession, regulations in secured transactions and the challenges of settling international disputes in the private law area.

In addition, the chapters have been arranged in a way to partly reflect another important aspect of legal reform projects. It draws readers' attention to three important factors in evaluating the successes and failures of these projects by looking into the close interactions between legal assistance and legal reform in the legislative process, the implementation scheme of new laws or regulations produced as a result of the international cooperation, and the subsequent question of settling or solving conflicts and disputes as

one of the important goals of legislating and regulating specific areas of private or property law.

Most Chapters of this compilation are written within these ambitious frameworks. Legislating a comprehensive Civil Code and Civil Procedure Code with Japanese legal expertise is one main attention of the first three chapters. An appropriate balance of influences between the Japanese assistance and the Cambodian initiative to reform has always been an important issue of concern, especially on the part of the Japanese donor. The relationship between the assistance and the reform in this particular legislative project in Cambodia has been discussed in different degrees and from different angles. The chapters praise the comprehensiveness of the Japanese project and its adoption of a working group system to secure an interactive process of discussions and exchange of knowledge and ideas before the final draft was produced. In conclusions, despite the different evaluations made in these chapters, they all seem to agree on one important aspect of the Japanese legal assistance, namely the strong element of human resources training or development in securing the sustainable results of a legislative assistance project. However, in a review about the long-term implication of university-level legal education in the broader context of human resources development, Kazuyo points out that ultimately the real human resources development has to depend on the development of university legal education program, which should be designed to promote international academic development, but not confined to training professionals for the sake of implementing specific enacted laws assisted by donors.

Even though new laws and institutions can be established by legal reform projects assisted by experienced donor agencies or foreign expertise,

effectiveness of these new laws in solving problems in the Cambodian social and economic contexts does not come along automatically. It requires continuous monitoring and analyses to understand the impacts and the shortages of some important provisions of these laws, and therefore to strengthen their implementation and to launch further revisions and adjustment. These monitoring and analytical efforts generally need be upheld by bold theoretical and academic exercises. Although highly qualified expertise has been involved in drafting and preparing these laws and institutions, loopholes and some shortages are frequently detected after these laws and institutions have been implemented but failed to achieve the originally expected results. To know how and why the failure happens indeed goes beyond the professional skills in implementing or applying the provisions of the new laws and institutions. It demands many in-depth analyses using higher academic skills which law faculties or law schools are the most appropriate forums to develop. The chapter also examines the gaps between the ongoing legal reforms and the contents of legal education curriculum at law faculties, emphasizing particularly on the importance of securing diversity in the context of legal education in Cambodia.

The last four chapters then are attempts to summarize the current development and challenges in the implementation of new laws and institutions, and to suggest some analytical approaches to be taken from academic and practical perspectives. The chapter on securities market includes analytical reviews of the technical conflicts between the new laws or regulations and other existing ones; and some technical challenges in defining players and operators in this new financial market. The Chapter on social land concession examines practical challenges with regard to the administrative and bureaucratic implementation of the relevant legislative

policy in the Cambodian social-economic context. Another chapter then presents some practical reviews of the developing secured transactions in Cambodia. With the entry into force of the Civil Code in 2011, some types of secured transactions are now simultaneously governed by both the Law on Secured Transactions and the relevant provisions of the Civil Code. The chapter therefore points out the technical ambiguity which may sometimes confront practitioners who have to determine a governing norm for secured transaction by choosing between the Law on Secured Transactions and the Civil Code during the current transitional period. The last chapter by Eonsuk introduces a comparative research on legislative efforts to set up rules for private international law in some Asian countries with the view to settling international civil and commercial disputes. The chapter suggests some issues to be taken into consideration when developing rules for private international law in the Cambodian context and recommend more attention to be paid to these issues in the ongoing legal reform and efforts to assist in such reform.

These are just some very limited concluding remarks on the highly diverse contents of the chapters contributed by leading scholars and practitioners in their respective fields. The objective of the compilation is nonetheless to encourage more debates on the issues proposed herein and not less. It is therefore desirable that readers of this compilation will themselves make the best use of the information and academic exercise contained in these chapters for their own research and analyses. These concluding paragraphs therefore are only meant to serve the purpose of initiating some very basic ideas to facilitate these future debates.