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A Study on Foreign Capital and Investment Laws in Korea and Cambodia (1)

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A Study on Foreign Capital and Investment Laws in Korea and Cambodia(Ⅰ)

한국과 캄보디아의 외자 및 외국인투자 관련 법제에 관한 연구(Ⅰ)

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Abstract

Ⅰ. Background and Purpose

□ The laws and regulations concerning foreign capital and investment play a very important role in a developing country with regard to its efforts to achieve solid economic growth while enjoying the benefits of an open economy.

□ However, movement of foreign capital also has a negative impact coming from its essence as a transfer of capital between countries. In that all countries, including developing countries, should consider the need to maintain their economic independence and self-reliance, they need to develop a domestic capital market efficiently by utilizing domestic savings as much as possible through domestic financial institutions in addition to using foreign capital.

□ It is important to adopt laws and regulations conducive to the efficient and harmonious realization of polity objectives in order to meet opposing requirements associated with foreign capital, particularly FDI, and to set proper limitations in the introduction of foreign capital.

□ Korea has also relied considerably on foreign capital to meet requirements for its economic development. It is said that

foreign capital has contributed greatly to the country's economic development. The country's economic growth strategy using foreign capital is benchmarked by many developing countries. Developing countries in East Asia, including China, Vietnam, Indonesia, and Cambodia, which are making rapid growth in the 21st century, are also adopting the policy of relying on foreign capital as part of their core economic growth strategy. However, it appears that the past foreign capital-related policies adopted by Korea are much different from those currently adopted by developing countries in East Asia in terms of their approach.

□ Considering the importance of foreign capital-related laws/ regulations in the whole strategy for economic development generally, it is not difficult to assume that foreign capital-related policies and laws have been one of significant contributing factors in Korean economic development.

□ In this sense, through the analysis about historical overview on the development of foreign capital and investment-related laws/institutions, it will be possible to define, albeit partially, the relations between the relevant laws and institutions and economic development, depending on what economic development strategies are adopted and what stage of economic development a country is in, including to what extent foreign capital-relevant laws and institutions have contributed to economic development in the Korean case.

□ The study may help them set up objectives that the relevant laws/ regulations should cover, i.e. a way to secure capital needed for economic growth, while maintaining economic independence and self-reliance and laying the basis for long-term development. If a developing country such as Cambodia relies only on foreign capital or its government plays only an inactive role in using foreign capital, it may fail to establish a basis for sustainable growth. In this regard, it is necessary to review whether the process followed by Korea's foreign capital and investment-related laws and regulations may provide such a country with a series of relevant clues.

Ⅱ. Outcomes

□ The current status and tasks of laws on foreign investment in Cambodia

○ Cambodia has had a good track record in attracting FDI since the early 1990s and it has become a key factor in its economic growth. It has become a major source of employment and foreign exchange through the labour-intensive garment industry, tourism and the agricultural sector.

○ Cambodia has been struggling to reform its legal system to include the international rules on investment in order to attract foreign direct investment. The general rules relating to foreign investment are found in Cambodia's Law on Investment of the Kingdom of Cambodia that was proclaimed on August 05, 1994 and the Law

on Amendment to the Law on Investment of the Kingdom of Cambodia on March 24, 2003. More remarkably, in order to fulfill the social development needs, the government has allowed to give ownership to foreigners over the buildings starting from the first floor since May 2010.

- Among various institutions to promote economic growth and attract foreign investment, especially, economic land concessions have been seen as a vehicle for economic development in Cambodia through the effective use of state private land. Economic land concessions can benefit the state and rural citizens, only if the mechanisms are done with legal rules.

- However, since the early inception of large scale economic land concessions in 1995, Cambodia has not remarkably enjoyed full benefit from the economic land concessions. In return, considerable economic land concessions granted continue to limit rural Cambodians' access to land and natural resources and to destroy the environment more seriously. Urgent government measures are necessary to be taken into account, because economic land concessions have continued to impact negatively on local community and indigenous people whose livelihoods depend upon land and forest resources. Environmental impact should be studied well and accounted by relevant authorities. Negative image from national and international communities toward economic land concessions also provokes a bad impact on government administration.

- To enjoy the benefits from granting economic land concessions fully, several suggestions would be put forward:

- Some provisions in the 2001 Land Law and relevant regulations should be urgently amended in order to have effective economic land concessions. First, paragraph 2 of Article 56 of the 2001 Land Law is seen to provide concessionaires too much right to defend concession land against any encroachment or infringement by all means.

- In addition, Article 59 of the same law tries to limit the maximum economic concession land size to not exceed 10,000 hectares in order to avoid the improper use of land. In reality, the reduction process has not been effective and moreover one economic land concession company was still granted ten times more than the limit after 2001. Therefore, it is not necessary to limit the size but to monitor the effective use of the land granted.

- The Sub-decree on State Land Management requires that economic concession land be registered before approval. This requirement has hardly been followed due to the fact that the systematic land registration is going on slowly. With this regard, the Sub-decree on Economic Land Concessions should provide a detailed instruction in order to allow relevant authorities to make use of unregistered state private land in accordance with the rule of law. Experience has witnessed enough that contracting authorities still continue approving economic concession land although the land has not been registered yet.

- Elimination of unsolicited economic land concession proposals is needed in order to improve the effectiveness of economic land concessions. So far the government has provided economic concession land through only unsolicited proposals. The result of this practice

has caused very problematic in Cambodian society because of land grabbing and violation of the right of affected people. This consequence leads to loss of confidence on the government administration.

- Delegation of power through decentralization to the local authorities has not fully contributed to economic land concessions. The role of local authorities extending from provincial to commune levels has little responsibility with regard to granting economic concession land. It seems that the voice of these local authorities is not much heard.

□ The historical review on laws and policis concerning foreign capital and investment in Korea

○ The laws and institutions on foreign capital and investment in Korea could be divided into four phases.

- In the first phase, which can be defined as 'Organizing the System for the Introduction of Foreign Capital and Expanding the Inflow of Foreign Capital(1960~65)', Korea tried to establish the legal and institutional foundations to increase quantitatively the inflow of foreign capital for the purpose of the postwar restoration project and economic development.

- The second phase, being called 'Selecting the Entry of Foreign Capital and Encouraging Foreign Direct Investment(1966~78)' had seen the transition from the quantitative enlargement toward the qualitative selection and management of foreign capital.

- The third phase can be described as a period of 'Diversifying the

Sources of Foreign Capital and Liberalizing Foreign Direct Investment (1979~97)'. Efforts were made aggressively to promote inflows of foreign direct investment both at a policy level and at a legal and regulatory level.

- In the fourth phase, which can be summarized as 'Attracting Foreign Direct Investment Strategically(1998~present)', almost all the laws and regulations have been revised so as to meet the so-called 'Global Standard' with the outbreak of foreign currency crisis of 1997.

○ The characteristics shown in the development of foreign capital and investment – relevant laws in Korea could be summarized as below:

- Firstly, the laws and institutions regarding foreign capital and investment had been mainly focused on the use of it, which was functioning as a significant method for implementing the Economic Development Plan, rather than the encouragement and inducement itself.

- Secondly, the leading role of central economic affairs ministry such as ‘Economic Planning Board’ in 1960s and 1970s which took charge of the establishment and implementation of economic development plan with enormous authorities and responsibilities was very obvious.

- Thirdly, when inducing foreign capital, Korea selected the best suitable types of foreign capital under the consideration of advantages and disadvantages of each type in view of the given situation strategically and then concentrated government’s political

and legislative backings on the chosen type of foreign capital exactly.

- Fourthly, if we see how the Korean economy has been developed, the level of inflow FDI remained very low even in the period when the economy was growing up rapidly, indicating that FDI was not the main resource contributed to the growth of Korean economy in its early shaping step.

Ⅲ. Utilization of Study Outcomes

□ Although the experience and performance of Korean economic development have become an object of attention recently, the attempt to set it up as a development model has not been made so far. But in order for Korea to assist developing countries in legal and institutional aspect, it should be very important. In this term, this study would be able to utilized for establishing the analytical framework of investment-related laws and institutions of developing countries including Cambodia as well as looking for opportunities to legislation assistance.

□ Additionally, the overview on development process of foreign capital and investment-related laws and institutions since 1960s in Korea, could be utilized as a meaningful reference for the enactment or revision of related laws. Although the external and internal economic environment Korea has faced with now have changed dramatically, considering a series of

process from adapting a legislation to realities, to influencing the behaviors of related parties, and toward leading to a certain outcome, is usually restrained by various levels of explicit and implicit rules, it is very necessary to grasp the institutions of past and present, as those rules has been made in the society by diverse factors over a long period of time.

Key Words : Cambodia, foreign direct investment, economic development, economic land concession, rule of law

요 약 문

Ⅰ. 배경 및 목적

□ 외자 및 외국인의 투자와 관련된 사항을 규율하는 법제는 발전도상에 있는 국가가 개방경제의 이익을 충분히 누리면서 경제성장을 꾀하는데 있어서 매우 중요한 의미를 가짐

□ 그러나 외자의 이동은 기본적으로 국가간 자본의 이동이라는 성격을 갖기 때문에 그 부정적 영향 또한 간과하기 어려운데, 특히 발전도상국 뿐 아니라 모든 국가들에게는 경제적 자주성 및 자립성 유지에 대한 이익이 있다는 점에서, 필요한 모든 자본을 오로지 외자로부터 충당할 수는 없으며, 외자활용과 동시에 국내금융기관을 통하여 가급적 높은 수준의 국내저축을 동원함으로써 효율적인 국내자본시장을 발전시켜야 할 필요도 있음

□ 이처럼 외자도입에는 적절한 한계가 설정될 것이 요구되며, 외국자본, 특히 외국인투자와 관련하여 서로 상반된 요구를 동시에 만족시키기 위해서는 그 정책적 목표들을 효과적이면서도 조화롭게 실현할 수 있는 법제를 마련하는 것이 중요함

□ 우리나라 역시 경제개발에 소요되는 막대한 자금을 상당부분 외자로부터 충당하였으며, 우리나라의 경제성장에는 외자도입이 크게 기여한 것으로 평가되고 있음

□ 한국의 경우와 같이 외자를 활용한 경제성장전략은 현재 발전도상에 있는 여러 국가에 의해서도 채택되고 있으며, 특히 21세기에 들어와서 괄목할 만한 성장세를 보이고 있는 중국, 베트남, 인도네시아, 캄보디아 등 동아시아의 여러 발전도상국가들은 가장 핵심적인 경제성장전략의 하나로서 외자유치정책을 추진하고 있는바, 이들 국가들에게는 한국의 경제성장과정이 하나의 중요한 범례가 될 수 있을 것임. 그런데 과거 한국의 외자 관련 경제정책은 현재 동아시아의 여러 발전도상국가들이 채택하고 있는 경제정책과는 그 접근방식에 있어서 상당히 달랐던 것으로 보임

□ 일반적으로 외자 관련 정책이 전체적인 경제발전전략에 있어서 갖는 중요성을 감안할 때, 한국의 경제발전에 있어서도 외자 관련 정책은 상당한 기여요인이 되었을 것임을 짐작하는 것은 어렵지 않을 것임

□ 따라서 한국의 외자 및 투자 관련 제도의 역사적 변천과정에 대한 검토를 통하여 한국이 그 발전과정에 있어서 어떠한 경제발전전략을 채택하였으며 그에 따라서 어떠한 외자 관련 정책 및 법제를 마련해 왔는지, 그리고 그 외자 관련 법제가 경제발전에 얼마나 기여하였는지를 부분적으로나마 규명할 수 있을 것임

□ 이를 통하여 외자 및 외국인투자 관련 법제가 지향해야 할 목적들, 즉 경제성장에 소요되는 물적 자본을 확충하는 동시에 경제적 자주성과 자립성을 유지하면서 장기적인 발전기반을 갖추어 나갈 수 있는 한 가지 방안을 제시할 수 있

을 것임. 특히 캄보디아와 같이 발전도상에 있는 국가들이 외국자본의 직접투자에만 의존하거나 이를 활용하는데 있어서 소극적인 역할만을 할 경우에는 지속가능한 성장기반을 구축하지 못할 가능성도 있는데, 이러한 문제의식과 관련하여 우리나라 투자법제가 발전되어 온 과정이 일단의 시사점을 줄 수 있는지 검토해 볼 필요가 있을 것임

Ⅱ. 연구 결과

□ 캄보디아의 외국인투자 관련 법제의 현황 및 과제

○ 캄보디아는 1990년대 이래 FDI를 유치하는데 있어서 상당히 좋은 성과를 거두고 있으며, 이는 경제성장의 주된 요인이 되고 있음. 또한 FDI는 노동집약적인 의류산업, 관광 및 농업분야를 통한 고용 및 외화의 주된 원천이 되고 있음

○ 캄보디아는 외국인직접투자를 유치하기 위하여 투자와 관련된 국제규범을 수용하기 위한 법 시스템 개혁을 위하여 노력해 오고 있음. 캄보디아의 투자 관련 기본 규범은 1994년 8월 5일에 제정된 Law on Investment of the Kingdom of Cambodia, 그리고 2003년 3월 24일에 제정된 Law on Amendment to the Law on Investment of the Kingdom of Cambodia 임. 주목할 만한 것은 2010년 5월에 사회적 개발수요를 충족시키기 위해서, 외국인에게 토지를 제외한 부동산 소유를 허용하는 입법이 이루어졌다는 것임

○ 경제성장을 촉진하고 외국인투자를 유치하기 위한 여러 제도적 수단들 중에서도, 특히 경제적 토지양여는 효율적인 국유사용토지(國有私用土地, state private land)의 활용을 통한 경제발전에

있어서 중요한 수단이 되고 있음. 이러한 경제적 토지양여는 그 메커니즘이 법 원칙에 부합하게 운용될 때에만 국가 및 지역민들에게 이익이 될 수 있음

○ 그러나 1995년에 대대적인 경제적 토지양여가 개시된 이래, 캄보디아가 경제적 토지양여로부터 충분한 이익을 얻지는 못하고 있는 것으로 보임. 오히려 상당수의 경제적 토지양여가 지역민의 토지 및 천연자원에 대한 접근을 제한하고 있을 뿐 아니라, 지연환경을 심각하게 훼손하고 있음. 이처럼 경제적 토지양여가, 지역공동체와 그 생활을 토지 및 산림자원에 의존하고 있는 토착민들의 삶에 부정적인 영향을 미치고 있다는 점에서, 신속한 조치가 취해질 것이 요구됨

○ 경제적 토지양여로부터 얻을 수 있는 유익을 충분히 누리기 위해서, 다음과 같은 개선방안이 제시될 수 있을 것임:

- 2001년 토지법상의 일부 조항 및 관련 규정들은 조속히 개정되어야 함. 먼저 동법 제56조 제2항은 양여권자에게 무단침입에 대한 방어권을 지나치게 많이 부여하고 있음

- 또한 동법 제59조에 따르면 토지의 부적절한 사용을 막기 위하여, 경제적 양여토지의 규모가 10,000 헥타를 넘지 목하도록 제한하고 있음. 하지만 실제로는 양여토지의 규모를 줄이는 절차가 효과적으로 이루어지지 않고 있는데다가, 심지어 어떤 경우에는 이 제한의 10배가 넘는 토지가 양여되기도 하였음. 따라서 양여토지의 효과적인 활용을 감독하기 위해서는 규모에 대한 제한을 둘 필요가 없을 것임

- 국가토지관리에 관한 시행령에 따르면 경제적 양여토지는 허가 이전에 먼저 등록되어야 함. 그러나 이러한 요건은 거의 준

수되지 않고 있고 있는데, 이는 체계적인 토지등록이 더디게 이루어지고 있기 때문임. 이러한 점에서, 권한당국은 법치원리에 부합하게 등록되지 않은 국유사용토지가 활용되도록 하기 위해서, 경제적 토지양여에 관한 시행령에서 상세한 규정을 마련할 필요가 있음

- 경제적 토지양여의 효과성을 향상시키기 위해서는, 신청에 의한(unsolicited) 경제적 토지양여 방식을 폐지할 것이 요구됨. 지금까지 정부는 오로지 자발적인 신청방식에 의한 경제적 토지양여만을 부여해 왔음. 그 결과 불법토지점유 및 관련 당사자의 권리침해 등 캄보디아 사회에 매우 심각한 문제를 야기하고 있음. 이는 결국 정부의 행정력에 대한 불신으로 이어지게 됨

- 분권화를 통하여 지방행정기관에게 권한을 위임하는 정책이 경제적 토지양여제도에 크게 기여하지 못하고 있음. 도에서부터 읍/면/동에 이르는 지방행정기관은 경제적 토지양여권의 부여에 있어서 거의 책임을 부여받지 못하고 있음. 즉 이와 관련하여 지방행정기관의 의견이 거의 반영되지 못하고 있는 것으로 보임

□ 한국의 외자 및 외국인투자 관련 법제의 발전과정

○ 한국의 외자 및 투자 관련 법제는 크게 네 가지 국면으로 나누어 살펴볼 수 있음

- 첫 번째 국면은 '외자도입의 양적확대기(1960~65)로서 전후 복구와 경제개발을 위하여 해외자본의 도입을 양적으로 늘리기 위한 법적·제도적 기반을 확충하고자 한 시기였음

- 두 번째 국면은 '외자도입에 대한 질적 통제 및 외국인직접투자의 촉진'으로 요약되는 시기로서, 무분별하게 도입된 차관으로 인해 원리금 상환 압박이 가중되고 경제 전체에 폐해가 미

칠 위험이 커지게 되자, 외자의 도입 및 관리를 질적으로 규제하고자 한 시기였음

- 세 번째 국면은 '외국인투자의 자유화'로서 외자의 도입 및 관리에 대한 주요 규제가 철폐되고, 외국인직접투자에 대한 유인 및 촉진정책이 적극적으로 시행되기 시작한 시기임

- 네 번째 국면은 '외국인투자의 전략적 유치'로 명명할 수 있는 시기로서, 1997년의 외환위기를 계기로 외자 및 외국인투자 관련 법제가 이른바 국제기준(Global Standard)에 부합하는 방향으로 개편되었으며 앞서 세 번째 국면에서부터 시작된 외국인투자의 자유화가 관련 제도 전반으로 확대되었음

○ 한국의 외자 및 외국인투자 관련 법제의 발전과정이 보여주는 특징을 다음과 같은 네 가지로 정리할 수 있음

- 첫째, 한국의 외자 및 외국인투자 관련 정책 및 법제는 외자 및 외국인투자의 도입과 유치 그 자체보다는 그 활용에 주안점을 두고 있었으며, 이를 경제개발계획의 실행을 위한 주요 수단으로 활용하였음

- 둘째, 외자의 활용에 있어서 정부, 특히 경제개발계획을 수립하고 수행하는데 있어서 중추적인 역할을 담당했던 '경제기획원'과 같은 중앙부처의 주도적인 역할이 두드러졌으며, 여기에 막대한 권한과 기능이 집중되어 있었음

- 셋째, 외자를 도입하는데 있어서도 외자의 유형에 따라서 각각이 갖는 장점과 단점을 고려하여 주어진 상황에 가장 적절한 외자 유형을 전략적으로 선택하고 이를 도입하는데 정책적 및 법제적 지원을 집중시켰음

- 넷째, 전반적으로 보았을 때 외자도입에 대한 경제정책의 태도는 그다지 적극적이었다고 하기 어려운 것으로 보이며, 필요한 범위 내에서 도입하되 법과 정책을 통하여 그로 인한 부작용과 폐해를 최소화하는데 상당한 주의를 기울였던 것으로 보임

Ⅲ. 연구결과의 활용방안

□ 본 연구에서 수행한 1960년대 이래 한국의 외자 및 외국인 투자 관련 법제의 변천과정에 대한 조망은 향후 관련 법제의 제개정시 의미 있는 자료로서 활용될 수 있을 것임. 물론 현재 한국이 처한 대내외적 경제환경이 과거의 그것과는 전혀 달라졌다고는 하나, 하나의 법제가 현실에 적용되어 그것이 관련자들의 행위에 영향을 미치고 나아가 일정한 결과를 야기하게 되는 일련의 과정은 매우 다양한 차원의 명시적·묵시적 제도에 의하여 결정되지 않을 수 없는 바, 이러한 제도들은 오랜 시간에 걸쳐서 다양한 요인에 의하여 그 사회에 자리 잡게 된 것이기 때문에, 미래의 제도를 설계하는 데에는 과거와 현재의 제도를 파악하는 것이 반드시 필요다고 할 수 있음

□ 또한 오늘날 한국의 경제발전경험 및 성과가 발전도상 국가들에게 관심의 대상이 되고 있다고는 하나, 실제로 어떠한 정책을 활용하고 법제를 도입함으로써 그러한 성과를 얻었는지를 구체적으로 정리함으로써 하나의 발전사례로서 정립하는 시도는 이루어지지 않은 것으로 보임. 한국이 외국의 발전도상국들에게 법제적인 측면에서 의미 있는 협력 내지 지원을 꾀할 수 있기 위해서는 이러한 시도가 진지하

게 이루어져야 할 것임. 이러한 점에서 본 연구는 캄보디아를 비롯한 발전도상 국가들의 투자 관련 법제를 분석할 수 있는 체계를 마련하고, 이들 국가들에 대한 법제정비 지원가능성을 검토하는데 활용할 수 있을 것임

주제어 : 캄보디아, 외국인직접투자, 경제발전, 경제적 토지양여, 법의지배

Contents

Chapter 1 Introduction

Section 1. Purpose of the Study

The laws and regulations concerning foreign capital and investment play a very important role in a developing country with regard to its efforts to achieve solid economic growth while enjoying the benefits of an open economy. Most developing countries find it inevitable to rely on foreign capital for most of their funding needs for economic development to bridge the gap between domestic savings and required capital. Introduction of foreign capital not only brings an increase in production through supplementation of a capital supply as a production factor, but contributes to the country's economic development by carrying out the function of helping to use domestic resources more efficiently through the transfer of advanced technology and management knowhow.

However, movement of foreign capital also has a negative impact coming from its essence as a transfer of capital between countries. Decisions on allocation and reinvestment of surplus created by the use of foreign capital are made in consideration of the capital-exporting country rather than from a perspective of the national economy of the capital-receiving country. In most cases, such surplus is taken out of the receiving country instead of contributing to capital accumulation or the social welfare of the country.[1] The receiving country also provides benefits to foreign-invested businesses to attract more foreign capital. Thus, foreign-invested businesses can reinforce their dominance over the

1) The Ministry of Finance and the Korea Development Bank, *The 30-Year History of Foreign Capital Introduction in Korea*, 1993, p. 30.

domestic industry. If foreign-invested businesses concentrate on the expansion of the market for goods produced in capital exporting countries or the securing of raw materials, the reliance of the receiving country's economy on foreign countries is likely to deepen.[2)]

Like this, all countries, including developing countries, should consider the need to maintain their economic independence and self-reliance, and thus, they should not entirely rely on foreign capital to meet their needs. They need to develop a domestic capital market efficiently by utilizing domestic savings as much as possible through domestic financial institutions in addition to using foreign capital.[3)] Besides, developing countries are required to set proper limitations in the introduction of foreign capital in conjunction with the policy objective of preventing a worsening of their international payment balance. It is important to adopt laws and regulations conducive to the efficient and harmonious realization of polity objectives in order to meet opposing requirements associated with foreign capital, particularly FDI.

Korea has also relied considerably on foreign capital to meet requirements for its economic development. It is said that foreign capital has contributed greatly to the country's economic development. It is noteworthy that the country adopted foreign capital in linkage with the policies related to economic growth, trade, and industries, and foreign capital thus introduced has fulfilled the intended requirements and built the country's ability for repayment of foreign debts. Accordingly, the

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2) The Ministry of Finance and the Korea Development Bank, Ibid, 1993, p. 30.

3) Robert Pritchard, "The Contemporary Challenges of Economic Development," *Economic Development, Foreign Investment and the Law - Issues of Private Sector Investment, Foreign Investment and the Rule of Law in a New Era*, Kluwer Law International & International Bar Association, 1996, p. 3.

country has not been faced with a serious foreign debt-related crisis similar to those experienced by countries in Latin America and Eastern Europe.[4] The country's economic growth strategy using foreign capital is benchmarked by many developing countries. Developing countries in East Asia, including China, Vietnam, Indonesia, and Cambodia, which are making rapid growth in the 21st century, are also adopting the policy of relying on foreign capital as part of their core economic growth strategy. These countries are vying with each other to overhaul their FDI-related laws and regulations for attraction of foreign capital through a foreign, investors-friendly institutional environment.

However, it appears that the past foreign capital-related policies adopted by Korea are much different from those currently adopted by developing countries in East Asia in terms of their approach. In Korea, core decision-making agencies headed by the Economic Planning Board (ECB)[5]

4) National Archives of Korea (NAK) <http://theme.archives.go.kr> ("adoption of foreign capital").

5) The ECB was a government agency that existed between July 22, 1961 and December 23, 1994. It played a pivotal role in the country's economic development process. Its predecessor was the Office of Planning established in 1948 under the Government Organization Act. In February 7, 1955, the budget and industry/economic development functions were transferred to the Budget Bureau of the Ministry of Finance and the Ministry of Rehabilitation, respectively. In July 22, 1961, the ECB was launched under the Government Organization Act and the Economic Planning Board Organization Rule, with a transfer of relevant functions from the bureaus of the Ministry of Construction, the Budget Bureau of the Ministry of Finance and the Statistics Bureau of the Ministry of Internal Affairs. In 1994, the ECB and the Ministry of Finance were replaced by the Ministry of Finance-Economy.
The ECB was in charge of the establishment and operation of comprehensive plans for the country's economic and social development, coordination of investment plans, drawing up and execution of the budget, coordination of planning made by central government agencies, analysis of their execution, measures for price stabilization, and coordination of economic policies involving foreign countries.
The ECB's predecessors and successors are as follows: The Office of Planning → The Accounting Bureau of the Ministry of Finance → The Budget Bureau of the Ministry

meticulously managed a series of economic development processes from the stage of planning until the stage of execution in a centralized and closely-planned way. It can be surmised that such a way was similarly adopted even in the introduction and use of foreign capital. With the verification of such a hypothesis through a review of the changes in the system related to foreign capital and investment, it will be possible to define, albeit partially, the relations between the relevant laws/regulations and economic development, depending on what economic development strategies are adopted and what stage of economic development a country is in.

The results of the study are thought to provide very meaningful indications to developing countries trying to adopt laws/regulations and policies related to foreign capital and investment for economic development. The study may help them set up objectives that the relevant laws/ regulations should cover, i.e. a way to secure capital needed for economic growth, while maintaining economic independence and self-reliance and laying the basis for long-term development, as stated in the foregoing. If a developing country relies only on foreign capital or its government plays only an inactive role in using foreign capital, it may fail to establish a basis for sustainable growth. In this regard, it is necessary to review whether the process followed by Korea's foreign capital and investment-related laws and regulations may provide such a country with a series of relevant clues.

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of Finance → The ECB → The Ministry of Finance-Economy → The Ministry of Finance and Economy → The Ministry of Strategy and Finance. Visit the Homepage of the National Archives of Korea <http://theme.archives. go.kr> ("Economic Planning Board").

Section 2. Scope and Composition of the Study

In connection with such a purpose, this study intends to check the features of the process followed by the relevant laws/regulations of Korea and current relevant laws/regulations of Cambodia as well as the process of their development in conjunction with a need to come up with a way to develop relevant laws/regulations of Cambodia based on the indications offered by Korea's experience in economic development. This study will use a comparative research method concerning the differences between the relevant laws/regulations of the two countries, taking the wide difference between the development stage of the laws and regulations of the two countries into account.

First, Report (1), 「A Study on Foreign Capital and Investment Laws in Korea and Cambodia」, written in English, takes a general overview of the Amendment to the Law on Investment 2003 of Cambodia, analysis the currently issues being debated hotly regarding foreigners' real estate ownership fueled by the recent amendment to the relevant clauses, and then seek to find way forward of Cambodian Laws on foreign investment reflecting on the experience of Korea in its development of the relevant laws/regulations. For this research, two Cambodian researchers (Ploy Pagna, Hap Phalthy) have written Chapter 2 and Chapter 3 respectively. All researchers participated a workshop held on 1st November 2011 in Cambodia for presentations and discussion. Also, Cambodian researchers have supplied with materials concerning laws and sub-decrees on foreign investment, which are published as a third book of this research as a source book. Lastly, Chapter 4 written by Hyeshin Cho examines the

developmental process of Korean laws/regulations on foreign capital and investment, which is a result of a rather comprehensive research published in book 2 of this research.

As for Report (2), 「A Study on the Development Process of Foreign Capital and Investment Laws in Korea」, written in Korean, aims to check how foreign capital and investment-related laws and regulations were adopted and changed, from the perspective of the economic development through an analysis of the laws of Korea over the past 50 years since 1958. FDI is a method of introducing foreign capital. Foreign aid or loans may be a more proper way of foreign capital introduction than FDI, depending on the country's development stage and economic environment. Thus, it is necessary to analysis investment-related laws and regulations from a wider perspective, i.e. "introduction, management, and use of foreign capital." This study intends to pay attention to how the policies related to introduction of foreign capital and investment promotion have changed, depending on the stage of economic development, and check to see what methods have been used for control and attraction of foreign capital.

This report concerns Part 1: A Study on Foreign Capital and Investment Laws in Korea and Cambodia of this study. In Chapter 2 of this report, Professor Ploy Pagna of Royal University of Law and Economics of Cambodia will take a general overview of the country's investment-related laws. In Chapter 3, Professor Hap Phalthy of the same university makes an analysis of controversial points from a perspective of investment-related laws in connection with the subject of the recent-heated discussion concerning foreigners' right for land development and real estate ownership. In Chapter 4, Associate Research Fellow Cho, Hyeshin

makes a historic review of the changes in foreign capital and investment-related laws/regulations of Korea and checks the features of the country's relevant laws and regulations adopted during the period of economic development, i.e. the 1960s through the 1980s. In Chapter 5, which will constitute the conclusion of this study, Associate Research Fellow Cho, Hyeshin will come up with desirable directions that Cambodia needs to take concerning the relevant laws/regulations in light of Korea's experience in economic development, which is also based on a discussion with the researchers writing Chapters 2 and 3 at the workshop held in Phnom Penh in 1 November 2011.

Chapter 2. The Legal Framework of the Investment Law in Cambodia

Introduction

Cambodia has maintained macroeconomic stability, strengthened its economic infrastructure and regulatory frameworks, and improved its business environment. The country has also gradually integrated itself into the regional and global economies by liberalizing its trade and investment regime. This has encouraged foreign direct investment ("FDI") which has become a major source of capital, economic growth and development. Cambodia has had a good track record in attracting FDI since the early 1990s and it has become a key factor in its economic growth. It has become a major source of employment and foreign exchange through the labour intensive garment industry, tourism and the agricultural sector.[6)]

An understanding of Cambodia's recent history is important for any new investor to place its political, human resources capabilities and system in context. One of the major legal difficulties is identifying the applicable law. Since Cambodia's independence from France in 1954, the present legal framework combines laws and principles from the various legal systems implemented at different points in time.

Cambodia has struggled to reform its legal system to include the international rules on investment in order to attract foreign direct investment. This paper will examine the investment policy of Cambodian government which provides the common incentives and facilitates to attract FDI to

6) Mr. Hing Vuthat and Tuot sokphally, Foreign direct investment and poverty reduction in Cambodia.

Cambodia. A comprehensive analysis of the legal framework on foreign investment in Cambodia will also be provided. In order to understand deeply the regulation on foreign investment in Cambodia, it's important to understand the general rule on foreign investment (Section I) and the legal effect of FDI in international investment agreements (Section II).

Section 1. The general rule on foreign investment

The general rules relating to foreign investment are found in Cambodia's Law on Investment of the Kingdom of Cambodia that was proclaimed on August 05, 1994 and the Law on Amendment to the Law on Investment of the Kingdom of Cambodia on March 24, 2003. These laws govern all types of investment for both citizens of Cambodia and foreign investors and this paper will only deal with the latter. These laws govern the "Qualified Investment Projects" entitled to protection under the law and define the procedures by which a foreign investor establishes a Qualified Investment Project ("QIP").[7] Foreign investors can be natural or juristic persons who have a foreign nationality or those who have already been permitted to invest in Cambodia by the approval of the Council for the Development of Cambodia ("CDC").

It is important to review the regulation on foreign investment in Cambodia. We will first examine the general condition of FDI and the different forms of FDI.

7) Article 1 of the new law on the amendment to the law on investment of the kingdom of Cambodia.

1. General condition of FDI

In Cambodia, FDI can occur in all sectors of the economy, except those which are prohibited or restricted. According to the Law on Investment in Cambodia, all persons wishing to establish a QIP shall submit an investment proposal to the Council for the Development of Cambodia in the form and according to the procedures provides in this law and the sub decree.[8] Foreign investors must comply with certain formalities and one must understand the procedure regarding investment and the institution in charge of FDI.

(1) Investment procedure

According to the Law on Investment in Cambodia, all persons wishing to invest in Cambodia or to establish a QIP shall submit an investment proposal to the Council for the Development of Cambodia in the form and according to the procedures established in the Law on Investment and its sub decree. A QIP is an investment project which has received a final registration certificate.[9] Additionally, the Council for the Development of Cambodia shall issue to the applicant a conditional registration certificate or a letter of Non compliance within three working days after receipt the investment proposal. This means that if the investment proposal contains all the information required, the Council for the Development of Cambodia should issue the conditional registration certificate to the

8) Article 6, *Law on the Amendment to the Law on Investment of the Kingdom of Cambodia.*

9) Article 2, *Law on Investment of Kingdom of Cambodia on August 5, 1994 and Law on the Amendment to the Law on Investment of the Kingdom of Cambodia.*

applicant very quickly. If the Council for the Development of Cambodia fails to issue a conditional registration certificate or letter of non compliance within three working days, the conditional registration certificate shall be considered to be automatically approved in the form set out in the sub decree.

The conditional registration certificate shall specify the approvals, authorizations, clearances, licenses, permits or registrations required for the QIP to operate, as well as the government entities responsible to issues such approvals, clearance, licenses, permits or registration. All government entities named shall issue such documentation no later than the twenty eighth working day from date of the conditional registration certificate. Any government official who does not respond to an applicant's request by this deadline shall be punished by law. The conditional registration certificate shall also confirm the incentives that the QIP is entitled to under new Article 14 of this law.[10)]

To summarize, the Council for the Development of Cambodia shall issue a final registration certificate within twenty eight working days of the issuance of the conditional registration certificate. Issuance of the final registration certificate does not release the QIP from obtaining other approvals specified by competent ministries entities. The date of issuing the final registration certificate shall be the date of the commencement of the QIP.

(2) The institution in charge on FDI: CDC role

According to the Sub-Decree on the Organization and Functioning of the Council for the Development of Cambodia,[11)] the Council for the

10) Article 7 of the *Law on the Amendment to the Law on Investment of the Kingdom of Cambodia.*

Development of Cambodia ("CDC") is the sole and one stop service organization responsible for the rehabilitation, development and oversight of investment activities.[12] The CDC plays an important role in guiding the utilization or public and private resources in the development of Cambodia. It works with other countries, bilateral/multilateral organizations and NGOs in order to sensitize them to the economic strategies and the priorities emphasized by the Royal Government in the allocation of development assistance.

2. Different forms of FDI

According to the Law on Investment and the Law on Commercial Enterprise[13] in Cambodia, foreign investment can occur through joint ventures such as mixed companies, companies with 100% foreign capital or through contract cooperation.

(1) The contract of cooperation

A contract of cooperation is an agreement between two or more parties creating obligations that are enforceable or otherwise recognizable by law as "a binding contract."[14] According to the Law on Commercial Enterprise, the contract of cooperation is an agreement in which the foreign investor and one or more Cambodian partners cooperates in a project or transaction. The foreign and Cambodian partners carry out

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11) Sub Decree N°147ANK BK, October 3rd, 2008,

12) Article10 of Sub Decree on the *Organization and Functioning of the Council for the Development of Cambodia*, October 3rd, 2008.

13) Dated May 17th, 2005

14) *Black's Law Dictionary* page 271, Eighth Edition.

commercial activities without the creation of a juristic person in Cambodia.

1) The Creation of the contract of cooperation:

According to Regulation on Commercial Enterprise in Cambodia, the contract of cooperation has to contain detailed information of the parties including names, nationalities, the designation of their interests in the project and the sharing of any profits and losses. It must stipulate how the rights and obligations can be transferred, establish the term of the contract and choice of law, as well as the method by which can be modified and the dispute settlement procedure. The contract shall also describe the production or exploitation activities to be undertaken in the performance of the agreement and list the origin of any material and equipment required by the enterprise.

2) The Contract of Cooperation Regime

The regime of the contract of cooperation determines all terms and conditions of modification under the Council for Development of Cambodia. This means that the contract of cooperation must be submitted to the Council for the Development of Cambodia before taking legal effect between the parties. Moreover, all rights and obligations that are transferred to a third party must first obtain preliminary authorization from the Council of Development of Cambodia. Throughout the duration of the contract of cooperation, the parties must report annually to the CDC. The contract may be terminated when its object has been realized or if the parties breach its terms. Furthermore, the CDC has the right to withdraw the privileges and incentives granted to the investor if its

activities are harmful to the environment. According to the Law on Investment in Cambodia, disputes between the parties should be solved by negotiation. If no amiable settlement is reached through negotiations, the dispute must be brought before the CDC. The CDC does not have the right to decide the case, but it can help the parties to find a solution either through mediation, arbitration or trial by a tribunal as agreed upon by the parties.

(2) The Joint Venture

A joint venture or a joint enterprise is a business undertaking by two or more person engaged in a single defined project. According to the Law on Commercial Enterprise, a partnership is a contract between two or more persons who combine their property, knowledge or activities in order to carry on business in common with a view to making a profit.[15] This means that Cambodian law allows two or more companies to join into a single economic entity in order to create a new company. The joint venture is thus a type of contract of cooperation since a new company is created under the form of a joint venture.

(3) Companies with 100% Foreign Capital

According to the Black's Law Dictionary, the company with 100% foreign capital is defined as being a:

> *"Foreign company which is an entity having authority under law to act as a single person distinct from the shareholders who own it and having right to issues stocks*

15) Article 8 of *Law on Commercial Enterprise* in Cambodia.

> *and exist indefinitely; a group or succession of person established in accordance with legal rules into a legal or juristic person that has a legal personality distinct from natural persons who make it up, exists indefinitely apart from them and has the legal power that is constitution gives it."*

According to the Cambodian Law on Commercial Enterprise a "Company with 100% Foreign Capital" is a company with 100% foreign capital that invests in the kingdom of Cambodia without partnering with any other company. The foreign company has the full rights and obligations of any other company under the law of the kingdom of Cambodia, such as the right to lead the company and carry out its duties as the investor.

Section 2. The Legal Effect of International Agreement on FDI

An international investment agreement is an international regulatory tool which governs the operations of states in international society and takes the form of a convention or a bilateral or multilateral agreement to invest in a particular sector. The legal effect of an international investment agreement is that it creates rights and obligations between state parties. What is the legal effect of international agreement on FDI? To answer this question, it is important to understand the international obligation of state parties and also the rights and duties of investors.

1. State party

The legal effect of an international agreement on FDI is that it creates the rights and duties of state parties in order to establish guarantees and incentives for investment in the territories of the State parties.

(1) The Investment Guarantees

The purpose of investment guarantees is to provide insurance for an investor against financial consequence attached to political risks related to the investment. This guarantee offers investors the possibility of protecting their investment activities in the territory of the host country. The guarantee includes a prohibition against nationalization of the investor's property, except under certain conditions, such as development needs and the public interest.

Aside from the guarantee mechanism, there are other rules already in force in other legislation that offer protection to foreign investors and their investments. According to the Law on Foreign Investment in Cambodia, for instance, a foreign investor is not permitted to be treated in any discriminatory fashion for the sole reason of the investor being foreign, except with respect to ownership of land and land use as set forth in the Land Law. Moreover, the foreign investor has the right to purchase foreign currencies through the Cambodian banking system and also to remit these currencies abroad to discharge any financial obligations that were incurred in connection with their investments.

1) The National Legislation

According to the Law on Foreign Investment in Cambodia, during their period of a foreign investor's investment in Cambodia, all capital and all foreign goods shall be protected against nationalization[16] and any requisitioning or confiscation of property through administrative procedures by the Cambodian government. This means that the Cambodian government shall prohibit the nationalization of the goods of a foreign investor in Cambodia and is obliged to respect the principle of free trade with foreign capital. In short, the Cambodian government is bound by law to prevent state acts or administrative procedures that cause difficulties for the foreign investor.

2) The International Legal Framework

Currently, we have the international agreement signed by Cambodian government and States of Foreign investor in order to guarantee and to protect the investor such as the following:

- ○ Between the government of Kingdom of Cambodia and the government of the United States on the protection and encouragement of investment in October 1995;
- ○ Investment incentive agreement between the Kingdom of Cambodia and the government of the United States of America on August 4th, 1995;
- ○ Law on the adoption of agreement between the government of the Kingdom of Cambodia and the government of Malaysia for

16) Article 9 of *Law on the Amendment to the Law on Investment* of the Kingdom of Cambodia, March 24, 2003.

the promotion and protection of investment on August 17th, 1994;

- ○ Agreement between the government of the Kingdom of Cambodia and the government of the Kingdom of Thailand on the protection and protection of investment on October 28th, 1996;
- ○ Agreement between the government of Kingdom of Cambodia and the government of the Republic of China for the protection and encouragement of investment on July 19th, 1996;
- ○ Agreement between the government of Kingdom of Cambodia and the government of Switzerland on the reciprocal protection and encouragement of investment on 1996;
- ○ Agreement on the Multilateral investment guarantee agency (MIGA) in 1999;
- ○ Agreement on the protection and encouragement of investment between the government of Kingdom of Cambodia and the government of Republic of Germany on June 26th, 2000;
- ○ Law on the adoption of agreement on the reciprocal protection and encouragement of investment between the government of Kingdom of Cambodia and the government of Republic France on March 3rd, 2001;
- ○ Law on the adoption of agreement between the government of Kingdom of Cambodia and the OPEC on the international development for the protection and encouragement of investment on July 2nd, 2001;
- ○ Investment incentive agreement between the royal Cambodian Government and the Government of the United States of America

- ○ Law on the adoption of the agreement between the Government of the kingdom of Cambodia and the Government of Malaysia on the promotion and Protection of Investment
- ○ Law on the adoption of the agreement between to government of the Kingdom of Cambodia and the Government of the Kingdom of Thailand on the promotion and protection of Investment.

Beyond its legal obligations under national legislation, the Cambodian government is also bound to adhere to the international conventions that it is party to. Cambodia is a signatory of a number of international conventions regarding investment guarantees, such as the Seoul Convention in 1985 for Establishing the Multilateral Investment Guarantee Agency, and the 1976 Principle of the Organization for Economic Co operation and Development (OECD), both of which prohibit the state from creating any laws or administrative rules that constitute a barrier to the formation or the liquidation of foreign investment.

(2) The Investment Incentive

According to the Law on Foreign Investment in Cambodia, an investment incentive is available for QIPs. This incentive and privilege includes custom duties and taxes, in whole or in part.[17] The incentive includes an exemption from a tax on profit, normally imposed under the Law on Taxation, through the mechanism of a profit tax exemption period. Finally, the sub decree also specifies that foreign investors are entitled to import equipment and construction materials duty free.

17) Article 12 new and 13new of the *Law on the Amendment to the Law on Investment* of the Kingdom of Cambodia, March 24, 2003.

2. Foreign Investor: Right and Duties of investor

Generally, the foreign investor automatically obtains certain obligations and entitlements through the Law on Investment. In Cambodia, the rights and obligations of all persons wishing to establish a QIP are guaranteed upon the submission of an investment proposal to the Council for the Development of Cambodia. Proposals must be submitted in the form according to the procedure provided by the law and its sub-decree[18].

(1) Investors' Rights

Foreign investors of qualified investment project have the right to use land, including concessions, unlimited long term leases and renewable limited short term leases in compliance with the provision of the Land Law.[19] Investors have the right to own real and personal property which the QIP uses, as well as pledge it as security for a period no longer than is permitted by law through a land concession contract or a land lease agreement. In addition, the investor shall be free to employ Cambodian nationals and foreign nationals of their choosing in compliance with the Labour Law and the Immigration Law. To qualify, a foreign employee must have qualifications or experiences that are not available in Cambodia among the Cambodia population. In the event of such hiring, appropriate documentation must be submitted to the CDC, including photocopies of the foreign employee's passport, educational certificates and/or degrees, and a curriculum vitae. A working permit for a foreign

18) Article 6 of *Law on Investment*, February 3, 2003.

19) Article16 new of *Law on the Amendment to the Law on Investment* of the Kingdom of Cambodia.

employee will be required for approval from the Ministry of Social Affairs, Labour, Vocational Training and Youth Rehabilitation. The investor shall also perform its obligations to provide adequate and training to Cambodian staff and to promote Cambodian staff to senior positions over time.

(2) Duties of Investors

The foreign investor in a qualified investment project has the duty to respect the Law on Investment in Cambodia. This means that where the foreign investor violates or fails to comply with a condition stipulated by the CDC, the Council has the power to withdraw the privileges and incentives granted to the foreign investor, in whole or in part.[20)]

3. The Dispute Settlement Mechanism

The Law on Investment contains a stipulation for the resolution of commercial disputes brought by foreign investors, but the mechanism by which these disputes may be settled has not yet been created. The law also specifies that except for land related disputes, any dispute relating to the rights and obligations set forth in the law regarding a qualified investment project shall be settled amicably as far as possible through consultation between the CDC, the investors and any other party involved in the dispute. Likewise, if the parties fail to reach an amicable settlement within two months from the date of the first written request to enter such consultations, the dispute shall be brought by either party for conciliation before the CDC. The CDC and the parties shall agree

20) Article25 new of *Law on the Amendment to the Law on Investment* of the Kingdom of Cambodia.

whether the matter will be resolved through arbitration in or outside of Cambodia, or through trial by a tribunal of the Kingdom of Cambodia. This means that an entire dispute related to the rights and obligations involving a foreign investment may be settled in an amicable fashion with alternative means to reach a solution through conciliation, arbitration, or a judicial procedure on the agreement between the parties.

Conclusion

The integration of Cambodia in the world trading system will be facilitated by the opening of Cambodia's economy to the world. It will expose Cambodia's economic institutions and enterprises to international competition. Furthermore, membership of Cambodia in the WTO and ASEAN will allow for the harmonization of international principles on trade with domestic law in a manner that will encourage foreign investment. The Cambodian government regards the private sector as a key partner and the engine of growth for the national economy. In an increasingly globalized world, capital, capacity and technology will flow into investment friendly countries. The government has done a remarkable job to make Cambodia investor friendly such as providing investor guarantees as well as offering peace, safety, security, good infrastructure, political and macroeconomic stability and an increasingly efficient legal and institutional framework that is transparent, accountable and predictable.

In summary, the improved legal framework for foreign investment in Cambodia along with a liberal business environment, non discrimination policies, low cost and a hard working labor force will together attract the FDI needed to develop Cambodia's economy.

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Chapter 3. The Critical Issues on the Foreign Ownership: A View of Foreign Investment in Cambodia

Introduction

Cambodia has passed her critical epoch of ownership system remarkably in the last two decades. A collective ownership was introduced after the collapse of the Khmer Rouge regime in 1979. Collective ownership witnessed the failure to boost the economic growth making the government to introduce land privatization in June 1989. Land laws have been developed to fulfill the needs of the society. In 1992, the first land law was promulgated with the restriction to the ownership in which ownership right was recognized over residential land and possession was recognized over agricultural land. Following the 1993 Constitution, the second land law promulgated in 2001 has been shaped in the strict way that private ownership can only be provided for Cambodian citizens.[21)]

Investment law of Cambodia was promulgated in 1996 to encourage investors to invest in Cambodia. Foreign investors with 51 percent of the share of Cambodian nationality are entitled to have ownership over land. Foreigners are able to have Cambodian nationality if they have invested in Cambodia with the total amount of 300,000 dollars in capital[22)] or granted about 250,000 dollars[23)] for Cambodian economy. The opportunity to allow foreigners to have Cambodian nationality may encourage the

21) Land Law of Cambodia, No.NS/RKM/0801/14, August 30, 2011, art. 5 (hereinafter the 2001 Land Law).

22) Law on Cambodian Nationality, No. NS/RKM/1096/30, October 9, 1996, arts. 10 11.

23) Law on Cambodian Nationality, No. NS/RKM/1096/30, October 9, 1996, art. 12.

foreigners to invest in Cambodia by having landownership. It is possible to see that Korean companies have invested in Cambodian land by constructing buildings like Camko City and a 42 storage twin tower in Phnom Penh.

Apart from having ownership, foreigners are also entitled to invest in land in Cambodia with a long period of time. Economic land concessions are the tool for foreigners who are willing to invest in Cambodia. Economic land concessionaires are considered as landowners except the right to transfer.[24] Interestingly, the economic land concessionaires are allowed to invest in economic land concessions up to 99 years.[25] The matter of economic land concessions is discussed in section 1.

More remarkably, in order to fulfill the social development needs, the government is allowed to give ownership to foreigners over the buildings starting from the first floor since May 2010. The controversial ideas have been also arising. Section 2 discusses of how the encouragement of investment works through providing foreigners ownership.

Section 1. Investment through Economic Land Concessions

Economic land concessions have been seen as a vehicle for economic development in Cambodia through the effective use of state private land.[26] By limiting the maximum size of economic concession land controlled by

24) The 2001 Land Law, art. 56.

25) The 2001 Land Law, art. 61.

26) State private land consists of 14 percent of state land. State land consists of 80 percent of the total land area. See also UNDP Cambodia, Land and Human Development in Cambodia, Discussion Paper No. 5 (Phnom Penh: UNDP Cambodia, 2007), 14.

any one individual to no more than 10,000 hectares, the 2001 Land Law may be seen to promote equitable distribution of wealth. Before going into detailed discussions of economic land concessions, one should understand the meaning of economic land concessions clearly. The term 'economic land concession' refers to a mechanism to legally provide state private land through a specific contract to an investor for agricultural and agro-industrial exploitation.[27] By investing economic concession land which consists of 6 percent of the total land area as of 2006,[28] it is expected that the investment will lead to country economic growth which benefits not only the rich but also the rural poor citizens. However, experience has not been enough witnessed. Therefore, only the actual implementation in accordance with the rule of law will lead to equitable share among Cambodian citizens.

This sub-section therefore discusses the impact arising from the actual practice of economic land concessions and proposes some considerations for improvement. Firstly, the sub section elaborates the overview of economic land concessions from the conceptual origin of land concessions since 1989. Secondly, this sub-section describes the actual mechanisms of economic land concessions. Thirdly, the sub-section raises the impact of economic land concessions which is resulted from ambiguous master plans. Lastly, this sub-section proposes the needs for reform in order to ensure that economic land concessions will benefit Cambodian citizens in general.

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27) Sub-decree on Economic Land Concessions, No.146ANK/BK, December 27, 2005, art. 2.

28) UNDP Cambodia, Land and Human Development in Cambodia, Discussion Paper No. 5 (Phnom Penh: UNDP Cambodia, 2007), 15.

1. Overview of Economic Land Concessions

Remarkably, in the early stage of land privatization in 1989, Cambodia used the word 'land concession' which referred to the right to large land for planting important crops in order to serve country economy.[29] Unlike the current economic land concessions, the size of the land concessions at that time was limited to only the minimum size which was no more than 5 hectares. The term of the use of concession land was determined clearly depending on the period of harvesting. The concession land was provided to each family depending on the ability of the family and the availability of the local land. However, it was uncertain that how the state could benefit from the use of concession land. At that time, the Ministry of Agriculture was authorized to issue certificates of concession land. However, records of certificates of concession land have remained unknown. Legally speaking, as of August 30, 2001 each Cambodian family could hold land up to 5.2 hectares.[30] It necessarily means that other size of landholdings belonged to concession land which was owned by the state. The unavailability of certificates of concession land might become a main reason why some people could own large amount of land[31] when the 2001 Land Law came into effect.

It is noted that the emergence of large concession land for agricultural purposes was available since 1995 although there was no law governing

29) Instruction on the Implementation of Land Use and Management Policy, No.03SNN, June 03, 1989.

30) The maximum of land subject to ownership was 2,000 square meters and the maximum of land subject to possession was 5 hectares.

31) Sedara Kim, Sophal Chan and Sarthi Acharya, Land, Rural Livelihoods and Food Security in Cambodia: A Perspective from Field Reconnaissance, Working Paper No. 24 (Phnom Penh: Cambodia Development Resource Institute, October 2002), 6.

concessions. It is understandable that the concessions may continue from the concession concept in 1989 which did not restrict the maximum size.[32] More remarkably, in 1994, under security reasons the government authorized military to control forest and some other land. Consequently, the military started to control unclear large amount of land. Although after full security in the whole country in late 1998, the military provided some land to companies for concessions. The Ministry of Agriculture, Forestry and Fisheries which is a responsible institution for land concessions failed to control land concession contracts made by the military.[33] Most of concession land[34] generally affected local people and indigenous people resulting from the fact that the companies failed to implement the concession contracts. As such, the government has not been benefited much from land concessions but in return suffered from national and international critics in terms of human rights violation.

Experiencing the ineffectiveness of large land concessions provided to one individual, the 2001 Land Law restricts the maximum size of concession land to no more than 10,000 hectares. Necessary requirements stipulated in the law that land concessions start exploitation after 12 months from the approved date otherwise the contracts will be void. More remarkably, the land concessions which were approved before the 2001 Land Law came into effect would be void if the concessions failed

32) Phea Pimex Company received 315,028 hectares of concession land under 2 provinces, Kampong Chhnang and Pursat on January 8, 2000.

33) Sophal Chan, Saravy Tep and Sarthi Acharya, Land Tenure in Cambodia: A Data Update, Working Paper No. 19, (Phnom Penh: Cambodia Development Resource Institute, October 2002), 23.

34) Until January 31, 2001, there were 55 concession companies in which 16 companies were cancelled. The total areas of the remaining 39 companies were 705,394 hectares. See Ibid, 19 23.

to start exploitation after 12 months from August 30, 2001 without reasonable grounds.[35] The 2001 Land Law also requires that only state private land be subject to the concessions[36] but fails to mention registration before concession contracts are made. Consequently, several land concessions were approved without prior registration. This flaw in law leads to disputes between companies and local and indigenous people when the companies start their exploitation. Responding to this defect, the Sub decree on State Land Management which was adopted in October 2005 requires that state private land, subject to land concessions, be already registered.[37] It is also remarkable that the 2001 Land Law needs a sub-decree to determine the procedures for granting concession land for agro industrial purposes, but the preparation of the sub decree required more than 4 years to complete.

The term 'economic land concession' was widely known in the Sub decree on Economic Land Concessions adopted on December 27, 2005. Since then, it is expected that economic land concessions approved by the contracting authority will not affect local and indigenous people. The sub decree requires 5 criteria[38] for granting economic land concessions

35) The 2001 Land Law, art. 62.
36) The 2001 Land Law, art. 17.
37) Sub-decree on the State Land Management, No.118ANK/BK, October 07, 2005, art. 2.
38) Sub-decree on Economic Land Concessions, No.146ANK/BK, December 27, 2005, art. 4. The 5 criteria of land for granting economic land concessions are: 1. land which was registered and classified as state private land, 2. land which consists of land use plan adopted by Provincial State Land Management Committee, 3. land which was valuated for the environmental and social impact to economic land concession plan, 4. land which has the solution for relocation in accordance with the law. The contracting authority has to ensure that no forced eviction is made without the agreement from legal landholders and has to ensure the right of way to private land, 5. land which was consulted with public or had a request for economic land concessions with territorial authorities and local people.

in which the competent authority have to ensure that no forced eviction is made without the agreement of legal landholders. The initiation of economic land concession projects consists of two possible ways that is a solicited proposal, where a contracting authority proposes a project for solicitation of proposals from investors and an unsolicited proposal, where an investor proposes a project proposal to the state for approval. The Sub decree on Economic Land Concessions also provides the procedural instruction of reducing economic concession land which was provided before the 2001 Land Law came into effect.

The purposes of economic land concessions have been known when the Sub decree on Economic Land Concessions was adopted. Since 80 percent of Cambodian people depend on agriculture and 23 percent of the total land[39] can be served as agricultural purposes, the government intends to develop intensification agriculture and agro industries by encouraging appropriate and large capital investment. Another purpose of economic land concessions is to increase state or provincial or commune revenues through the collection of land use fees, taxation and related service charges. It is noted that one of the most important purposes is to increase employment in rural areas within a framework of intensification and diversification of livelihood opportunities and within a framework of natural resource management based on appropriate ecological system. It is therefore expected that rural citizens will receive benefit from economic land concessions and the government is able to improve social development because of the national income from economic land concessions.

39) UNDP Cambodia, Land and Human Development in Cambodia, Discussion Paper No. 5 (Phnom Penh: UNDP Cambodia, 2007), 14.

2. Economic Land Concession Mechanisms

Economic land concessions can benefit the state and rural citizens if the mechanisms are done with legal rules. It is also necessary that all relevant institutions be responsible for their duties so that no violation of power is made. For example, the Ministry of Agriculture, Forestry and Fisheries which is the contracting authority has to be accountable to the government. Also, technical secretariat is required to ensure that all technical matters with regard to economic land concessions do not affect social and environmental harmonization. Provincial and district authorities play an important role in confirming that the economic land concessions will also benefit their people and in controlling the implementation of the companies. Moreover, commune authorities, who are already decentralized, are necessary to make sure that their commune people are not affected by economic land concessions.

Although economic land concessions have shaped the focus on large capital investment, similarly to land concessions conceptualized in 1989, the Ministry of Agriculture, Forestry and Fisheries is responsible for approval of all economic land concessions in the whole country.[40] It should be noted that the Sub decree on Economic Land Concessions adopted on December 27, 2005 allowed provincial governors to provide economic land concessions with the capital investment less than 10,000,000,000 Riel[41] and concession land size less than 1,000 hectares. The Ministry of Agriculture, Forestry and Fisheries is entitled to provide

40) Instruction on the Implementation of Land Use and Management Policy, No.03SNN, June, 3, 1989.

41) 10,000,000,000 Riel is equivalent to US$ 2,500,000.

economic land concessions with capital investment of no less than 10,000,000,000 Riel or economic land size of no less than 1,000 hectares. Just approximately 3 years after this practice, the government divested the provincial governors of the authorization to provide economic land concessions.[42] The reasons of divesting of the right of provincial governors have not been known. However, it may be hard to manage economic land concessions if contracting authorities are available for various institutions.[43] The reform of contracting authority is expected to work in a better way because only the Ministry of Agriculture, Forestry and Fisheries is responsible for signing contracts of economic land concessions.

Technical secretariat plays a pivotal role in economic land concessions. This secretariat consisting of 8 members from various ministries has duties to develop economic land concession projects and documents for economic land concessions through solicited proposals. The recommendations on all economic land concession proposals and on the review of existing economic land concessions are made by the technical secretariat in order to make smooth economic land concessions. The secretariat has to monitor the performance of economic land concession contracts. However, the Sub-decree on Economic Land Concessions does not say effectiveness of recommendations made by the secretariat. For example, if the secretariat finds that concession contracts do not follow the conditions stated in the contracts, the economic land concession companies may still

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42) Sub-decree on the Amendment of the Sub-decree on Economic Land Concessions, No.131ANK/BK, September 15, 2008.

43) It is noted that reports of economic land concessions prepared by the Ministry of Agriculture, Forestry and Fisheries do not include any information of economic land concessions with less than 1,000 hectares.

continue the contracts unless the recommendation to cancel the contract is followed by the contracting authority. Moreover, the secretariat does not maintain all concession contracts thereby making it difficult to monitor the concession performance.[44] Clear duties of technical secretariat are needed.

More remarkably, provincial state land management committees, which are led by provincial governors, are not entitled to have a main responsibility on economic land concessions. With regard to land concessions, it is known that these committees have duties to decide and monitor commune land use plans through commenting on land concession projects and cooperate in monitoring the performance. Another duty of these committees is to cooperate in organizing public consultations on land concession projects. Provincial authorities should be authorized to propose for cancellation of economic land concession contracts if it is clear that the contracts are not well performed. As such, so far, a lot of social land concessions[45] have affected local and indigenous people and provincial authorities are not able to resolve the problems. The responsibilities and duties of provincial authorities to ensure effectiveness of economic land concessions are indeed necessarily stipulated in law.

Similarly to provincial authorities, district authorities are not vitally provided with responsibilities to contribute to effective economic land concessions. As stipulated in the Sub decree on State Land Management, concerning economic land concessions, district state land working groups

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44) Special Representative of the Secretary-General for Human Rights in Cambodia, Economic Land Concessions in Cambodia: A Human Rights Perspective (Phnom Penh: United Nations, Cambodia Office of the High Commissioner for Human Rights, 2007), 7.

45) Ibid, 12; RFA, June 22, 2007; November 11, 12 & 23, 2007; March 9, 2009; May 18, 2009.

led by district governors have duties to organize consultations and commenting on land concession projects as well as cooperate in monitoring the performance of land concession projects. It is unclear how these authorities cooperate in monitoring. Thus, the monitoring of the performance of economic land concessions should be given to district authorities because these authorities stay closer to the concession land and local people. The government should therefore provide district authorities with more responsibilities for economic land concession approval in their district territory.

The voice of commune councils with regard to economic land concessions has not much heard. The Sub-decree on Economic Land Concessions includes commune councils in economic land concession mechanisms but does not provide enough power to the approval of economic land concessions. Commune councils have duties to check and comment on detailed documents of solicited or unsolicited economic land concession proposals within 28 days of working days.[46] The comments of commune councils will be considered by the contracting authority. These comments can be possibly refused by the contracting authority. Moreover, the commune councils are not involved in initiation of economic land concessions thereby leading to a lack of information concerning the impact of economic land concessions. Therefore, it is necessary to consider amending the Sub decree on Economic Land Concessions in order to include more involvement of commune councils in economic land concessions.

46) Sub-decree on Economic Land Concessions, No.146ANK/BK, December 27, 2005, art. 34.

3. Impact of Economic Land Concessions

A dream of contribution to economic growth through economic land concessions is far to come. Since the early inception of large scale economic land concessions in 1995, Cambodia has not remarkably enjoyed full benefit from the economic land concessions.[47] In return, considerable economic land concessions granted continue to limit rural Cambodians' access to land and natural resources and to destroy the environment more seriously. Urgent government measures are necessary to be taken into account, because economic land concessions have continued to impact negatively on local community and indigenous people whose livelihoods depend upon land and forest resources. Environmental impact should be studied well and accounted by relevant authorities. Negative image from national and international communities toward economic land concessions also provokes a bad impact on government administration.

The impact of economic land concessions has continued to exacerbate the daily life of community living in surrounding concession areas. Land provided for economic land concessions have not carefully conducted research on every impact arose therefrom. Although the government tried to issue regulations stating that concession land is not to affect private ownership in the areas of investment projects,[48] evidence has shown that tears and fears of local communities affected from the concessions have always existed. There are no data of affected people concerning economic

47) 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, 2007), 75.

48) Instructive Circular on Providing Economic Land Concessions for Investment Plan with regard to the Implementation of Order No.02BB dated June 13, 2005 on Strengthening the Management of State Property, No.05SRNN, July 01, 2005.

land concessions available at both government and NGOs' sides. However, a very apparent example of well known largest economic concession land granted to Phea Pimex Company has affected a number of people living in Kampong Chhnang and Pursat Provinces. Protests from villagers have happened since the performance of the contract in 2000.[49] On account of the protests, the company did not continue the work from 2005.[50] Also, small economic land concession scale affected the livelihoods of people living at the concession areas.[51] For instance, an economic land concession provided to C.I.V Development Agro Industry in Kratie Province affected villagers in two communes. Consequently, 334 families[52] filed a complaint to Kratie Provincial Governor requesting to cancel the company contract.

Economic land concessions have also had a serious impact on indigenous people[53] although their rights to collective ownership of land are

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49) Special Representative of the Secretary General for Human Rights in Cambodia, Economic Land Concessions in Cambodia: A Human Rights Perspective (Phnom Penh: United Nations, Cambodia Office of the High Commissioner for Human Rights, 2007), 62~67.

50) Ministry of Agriculture, Forestry and Fisheries, Situation of Investment Companies with Economic Concession Land more than 1,000 hectares (Phnom Penh, December 1, 2008).

51) Information: Company Bought Land and Then Obtained a Possessory certificate While People Did not Know (RFA radio broadcast May 18, 2009) (morning session, in Khmer Language); see also Information: Land Disputes between Villagers and Khaou Chuly Development Company (RFA radio broadcast June 19, 2009) (morning session, in Khmer language).

52) On August 28, 2008, 204 families of Srechar Commune in Snuol District of Kratie Province filed a complaint to Kratie Provincial Governor requesting to cancel the company contract. On September 9, 2008, 130 families of Pithnu Commune in the same district filed another complaint requesting to cancel the company contract. Their reasons of the complaint are they lose agricultural land, community forest land, grazing land, rotational cultivated land of indigenous people.

53) LICADHO, Land Grabbing and Poverty in Cambodia: The Myth of Development, A LICADHO Report (Phnom Penh: LICADHO, May 2009), 19.

protected by the 2001 Land Law. The non existence of public consultation before the approval of economic land concessions has resulted in various problems.[54] The livelihoods of indigenous people depend profoundly on shifting agriculture and non timber products, therefore land and forest are the central resources of their livelihoods. A lack of responsibilities of relevant authorities is the main cause of conflicts between indigenous people and concession companies. Usually, before signing a contract, a mission group is established in order to evaluate and collect data of land which belongs to local and indigenous people. However, the affect on those people still exists making more intricate complaints. For example, Khaou Chuly Development Company made a contract with the government on October 8, 2008 after various legal mechanisms had been made. Yet, conflicts resulted from the performance of this contract still happened.[55]

Remarkably, economic land concessions have caused a strong environmental impact. Various studies have witnessed that forest land is also affected by the concessions. Procedurally, it is required that the environmental impact with regard to economic concession land be evaluated.[56] In so doing, it is expected that economic land concessions bring a sound investment and a sustainable development. Yet, experience has so far shown that economic land concessions have been frustrating. The concessions always cause deforestation, polluted rivers and underground water,[57] toxic

54) UNDP Cambodia, Land and Human Development in Cambodia, Discussion Paper No. 5 (Phnom Penh: UNDP Cambodia, 2007), 14.

55) Information: Land Disputes between Villagers and Khaou Chuly Development Company (RFA radio broadcast June 19, 2009) (morning session, in Khmer language).

56) Sub-decree on Economic Land Concessions, No.146ANK/BK, December 27, 2005, art. 4.

57) UNDP Cambodia, Land and Human Development in Cambodia, Discussion Paper No.

environmental waste.[58] The use of pesticides and fertilizers in an inappropriate way is also a serious concern of environmental affect. Planting eucalyptus trees on a large scale economic concession land has caused severe ecological damages such as "the drying up of streams, lowering of underground water tables, soil acidification, reduction in local biological diversity and degradation of soil fertility."[59] Although the law says that economic concession land belongs to state private land which does not cover forest land and protected areas, economic concession land sometimes overlaps the prohibited land.[60] It is, therefore, necessary that the government consider avoiding violation of law when providing economic land concessions.

Economic land concessions have also affected the government administration's image. As already mentioned, although legal procedures are stipulated, the actual practice has skipped some parts of the procedures. For example, the Sub-decree on Economic Land Concessions requires that detailed documents of unsolicited economic land concession proposals be included preliminary studies of environmental and social impacts, in actual practice however this requirement is not fulfilled.[61] Remarkably,

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5 (Phnom Penh: UNDP Cambodia, 2007), 14.

58) Special Representative of the Secretary General for Human Rights in Cambodia, Economic Land Concessions in Cambodia: A Human Rights Perspective (Phnom Penh: United Nations, Cambodia Office of the High Commissioner for Human Rights, 2004), 32.

59) TERRA, "Eucalyptus Plantations Threaten Ecology of Cambodia's Great Lake," Watershed, vol. 8, July~October 2002, 6. See also Ibid.

60) 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, 2007), 75.

61) Special Representative of the Secretary General for Human Rights in Cambodia, Economic Land Concessions in Cambodia: A Human Rights Perspective (Phnom Penh:

the 2001 Land Law requires that concessions be exploited within 12 months after the date of concession approval otherwise the concessions will be void. However, many valid land concessions have remained inactive after 12 months.[62] More noticeably, although the 2001 Land Law states that economic concession land shall not exceed 10,000 hectares, still after August 30, 2001 one concession company was provided 100,852 hectares of economic concession land.[63] Uncommitted contracts lead to incomplete work of the companies because affected people's protests always happen. This situation consequently deters potential foreign investors from investing in Cambodia since they do not trust the government administration.

A typical example has shown the imperfect performance of economic land concession contracts. Khaou Chuly Development Company, which is a corporation, applied for 10,000 hectares of economic concession land in Pichreada District of Mundul Kiri Province on February 14, 2006 to the Ministry of Agriculture, Forestry and Fisheries. The company probably did not research on the place of the proposal because the Ministry of Environment reduced the size of area causing environmental impacts to

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United Nations, Cambodia Office of the High Commissioner for Human Rights, 2007), 8. During the Government Donor Coordination Committee Meeting on February 12, 2007, H.E. Sarun Chan, Minister of Agriculture, Forestry and Fisheries said that concession companies do not want to undertake environmental and social impact assessments prior to applying for economic land concessions because of the reason of time consuming and expensive assessments.

62) Special Representative of the Secretary General for Human Rights in Cambodia, Economic Land Concessions in Cambodia: A Human Rights Perspective (Phnom Penh: United Nations, Cambodia Office of the High Commissioner for Human Rights, 2007), 9.

63) Ministry of Agriculture, Forestry and Fisheries, Situation of Investment Companies with Economic Concession Land more than 1,000 hectares (Phnom Penh, December 1, 2008) (reporting that GREEN SEA INDUSTRY Co., Ltd. received 100,852 hectares from the Ministry of Agriculture, Forestry and Fisheries dated October 23, 2001).

2,705 hectares. After the request of the Ministry of Environment, the Ministry of Agriculture, Forestry and Fisheries as the contracting authority worked much on the company's proposal. Mundul Kiri's Provincial Governor issued a mission order to assign a working group in order to study, investigate, assess, and get statistic of land area of cultivated field, rotational cultivated field, and graveyard which may be affected. This working group found that 319 hectares was affected among proposed 2,705 hectares. Finally, the Ministry of Agriculture, Forestry and Fisheries signed a contract with Khaou Chuly Development Company providing only 2,386 hectares of economic concession land on October 8, 2008. The contract stated that the company has to pay deposit US$ 10 per hectare equaling US$ 23,860 not later than 2 months after the contract approval. Yet, until December 31, 2008 the company did not pay deposit yet. Moreover, in June 2009 the company had a conflict with indigenous communities living in the commune where economic concession land was granted.[64] This consequence necessarily reflects that all work done by the relevant authorities has not been clear and the government should therefore strengthen the administration well.

4. Needs for Successful Economic Land Concessions

The attempt to increase national and local revenues through economic land concessions have not met yet. As of February 28, 2009, excluding the economic concession land approved by provincial governors,[65] the government has granted 845,920 hectares accounting for 4.7 percent of

64) Ibid; RFA, June 19, 2009.

65) Data on economic concession land less than 1,000 hectares approved by provincial governors have not been available yet.

the total land as economic concession land to 65 valid concession companies.[66] Land concession fees and workforces resulted from economic land concessions have not been known. Moreover, unused economic concession land which is required to pay for unused land taxes has not been enforced. Misconduct of concessionaires has remarkably continued and exacerbated livelihoods of affected people. The laws and legal regulations have not been fully respected. The flaw in law should be necessarily amended. Since most of state land has not been registered, it urgently needs an appropriate instruction to use it effectively. Unsolicited economic land concession proposals which are stipulated in the Sub decree on Economic Land Concessions have resulted badly and are therefore required elimination. Also, the government should provide more power and responsibilities for local authorities to initiate and monitor economic land concessions.

Some provisions in the 2001 Land Law and relevant regulations should be urgently amended in order to have effective economic land concessions. Paragraph 2 of Article 56 of the 2001 Land Law is seen to provide concessionaires too much right to defend concession land against any encroachment or infringement by all means. So far, concessionaires have enjoyed this provision by use of security guards to kill animals and injure people inhumanely. Sometimes, this conduct has violated fundamental rights of Cambodian citizens because as stated earlier most of economic concession land has not been demarcated and registered. Therefore, it is necessary to eliminate this provision. In addition, Article 59 of the same law tries to limit the maximum economic concession land size to not exceed 10,000 hectares in order to avoid the improper use of

66) Ministry of Agriculture, Forestry and Fisheries (2009).

land. The actual ground of this limit has not been known although it may be reasonable that it is for the fair share of wealth to rich people. In fact, only unsolicited economic land concession proposals have been approved so far allowing the companies to look for potential business gains through logging. The law requires reducing the size of concession land which exceeds 10,000 hectares provided before August 30, 2001. The reduction process has not been effective and moreover one economic land concession company was still granted ten times more than the limit after 2001.[67] Therefore, it is not necessary to limit the size but to monitor the effective use of the land granted.

It is necessary to have an appropriate legal instruction for economic land concessions relating to state private land which has not been registered. The Sub-decree on State Land Management requires that economic concession land be registered before approval.[68] This requirement has hardly been followed due to the fact that the systematic land registration is going on slowly.[69] Following legal procedures, economic land concessions may never be provided. With this regard, the Sub-decree on Economic Land Concessions should provide a detailed instruction in order to allow relevant authorities to make use of unregistered state private land in accordance with the rule of law. Experience has

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67) Green Sea Industry Company was provided 100,852 hectares in Stung Treng Province by the Ministry of Agriculture, Forestry and Fisheries on October 23, 2001, about two months after the 2001 Land Law came into effect. Although this land size was later subject to the reduction, it shows bad image of implementation because the law was already violated.

68) Sub decree on the State Land Management, No.118ANK/BK, October 07, 2005, art. 3.

69) As of September 2008, the number of land certificates which was already signed through systematic land registration was 952,010 certificates. The systematic land registration project started since 2002. The amount of state land registered through this project has not been known.

witnessed enough that contracting authorities still continue approving economic concession land although the land has not been registered yet. On the process of initiating contracts, the Ministry of Agriculture, Forestry and Fisheries requests registration from the Ministry of Land Management, Urban Planning and Construction and then the ministry signs contracts although the land has not completely registered. Consequently, conflicts always arise thereafter.

Elimination of unsolicited economic land concession proposals is needed in order to improve the effectiveness of economic land concessions. So far the government has provided economic concession land through only unsolicited proposals. The result of this practice has caused very problematic in Cambodian society because of land grabbing and violation of the right of affected people. This consequence leads to loss of confidence on the government administration. The government's attempt is to make the effective use of state private land in an appropriate way for a fruitful result. The government recognizes that solicited economic land concession proposals have more priority than unsolicited proposals. This recognition may be true that the government realizes that the existing unsolicited economic land proposals have been ineffective. However, the government fails to stop approving unsolicited proposals by raising three main purposes, "the introduction of new technology; exceptional linkages between social land concessions and economic land concessions; and exceptional access to processing or export markets"[70] which are not much logical.

Delegation of power through decentralization to the local authorities has not fully contributed to economic land concessions. As mentioned in

70) Sub-decree on Economic Land Concessions, No.146ANK/BK, December 27, 2005, art. 18.

"Economic Land Concession Mechanisms" above, the role of local authorities extending from provincial to commune levels has little responsibility with regard to granting economic concession land. It seems that the voice of these local authorities is not much heard. For example, when Mundul Kiri provincial authority asked WUZHISHAN L.S. GROUP for a list of Chinese technicians, the company did not provide that list. The special representative of the Secretary General for human rights in Cambodia witnessed this fact that "[r]equests by the [P]rovincial Department of [Labor] to inspect the sites have not been met, with company representatives in the province saying that inspection would require the Prime Minister's direct authorization."[71] Albeit such response from the company, the provincial governor has nothing to do, meaning that authorities have not been authorized to initiate the cancelation of companies in case the companies do not follow the rules set by law. In addition, the power of district and commune authorities is even worse. Therefore, if the government does not share power to local authorities to control concession companies, it is likely that the companies pay less respect to the local authorities.

Section 2. Encouragement of Foreign Investment through Providing Ownership

The idea of providing foreign ownership over immovable property has been controversial. According to the Constitution, foreigners are not allowed to have ownership over land.[72] This concept of ownership has

71) Special Representative of the Secretary General for Human Rights in Cambodia, Economic Land Concessions in Cambodia: A Human Rights Perspective (Phnom Penh: United Nations, Cambodia Office of the High Commissioner for Human Rights, 2004), 70.

been implemented by the 2001 Land Law which states clearly that "[o]nly natural persons or legal entities of Khmer nationality have the right to ownership of land in the Kingdom of Cambodia."[73] It is then widely understandable among Cambodians that no foreigners can buy Cambodian land. However, Cambodia managed to pass a law in 2010 which provides an opportunity for foreigners to have ownership over buildings from the first floor.[74]

One of the main purposes of the 2010 Foreign Ownership Law is to encourage foreigners to invest in Cambodia.[75] There has not been a study on the efficiency or the bad impact of providing such foreign ownership yet. While land registration system especially coownership registration is not strong enough, things may happen in the wrong way. It is impossible for a foreign investor to buy a piece of land to build a condominium for selling to other foreigners. It is then unclear how the encouragement is. Evidence has been shown that as of February 15, 2011, only 160 foreigners bought 160 rooms of coownership buildings.[76] This number does not necessarily show a great deal of success.

Unlike private ownership, coownership of foreigners has some restrictions. Foreigners are not allowed to buy underground and ground floors.[77]

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72) The 1993 Cambodian Constitution, art. 44.

73) The 2001 Land Law, art. 8.

74) The Law on Providing Ownership over Private Part of Co ownership for Foreigners, No. NS/RKM/0510/006, May 24, 2011 (hereinafter called the 2010 Foreign Ownership Law)

75) The 2010 Foreign Ownership Law, art. 2(2).

76) Welcoming speech of H.E. Senior Minister Im Chhunlim, Minister of Land Management, Urban Management, and Construction during the conference concluding work in 2010 and planning 2011 work of the Ministry of Land Management, Urban Planning, and Construction, February 15, 2011, p.2.

77) The 2010 Foreign Ownership Law, art. 6(1).

Except coownership buildings in special economic zones determined by the government, foreigners are entitled to have private ownership of coownership buildings located 30 kilometers from the territorial boundary.[78] Foreigners with private ownership over coownership buildings have only the right of use and right of enjoyment over joint parts of coownership.[79] It remains unclear that how foreign coownership is taxed. However, foreign co-owners have obligation to maintain the joint parts of coownership.

Conclusion

Providing the opportunity for foreigners to invest in land of Cambodia is beneficial. Since Cambodian people face the capital to invest, foreigners whose capital is available are able to invest in Cambodia. Cambodia with this regard encourages foreigners to invest in Cambodian immovable property in several ways.

Providing the possibility for foreigners to have Cambodian nationality attracts foreigner to invest in Cambodia. Foreigners who have Cambodian nationality are able to buy Cambodian land. The 1993 Cambodian Constitution allows only Cambodian nationality to own land. Foreigners are entitled to have Cambodian nationality.[80]

Economic land concessions are a possible way to allow foreigners to easily invest in Cambodia. As 14 percent of Cambodian state land belongs to private state land which can be the subject of economic land concessions up to 99 years, investors are able to enjoy investing in such

78) The 2010 Foreign Ownership Law, art. 6(5).
79) The 2010 Foreign Ownership Law, arts. 5 & 9.
80) Law on Cambodian Nationality, No. NS/RKM/1096/30, October 9, 1996, arts. 8 14.

land in agro industrial or intensive agriculture purposes. Then Cambodia can benefit from such investment in order to develop country economy.

Providing ownership for foreigners is another way to encourage foreign investors to invest in Cambodia. Although foreign ownership is permitted only from the above ground floor, foreigners may take advantages to buy above ground floor houses for their residence in Cambodia and invest in Cambodia in other fields.

Chapter 4. The Historical Review on Laws and Policies regarding Foreign Capital and Foreign Investment in Korea

Introduction

The economic development is one of the major goals which all countries pursue with all their resources and efforts enthusiastically. Especially for developing countries which try to catch up developed countries, this has often been the only supreme goal so that other important goals like democracy, cultural pluralism or social equality are sometimes pushed back on the priority list. However, the economic development is hard to achieve in reality, which would be obvious from the historical evidences. Furthermore, if we aim to get it within the boundary or on the ground of 'rule of law,' it is inevitable for us to make a way nobody knows exactly. That's why no country in the history has ever been fully successful in attaining the ideal form of economic development rooted on the rule of law. Rather in the course of economic growth, law is apt to be used as a mean of economic policy. On the other hand we cannot even expect effective economic growth, unless all the required laws and institutions for economic activities are equipped. In this sense it would be said that it is a necessary condition to have proper laws and regulations for economic development.

Interestingly Cambodia and Korea have been undergoing similar processes to adapt a comprehensive strategy to pursue a specific goal for economic growth, although Korea leads the way a bit ahead of Cambodia. In this respect a comparative study on the investment law of

Cambodia and Korea from the perspective of a phrased development of investment law would be able to carry some implications for the role and importance of laws and institutions for the economic development. Especially the experience of Korea since 1960s in framing the mechanisms and legal institutions related to foreign capital and investment exhibits very unique features, mainly in that the central government played a significant role in controlling and managing the inflow foreign capital and investment. We could see it through the analysis following below.

Although the full liberalization of foreign investment today seems to be considered as the undeniable norm worldwide, there is no country where restrictions on foreign direct investment are completely lifted in all fields. For example, in such government sectors as international relations or defense, or in industries that are of critical importance for the national economy, foreign investment is often either not allowed at all or allowed only in a limited fashion. In the case of Korea, if one examines how its laws and regulations related to foreign capital and foreign investment have evolved over time, one quickly notices that not only foreign investment has been kept out of certain industries, but the introduction of foreign capital and foreign investment has also been controlled and supervised by the government authority across all sectors, and for a long time.

The means used for such control was mainly the right of the ministry in authority to authorize or approve the introduction of foreign capital or foreign investment in fields under their respective jurisdiction. Up until the enactment in 1997 of the Foreign Investment and Foreign Capital Inducement Promotion Act, cabinet ministers had the right to authorize or approve the introduction of foreign capital or foreign investment in fields

under their responsibility, and they also had considerable discretionary powers in deciding whether or not to authorize a foreign capital investment project. Such a control mechanism was intended for ensuring the maximum efficiency in the use of limited capital. This was also to ensure that foreign capital and foreign investment effectively contribute to achieving economic development goals set by the government. Hence, the government managed foreign capital throughout the entire process of its use, through a planned approach.

This trend, however, could no longer continue with the outbreak of the foreign currency crisis of 1997, which brought about a clear breakpoint in Korean foreign capital and investment policy. Changing priorities in the new phase of economic development must have certainly contributed to this shift. But the main contributing factor appears to have been the external pressure Korea came to face, as it grew into a larger economy.

Phase Ⅰ (1960~1965): Organizing the System for the Introduction of Foreign Capital and Expanding the Inflow of Foreign Capital

1. Overview: Encouraging the inflow of commercial loan

To understand foreign capital and investment-related laws and regulations during phase I, one needs to understand the economic policy of the Park Chung hee administration during the 3rd Republic, inaugurated in 1962, as the former is the reflection of the latter. Under the Park administration, the domestic market-oriented import substitution industrialization policy of the 1950s, which lasted until the early 1960s, was replaced by an export-oriented industrialization policy. This orientation

puts Korea of this period in sharp contrast with other developing countries, which took in huge amounts of foreign direct investment. Such export-oriented industrialization policy adopted by the Park administration necessitated a colossal amount of foreign capital. They, therefore, had no other choice but to seek ways to increase the inflows of foreign capital. At that time, Korea was very poor in terms of its capacity to raise capital. What the Park administration did was to take out public loans from foreign governments and to bring in foreign capital (commercial loan) through the private sector by providing government payment guarantees or authorizing capital transfers on a selective basis.

Foreign capital-related laws and regulations enacted during this period were, in other words, designed to back this policy of the Korean government. The *Act on Public Loan Repayment Guarantees*, in particular, was a law enacted to increase the creditworthiness of Korean companies so as to facilitate the process of acquiring commercial loans from foreign sources. In concrete, this law provided legal basis for guaranteeing the repayment of foreign loans by businesses authorized to receive foreign capital investment pursuant to the *Foreign Capital Inducement Promotion Act* and the *Special Measures on the Inbound Transfer of Capital Goods Using Long-term Settlement Methods Act*.

During this early phase of foreign capital policy, the government offered active support to businesses to assist them with obtaining commercial loans, mostly because commercial loans were the easiest vehicle for gaining access to foreign capital, given the poor creditworthiness of the country at that time. Unsurprisingly, the terms of most commercial loans obtained through this means were highly disadvantageous for the borrower. As the burden of principle repayment and initial payments

eventually became too heavy to be sustainable, the Korean government shifted its policy, this time, discouraging commercial loans in favor of public loans and foreign investment. To gain easier access to public loans, the Korean government became a member of international organizations and also normalized relations with Japan.

2. Characteristics in then laws: approval-based approach

Laws and regulations related to foreign capital show clear indications that authorities tightly regulated foreign capital and had considerable supervisory powers. What deserves our particular attention here is the right to approve or authorize foreign capital investment deals conferred on government agencies. The *Foreign Capital Management Act of 1958*, for example, was a law whose purpose was to ensure an efficient use of foreign capital, mostly acquired through foreign aid from rich countries, and to appropriately manage their use. Under this law, a recipient of foreign aid entered into an agreement with the government and was required to seek approval from ministers in authority, on the use of the capital so obtained. The recipient of foreign aid was subject to criminal prosecution or had to pay compensation for any losses incurred by the government side, due to a violation of contract terms on its part.[81] The law even authorized the government to sell recipient companies if they were deemed unable to attain the initial investment goal.

The *Foreign Capital Inducement Promotion Act of 1960* adopted an approval-based approach (Article 6), with the Chairman of the Economic

81) Here, the damage compensation appears, in legal nature, close to administrative punishment.

Planning Board (hereinafter 'EPB') deciding whether or not to approve a foreign capital investment deal on the basis of opinions gathered from relevant cabinet ministers. Under the original *Foreign Capital Inducement Promotion Act*, a foreign investor submitted an investment application for each of the companies concerned to the Finance Minister who, then, forwarded it to the Minister of Reconstruction for his review. But, after the 2nd amendment in 1961, all powers related to the approval of a foreign investment deal, including the acceptance and review of an application and decision making, were devolved to the EPB. Meanwhile, the criteria used by the Chairman of the EPB for investment review, under the same law, were only a handful, set out under Article 3[82], Paragraph 1. The deliberation for investment review, in fact, required consideration of wide-ranging policy priorities, which demanded quite a high-level substantial and significant review. The Chairman of the EPB, therefore, appears to have had been sufficiently empowered under this law to have a strong and effective control of the entry of foreign capital.

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82) [Foreign Capital Inducement Promotion Act]
(amended Dec. 16, 1963, Law No. 1544, entered into force Dec. 17, 1963)
Article 3 (for cases not qualifying for preferential consideration)
(1) This law must be freely and rapidly applied to foreigners, unless the investment plan approved by the Foreign Capital Inducement Committee was deemed by the Chairman of the Economic Planning Board as meeting descriptions in any of the following items and was notified as such through an official government notice:
1. Cases constituting squandering of foreign exchange rather than acquiring or saving it;
2. Activities that must be prohibited in order to prevent a sharp decrease in, or to increase, the foreign exchange reserves of the Republic of Korea;
3. Cases which may lead to excess production in the Korean industry; or
4. Foreign capital introduced into the Republic of Korea for the purpose of temporary placement or speculative investment.
(2) This law, unless it is authorized by an international agreement, does not apply to the use of nuclear power, production of war supplies, coastal navigation and domestic aviation, and government monoPloy businesses (salt, tobacco and ginseng).

The approval-based foreign capital investment system under the *Foreign Capital Inducement Promotion Act of 1960* was applied not just to the acquisition of stocks and equity shares in Korean companies by a foreign individual or entity, but also to technical assistance or loan agreements with foreign institutions. When a Korean national or Korean corporation newly entered into a technical assistance agreement with a foreign entity or amended an existing one, and had the fees sent under such an agreement overseas, the Korean national or corporation was required to seek approval from the Chairman of the Economic Planning Board on the new agreement or the amendments introduced to the existing one. The remittal of the technical assistance fee was allowed only with the approval of the Economic Planning Board Chairman. Such regulation of technical assistance fees was meant to prevent Korean firms from illegally transferring funds to overseas destinations.

Phase Ⅱ (1966~1978): Selecting the Entry of Foreign Capital and Encouraging Foreign Direct Investment

1. Overview and Background: Selecting and managing foreign capital qualitatively

The period between 1966 and 1978, being the second phase in the development of foreign capital and investment-related laws and regulations in Korea, saw the transition from the quantitative enlargement toward the qualitative selection and management of foreign capital. During this period where major external crises such as the 1st and 2nd oil crises succeeded one another, economic development and industrialization continued

steadily in Korea with the 2nd Economic Development Plan implemented from 1962, and the Heavy and Chemical Industry Development Strategy begun in 1973. For the government to successfully implement its plans and strategies amid the deteriorating economic conditions, actively bringing in foreign capital and effectively managing it must have been highly important.

First of all, the amount of foreign aid that accounted for nearly 83.4% of all foreign capital introduced to Korea during the 1st phase sharply fell down in the mid-1960s, inevitably driving down the overall inflow of foreign capital in 1964 and 1965. Because of this, during phase II, active efforts were made to bring in foreign capital in the form of loans (public or commercial) in order to secure colossal amounts of financial resources needed for the implementation of the economic development plan, Saemaeul project and the heavy and chemical industry development projects. The directions taken in legislative activities during this period were, therefore, towards the simplification of procedures for the inflow of public loans, and the improvement of procedures for the government's payment guarantees on foreign loans. Meanwhile, a new law named the "*Act on the Use and Management of Public Loans*" was enacted also during this period to provide a legal framework for taking out public loans.

As a result, the inflow of foreign capital continuously increased over this period between 1966 and 1972, from US$ 330 million (1966) to US$ 368 million (1967), then to US$ 537 million (1968), US$ 680 million (1970), US$ 863 million (1971) and US$ 763 million (1972). Commercial loans accounted for 45.6%, public loans 26.4%, foreign direct investment 5.3%, bank loans 4.8% and foreign aid 17.8%; hence,

the types of foreign capital introduced were quite different from the previous period. The uptrend in the inflow of foreign capital continued into 1973 1978, and the total amount of foreign capital (final amounts and amounts on approved basis) surged sharply to US$ 1,104 million (1973), US$ 1,369 million (1974), US$ 1,540 million (1975), US$ 1,768 million (1976), US$ 2,279 million (1977) and US$ 3,159 million (1978). Commercial loans accounted for the largest share in total inbound foreign capital of 52.2%, followed by public loans claiming a share of 30.6%, loans by financial institutions (including bank loans and foreign currency debt issues) representing 10.9%, and foreign direct investment standing for 6.3%. Meanwhile, even as the volume of inbound foreign capital increased massively, this did not bring down the percentage share of national savings in total national investment. On the contrary, it jumped from 59.9% in 1966 1972 to 81.5% in 1973 1978, for a 41.3% increase from the level during phase I (1962~65); indicating that the dependence on foreign capital, in fact, was reduced.

2. Characteristics in then laws and policies

(1) Authorization-based approach in principle

During the early part of this period, it was necessary for the Korean government to attain the dual goal of implementing the 2nd Five-year Economic Development Plan and the Heavy and Chemical Industry Development Project, at the same time as stabilizing the economy, which was then showing signs of overheating. The government, therefore, had to reduce as much as possible the inflow of foreign capital, and when the use of foreign capital was absolutely necessary, tried to decide the

amount and intended purpose beforehand, to go about it in a planned manner. There were pre-established rules, and companies using foreign capital were required to follow them. Concrete characteristics of foreign capital and investment-related laws and regulations in this period are as follows: The *Foreign Capital Inducement Act of 1966*[83] introduced an

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83) [Foreign Capital Inducement Act]
(enacted Aug. 3, 1966, Law No. 1802, entered into force Sep. 3, 1966)
Article 4 (Authorization Criteria, etc.)
(1) The Chairman of the Economic Planning Board, when authorizing or recognizing an investment projects pursuant to this law, shall consider the criteria set forth in the items below, and must give priority to those projects that may effectively contribute to the improvement of Korea's international balance of payments:
1. Projects that can make noticeable contributions to the improvement of Korea's international balance of payments;
2. Projects of importance or projects that can contribute to the development of public interest sectors; and
3. Business categories that are included in the government's Economic Development Plan.
(2) Details for the authorization or recognition pursuant to the above paragraph are to be specified by the Presidential Decree.
Article 6 (Authorization of investment by foreigners) (1) A foreign individual or entity wishing to acquire stock (including convertible bonds) or an equity share in a corporation or private firm of the Republic of Korea, pursuant to this law, must obtain the authorization from the Chairman of the Economic Planning Board. A foreign individual or entity must do the same when wishing to change the details of investment authorization.
(2) To the authorization pursuant to the above paragraph may be added a proviso if deemed necessary.
(3) Notwithstanding the provisions under Paragraph 1, the acquisition of stock or equity shares corresponding to any of the descriptions in items below must be reported to the Chairman of the Economic Planning Board:
1. When a foreign investor acquires stock issued due to the capitalization of reserves at the foreign invested firm;
2. When a foreign investor acquires stock issued due to the capitalization of reevaluation reserves at the foreign invested firm;
3. When a foreign investor acquires stock or equity shares of the foreign invested firm as part of an inheritance or a bequeathal from another foreign investor;
4. When a foreign investor acquires, after the foreign invested company merges with another company with his/her stock or equity shares used for the merger,

authorization-based approach. Not only the new concept, 'authorization,' replaced 'approval' under the old law, but, changes were made both in terms of the organization and content of the text of law. But, there was no real change with regard to the virtually unlimited discretionary power of the Chairman of the EPB concerning decisions related to foreign capital investment. Also unchanged were the decision-making criteria, which included no specific rules except the appropriateness of investment projects to macroeconomic policy goals of the day and the economic development plan; in other words, just as under the old law, the Economic Planning Board Chairman based his decisions largely on general economic policy priorities and his own personal judgment. To boost the economic efficiency of foreign loan projects, the government set an order of priority. Inbound foreign capital was distributed first to (1) heavy and chemical industry investment projects, followed by (2) agricultural and fisheries modernization projects; (3) export industries; (4) national land development projects; and (5) SOC expansion projects. Accordingly, in Article 4 of the *Foreign Capital Inducement Act* of 1966

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stock or equity shares of the existing corporation or a new corporation created;

5. When a foreign investor acquires stock shares newly issued following the split or merger of shares he/she owns;
6. When a foreign investor acquires stock shares issued as dividends by the foreign invested firm;

(4) Concerning the acquisition of stock or equity shares, authorized pursuant to provisions under Paragraph 1, the import of goods as part of equity contribution in kind shall be considered also authorized by the authorization pursuant to Paragraph 1.

Article 13 (Restrictions on the disposition of foreign capital) (1) A foreign investor or a foreign invested firm, when intending to use foreign capital for purposes other than the authorized purpose, must obtain the authorization of the Chairman of the Economic Planning Board in advance.

(2) A foreign invested firm, when intending to engage in a business other than the one for which it is registered, must obtain the authorization of the Chairman of the Economic Planning Board in advance.

stipulates that the Chairman of the EPB consider three criteria that are (1) projects that can help noticeably improve Korea's international balance of payments; (2) projects of importance or projects contributing to the development of public interest sectors; and (3) business categories that are included in the government's economic development plan, when authorizing the acquisition of stocks or an equity share in a Korean company by foreign investors, cash loan agreements, capital goods transfer agreement or technology transfer agreements. In some exceptional cases, the authorization of the EPB Chairman, otherwise required, was waived, if a review is deemed unnecessary, and a simple report sufficed. Notably this was the first time the principle (i.e. authorization) and exception (i.e. report) - based approach was adopted.

The law further required the authorization of the Chairman of the EPB also when planning to use foreign capital for another purpose than originally intended or when a foreign invested company changes its business line to something else than the one it is registered for; hence, indicating the possibility for practically effective management and supervision of foreign capital related affairs. Given how the Economic Planning Board played the most crucial role in allocation resources necessary for economic development in this period where the government was pushing for the five-year economic development plan, supervisory activities on the inducement and use of foreign capital must have been carried out the most actively under this law of this period.

(2) Regulating foreign loans more tightly

Meanwhile, as a consequence of an excessive emphasis on the quantitative growth of foreign capital inflows under the 1st Five-year

Economic Development Plan, the problem of insolvency among foreign-invested companies came to a head between the mid-1960s and the early 1970s, and the external debt problem became a serious issue. To curb the debt problem, the Korean government implemented a series of measures to more tightly regulate foreign capital, starting with the 'Measures for Rationalization of the Use of Foreign Capital,' announced in 1967. These measures included placing a maximum cap on the amount of foreign capital investment, regulating private commercial loans from foreign sources and restricting cash loans to meet domestic demand. To provide a legal backing to these measures, in 1968, the *Enforcement Decree to the Foreign Capital Inducement Act* was amended. The criteria for obtaining authorization on commercial loans were, for instance, toughened. Even those businesses benefiting from a payment guarantee from a commercial bank were now required to have their foreign loan projects reviewed by the Foreign Capital Inducement Committee, which looked at the amount of funds needed, whether the funds could be domestically procured and the principal repayment capacity of the borrower. The borrower's financial means, plan for collateral supply and ability to supply collateral were newly included in the review criteria. Cash loans for use as a means of domestic payments had to be consented also by the Minister of Finance. Under the amended Enforcement Decree, stock and equity shares of the borrower benefiting from the repayment guarantee by the government counted toward the collateral, and when the government repaid a loan under its liability as the guarantor, it had the right to immediately liquidate the collateral, without the grace period of three months given under the old decree; hence, making the liquidation of collateral a practical option for the government in the

context of its repayment guarantee offer and thereby strengthening its overall capacity of management and supervision of foreign loans.

(3) Encouraging foreign direct investment with reservations

As for foreign direct investment, new criteria for authorization were prepared to promote inward foreign direct investment. Foreign direct investment deals, channels of inbound foreign capital, helping to accelerate the development of domestic technology at the same time as not entailing the principal repayment burden, were a priori actively encouraged, as long as they did not run overtly or excessively counter to the interest of the domestic industry. The five criteria used by the authority in reviewing FDI plans were as follows: (1) whether a project contributes to the improvement of Korea's international balance of payments, can create new jobs, help improve domestic technology, help increase production and have important spillover effects on other industry sectors; (2) priority given to investment projects in export industries, that should be joint ventures with Korean nationals or entities in principle; (3) investment by only foreign individuals or entities without Korean nationals or entities in a 100% export business accepted; (4) only joint ventures with Korean nationals or entities allowed, if the business distributes goods inside Korea; (5) as for the ratio of investment in a joint venture, at the same time as respecting the terms negotiated between the parties, an appropriate rate of equity participation by the Korean side must be ensured. The *Free Export Zone Establishment Act* and the *Act on Special Temporary Measures on Labor Unions of Foreign Invested Firms and the Mediation of Labor Disputes*, both enacted in

1970, are some of the examples of legislative activities from this period, aimed at promoting foreign direct investment in Korea.

With the 'Foreign Investment Attraction Policy,' unveiled in 1971, the Korean government set out in earnest, toward the direction of increasing foreign direct investment. A series of measures were undertaken, for example, to simplify the procedural requirements for the approval of foreign direct investment. With the amendment of the *Enforcement Decree to the Foreign Capital Inducement Act* in July 1973, foreign-invested companies in which the amount of equity participation by foreign individuals or entities was US$ 500,000 or less and that exported all of its production, were waived the requirement to obtain the approval of the Foreign Capital Inducement Committee. Meanwhile, the *Enforcement Decree to the Foreign Capital Inducement Act* was again amended in August 1974, to lift the maximum amount of foreign investment to receive the waiver of the review by the Foreign Capital Inducement Committee from US$ 500,000 to US$ 1 million.

On the other hand, measures to liberalize inbound transfer of technology were also undertaken during this period. Until then, due to the high cost of technology transfer, technical assistance from developed countries or international organizations was preferred to licensing-based technology transfer. From this point on, foreign technology was introduced to Korea through official channels such as licensing agreements or foreign direct investment. Concretely, the *Technology Development Promotion Act* was enacted in 1972 to provide government support for technology development, at the same time as various restrictions on technology transfer under the *Foreign Capital Inducement Act* were eased progressively.

The Foreign Investment Attraction Policy of 1971, on the other hand, maintained the basic principle that foreign direct investment must take place in the form of joint ventures with Korean nationals or entities. 'The Principle on the Adjustment of Foreign Investment Ratios' of February 1973 also put forth a principle whereby join ventures at the ratio of 50:50 were preferred over 100% foreign-invested ventures. This basic stance was abandoned only with the 'Strategy for Increasing Inward Foreign Investment' of 1980, during phase III, in favor of letting interested parties negotiate on the ratio of investment. But, even then, business categories in which foreign nationals or entities can hold a 50% to 100% equity share were limited to a small number.

At the same time, it should be noted that under this same amendment, requirements related to foreign-invested companies' plant sites were toughened. In July 1973, the plant site-related requirements were added to the list of requirements for the authorization of foreign direct investment in the *Enforcement Decree to the Foreign Capital Inducement Act*, so as to geographically distribute plants in a planned manner and minimize pollution. The amendments introduced to the same Enforcement Decree, later in March 1977, included a new restriction on the lot size of plants, aimed at improving the efficiency of land use.

In sum, once into the 1970s, foreign direct investment started to have precedence over other channels for inbound foreign capital in the Korean government's policy. But, this policy did not yet include measures for actively attracting foreign investment, in that the government had not given up on its authority for actual control of foreign capital.

(4) Overcoming the crisis on the one hand, and strengthening the regulation of foreign loans on the other hand

In the wake of the oil crisis in 1973, however, to make up for the balance of payments deficit and procure capital for the Economic Development Plan, the government again authorized cash loans on a temporary basis, as part of the effort to increase the amount of inbound foreign capital. Subsequently, as the economy improved starting in the second half of 1975, the government strengthened the regulation of inbound foreign capital. Concerning foreign loans, in particular, the government tried to closely manage the entire process, including how the funds were introduced and used, and not just their sources or types. Preferring public loans to commercial loans, the government made active efforts to use the former funding channel and implemented, in 1977, a pre-reporting system for projects involving foreign public loans for greater efficiency of the use of them; thus giving itself the ability to plan and coordinate borrowing activities *ex-ante*. The Chairman of the EPB, in reviewing the pre-report on a foreign loan project for its feasibility, comprehensively examined the project, considering various factors including the size of facilities, domestic market potential, profitability, effects on Korea's international balance of payments, plant site details, effects on the national economy, international competitiveness, foreign capital investment requirement, terms, method and time-frame of the loan; in other words, in a manner to keep an effective oversight over the borrowing process and the use of foreign loans. The main criterion for deciding whether a foreign loan project had the prospect of profitability or feasibility was certainly the heavy and chemical industry development initiative and the economic development plan underway at that time.

3. Summary

Viewed in its entirety of this period, commercial loans that accounted for the majority of foreign loans during this period were mostly short-term loans at high interest rates, and the principal repayment burden soon turned out too heavy. Many companies using foreign loans became insolvent, and foreign capital so borrowed, people felt, was not used for productive purposes. It is against this backdrop that a shift occurred in Korea's foreign capital policy, during phase III, toward a foreign direct investment-centered one. Foreign capital-related policies and laws during this period are highly significant also, insofar as an examination of what industries and companies much of the foreign capital introduced during phase II was channeled into, at a time when industrialization was taking place in full swing under the government's initiative, reveals important facts about the origin of the industrial and market structure in Korea.

Phase Ⅲ (1979~1997): Diversifying the Sources of Foreign Capital and Liberalizing Foreign Direct Investment

1. Overview and Background

The foreign capital policy during this period between 1979 and 1997, corresponding to phase III, can be described as a period of diversification of foreign capital and liberalization of foreign investment. The Korean government came into the awareness of the advantages of foreign direct investment already during the period 1966~1978 (phase II). Efforts were, therefore, made to promote inflows of foreign direct investment both at a

policy level and at a legal and regulatory level. But, commercial loans and public loans still represented the vast majority of inbound foreign capital, and foreign direct investment accounted for a meager share of 5% of total inbound foreign capital.

In 1978 when the 2nd oil crisis broke out, sky-high interest rates worldwide, accompanied by a sharp appreciation of the US dollar, dealt a serious blow to the external debt servicing capacity of Korean companies. This situation forced the goal of the Korean foreign capital policy of this period to shift from securing financial resources for investment to repaying foreign loans. In the early 1980s, even if on a temporary basis, there was no choice but to turn to short-term capital to steer out of the crisis. In order to do that, a regulatory overhaul was undertaken as well, to allow foreign loans for wider categories of projects and simplify related procedures. In some cases, even cash loans were allowed. But, overall the basic policy guidelines remained 'reducing new loans,' 'early repayment of loans to reduce foreign debt' and 'liberalization of foreign investment.'

Of these three, the 'liberalization of foreign investment' is the most noteworthy change that took place during phase III. The trend towards the liberalization of foreign investment began during phase III and gained momentum once into phase IV. The key driving factor for such change was arguably Korea's becoming a member of OECD in December 1996. During phase IV, it was the foreign currency crisis which broke out in December 1997 that largely reshaped Korea's foreign capital policy. In sum, foreign capital policy had to respond to the demand, during phase III, to overcome the problems of insolvency and inefficiency in the industry, resulting from the quantitatively-oriented growth policy of the

previous decade, and, to structurally improve the Korean economy, amid the trend of economic globalization.

As a result of such efforts at a policy level as well as at a legal and regulatory level, major changes took place in the pattern of foreign capital inflows. The shares accounted for by public loans, commercial loans and bank loans in overall inbound foreign capital fell sharply, while the shares of foreign direct investment (3.4% of total inbound foreign capital during period 1979~1985 and 18.7% during period 1986~1992), foreign currency bonds issued by financial institutions and private firms and technology transfer increased. The increase in inward foreign direct investment was not just a result of the global trend toward the liberalization of capital which started to accelerate since the mid-1980s, exercising pressure on Korea for the opening of its markets. It was also the result of long standing efforts by the Korean government to help boost the international competitiveness of Korean companies through transfer of business management know-how and technology.

2. Characteristics in then laws and policies

(1) Easing Foreign Investment Approval Criteria: a principle-exception rule

There are two main ways for restricting foreign investment: the positive list system, enumerating business categories in which foreign investment is allowed, and the negative list system, listing business categories in which foreign investment is not allowed. In Korea, a positive list system was replaced by a negative list system in 1983, with the wholesale amendment of the *Foreign Capital Inducement Act*. In other words, the

1983 amendment of the *Foreign Capital Inducement Act* was the first cornerstone for the liberalization of foreign investment in Korea. In terms of policy, both the 'Strategy for Increasing Inward Foreign Investment' of 1980 and the 'Directions for Overhauling the Foreign Investment System' of 1984 eased various regulations and expanded support for quantitative expansion of foreign investment. At the same time, the government also tried to restrict capital inflows in the form of commercial loans, through measures like the 'Commercial Loan Approval Guidelines' and the 'Strategy for Funding Efficiency through Public Loans' of 1986, so as to reduce foreign debts and ensure the efficient use of borrowed funds.

When this law was entirely overhauled in 1983, Article 4 of the *Foreign Capital Inducement Act* conferring on the Chairman of the Economic Planning Board the right to authorize a capital investment project and decide an order of priority was removed. Instead, a new provision (Article 3[84]) was created, stipulating that inbound transfer of foreign capital was a priori allowed, aside from some exceptional cases; thus, establishing a principle-exception structure of rule-making. The regulatory approach stated in this Article is echoed in Article 4 of the

84) [Foreign Capital Inducement Act]
(comprehensively amended Dec. 31, 1983, Law No. 3691, entered into force Jul. 1, 1984)
Article 3 (Inducement Criteria for Inbound Foreign Capital)
(1) Korean nationals, Korean corporations or foreign nationals may introduce foreign capital into the country except in cases described in items below:
1. Cases in which the inbound transfer of foreign capital may interfere with national security or the maintenance of order in the Korean society;
2. Cases in which the inbound transfer of foreign capital can have negative effects on the sound development of Korea's national economy; or
3. Cases which violate the laws of the Republic of Korea.
(2) The government must not authorize, or receive the reporting of, a foreign capital investment project which corresponds to any of the cases described in items under Paragraph 1.

current *Foreign Capital Inducement Promotion Act*. Further, under the *Foreign Capital Inducement Act* of 1983, business categories in which there are restrictions imposed on foreign investment were listed in Article 9[85]. The business categories listed in this Article were rather wide-ranging and loosely defined, with the specification of related details delegated to a Presidential Decree; suggesting, therefore, that the control and management of inbound foreign capital by the government was not

85) [Foreign Capital Inducement Act]
(comprehensively amended Dec. 31, 1983, Law No. 3691, entered into force Jul. 1, 1984)
Article 9 (Prohibition of Foreign Investment)
(1) Categories of business in which foreign investment is not allowed are as listed in items below:
1. Public interest businesses conducted by the government or public organizations;
2. Business categories that may be harmful for public health and the environment;
3. Businesses that run clearly counter to the good mores; and
4. Other types of businesses specified in the Presidential Decree.
(2) Details related to businesses described in items below are to be specified in the Presidential Decree:
Article 10 of the Enforcement Decree to the Foreign Capital Inducement Act (Types of businesses in which foreign investment is prohibited)
(1) "Public interest businesses conducted by the government or public organizations" mentioned in Article 9, Paragraph 1, Item 1 of the Act refer to water and sewage services, postal service, telecommunications, rail transportation, cigarette and ginseng manufacturing, and other businesses selected and notified by the Minister of Finance through consultation of cabinet ministers with relevant authority.
(2) "Business categories that may be harmful for public health and the environment" mentioned in Article 9, Paragraph 1, Item 2 refer to businesses that may cause environmental pollution and other businesses selected and notified by the Minister of Finance through consultation of cabinet minister with relevant authority.
(3) "Businesses that run clearly counter to good mores" mentioned in Article 9, Paragraph 1, Item 3 refers to gambling establishments and other businesses selected and notified by the Minister of Finance through consultation of cabinet ministers with relevant authority.
(4) "Other types of businesses specified in the Presidential Decree" mentioned in Article 9, Paragraph 1, Item 4 refer to newspaper publishing, radio broadcasting, grain crop agriculture and other businesses selected and notified by the Minister of Finance through consultation of cabinet ministers responsible for relevant fields.

completely ended under this law. Notwithstanding, the criteria for the judgement, provided in the Presidential Decree and related government notice, were quite concrete, indicating that a shift in regulatory approach to foreign capital somehow occurred with this amendment.

Article 7[86] setting forth procedures for foreign direct investment, more

86) [Foreign Capital Inducement Act]
(comprehensively amended Dec. 31, 1983, Law No. 3691, entered into force Jul. 1, 1984)
Article 7 (Authorization of Foreign Investment)
(1) A foreign national or entity, when acquiring stock or equity share in a Korean corporation (including corporations that are in the process of incorporation) or a company run by a Korean national pursuant to this Act must first obtain the authorization of the Minister of Finance.
(2) The Minister of Finance must authorize such acquisition of stock or equity shares without delay, unless the foreign investor falls into one of the categories set out in items below. In this case, notwithstanding the provisions under Article 35, no consultation with cabinet ministers in relevant fields is required:
1. When the foreign share or equity holding after the acquisition amounts to 50% or more. This rule, however, does not apply to those foreign invested companies exporting their products at a percentage rate exceeding that specified in the Presidential Decree or producing products for which import regulations have been liberalized and whose customs tariff is below the rate specified in the Presidential Decree;
2. When the value of stock or equity shares to be acquired exceeds the maximum value specified in the Presidential Decree;
3. When the foreign investor or foreign invested firm intends to receive tax benefits pursuant to Article 14, Paragraph 1; or
4. When the investment is in business categories in which foreign investment is restricted. In this case, business categories for which restrictions are imposed on foreign investment are selected and notified by the Minister of Finance through consultation with cabinet ministers with relevant authority.
(3) For cases corresponding to the descriptions in items under Paragraph 2, the Minister of Finance must decide, in accordance with provisions of the Presidential Decree, whether the foreign investment project should be approved, and whether the project is eligible for tax reduction or exemption pursuant to Article 14, Paragraph 1, and notify the applicant of the results. In this case, the Minister of Finance must consult the cabinet minister with relevant authority before making the decision.
(4) The Minister of Finance, when deemed necessary, may impose certain conditions for the authorization of a foreign investment project pursuant to Paragraph 1.

particularly, procedures for authorization of the acquisition of stock or equity shares by foreign nationals or entities stipulates that foreign investors must a priori seek the authorization of relevant government authorities, at the same time as establishing an instant authorization system. In other words, except certain cases such as the foreign stake or equity share holding in a company is 50% or greater, foreign investment may be instantly authorized through this system, without the consultation of cabinet ministers. Meanwhile, Article 8[87] provides for exceptional cases in which stock or equity shares may be easily acquired by foreign investors by simply reporting it to the Finance Minister. The easing of rules on foreign investment was also accompanied by the removal of the authorization requirement for technology transfer in favor of a simple report.[88]

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(5) When planning to modify the details of an approved investment project, the foreign investor must obtain the authorization of the Minister of Finance. Notwithstanding, for minor changes, specified in the Presidential Decree, it is sufficient to report the changes to the Minister of Finance.

87) [Foreign Capital Inducement Act]
(comprehensively amended Dec. 31, 1983, Law No. 3691, entered into force Jul. 1, 1984)
Article 8 (Foreign Investment Reporting) Notwithstanding the provision under Article 7, a foreign investor, when acquiring stock or equity share corresponding to the descriptions in items below must report it to the Minister of Finance:
1. When a foreign investor acquires stock issued in conjunction with the capitalization of reserves or reevaluation reserves at the foreign invested company;
2. When a foreign investor acquires, after the foreign invested company merges with another company with his/her stock or equity shares used for the merger, stock or equity shares of the existing corporation or a new corporation created;
3. When a foreign investor acquires stock issued as dividends by the foreign invested firm;
4. When a foreign investor acquires stock or equity shares of the foreign invested firm as part of an inheritance or bequeathal from another foreign investor; or
5. When convertible bonds received as part of a loan agreement approved pursuant to Article 19, Paragraph 1 are converted to stock.

88) The new reporting based approach to the regulation of technology transfer was

The partial amendment in 1991 of the *Foreign Capital Inducement Act* was intended mainly to reflect the agreements reached between Korea and the US on foreign investment, in relation to Articles 301 to 309 of the *US Trade Act.* Thus, the amended provisions clearly echo a pro-opening and pro-liberalization policy. The way in which Article 1, stating the purpose of the law, is amended is particularly important in this regard. The phrase ‘contribute to the improvement of Korea’s international balance of payments’, for instance, was deleted from this Article; making it clear that the management of foreign capital and investment through related laws and policy undertakings could no longer be a means for macroeconomic adjustment.

Later, with the amendment of the *Foreign Capital Inducement Act* in 1992, a new shift occurred in the regulation of foreign investment, from 'the authorization in principle' – 'the report in exception' (in law of 1991), to 'the report in principle' – 'the authorization in principle'.[89]

Finally, under the *Foreign Investment and Foreign Capital Inducement Act*, enacted in 1997, Korea’s foreign investment-related system was

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reflected in the wholesale amendment in 1983 of the Foreign Capital Inducement Act.

89) [Foreign Capital Inducement Act]

(amended Dec. 8, 1992, Law No. 4319, Entered into force Mar. 1, 1993)

Article 7 (Foreign investment) A foreign national or entity acquiring stock or an equity share in a Korean corporation (including a company in the process of incorporation) or a company run by a Korean national (hereinafter “foreign investment”) pursuant to this Act must report it to the Minister of Finance beforehand. Notwithstanding, for cases described in any of the items below, the investment project must be authorized by the Minister of Finance:

1. When foreign investment is allowed pursuant to provisions under Article 9, Paragraph 2;
2. When the foreign investor has previously been found to be in violation of Korea’s labor law and regulations, including the Labor Standards Act; or
3. When an investment project is urgently needed for the furtherance of Korean industrial policy and is listed among such project in the President Decree.

comprehensively overhauled to harmonize it with international standards. Article 6-2[90], newly created at this time, declares explicitly the principle of liberalization of foreign investment. Meanwhile, concerning whether to approve according to specific business categories as well as the extent to which they may be allowed, the specification of related details is delegated to the Presidential Decree. For foreign investment through acquisition of newly issued shares, the regulatory approach was completely changed to a reporting-based system (Article 7, Paragraph 1[91]). In the meantime, under the newly-added Article 8-2[92], it was now possible for

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90) [Foreign Investment and Foreign Capital Inducement Act]
(amended Jan. 13, 1997, Law No. 5256, entered into force Feb. 1, 1997)
Article 6-2 (Principle of the liberalization of foreign investment) Foreign nationals and entities shall not be subject to restrictions, when making investment in the Republic of Korea, except in cases where restrictions under this law or other laws and regulations apply.

91) [Foreign Investment and Foreign Capital Inducement Act]
(amended Jan. 13, 1997, Law No. 5256, entered into force Feb. 1, 1997)
Article 7 (Foreign investment through acquisition of new stock shares, etc.)
(1) When making foreign investment in a Korean corporation (including corporations in the process of incorporation) or a company run by a Korean national, through the acquisition of newly issued stock or equity shares, a foreign national or entity must report it to the Minister of Finance and Economy beforehand.

92) [Foreign Investment and Foreign Capital Inducement Act]
(amended Jan. 13, 1997, Law No. 5256, entered into force Feb. 1, 1997)
Article 8 2 (Foreign investment through acquisition of existing stock shares)
(1) A foreign national or entity may acquire existing stock or equity shares of a Korean corporation or a company run by a Korean national, notwithstanding provisions under Article 203, if the board of such corporation or company approves the transfer thereof.
(2) A foreign national or entity acquiring existing stock shares pursuant to Paragraph 1 must report it to the Minister of Finance and Economy beforehand.
(3) A foreign national or entity acquiring existing stock shares in a company of a certain size which may have an important impact on the national economy of Korea, designated in the Presidential Decree must obtain the approval of the Minister of Finance and Economy beforehand.
(4) The Minister of Finance and Economy must authorize the acquisition of existing

foreign nationals and entities to make investments in Korean companies by acquiring stock or equity shares already issued under the consent of the board.

(2) Opening the Door to Foreign Investment in More Business Categories

As for liberalization of business categories where foreign investment is allowed, this process began with a program called "Pilot Liberalization Program" under the *Directions for Overhauling the Foreign Investment*

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stock shares in a company subject to individual reviews, by a foreign national or entity, pursuant to Paragraph 3, if such acquisition satisfies the conditions set out in items below:

1. The stock shares acquired by the foreign national or entity represent 15% or less of total shares issued by the company or its total equity; and
2. The acquisition of the stock shares does not make the foreign national or entity the largest shareholder of the company.

(5) A foreign national or entity may acquire existing shares in a company engaged in a business belonging to a category for which there is a cap on the maximum ratio of foreign holding in stock or equity shares (the percentage of foreign holding in total stock or equity of a company), as long as the amount does not exceed such cap.

(6) When acquiring existing stock shares pursuant to Paragraph 1, a foreign national or entity must do so through a direct transaction with shareholders of the company in accordance with the manner specified in the Presidential Decree. Notwithstanding, this rule shall not apply to the acquisition of shares under the Securities and Exchange Act.

(7) Those who acquire existing stock shares in violation of provisions set forth in Items 1 to 3 inclusive, Item 5, Item 6 or Item 8 may not exercise the voting right that comes with the shares, and the Minister of Finance and Economy may order the transfer of shares acquired in violation of such provisions to a third party, in accordance with the details specified in the Presidential Decree.

(8) A foreign national or entity acquiring existing stock shares of a Korean corporation or a company run by a Korean national through inheritance, bequeathal or donation must report it to the Minister of Finance and Economy.

(9) The method of calculating the maximum limit on the acquisition of existing stock shares and other necessary details related to the acquisition of existing stock shares by foreign nationals and entities are to be specified in the Presidential Decree.

System of 1984. Categories of foreign investment-allowed businesses were selected in accordance with provisions under Article 9 and Article 7 of the *Foreign Investment and Foreign Capital Inducement Act*. Subsequently, in 1986, the government implemented measures to actively invite foreign investment in small and medium size companies. Thereafter, by 1987, restrictions on foreign investment in manufacturing were virtually completely lifted. Starting in 1989, particularly numerous liberalizing measures were undertaken for service sectors.

Later, in June 1993, under the '*Directions for the Liberalization of Foreign Investment*,' the 'Five-year Pilot Foreign Investment Liberalization Program' was conducted, opening-up business sectors that were previously closed to foreign investment. Until then, the Korean government restricted foreign investment more particularly in service sectors as part of a policy to protect less competitive domestic firms in service sectors such as finance and telecommunications. From this point on, service sectors were gradually opened up for foreign investment. As a result of progressive liberalization, as of January 2000, only 18 of the 1,148 total service business categories, including some real estate-related businesses, broadcasting and gambling business are still closed to foreign investment.

<Table> Business Sectors Opened up and Scheduled to Be Opened up for Foreign Investment (as of January 1997) (unit: number of sectors)

\	Number of Sectors Opened up or Scheduled to be Opened up for Foreign Investment								Number of sectors still restricted even after 2000
	1993	1994	1995	1996	1997	1998	1999	2000	
Manufacturing	2	1		6	1				1
Services	9	23	42	39	16	9	1	1	14
Agriculture, fisheries, mining	5	6	2	4	10			1	3
Total	16	30	44	49	27	9	1	2	18
Rate of liberalization (%)	84.6	87.2	90.7	95.0	97.4	98.2	98.3	98.4	

Phase Ⅳ (1998 to the present): Attracting Foreign Direct Investment Strategically

Under the *Foreign Investment and Foreign Capital Inducement Act*, after its first amendment in 1998, (1) The old rule requiring a foreign investor acquiring existing shares in a Korean company, in amounts corresponding to 10% or more of total shares, to obtain the approval of the board was replaced by a new one in which no approval from the board is necessary as long as the number of shares acquired is less than one third of total shares (proviso to Article 8-2, Paragraph 1). (2) The old rule requiring a foreign national or entity acquiring existing stock

shares of a Korean company, whose total assets amount to 2 trillion won or more, to seek the authorization of the Minister of Finance and Economy was repealed. The authorization from the Minister of Finance and Economy was only required for the acquisition of existing shares in defense companies or companies engaged in critical national infrastructure industries, specified in the Presidential Decree (Article 8-2, Paragraph 3).

Further, with the second amendment of the *Foreign Investment and Foreign Capital Inducement Act* during the same year, the requirement of obtaining the approval of the board for the acquisition of existing shares of a Korean company by a foreign investor, in amounts equal to or exceeding one third of total shares was repealed. In a move to actively encourage foreign investment to facilitate the restructuring of Korean industries and strengthen the competitiveness of Korean firms, changes were introduced to make it easy for foreign nationals and entities to acquire, or merge with, Korean companies (Paragraph 1 of the current Article 8-1 and Paragraph 1 of Article 8-3 deleted).

Finally, the *Foreign Investment Promotion Act*, enacted in 1998, declares, in Article 4[93], the principle of foreign investment liberalization,

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93) [Foreign Investment Promotion Act]
(enacted Sep. 16, 1998, Law No. 5559, entered into force Nov. 17, 1998)
Article 4 (Liberalization of foreign investment, etc.)
(1) Unless there is a special restriction under a law, foreign nationals and entities are free to conduct investment in Korea.
(2) Except in cases described in items below, foreign investment pursuant to this Act is subject to no restrictions:
1. Cases in which a foreign investment project may interfere with national security or the maintenance of order in the Korean society;
2. Cases in which a foreign investment project can have harmful effects on public health or the environment or runs clearly counter to good mores; or
3. Cases constituting the violation of laws and regulations of the Republic of Korea.

as was the case with the *Foreign Investment and Foreign Capital Inducement Act* of 1997. When compared to its predecessor, there was no significant change in this law, in the content, except some changes in phrasings. One notable difference is that in the new law, restrictions applying to foreign investment and liberalizing measures, which were stipulated in the old law, in Article 2, Article 6-2 and Article 9, are set forth under a single Article; Article 4. Article 4 is organized as follows: in Paragraph 1, the principle of liberalization is stated, in Paragraph 2, cases in which foreign investment is restricted are described, and in Paragraph 3, the specification of concrete restrictions is delegated to the Presidential Decree.[94] Meanwhile, in <Appendix Table 2> of the 'Rules

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(3) Business categories in which a foreign investment project is restricted, it being one of the cases described in items under Paragraph 2, and the details of restrictions that apply shall be specified in the Presidential Decree.

(4) The head of a government agency imposing restrictions on a foreign investment project in accordance with laws and regulations other than this Act must report their details to the Minister of Finance and Economy, following the procedures specified in the Presidential Decree, and the Minister of Finance and Economy must make a comprehensive annual report on such reports received over the year in the manner specified in the Presidential Decree.

94) Article 5 of the Enforcement Decree to the Foreign Investment Promotion Act (Presidential Decree No. 15931, enacted Nov. 14, 1998, entered into force Nov. 17, 1998), specifying the matters delegated by Article 2 of the Act reads as follows:

Article 5 (Business sectors with restrictions on foreign investment, etc.)

(1) Business categories in which foreign investment is restricted pursuant to provisions under Article 4, Paragraph 3, and types of restrictions are listed in items below, whose details shall be determined by the Minister of Finance and Economy through consultation of cabinet ministers with relevant authority and be announced through an official government notice, in a manner conforming to the range permitted in the proviso on the direct investment in Korea by non residents in the Appendix (provisos to the Code of Liberalization of Capital Movements) to the Agreement on the Invitation to the Republic of Korea to Accede to the Convention on the Organization for Economic Cooperation and Development (OECD) (in the Convention on the OECD) and the provisos in the Appendix on Investment between Two or Multiple Parties.

on Foreign Investment and Technology Transfer,' a set of rules established by the Minister of Finance and Economy in collaboration with other cabinet ministers with relevant authority, pursuant to Article 5, Paragraph 1 of the *Enforcement Decree to the Foreign Investment Promotion Act,* business sectors in which foreign investment is restricted are classified into two types: (1) 'sectors not open to foreign investment' in which foreign investment is not at all allowed, and (2) 'sectors with restrictions on foreign investment' in which foreign investment is allowed, but restrictions exist concerning the ratio of foreign holding, eligibility of the Korean partner for a joint venture with a domestic party and the period of foreign investment authorization (the so called "partially open sectors").

Conclusion

The characteristics shown in the development of foreign capital and investment – relevant laws in Korea could be summarized as below:

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1. Business categories in which foreign investment is not at all allowed or partially allowed;
2. Maximum ratio of foreign shareholding allowed in business categories described in Item 1;
3. The eligibility of the Korean partner in a joint venture involving a foreign and Korean investor; and
4. Other approval criteria including the period of authorization.

(2) The head of a government agency under rules restricting foreign investment in the form of disadvantageous treatment of foreign nationals or foreign invested firms, compared to Korean nationals or Korean corporations, or imposition of additional duties on foreign nationals or foreign invested firms must, pursuant to Article 4, Paragraph 4, describe the details of such rules in place, as of December 31 of the previous year and submit the description to the Minister of Finance and Economy every year by January 31. The Minister of Finance and Economy must gather these reports and issue a comprehensive notice every year by the end of February.

Firstly, the laws and institutions regarding foreign capital and investment had been mainly focused on the use of it, which was functioning as a significant method for implementing the Economic Development Plan, rather than the encouragement and inducement itself. Especially, in the same context as the strategy for development of Korean economy was selective supports for several main industries, the allocation of foreign capital was concentrated on those industries as well. On the other hand, at the moment when the restructure of industries was needed in accordance with the change in the economic environment outside and inside of the country, the allocation of foreign capital had been useful tool for restructuring industries. With the characteristic mentioned above, there were various devices in foreign capital and investment – relevant laws and regulations for controlling and managing the whole process from the inducement and use to the evaluation and monitor of foreign capital and investment.

Secondly, the leading role of central economic affairs ministry such as 'Economic Planning Board' in 1960s and 1970s which took charge of the establishment and implementation of economic development plan with enormous authorities and responsibilities was very obvious. This point is the crucial feature which defines the unique individuality of laws and institutions related to foreign capital. The central ministry with the responsibility of main economy affairs had the most powerful authority in the industry policy, price control policy, finance policy, etc. as well as the management and monitor of macroeconomic policy overall until 1980s when the initiative in managing economy as a whole had begun to shift toward private sector. Of course foreign capital policy was one of the areas in which the central ministry of economic affairs dealt with as a

part of the entire economic policy. As known to everyone very well, there might be many disadvantages in the way of managing economy which Korea had been following and somehow a number of problems with which Korea has confronted even now would have come from it. Nevertheless, we would be able to make a positive estimation about the development process of Korean economy, in that the advantages of the centrally planned way of managing economy have been made the best use of, considering, especially relating to foreign capital policy, it had been allocated in the way, not only waste and inefficiency can be minimized when pursuing the consistent strategy and sole purpose, but also the mediation among many economic policies was possible. It might be said that this is the successful result in spite of the constraint such as lacking financial resources and vulnerable creditworthiness that the countries in the early stage of economic development have. It cannot be said with assurance that this way of managing foreign capital adapted by Korea in the past will be valid for other countries today. In this sense, it would be necessary to look deeper into the conditions and the concrete mechanism from which the Korea's unique way gained quite a successful outcome in various aspects.

Thirdly, when inducing foreign capital, Korea selected the best suitable types of foreign capital under the consideration of advantages and disadvantages of each type in view of the given situation strategically and then concentrated government's political and legislative backings on the chosen type of foreign capital exactly. Moreover, in responding to the confronted changing situations, the government moved very quickly and timely, enacting and revising laws and regulations concerned very often. It's because the foreign capital policy was being used as a main tool for

macroeconomic control, as mentioned above. So the government intended to tune the share of each type of foreign capital, like foreign aid, commercial loan, public loan, foreign direct investment, etc., according to the conditions of supply and demand in foreign currency as well as international balance of payments.

Fourthly, related to the third characteristic explained above, among various types of foreign capital, especially the meaning and function of foreign direct investment has been somehow different as people generally think about the relations between economic growth and FDI in Korea's case. Especially today when the enormous capital rushing in from multinational corporations is considered as the essential sources for developing countries, it is commonly believed that attracting FDI aggressively is the primary policy goal which should be pursued enthusiastically at the early stage of economic development. If we see how the Korean economy has been developed, however, the level of inflow FDI remained very low even in the period when the economy was growing up rapidly, indicating that FDI was not the main resource contributed to the growth of Korean economy in its early shaping step. Attracting FDI has become the central objective in foreign capital policy once into the 1990s. From the overall point of view, Korean government's attitude toward attracting foreign capital doesn't seem to be so aggressive and very cautious about minimizing harms and side-effects causing from dependence on foreign capital, while trying to mobilize and utilize it just as much as it was needed. At the same time, the Korean government struggled to enlarge the portion of domestic savings rather than foreign capital for the sake of the independence of national economy.

One thing that needs to be commented concerning the way to go for foreign capital policy in Korea is that laws and institutions after economic crisis in December 1997 fundamentally diverted to different direction unlike they had been following before, paving the new way for much more liberalized and globalized phase. Above all things, it should be understood as a response and adaptation to not only the change of economic conditions inside and outside but also the transition in development phase. Still, we should be more prudent before we conclude that the full-scale opening-up and liberalizing policy guarantees the attainment of desired goals such as the economic growth and development through strengthening the competitiveness of domestic industries and enterprises, considering the way Korean economy has been going through so far.

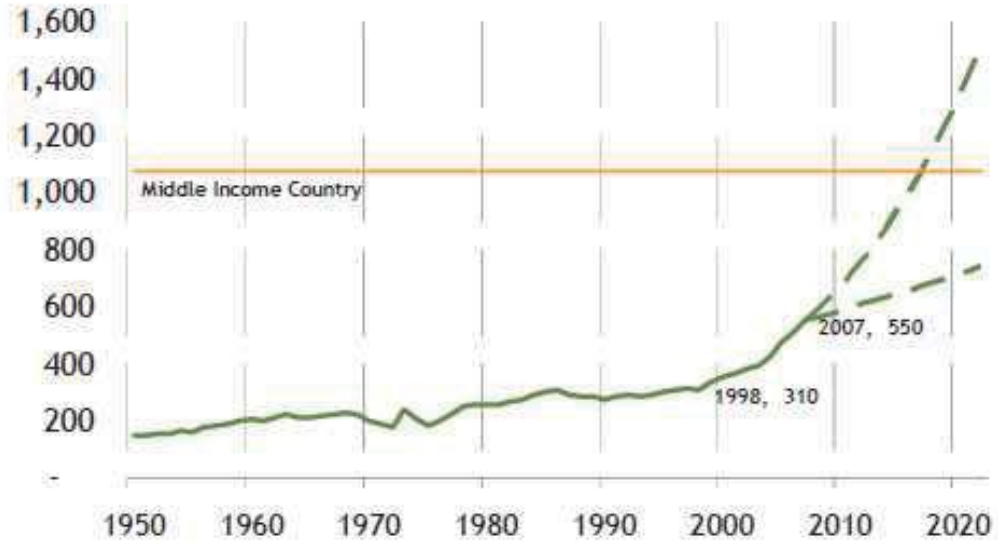
Chapter 5. Conclusion: The way forward of Investment Law in Cambodia reflecting on the experiences of Korea

Section 1. The Outcome and Tasks of Economic Development in Cambodia

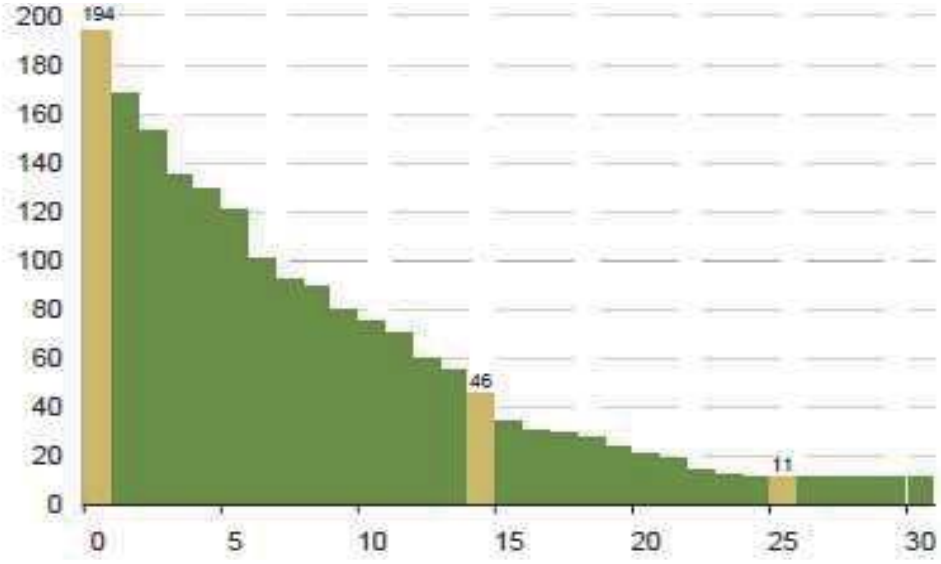
Cambodia has gone through an unusual period of rapid growth. Growth has averaged 9.8% per annum over the past decade, and was above 10% in the four consecutive years from 2004 to 2007. Over 1998-2007, Cambodia's growth performance ranks 6th across all countries in the world.[95] In a word, Cambodia has a story of remarkable and dramatic achievements in a challenging environment through overcoming the enormous tragedy called "Killing Field". The best estimates suggest that about 250,000 people died during the civil war (1970-75) and a further 2 million during the Democratic Kampuchea period (April 1975 - January 1979). Especially, Cambodia managed well the policy reforms around 1990 to liberalize its economy and began to establish a track record of legal reforms.[96]

95) World Bank, *Sustaining Rapid Growth in a Challenging Environment - Cambodia Country Economic Memorandum* (February 2009), p. 1.

96) *Ibid*., p. 20.



[Figure 1] Income per Capita (2007, $)[97]



[Figure 2] Growth Performance (1960-2007)[98]

97) *Ibid*. Projections made based on recent performance (7.5% p.a. per capita) and lower performance (2% p.a. per capita). Middle income country level is defined as US $1,075 per capita. (Source: NIS, national accounts, Madison for pre-1993 estimates)

98) *Ibid*. Each bar shows the number of countries that have achieved a rate of growth

However, it might be questionable whether this achievements will sustain in the next decade, especially at a time of considerable uncertainties in the global economy. As the statistics during 1960-2007 shows, of 194 countries with data, 46 have achieved 7% annual growth on average for 14 consecutive years, but only 11 of the 46 countries have sustained 7% annual growth for a second decade.[99] Furthermore the evolution of the population structure has been a major driver of rising output and living standard.[100] this could imply a less sustainable growth model than if growth and poverty reduction had been driven primarily by productivity gains.[101]

The concern pointed out above is somewhat plausible considering that several structural vulnerabilities have begun to kick in Cambodian economy recently. Above all, we need to notice that Cambodian economy has become prone to external changes as the dependence of Cambodian economy is increasing, which is evidenced by the economic crisis in 2008-2009. While Cambodia's successful performance has largely benefited from a very favorable external environment, the global financial turmoil, to which Cambodia is not directly exposed given its small financial sector, will significantly weaken the existing drives of growth.[102] Although the limited development of the financial sector is shielding Cambodia from the direct impact of the financial turmoil in the global economy, this highly uncertain environment will exacerbate several pre-existing

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of 7% p.a. for x consecutive years (calculated with a geometric average). Cambodia is one of 46 countries that have achieved this performance for 14 consecutive years. (Source: WDI)

99) *Ibid*., p. 1.

100) *Ibid*., p. 33.

101) *Ibid*., p. 33.

102) *Ibid*., p. xi.

vulnerabilities, like the four drivers of growth being subject to the uncertain environment,[103] the large current account deficit more than inflows of private and official capital, the rapid development of the financial sector and concerns about rising inflation.[104]

On the investment side, it is a major achievement that the investment-to-GDP ratio has increased from 15% in 1997 to 21% in 2007, contributing 2.4 points of growth per annum on average. But the composition of investment is problematic: public investment is low and the rapid increase in FDI suggests that domestic investment has been particularly limited, possibly averaging only around 5% of GDP per annum.[105] In other words, domestic savings and investments have remained relatively low (13% and 20.8% of GDP respectively in 2007), which means that substantial portion of necessary capital for developing economy inflows from abroad. The reliance on foreign savings highlights how vulnerable Cambodia is to the recent global economic turmoil.[106]

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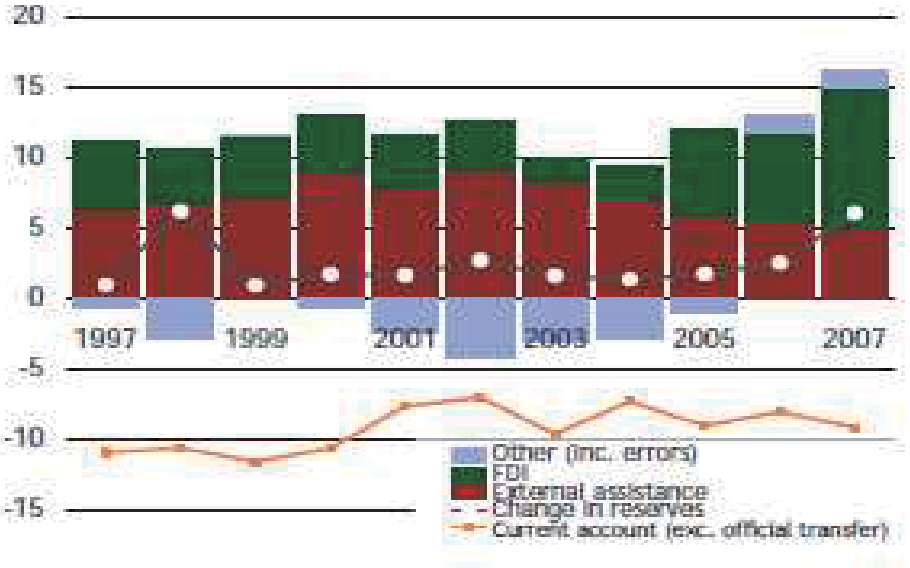
103) Garments and tourism will directly suffer from the global slowdown, especially in the US for garments and in Korea for tourism. Construction was also weakening and will further slow down as foreign investment in real estate slows down. *Ibid.*, p. 11.

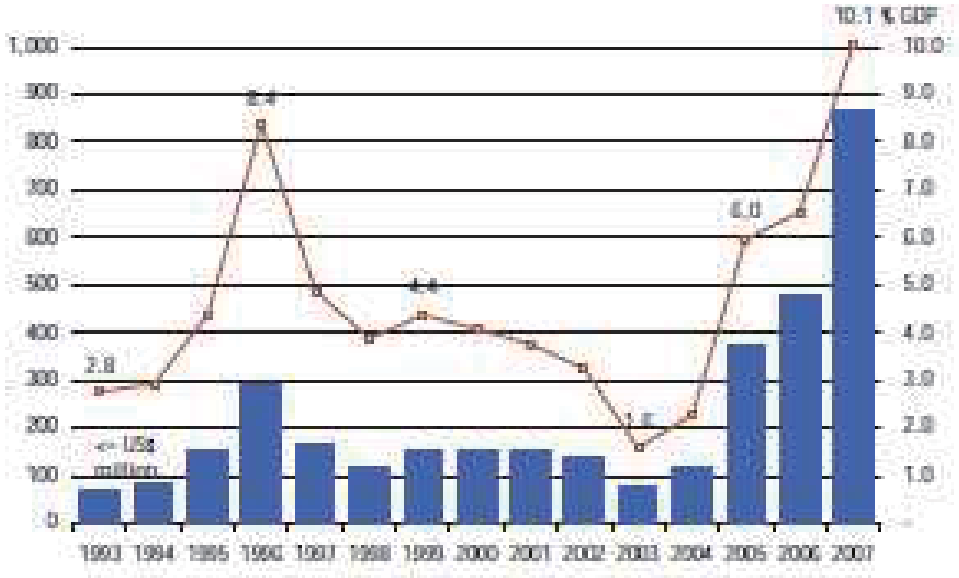
104) *Ibid.*, pp. 10-1.

105) *Ibid.*, p. 13.

106) *Ibid.*, p. x .

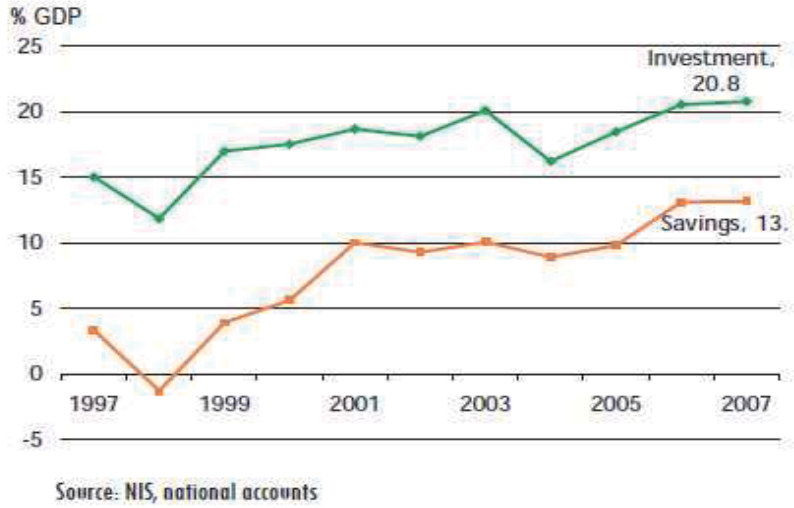


[Figure 3] Current Account and Financing (%, GDP)[107)]



[Figure 4] Foreign Direct Investment (US$m and % GDP)[108)]

107) *Ibid*., p. 11.
108) *Ibid*., p. 11.



[Figure 5] Investment and savings have been increasing, but remain low (% GDP)[109)]

The external vulnerabilities and relatively high dependence on foreign capital and investment relating thereto of Cambodian economy considered, the relevant laws and institutions should support the effective use of foreign capital and investment for establishing the industrial base at the same time while enhancing the proportion of domestic savings in the total investment capital, in order for Cambodian economy to develop sustainedly and stably. To put it concretely, a few issues could be raised as challenges Cambodian economy faces now. Simultaneously, special regard should be paid to the fact that Cambodia has many comparative advantages and potentials, for example, in land and extractive industry sectors like mining, oil and gas.

First of all, it can be said that land might be not only the most potential resources from which the dynamic of growth will derive but also the most serious constraints on realizing the growth potential. As

109) *Ibid*., p. 21.

pointed out appropriately and clearly in the paper written by Professor Hap Phalthy, the issues surrounding the investment in land and the economic and social land concession demonstrates that land should be the focal point when trying to find the way to improve laws and institutions relating to foreign investment which can contribute to economic development.

Especially, Economic Land Concessions (ELC) were legally planned to respond to an economic purpose allowing the beneficiaries to use the land for industrial purposes. They are now used mainly for the flow of foreign direct investments from France, China, Kuwait, and Qatar, and so on. ELC serve as the legal vehicle for foreign direct investments through leasing at the expense of the former (e.g. indigenous or communal) private land users such as small-scale farmers who are involved in agriculture for subsistence purpose.[110] However, the ELCs process has been described as full of confusion and allocated land has often turned out not to be properly identified (often with conflicts with indigenous communities, which have a traditional use of land and forest and, by law, a right to use).[111] Few foreign investors have had the will to be involved in these difficult land issues.[112]

From the other aspect, we need to notice the policy of Decentralization & Deconcentralization in relation with the mechanism of decision making for investment. Someone argues that *politically* federal institutions, those that give regional units (states and provinces) representation at the national level, attract more FDI that unitary regimes.[113] It's an observation from

110) Fabian Thiel, "Donor-Driven Land Reform in Cambodia - Property Rights, Planning, and Land Value Taxation," ERDKUNDE Vol. 64 No. 3, p. 236.

111) World Bank, *supra* n. 75, *Ibid*., p. 37.

112) *Ibid*.

113) Nathan M. Jensen, *Nation-States and the Multinational Corporation - A Political*

the political-economic point of view. Professor Hap Phalthy argues that the government should provide more power and responsibilities for local authorities to initiate and monitor economic land concession in his paper in this book.

But, compared with other developmental states' experiences such as Korea where the role of central government in managing and organizing the overall flow of foreign and domestic capitals was crucial, it is somewhat doubtful whether it would be right way for Cambodia to delegate the relevant power to local authorities which have not yet been fully matured and independent from informal and corrupt local powers. Taken a broad view, this issue is connected to the overall problem of governance in Cambodia.

Section 2. The Importance of the Strategic Use of Foreign Capital and Investment: From the Examples of Developmental States in East Asia

It is needless to say that the mobilization and accumulation of capital is extremely important for countries in the initial stage of economic development. Because a majority of non-oil-exporting developing nations have historically incurred deficits on their current account balance,[114] a continuous net inflow of foreign financial resources represents an important

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Economy of Foreign Direct Investment, Princeton University Press, 2008, p. 5.

114) A country's international financial situation as reflected in its balance of payments and its level of monetary reserves depends not only on its current account balance (its commodity trade) but also on its balance on capital account (its net inflow or outflow of private and public financial resources). Michael P. Todaro & Stephen C. Smith, *Economic Development* (11th Edition), Addison-Wesley, 2010, p. 684.

ingredient in their long-run development strategies.[115] However, we should throw a question, "Does foreign direct investment promote development?" Few areas in the economics of development arouse so much controversy and are subject to such varying interpretations as the issue of the benefits and costs of private foreign investment.[116]

The first and most often cited contribution of private foreign investment to national development (i.e., when this development is defined in terms of GDP growth rates – an important implicit conceptual assumption) is its role in filling the resource gap between targeted or desired investment and locally mobilized savings.[117] On the other hand, among many arguments against private foreign investment summarized as 'widening gap', the most notable points reflecting the tension between multinational/ foreign corporations and domestic corporations is that foreign corporations may damage host economies by suppressing domestic entrepreneurship and using their superior knowledge, worldwide contacts, advertising skills, and range of essential support services to drive out local competitors and inhibit the emergence of small-scale local enterprises.[118] They can thereby crowd out local investors and appropriate the profits for themselves. For examples, in a quantitative study of 11 developing countries outside the Pacific Basin, higher foreign direct investment was accompanied by lower domestic investment, lower national saving, larger current account deficits, and lower economic growth rates.[119] Ajit Ghose's study of

115) *Ibid.*, p. 684.
116) *Ibid.*, p. 688.
117) *Ibid.*, p. 689.
118) *Ibid.*, p. 691.
119) Maxwell J. Fry, "Foreign direct investment, financing and growth," in *Investment and Financing in Developing Countries*, ed. Bernhard Fischer (Baden-Baden, Germany: Nomos, 1994), and *Foreign Direct Investment in Southeast Asia: Differential Impacts*

fifty-nine representative developing nations in the 1975-2000 period found that foreign FDI does not completely act as a *complement* to local investment, promising to increase the rate of growth, but rather, in part, as a *substitute* for local capital ownership, local control, and perhaps for local learning.[120)]

The argument both for and against private foreign investment are still far from being settled empirically and may never be, as they ultimately reflect important differences in value judgments and political perceptions about desirable development strategies.[121)] Therefore, it is crucial from the view of economic development what kind of capital comes in and how the capital is used and affects national economy eventually, rather than how much capital is accumulated. In this regard, when appraising the laws and institutions relating to foreign capital and investment from the perspective of economic development, we need to consider 'the important linkages between FDI, and flows from stock and bond purchases (portfolio investment), bank and corporate lending (private loans), bilateral aid institutions (such as United States Agency for International Development) and multilateral institutions (such as the World Bank or the regional development banks) which make official loans and grants' synthetically. It should be stressed that FDI forms only the part of overall foreign capital and amounted to only 26% of the net long-term flows to developing nations in the 1986-90 period.[122)]

(Singapore: Institute of Southeast Asian Studies, 1993) (*Ibid.*, p. 691).

120) Ajit Ghose, "Capital Inflows and Investment in Developing Countries," *Employment Strategy Papers* (November), International Labour Organization, 2004 (*Ibid.*, pp. 461-2).

121) *Ibid.*, p. 693.

122) James M. Cypher & James L. Dietz, *The Process of Economic Development* (Third Edition), Routledge, 2009, p. 463.

By the way the impact of foreign private capital and investment on national economic growth differs from country to country. In a large study over the 1971-2000 period, Manuel Agosin and Robert Machado found evidence of crowding out in some sub-periods in some developing regions (Africa and Latin America) and a "neutral" effect in Asia.[123] The authors speculate that the reason why crowding out did not occur in some Asian countries was that the Asian nations as a group were more aggressive in selecting foreign investors and more prone to impose conditions on these investors that would guard against adverse affects.[124] Now we will draw several implications Korean laws and institutions on foreign capital and investment could carry as one of the successful models for establishing a mechanism of management and control foreign capital as well as using it strategically in the next section.

[Table] Net long-term resource flows into developing regions (billions of dollars) (Source: World Bank, Global Developing Finance, 2002, p. 3)

Type of flow	1991	1997	1999	2001	2003	2005
Foreign Direct Investment	35.7	168.7	183.3	176.9	161.6	237.5
Portfolio Investment	21.5	71.7	41.7	11.1	45.7	116.4
Bank Loans	5.0	44.0	-7.1	-10.8	9.8	67.4
Official Flows	62.6	34.9	40.2	35.8	29.0	22.3
Total	124.2	319.3	258.1	213.0	246.1	443.6
FDI/Total(%)	28.7	52.8	71.0	83.1	65.7	53.5

123) Manuel Agosin & Ricardo Machado, "Foreign Investment in Developing Countries: Does It Crowd-Out Domestic Investment?" *Oxford Development Studies* 33(2), pp. 149-62 (*Ibid*., p. 462).

124) *Ibid*., p. 462.

Section 3. Implications from the Developmental Process of Laws on Foreign Capital and Investment in Korea

1. The Backward Linkages between Foreign Capital and Domestic Economy

Regarding the so-called "backward linkages", which refers to the probable positive interaction between foreign investment and domestic economy, such as sustained exchanges of information, technology, skills and other assets, we might be able to think of two possibilities.[125)]

Firstly, core suppliers to the large transnationals are increasingly foreign-owned. These firms often exhibit the characteristics of cutting-edge suppliers - mastery of quality control, capacity for flexible "just in time" delivery, ability to independently design components and supplies at the level of original equipment standards, and so on. Clearly, in this instance neither learning nor technology transfers occur with heightened FDI, and the domestic economy remains disarticulated from the accumulation process driven by the foreign investors.

Secondly, more importantly, deep linkages and dynamic technology and learning transfers occur normally when host nations intervene and set up their own "linkages promotion programs," The state can play a crucial role in tying together the forces of the foreign investors and the national needs for rapid development. Not surprisingly, most successful linkage nations in East Asia have struggled to upgrade existing linkages, create new domestic sourcing possibilities, and force foreign investors to reorient their production toward linkages to higher value-added activities.[126)]

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125) *Ibid*., p. 472.

In the sense of the establishment of the foundation for sustainable economic development, it is needless to say that the second possibility is much more desirable. Nations with developmental states, such as many East Asian nations, have been able to build strong backward linkages.[127] In Asia the ability to insert a national strategy into the process demonstrates that there is no inevitable fate for host nations.[128] As active participants they can increasingly experience the positive effects of FDI.[129]

Also it can be said that Export Processing Zones (EPZs) tend to illustrate the most undesirable consequences which may arise when a less-developed nation uncritically turns to FDI hoping for the potential benefits, as EPZs generally fail to create either forward or backward linkages to local production; in fact, in most countries, firms located within EPZs are prohibited from having any but minimal sales to the internal market, so forward linkages are typically impossible.[130] In order

126) Six key processes have been encouraged by the state:
   a. Create public/private sector forums to open a dialogue between the TNCs (transnational corporations) and unions, regional planners, national development agencies, business associations, supplier industry associations, and financial sector firms.
   b. Disseminate to all parties information regarding successful examples of linkages.
   c. Limit and target specific sectors or industries, bypassing areas where internationally integrated production systems area already dominant.
   d. Choose to host affiliates on the basis of their commitment to interact with and their potential to spin off crucial learning/technology to local suppliers.
   e. Select suppliers based on their capability of meeting production standards, quality requirements, workforce skill requirements, and the commitment of local entrepreneurs to restructuring their operations to meet continually evolving standards set by the contracting TNC.
   f. Monitor and evaluate local suppliers, rewarding those that meet the above goals.

   Ibid., p. 463.

127) *Ibid*., p. 463.

128) *Ibid*., p. 474.

129) *Ibid*., p. 474.

for EPZs to function as the "starter" for the export engine of growth for an indigenous manufacturing sector, the TNCs operating in the EPZs must be embedded in a production structure which forges ever-more profound linkages to the national economy of the host nation.[131] Only in Korea and Taiwan has such a "virtuous circle" been created with export-oriented TNCs, so the EPZs became important sites for national capitalists to produce and export from, not simply for TNCs.[132]

2. The Characteristics of Korean laws on Foreign Capital with positive linkage effects

As we have analyzed in the previous first article written by Hyeshin Cho in this book, Korea utilized foreign investment as a strategic means to gain access to technology and skills at a lower cost than might otherwise have been possible through domestic channels alone.[133] The Korean state's approach to investment from abroad has been anything but laissez-faire, taking what has been called the "eye of the needle" approach, to make certain that any foreign investment met Korea's needs.[134]

What is most notable is the emphasis in Korea on increasing the degree of local sourcing of inputs as a condition for firms remaining in the EPZs and reaping the benefits of the exclusions from taxes and tariffs.[135] And Korea's industrial policy has been noted for their monitoring

130) *Ibid*., pp. 475-6.
131) *Ibid*., p. 479.
132) *Ibid*., p. 479.
133) Richard Luedde-Neurath, "State Intervention and Export-Oriented Development in Korea,": in Hordon White ed., *Developmental States in East Asia*, St. Martin's Press, 1988, pp. 84-5, 90-3.
134) James M. Cypher & James L. Dietz, *supra*. n. 97, p. 479.
135) *Ibid*.

of the effects of their policies and for the successful use of performance-based subsidy structures that reward results, in particular greater efficiency, while penalizing rent-seeking, unproductive behavior.[136] In terms of technology transfers, the government usually approved these through the Economic Planning Board or the Ministry of Finance, with input from the Ministry of Science and Technology. Technical assistance contracts were typically limited to no more than three years, except in complex processes, with the intention of forcing domestic firms to learn how to do technology themselves rather than depending on foreign consultants. Thereby, foreign investors were expected by their partners and by the Korean government to make a continuing contribution to Korean development, one which was complementary to, rather than at the expense of domestic manufacturing interests.[137] In this context, the laws and policies intended to control the ownership structure of foreign-invested companies in order not to be deprived of the benefits from the investment. One study found that only 29.7 percent of foreign direct investment in Korea took the form of wholly-owned subsidiaries of multinational companies. This compares with 33.1 percent for Japan at the same time (1976), and an average 69.1 percent ratio for the sixty-six countries in the study. In fact, Korea's ratio of wholly-owned FDI was the lowest in the sample.

Regarding the role and composition of foreign capital and investment, Korean government favored borrowing from foreign governments, with relatively easy repayment requirements, to having FDI and continued to weigh the relative merits of FDI against bank loans and other forms of credit, maintaining a balance between these in their favor and a relatively

136) *Ibid*.
137) *Ibid*.

lower reliance on FDI for capital and technology.[138] In contrast with it, the Latin America nations tended to adopt one strategy regarding FDI and foreign capital, to the exclusion of dynamic combinations regarding, first, openness to FDI versus protection and closure of certain key industries, and second, FDI versus bank loans.[139]

Lastly, Korea had strong and cohesive states which were willing to operate strategically and plan strategically in pursuit of national development, being able to maneuver between Japan and the United States, thereby improving their bargaining position in determining the conditions under which FDI has taken place.[140]

Section 4. Conclusion

In the Cambodian laws on foreign capital and investment, it seems to be necessary to draw some measures up to lay foundation for the stable and continuous development. Although several industries such as tourism, construction, agribusiness have become dynamic forces for growth through the vigorous inflows of foreign capital and investment and this trend is fortunately expected to be going further, we cannot exclude the possibility that the sustained and enhanced development of Cambodian economy might be difficult to be obtained, unless Cambodian economy has a sound industrial base which makes the stage of development update continuously and autonomously with retaining a certain degree of external economic independence.

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138) Refer to Barbara Stallings, "The Role of Foreign Capital in Economic Development," pp. 55-89: in Gary Gereffi and Donald wyman (eds.), Manufacturing Miracles, Pinceton University Press, 1990. (James M. Cypher & James L. Dietz, *supra*. n. 97, p. 485)

139) *Ibid.*

140) *Ibid.*

Eventually we have come to conclusion that the issue at stake is whether the State's choice of development strategy determines the role of foreign capital or whether foreign capital determines development strateg y.[141] The final conclusion of this research would be summarized with articles as below[142]:

> *There is no ideal universal strategy on FDI. Any strategy has to suit the particular conditions of a country at a particular time, and evolve as its needs change and its competitive position in the world alters. Making effective strategy requires above all a development vision, coherence and coordination. It also requires the ability to decide on trade-offs between different objectives of development. In a typical structure of policy-making, this requires the strategy-making body to be placed near the head of government, so that a strategic view of national needs and priorities can be formed and enforced.*

141) *Ibid.*

142) UNCTAD, *World Investment Report 1999*, United Nations, 1999, p. 326.