LEGAL OPINION ON THE STATUS AND LEGAL OWNERSHIP OF SAMRONG ESTATE

We have been engaged to render a legal opinion ("Legal Opinion") to the Asian Development Bank ("ADB") on the status (public or private) and legal ownership of a parcel of land located at Sangkat Samrong Krom and Sangkat Kakab, Khan Dangkor, Phnom Penh ("the Land") on the basis of: (a) applicable laws; and (b) available relevant documents.

1. APPLICABLE LAWS AND AVAILABLE RELEVANT DOCUMENTS REVIEWED

For the purpose of rendering this Legal Opinion, we have examined and relied on the originals or copies, certified or otherwise identified to our satisfaction, of the following:

A) APPLICABLE LAWS

a) Sub-Decree No. 25 on Granting Ownership to Cambodian Citizens dated 22 April 1989 ("Sub-Decree 25") but prohibiting private ownership of public land or State buildings;


c) Ministerial Notice No. 007 of Ministry of Economy and Finance ("MEF") dated 3 September 1993 ("Ministerial Notice") to deny all transfers, sale or lease of public properties and to order all public servants including governmental forces to help protect public State property;

d) The Constitution of Cambodia dated 21 September 1993 ("the Constitution") providing, among others, that Cambodian citizens must respect State owned property;


f) Governmental Instruction No. 30 on the Management of State Property dated 25 December 1997 ("Governmental Instruction No. 30") confirming that land under the management of governmental institutions is considered State property;

 g) Prakas No.06 on the Measures of Elimination of Anarchy in Land Grabbing Issues dated 27 September 1999 ("Prakas No. 06") giving measures to eliminate private ownership of State land including land reserved for or abutting railways;
h) Cambodian Land Law dated 30 August 2001 ("the 2001 Land Law");

i) Sub-Decree No. 118 on State Land Management dated 7 October 2005 ("Sub-Decree 118") providing that public State land includes land for railways and railway stations;

j) Decision No. 52 of the Ministry of Land Management, Urban Planning and Construction ("MLMUPC") dated 25 December 2006 ("Decision No. 52") on the inclusion of documents for the determination of State land classification;

k) Governmental Circular No. 02 on the illegal possession of State land dated 26 February 2007 ("Circular No.02") stating that any possession of State land listed as public State land would be regarded as illegal possession;

l) Civil Code of Cambodia dated 8 December 2007 ("the Civil Code") and the Law on the Implementation of the New Civil Code promulgated on 31 May 2011, which fixed the effective date for the implementation of the Civil Code as at 21 December 2011; and

m) Sub-Decree No. 197 on the Management of the Land Abutting the National Roads and Railways in Cambodia dated 23 November 2009 ("Sub-Decree No.197") giving Ministry of Public Works and Transport ("MPWT") full authority to manage and use the land abutting the national roads and railways.

B) AVAILABLE RELEVANT DOCUMENTS

a) Inventory list of immovable property of the Railway Department of MPWT dated 31 July 1993 ("1993 Inventory List") which, among others, lists various railway property of MPWT;

b) Letter No. 1621 from MPWT to the Governor of Phnom Penh Municipality dated 3 July 1997 ("Letter No. 1621") requesting the promotion of public awareness of illegal land occupation;

c) Record of Inventory list of movable and immovable assets of Royal Railways of Cambodia ("RRC") dated 20 May 1998 ("1998 Inventory List") which, among others, lists further railway property of MPWT;

d) Inventory list of movable and immovable assets of RRC dated 31 December 2002 ("2002 Inventory List") which, among others, lists further railway property of MPWT;

e) Letter No. 1986 from MLMUPC dated 24 December 2003 requesting issuance of certificates of ownership of registered State properties;

f) A set of 5 receipts ("the 5 Receipts") allegedly issued by the cadastral officials to individual occupants of the Land during the land data collection for the land systematic re-titling;

g) A set of 26 letters ("the 26 Letters") from the commune and/or village chiefs purportedly confirming the Land was located in their commune and purportedly certifying the identity of the persons signing The 26 Letters; and

h) A set of 27 receipts ("the 27 Receipts") acknowledging the applications (only) for possessory rights over the Land.
2. LEGAL OPINION

2.1 The Ownership of State Property under Cambodian Law

After the collapse of Democratic Kampuchea in 1979 (Khmer Rouge Regime), the new Royal Government of Cambodia did not recognize any land ownership rights existing before 1979 and all the land in the Kingdom of Cambodia ("Cambodia") was State property, administered and governed by the State. This position is stated and reinforced in the following legislation:

Article 1 of Sub-Decree 25 provides that "no person shall claim previous ownership over any house, building or land for house construction existing before 1979".

Article 1 of 1992 Land Law states that "in the People’s Republic of Kampuchea all land belongs to the State and shall be administered and protected by the State. The State does not recognize any previous land ownership existing before 1979".

Article 7 of 2001 Land Law states that "any regime of ownership before 1979 shall not be recognized [by the State]."

In 1989, under Article 2 of Sub-Decree 25, the State first allowed private ownership throughout Cambodia only on houses that were privately owned by Cambodian citizens at that time. However, under Article 6 of Sub-Decree 25, the aforementioned private ownership could not be granted on State buildings either in whole or in part.

From 1992, the State allowed Cambodian citizens to legally own real property (i.e. private land) in Cambodia, but legal ownership could not be granted over State land, including land used or reserved for railways. Under Article 5 of 1992 Land Law, private ownership shall not be granted over (unofficial translation) "...former public buildings, land reserved for roads and road pavement, and lands reserved for railways..."

Then in 1993, the Constitution came into force. Article 50 of the Constitution provides that citizens must respect public State property and legal private ownership.

Article 12 of the Law on Land Management also prohibits any construction on any public State land without limitation, "...land reserved for roads, pavements of the roads, railways and airports..." Public State land, under Article 4 of Sub-Decree 118 and Article 15 of 2001 Land Law, also includes, without limitation, the land for railways and railway stations.

Furthermore, Decision No. 52 clearly states that railway stations, railways including land abutting the track and land reserved for railways are public State property, which shall not be the subject of private ownership or transfer.

2.2 Public or Private Status of the Land

According to the 1993 Inventory List, the Land appears to be owned by the State (i.e. MPWT) and listed in the inventory lists of MPWT since 1969.

Also, under the Governmental Instruction No. 30, all property (including real property) under the management, care, and use of ministries, provinces/municipalities, public enterprises and other governmental institutions is public State property.

Therefore, clearly the Land has been and continues to be public State land.
Moreover, MPWT has never waived, abandoned or renounced ownership and/or title to its properties including the Land. The Royal Government of Cambodia and/or MPWT have taken continuous actions against illegal occupation and/or encroachment over the Land. For instance, the MEF issued the Ministerial Notice to deny all transfers, sale or lease of public State property and to order all public servants including governmental forces to help protect public State property.

Furthermore, on 3 July 1997, MPWT sent Letter No. 1621 to the Governor of Phnom Penh Municipality requesting the latter to promote the public awareness of illegal occupation of its real property as MPWT noticed illegal buildings/houses on or near the track of its railways.

Subsequently, Prakas No. 06 gave measures to eliminate private ownership of public State land including land reserved for or abutting railways. This Prakas No. 6 also instructed the relevant local authorities to promote public awareness of public State land and law and regulations relating to its illegal occupancy. This Prakas also included measures to unconditionally evict illegal occupants.

Also, on 24 December 2003, MPWT issued a letter to MLMUPC to request the issuance of certificates of ownership for the registered public State properties (including the Land) which were previously registered as public State property under MPWT’s inventory lists from 1993 – 2003.

Although the Railway Department of MPWT, which operated the railway in the early 1980s appeared to have granted some of its employees authorization to use part of the Land for rice cultivation, such authorization under no circumstances was intended to vest ownership or rights in rem over the Land. In any case, under Governmental Instruction No. 30, the State may allow its citizens to live on or use its real property, but such authorization may be revoked at any time when the State so requires.

Additionally, Sub-Decree No.197 (Article 5) states that MPWT shall have the full authority to manage and use the land abutting the national roads and railways.

2.3 Acquisition of Ownership through Legal Possession under 2001 Land Law

According to Articles 30, 31, 32, and 38 (under Chapter 4) of the 2001 Land Law, a Cambodian individual who has occupied land in Cambodia for at least five years by the time of the promulgation of the Land Law in 2001, and was able to fulfill the following requirements, would be regarded as legal possessor and be entitled to request legal ownership of that land. Those requirements include occupying the land unambiguously, non-violently, publicly known, continuously, and in good faith.

However, the legal possession mentioned above can only be converted to private ownership provided that the possessed land is capable of being lawfully and privately possessed. Article 16 of 2001 Land Law states that “public State property is inalienable and ownership of those properties is not subject to prescription. Public State properties cannot be acquired by the special acquisition provisions of Chapter 4 of 2001 Land Law; Public State property may, however, be subject to authorization of temporary occupancy which is precarious and revocable...Such authorization cannot be transformed into ownership or rights in rem for the benefit of the holder.”

Article 18 of 2001 Land Law also nullifies any private possession or claims of transformation into ownership of public State property. Also, Circular No.02 states that any possession of State land listed as public State land would be regarded as illegal possession regardless of whether such possession took place before or after the 2001 Land Law came into force.
Furthermore, paragraph 3 of Article 162 of the Civil Code, states that any legal possession of public State land shall not be converted to private ownership.

Therefore, it is very clear from the Cambodian law discussed above that the occupants of the Land are not entitled to any possessory or ownership rights over the Land.

2.4 The Validity of Land Documents provided by the Occupants

We have not seen any document providing official confirmation from the local authority (such as the cadastral officer), or village, commune, or district chiefs, that the Land was in the legal possession of the occupants. In the 26 Letters, the commune and village chiefs, by their handwritten remarks, only confirmed that the Land was located in their commune and only certified the identity of the persons signing the transfer documents. Neither did they certify the legality of their possession of the Land nor did they have the authority to do so. They would still have required the official confirmation from the Chief of the District Agriculture Office, which was empowered to be in charge of land transfer at that time.

Although the transfer of possessory rights by way of the 26 Letters would have been a practical procedure for transferring possessory rights over unregistered land in Cambodia, to effectively transfer freehold title in land, the land transfer and sale would need to be made before and verified by the relevant competent authority, followed by the registration of the land certificate (i.e. Certificate of Possession or Certificate of Ownership). However, we have not seen any such verification in the documents we have reviewed.

As regards both the 5 Receipts and the 27 Receipts, these are not title documents nor are they evidence of such.

The 5 Receipts do not contain any official stamp or signature of the competent officers. In any case, even if they did, they would not confer any possessory or other title rights on the occupants.

The 27 Receipts, acknowledging the applications for possessory rights over the Land provided to the occupants by the District Agriculture Office, cannot be construed as legally valid documents used to confirm the legal possession of the occupants over the Land. These receipts were used only to certify that the occupants had applied for possessory rights on the Land, but the decision to grant the legal possession over the Land to the occupants relied solely on the official investigation and evaluation of the relevant competent officers. We have not seen any official confirmation from such competent officers, confirming that the occupants had been granted legal possessory rights over the Land.

3. CONCLUSION

Based on the foregoing and subject to assumptions and qualifications set out below, we are of the opinion that:

(i) The Land is public State property under Cambodian law and is not subject to private ownership; and

(ii) MPWT is the legal and beneficial holder of the Land, for and on behalf of the State.
4. ASSUMPTIONS AND QUALIFICATIONS

This Legal Opinion is subject to the following assumptions and qualifications:

a) This Legal Opinion is based solely on the: (a) applicable laws listed in Section 1(A) above; and (b) facts stated in the documents listed in Section 1(B) above on the assumption that such documents are authentic. We have not verified the authenticity of these documents;

b) Cambodian courts do not usually publish their decisions and there is no binding precedent system in Cambodia. Therefore, we cannot guarantee that the courts would concur with our interpretation of the laws, decisions, sub-decrees, and circulars etc., referred to Section 1 (A) herein.

c) This Legal Opinion is limited to Cambodian law and we do not express any opinion or give any advice on the law of any country other than Cambodia.

d) Unless otherwise stated, we have relied on Cambodian law, decisions, sub-decrees, and circulars etc., published in the official Gazette of the Royal Government of Cambodia in the Khmer language. We are not certain that the official Gazette of the Royal Government of Cambodia contains a complete record of all the laws, decisions, sub-decrees, and circulars etc. currently in force.

e) This Legal Opinion is given for the benefit of ADB and may be disclosed or transmitted to any person other than ADB.

f) The opinions expressed herein are as of the date hereof, and are based on the facts and laws, decisions, sub-decrees, and circulars etc., as of such date.

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