





## **Foreword**

### **PUBLISHING THE FIRST ENGLISH VERSION OF ICD NEWS**

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Eight years have passed since the establishment of the International Cooperation Department (ICD) in 2001. After the high-spirited foundation period, through several hardships such as the reduction of national budgets for Official Development Assistance (ODA), difficulty in winning recognition from the public about its activities, finally its achievements are receiving high praise. So many thanks go to our predecessors for their strenuous efforts to build today's ICD. In April 2009 the Council of Overseas Economic Cooperation established within the Cabinet approved the "Basic Policy of Assistance for Legal and Judicial System Development". Thus, legal technical assistance is steadily securing a foothold as one of the important policies for overseas cooperation of Japan.

Since its inauguration the ICD has regularly published its departmental journal, ICD NEWS in Japanese. ICD NEWS includes a wide variety of articles, varying from academic theses on legal technical assistance, law and development studies, etc., to papers on the legal systems and challenges in legal practices in the recipient countries of our assistance, written by Japanese experts living in such countries, proposals by both domestic and international experts on legal and judicial system development, reports on the progress or results of assistance by the ICD or on the activities of Japanese experts dispatched overseas or related officials of the Japan International Cooperation Agency (JICA). As the journal contains valuable information on the legal systems overseas rarely available in Japan and is highly valued as important material, it has gained a good reputation from institutions related to, scholars of, or experts in legal technical assistance, legal professionals engaging in assistance in the recipient countries, etc., and its articles have been quoted or introduced in several theses.

In the meantime, ICD NEWS has never been published in English on a regular basis, and only an ad hoc edition was published in 2003. It was maybe due to the following reasons: ICD NEWS addresses mainly related institutions, experts or legal practitioners in Japan; English is not used as an official language in almost any recipient country of our assistance; and so far, no organizational partnership, has been constructed with other donor organizations.

However, when looking around the world now, you can find a lot of donor countries and organizations undertaking legal technical assistance for developing countries. In most of our recipient countries, such numerous donors are developing their assistance activities. In order

for the ICD to continuously extend more efficient and effective assistance to its recipient countries, it will be highly necessary for us to make greater and all kinds of efforts aimed at providing the best information for other donors, while exploring cooperative relationships with them. The ICD annually organizes the Conference on Technical Assistance in the Legal Field, and in the conference held in January 2009, an expert of UNDP, one of the UN-related organizations, was invited to make a presentation on their legal assistance policies. It is our sincere hope to gradually develop and enhance such partnerships with overseas donors, including such international organizations.

On the other hand, as the ICD enjoys higher evaluations on its attainments or contributions to the improvement of legal systems in the recipient countries, it has received a rising number of requests for legal technical assistance. Moreover, along with the development of the recipient countries for which the ICD has provided assistance for many years, communication in English between ICD staff and related organizations or experts in those countries has become much easier, and it has also led to the increased necessity of information transmission in English.

As a result of the above, we have decided to publish the first English version of ICD NEWS. This publication contains several articles published in the recent editions of ICD NEWS in Japanese, such as papers with special values as theoretical literature or material regarding legal technical assistance of Japan, reports on recent ICD activities and those which are useful to know their actual situation, and achievements, articles on the position of the ICD from the viewpoint of legal assistance activities of Japan as a whole, etc., which are translated into English.

Our plan is to periodically transmit information in English, through the annual publication of ICD NEWS in English. Taking this publication as a foothold for such information transmission to the international community, we will devote further effort to provide information of higher quality in the future.

We look forward to your continued support to our legal technical assistance activities.

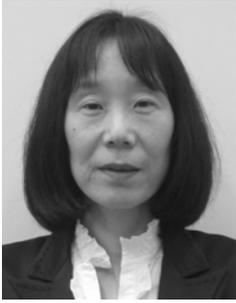


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Please note that some of the articles contained in this book were originally written for ICD NEWS NO. 37 through No. 39 (Japanese version) published in December 2008, March and June 2009. Therefore, some of the future dates and times referred to in the articles may now be in the past.



## **I. ENCOUNTER WITH A DREAM THROUGH LEGAL TECHNICAL ASSISTANCE**

**Tomoko Akane**

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### **I. TALKING ABOUT YOUR DREAM**

It seems that these days people in Japan rarely talk about their dreams. It is not directly related to the global depression stemming from the subprime loan crisis, or the aggravated Japanese economic and labor situation caused thereby. It is said that, in Japan an increasing number of people of all generations, including young people, cannot embrace their dreams for the future. In line with this, it seems that more and more adolescents cannot find motivation for learning or working. They have no confidence in themselves and tend to excuse what they can do is very little in this world.

What I remember at times are the barefoot children I met in Kenya. Even though there were not sufficient textbooks, notebooks or writing utensils for them, every child was very enthusiastic about studying and making their dreams come true in the future with a look of determination in their eyes. In none of the following fields such as the economy, living conditions, educational and medical systems, etc., the present Kenya would be compared to Japan. I can still recall their positive attitude, which was so impressive to me, and I wondered why they never lose their hope and motivation to study hard.

When I critically describe the situation in Japan, I must admit that some pessimistic thoughts, such as the following, go through my head:

“Contemporary young Japanese people are too blessed both materially and environmentally, and they do not know ‘privation’. On the other hand, the rapid and lasting economic growth has transformed into a mythology of the past, and no matter how much effort one makes, there is no assurance that such effort will lead to the success of an individual or the company which an individual works for or manages. In the first place, in this enormous and complex social structure, an individual cannot work on his/hers own initiative, and is forced to endure that smothering feeling. Having said that, at the mercy of roller coaster circumstances, given the risk of falling into the so-called underworld, it must be a big challenge for an ordinary person to leave a ‘stable life’. Thus, all one can do is not lose the status, in this “unstable and no way out” society. In such a situation, one may seek an immediate gain, but no incentive or positive attitude, and therefore no dream can be

fostered.”

A lot of people including experts in various fields have tried to address and overcome this situation, and the government has formulated and put various measures into practice. However, as it is an extremely difficult problem, no effective solution may be found so easily.

Nonetheless, I have a thought, though it is not as strong as a conviction, that a person has infinite possibilities. I think that just an “encounter” with something may trigger a complete change in one’s life, cultivate a dream, and greatly motivate a person.

I would like to briefly talk about the field of “legal technical assistance” which may offer the opportunity of such an “encounter”. The reason why I pick up this topic is that the International Cooperation Department (ICD) of the Research and Training Institute (RTI) of the Ministry of Justice (MOJ) of Japan to which I belong mainly engages in legal technical assistance.

Before entering into the main topic, let me introduce myself. I am originally from Nagoya City, and was appointed as public prosecutor in April 1982. As of 19 January of 2009, I assumed my position as the director of the ICD. This is the first time that I have worked in Osaka, so everything I see and hear here is new to me. Though I have just stepped into the field of legal technical assistance, I am greatly fascinated by this field. This is maybe because, through my experience of working twice in the United Nations Asia and Far East Institute for the Prevention of Crime and the Treatment of Offenders (UNAFEI), one of the departments of the RTI, for six years in total, I may have had certain interests in the international cooperation field. I will wholeheartedly devote myself to my assignments and hope to receive your continued support to our activities.

## **II. IMAGE OF LEGAL TECHNICAL ASSISTANCE**

Legal technical assistance in which the ICD engages is one of the main duties of the RTI. The ICD is involved in large scale projects and programs that may not be possible without support, not only by all related bureaus and departments of the MOJ, the mother organization of the ICD, but also by the Supreme Court, the Japan Federation of Bar Associations, university law faculties and law schools, law professionals and scholars. Moreover, legal technical assistance of Japan is implemented within the framework of technical cooperation as Official Development Assistance, designed by the Ministry of Foreign Affairs, and under its direction and advice, organized by the Japan International Cooperation Agency. Moreover, full support and cooperation by many people concerned in the private sector is indispensable, such as the International Civil and Commercial Law Centre (ICCLC) and the Japan International Cooperation Center (JICE), a

nongovernmental organization and non-profit foundation entrusted with the implementation of legal technical assistance, interpreters and translators who provide their services for assistance activities. Therefore, we should always bear in mind that support and efforts by a lot of related organizations and individuals have made the ICD of today.

It would be easier to picture the actual legal technical assistance activities of Japan if they were compared to the legal system improvement process which occurred in Japan after the Meiji Restoration (1868 and onwards). French Law Scholar Boissonade, who was invited to Japan during the above-mentioned process, served Japan as a legal advisor for a long time. Likewise, Japanese people including legal experts have engaged in legal technical assistance activities in and after the 1990s in Cambodia, where the devastation of the legal system and massacre of lawyers was committed by the Pol Pot regime. Of course, the situation in Japan after the Meiji Restoration is quite different from that in Cambodia in and after the 1990s. And it may be difficult to compare the activities conducted by Boissonade, with the present Japanese legal technical assistance activities, because latter ones are implemented in an organized way using various methods with the involvement of many people. However, they have the following aspects in common: both target, based on the cooperative relationships constructed between the donor and the recipient for a long period of time, enactment and revision of law, institutional improvement of legal operation, capacity development of personnel such as judges, prosecutors, lawyers, etc. In short, I would like to reiterate that there is no difference between them in the fact that they are long-term processes. As Boissonade stayed in Japan for a long period of time for the improvement of Japan's legal system, the present day legal experts dispatched by donors to recipient countries as legal or judicial advisors reside in the assisted countries for an extended period, as necessary.

### **III. LEGAL TECHNICAL ASSISTANCE AS THE SCHOOL OF LIFE**

Whether it happens in Japan or in the target countries of Japanese legal technical assistance such as Cambodia or Vietnam, accepting experts from other countries in relation to the legal system of one's own country means that such foreign experts are involved in key issues for national sovereignty. It may require a quite momentous determination for the recipient country of foreign assistance. Therefore, experts dispatched from donors may be looked at, at least at the initial stage of assistance, with caution or anxiety by the politicians or officials of related authorities in the recipient country. Or, on the contrary they may be looked at by many people with great expectations. It must be a very crucial stage for donors' experts as well, and they may confront strong tension in the implementation of activities.

I myself have no experience in working as a legal expert in the field of legal technical assistance. Therefore, I have only fragmentary information and knowledge gained through several reports written by experts who actually experienced Japanese legal technical assistance in the field, stories directly heard from such experts, output documents of legal technical assistance accumulated in the ICD and data in the past. However, by piecing those materials together, it seems that the success of legal technical assistance activities in a country highly depends on each expert dispatched to the recipient country (even though they are backed up by the organizational assistance scheme existing in Japan). It may be only when their professional expertise, objective and proper advice, multiple works requiring patience and selfless commitment, eagerness to reach the only goal of assistance, that is, improvement of the recipient country's legal system, gradually sink into the psyche and strike the right chord of people in the recipient country, that "major hurdles", that is, people's anxieties and expectations, can be overcome. And legal technical assistance in a real sense may start here based on the mutual communication between dispatched experts and the people concerned in recipient countries. Such a process itself is an "encounter" between people, and not only for experts dispatched for assistance but also for the relevant people in the recipient country, legal technical assistance may be such a big event that it may completely change their view of life or offer them an opportunity to cultivate new dreams and drive them to move toward such dreams.

It is a natural way of life and an ideal process of growth for a human to try to cross over hurdles, if and when they arise, and as such legal technical assistance must be the best "school" for both donors and recipient countries in that it necessarily presents a significant hurdle before them. Moreover, those involved therein may serve as a "good teacher" for each other.

#### **IV. "GAKUMON NO SUSUME" [AN ENCOURAGEMENT OF LEARNING] AND LEGAL TECHNICAL ASSISTANCE**

Now that I have mentioned that legal technical assistance is the best "school" and "teacher", I would like to talk about a school and a teacher. I noticed that Yukichi Fukuzawa, founder of Keio University, stated in one of his representative works, "*Gakumon no Susume*" [*An Encouragement of Learning*], that Japan, just after the Meiji Restoration, needed assistance from overseas, including assistance similar to the present legal technical assistance. I found the book interesting because, it offers perspectives of the recipient side of legal assistance, and it may give one suggestion to us engaging in legal technical assistance as a donor. Now I would like to speak a little bit about this book.

Fukuzawa wrote, "At present Japan falls well short of other countries in the fields of

academics, commerce (it may refer to economic activities, especially transactions with overseas) and law”. A civilization exclusively relates to these three fields and unless these are in due place, national independence may be at risk. However, currently in Japan none of them are well-formed,” and continued, “some critics question whether or not there is a possibility for Japan to lose its independence. They also ask us if Japan makes gradual advances building on the momentum we see now, will it finally lead to the significant development of civilization in Japan? Regarding this question, some say that it will take 20 to 30 years to answer the question, after it reveals itself, and others fear that Japan’s independence is clearly at risk. Suppose that, if you ask in England if there is a risk for the country to lose its independence, you will surely be laughed at, because everybody there knows without any doubt the country will maintain its independence. Based on this as well, I cannot say that I am confident that Japan’s civilization will develop.”

In those days, Japan had just opened the door to the world abandoning its isolation policy, and formed a new government. With regard to the relationships with Western countries, Japan was forced to enter into unequal commercial treaties with them. Under such a situation, Fukuzawa emphasized that Japan was in such a serious situation that it was difficult for the country even to maintain its independence. Facing such menace by foreign countries, Fukuzawa inspired Japanese scholars and citizens by recommending them to study (the study recommended by Fukuzawa refers to empirical studies including basic knowledge and practical skills useful in daily life, and science and technology. According to him, they are “practical studies”. On the other hand, Fukuzawa hated speculative studies where feudal values and ethics are considered positively, and considered such studies, as Confucianism or Sinology empty). (This part reflects my personal opinion, in reference to “*Gakumon no Susume*” [*An Encouragement of Learning*] Vol. 4, Iwanami bunko.)

On the other hand, Fukuzawa described Japan of those days as follows: “Japan is dispatching a lot of students overseas and hires foreigners all over the country. Both public and private schools, government offices, companies, etc. request assistance to foreigners paying an excessive amount of remuneration. In order for Japan, which has fallen behind other countries due to its isolation policy for a long period, and has just opened the country, to interact with other countries on equal terms, depending on the assistance from developed countries is an inevitable last-ditch measure, and only with this fact it should not be considered that Japan has taken a false step,” and continued, “Although I try to convince myself considering national policy as a temporary measure, it is extremely difficult to give a clear forecast on when we should finish such a temporary measure, what we should do in order for Japan to become autonomous without the necessity of depending on the aid given by foreign countries. Then, he explains that in order for Japan to become independent in a

real sense from other countries, it is important for the nation to acquire the capacity to stand on an equal footing as them, by improving its academic quality (this part also reflects my personal opinion, in reference to “*Gakumon no Susume*” [*An Encouragement of Learning*] Vol. 10, Iwanami bunko).

You may already know that “*Gakumon no Susume*” [*An Encouragement of Learning*] is one of the representative works of Yukichi Fukuzawa, famous for the following starting phrase: “*Ten wa Hito no Ue ni Hito wo Tsukurazu, Hito no Shita ni Hito wo Tsukurazu to Ieri*” [*It is said that heaven does not create one man above or below another man*]. The work was published in 17 volumes from 1872 to 1876, each of which were in the form of a booklet, and then later compiled into one book. At that time it became so popular that it was even said that one out of every 160 Japanese people read it (according to the data in Nobuzo Koizumi “*Kaidai*” [*annotation*] at the back of the above-mentioned book).

I think that this book became so popular because in those days it offered Japanese people the opportunity of “encountering”. During that era, people were puzzled by the several measures and policies taken by the new Meiji government. Even though they were feeling the arrival of a new era, they did not have a consciousness of being citizens of Japan. They might have been just engrossed in immediate moneymaking relying on their government. I suppose that they were concerned about the possibility of Japan losing its independence, feeling threatened by other countries, and also were continuously bound by outdated thoughts, such as “the principle of excluding foreigners” which was a popular thought before the Meiji Restoration.

Moreover, the book might have satisfied the people who were feeling intellectual hunger and never stopped seeking new knowledge and studies, with his objective analysis on the Japanese situation backed up by his vast knowledge of Western affairs. Even though it contained some acid remarks, Fukuzawa’s writing style reflects his cheerful and positive personality which made the book interesting and drove readers to have a hope and dream, and encouraged them to think, “I should not be content with my current situation. There must be something I can do. I have to start it right away.”

It can be imagined that the people in the period when this book was published were living in a situation unimaginable for the present Japanese people. However, it was just 130 years or so ago. I have renewed my thought that, thanks to many approaches taken with people’s courage and efforts since the initial period of the Meiji era, their results promoted the later development of Japan and built the present Japan.

For your information, Fukuzawa emphasized in every corner of this book that in order to maintain national independence, it is not enough that the government solely makes unilateral efforts, and it is a wrong idea that only public officials should promote independence. He says that in order to maintain Japan’s independence all citizens should

pursue their studies and show spirit in doing their duties, and to this end, citizens, not government officials, must make efforts in the position of the private sector and cooperate with the government. Fukuzawa himself spent all his life as an educator and book writer and supported Japan's development in the private sector. Fukuzawa was very insightful in a sense that, in an era where a lot of people were still unable to break out of the spell of the caste system inherited from the Edo period, he taught the importance of cultivating the power of the private sector, and public and private cooperation. Today, it is needless to say that, nothing will go smoothly unless a government, private companies sustaining industry and economy, and universities promoting studies address matters of national importance in mutual cooperation. Legal technical assistance cannot be implemented only by the government, and inevitably needs cooperation by the private sector, such as company people, scholars, lawyers and NGOs. I strongly feel the importance to further develop our cooperative structure constructed up to today, and make better use of it.

In addition, "*Gakumon no Susume*" [*An Encouragement of Learning*] also makes us realize that in the recipient countries of Japanese legal technical assistance, surely there must be people, like Fukuzawa, who are anxious about their country's situation, and intend to inspire their people to be autonomous in the legal field. People who have such an ambition and intention may show wariness toward donors at first, and may object to them for some time. Moreover, people in the recipient countries may desire to improve their legal system and make sure of its development as early as possible. In the course of legal technical assistance in mutual cooperation with recipient countries, we need to endeavor to help those inspired people in their efforts to be autonomous, by thoroughly talking with them and winning their trust. It will create a lot of opportunities of "encountering" for us, nurture a lot of dreams, conducive to better fruits of legal technical assistance.

## **V. "TEKIJUKU" SCHOOL ESTABLISHED BY KOAN OGATA AND HUMAN RESOURCES DEVELOPMENT**

I have mentioned that in any country there must be people who are like Fukuzawa. Now, I would like to give a thought to how such a person like him develops.

When Commodore Perry of the U.S. arrived at Uruga (located in the Miura Peninsula in Kanagawa Prefecture) to demand that Japan open a port in 1853, Fukuzawa was already 18 years old. According to his biography, in 1855, two years after the arrival of Perry, Fukuzawa started to study Western learning and medicine in "*Tekijuku*" school opened by Koan Ogata in Osaka.

People from all over Japan went to *Tekijuku* school to study. In fact, in its existing "list of student names" over 1,000 students are registered. It is said that the school mainly

taught Western learning in the fields of medicine and physics and it is quoted as an “institution for decoding Dutch books” where studies were conducted mainly by translating books written in Dutch.

On the other hand, in 1854, one year after the arrival of Perry another fuss of “Black Ship” occurred where Russian Admiral Putyatin in a battleship went up north through the *Kii* Channel (a strait separating the Japanese islands of Honshu and Shikoku. It connects the Pacific Ocean and Inland Sea), heading for the main area of Osaka, and finally appeared in the offshore of *Tempozan* (located in the center of the coastal line of Osaka) to demand that Japan open the country to the world. On this occasion, students of “*Tekijuku*” acted as interpreters. From this fact, it can be supposed that the school offered access to information from overseas and played the main role in cutting-edge Western studies in Japan of those days.

In addition to Fukuzawa, “*Tekijuku*” produced a lot of quality graduates; for example, those deeply involved in the revolutionary movements of the then political regime before and around the Meiji Restoration, such as Sanai Hashimoto and Masujiro Omura, those dedicated themselves to the improvement of hygiene and development of medicine and nursing, such as Sensai Nagayo and Tsunetami Sano, etc. (This information is based on the brochure of “*Tekijuku*”, a historic site and national certified important cultural property, “*Osaka-shi no Rekishi*” [*History of Osaka City*] edited by the Office of Editors for Osaka City History, etc.)

Fukuzawa studied at “*Tekijuku*” for just a few years before the onset of the Meiji Restoration and soon after the opening of the country. In those days there were no sufficient textbooks of good quality. The school had only two Dutch textbooks available and students read and worked out the meaning of the textbooks in competition, with the help of senior students. After learning the Dutch language to some extent in this way, they studied by themselves, in principle deciphering about 10 books on physics and medicine, using only one Dutch dictionary (a copy, not original) available in the school.

With regard to the founder and teacher, Koan Ogata, he was gentle and adopted rather a let-alone policy toward students so that they could engage themselves in study in a self-driven climate, never having to be tied to anything. It is said that students developed their academic ability attending occasional lectures by the teacher, impressed by his logical and ingenious theory, and by his outstandingly deep knowledge, and through discussions among themselves.

Fukuzawa described life at the school as follows in his biography: students lived in the 2<sup>nd</sup> floor of the school building and studied hard day and night as long as time allowed; in the room where the Dutch dictionary was placed there were three or four students all the time scrambling for its use; they used to perform autopsies on bears when there was a

request from someone in need of bear liver; they produced hydrochloric acid to attempt galvanization; when they borrowed a Dutch book on physics from a feudal lord for a short time, students jointly copied theses on electricity contained in the book day and night in rotation to share the knowledge; they took advantage of the few opportunities to obtain study materials to conduct practical studies using such materials. We can see from this description that in spite of a scarcity of study materials and information, students used their abilities to the maximum and made every effort to become the people who sustained the future of Japan.

When looking at the school in this way, in the end it may be concluded that an excellent teacher naturally attracts such outstanding people. However, it can also be said that encountering a good teacher gives such excellent people an opportunity to develop their talents. A person will act when driven by the right encounter at the right time. In the same way, when such enlightened people meet with other enlightened people, they make another encountering and they will improve their ability through friendly competition. Later they will grow as human beings and stand on their own two feet, come to help others and eventually, may serve as an inspiration to their nation.

This means, even a single encounter brings a possibility to motivate a person to grow, and to change his/her life. Similarly, a person has the possibility to influence other persons and change their lives through encountering.

## **VI. LEGAL TECHNICAL ASSISTANCE WHERE MANY “ENCOUNTERS” FOSTER A DREAM**

All of those engaging in legal technical assistance, including us, continue their efforts on a mission and according to their roles, in their assistance activities within Japan or in recipient countries, mainly in Asia, facing several tough difficulties. During this course they encounter with many countries, systems, customs and people. Each of these encounters fosters new dreams and links many people with hopes in every corner of the world. Moreover, each of us can grow through such encountering and work for others, for our nations and for the people in the world. Thinking that way, there may be almost no other jobs so dream-inspiring as legal technical assistance.

I will tell you once again. Legal technical assistance is the main duty of the ICD. The ICD is located in Osaka, where Koan Ogata opened “*Tekijuku*” and Yukichi Fukuzawa studied. The door to Western countries that Japan at that time looked up to as its mentor was located in Osaka, and now Osaka is the entrance to legal technical assistance for other countries around the world, mainly for Asia.

---- Wouldn't you feel something thrilling in encountering with legal technical

assistance?

Young folks! Why don't you open the door to legal technical assistance that fosters your dreams?

## **II. ROLES OF AND FUTURE CHALLENGES FOR THE INTERNATIONAL CIVIL AND COMMERCIAL LAW CENTRE FOUNDATION**

**Akio Harada**

*President*

*International Civil and Commercial Law Centre Foundation*

### **I. PURPOSE OF THE ESTABLISHMENT OF THE INTERNATIONAL CIVIL AND COMMERCIAL LAW CENTRE FOUNDATION (ICCLC)**

The ICCLC was established in April 1996 in cooperation with the business community, jurists and the legal community, and in close coordination with the government of Japan, mainly with the Ministry of Justice (MOJ), in order to implement legal technical assistance in the field of basic laws, especially civil and commercial laws, in Asian countries in transition to a market economy, which is entrusted by the Japan International Cooperation Agency (JICA). JICA organizes the above-mentioned assistance as part of grant aids within the framework of Official Development Assistance (ODA) for developing countries.

Even in countries in Asia achieving remarkable development, there is a concern about the delay in the establishment of legal systems, mainly civil and commercial laws necessary for economic activities, and their dysfunctional legal systems due to a lack of human resources capable of operating them. Under these circumstances, Japan has received requests from these countries for assistance and cooperation for the establishment of a legal base, which was the background to the establishment of the ICCLC. It was expected that responding to such requests would contribute to the development of economic relationships between Japan and requesting countries in Asia, thereby leading to the general promotion of friendly international relationships in the world.

### **II. PROGRESS OF ICCLC ACTIVITIES**

#### **A. Progress of legal technical assistance**

Our legal technical assistance started with legislative support on the civil code and civil procedure code for Vietnam and Cambodia, and along with the expansion of requesting countries, such as Laos, Uzbekistan, Indonesia, Myanmar, China, etc., assistance scope has also extended to individual specific areas such as bankruptcy or

mediation legal systems, etc. Currently, contents and methods of cooperation are becoming diversified and multifaceted, ranging from organization of international seminars to joint studies with specific focal points, for the purpose of not only legislative support but also human resource development, etc.

## **B. Development of related activities**

Among the activities implemented by the ICCLC, the following three may deserve special mention:

### 1. Japan-China Civil and Commercial Law Seminar

This seminar started soon after the foundation of the ICCLC, and since then, it has been organized annually under the joint hosting of the National Development and Reform Commission under the direct control of the State Council of China, MOJ of Japan and the Japan External Trade Organization (JETRO), alternatively in Japan and China. In October of 2008 the 13<sup>th</sup> seminar was held in Beijing.

Seminars have covered issues of interests of the time for both countries. For example, the last seminar took up problems in relation to the enforcement and operation of the Antitrust Law, which was just put into effect in China last year.

### 2. Japan-Korea Partnership Training

This training course aims at mutual exchanges between officials of the Supreme Court of Korea and the MOJ and the Supreme Court of Japan in charge of registration of immovable properties and corporations, deposition, family registration and civil execution. It offers a good opportunity for officials of both countries to learn and deepen their understanding on the problems existing in the practices in relation to the preservation of civil and commercial rights in both countries. Last year marked the tenth year since the commencement of this training.

### 3. Research, studies and symposium on the legal systems in Asia-Pacific countries

The MOJ and the ICCLC, in cooperation with JETRO, scholars of company law and lawyers in the Kansai region (the southern-central region of Japan's main island), conduct studies on problems under company law in relation to Japanese companies expanding their businesses to Asian countries such as China, Singapore, the Philippines and Thailand.

## **III. CURRENT PROBLEMS AND PROSPECTS FOR THE FUTURE**

On 16 January 2009, the Research and Training Institute (RTI) of the MOJ and JICA co-hosted the “10<sup>th</sup> Annual Conference on Technical Assistance in the Legal Field” in Osaka and Tokyo and I attended the conference on behalf of the ICCLC, one of the supporters of this conference. This annual event has been planned and organized practically by the ICD of the RTI, for the purpose of information exchange among donors of legal technical assistance in Japan, including universities, bar associations and other associations implementing their unique programs, though JICA has conventionally been the main subject of legal technical assistance activities of Japan in the form of ODA.

In the recent conference, Mr. Nicholas Booth, a policy advisor for the United Nations Development Program (UNDP) in Vietnam, gave a special presentation titled “Support to Developing Countries in the Field of Law” in which he emphasized, from the standpoint of the UN, the necessity of mutual cooperation and coordination among donor countries in the future, while making certain evaluations on Japanese legal technical assistance.

With regard to the movement within the government of Japan, the “Council of Overseas Economic Cooperation” was established within the Cabinet, composed of related ministers. They reached an agreement to strategically promote “legal technical assistance” as one of its important challenges. Currently related ministries are preparing “basic plans” to that end, showing an increasing momentum toward further enhancement of “legal technical assistance” as part of the measures for international cooperation and contributions. In the course of such movement, approaches taken by the MOJ and the Japan Federation of Bar Associations (JFBA) for the promotion of the rule of law and access to justice in Asia were presented. Moreover, Professor Hiroshi Matsuo of the Law School, Keio University, proposed a more detailed theoretical and strategic examination of the meaning of “good governance and the rule of law” in connection with legal technical assistance.

Through the above-mentioned conference and discussions within the government, I realized, from the viewpoint of the ICCLC, the existence of the following problems related to Japan’s international cooperation, including legal technical assistance:

1. Necessity of general perspectives on international cooperation as one of the national policies

I strongly feel that the “Council of Overseas Economic Cooperation”, established within the Cabinet, aside from the Security Council, is trying to play the commanding role in the formulation of measures for coordination of international relationships by the so-called “soft-power”, in order to realize national interests and secure national safety in a broader sense. As part of such measures, it is desirable that the concept of “peace

through law” is further understood and realized to prevent and resolve domestic and international conflicts through peaceful means. To this end, I hope that efforts are made in order for the concept of “legal technical assistance” to be more actively developed and established within the framework of international economic cooperation.

As participants of such activities, not only government agencies but also universities, the JFBA and non-governmental organizations such as the Japan Bar Association, and a broad range of the general public including private companies and individuals, who have the viewpoint of corporate social responsibility (CSR), will need to work in cooperation.

## 2. Support for cultivation of participants in legal technical assistance

According to those who have cooperated in “legal technical assistance” in various fields in the capacity of university professors, lawyers or volunteers, they have indicated that, though they have enjoyed a certain sense of accomplishment and self-satisfaction, if participants in assistance activities can receive evaluation and are valued by the general public at large, including the government, it will give people an incentive to engage in legal technical assistance more actively.

I have heard that recently many university students are highly interested in the significance of “legal technical assistance” in the field of international cooperation. While it is pointed out that there is an inward-looking trend in Japan as the country is less and less represented in the international community, it is desirable for the nation to take such measures that will nurture dreams and hopes among the younger generation toward future international activities. The energy of the younger generation is crucial in this field, and in order to enable young people to participate in truly effective assistance activities, support by experienced people is necessary for their cultivation.

## 3. Assistance as part of ODA and new development of international cooperation

The development of such activities as the above-mentioned Japan-China Civil and Commercial Law Seminar have their own significance beyond the scope of unilateral development aid as conventionally defined by the Organization for Economic Co-operation and Development (OECD). In other words, it is necessary to understand the value of personnel cooperation, such as mutual studies and collaboration regarding “governance system and its operation” with countries that have moved up from the position as assistance recipient countries. In this regard, it can be envisaged to explore a new field of “international cooperation” with countries that have graduated from receiving ODA, as well as any possibilities of new activities for the new JICA, which has been reorganized in order to carry out ODA more comprehensively.

Thinking in this way, it will be necessary for the ICCLC as well, while conducting

its activities in the capacity of an organization entrusted with the implementation of “legal technical assistance” as part of conventional ODA, to examine measures to develop activities as an organization playing a part of “overseas cooperation supporting the strengthening of governance” that supplements the personnel power of the government, from the standpoint of NGO.

In the last annual conference on technical assistance in the legal field, Attorney Takeo Kosugi, a board member of the ICCLC made remarks, from the above-mentioned standpoint and based on his long-time experience, on the necessity of government assistance activities, understanding and support by private companies, etc. upholding government assistance activities, and grass-roots international exchanges by international lawyers, such as the Law Association for Asia and the Pacific<sup>1</sup>, which offered a very valuable viewpoint. It is my sincere hope to step up efforts so that the roles of the ICCLC will be further evaluated in this respect as well.

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<sup>1</sup> An Australia-based international voluntary organization consisting of lawyers from 24 countries in the Asia-Pacific region



### **III. SPECIAL FEATURE**

## ***STATUS QUO OF LEGAL TECHNICAL ASSISTANCE FOR EACH RECIPIENT COUNTRY***



### **VIETNAM**

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#### **I. TECHNICAL ASSISTANCE TO VIETNAM - THE FORMATION OF PROJECT-PHASE III**

Legal technical assistance for Vietnam first started, upon request for assistance from the Vietnamese government in 1992, with the organization of a training session in Japan inviting Vietnamese judicial officials in 1994. In 1996 the Japan International Cooperation Agency (JICA) materialized legal technical assistance for Vietnam as a technical cooperation project within the framework of Official Development Assistance (ODA), and since then, the project had been augmented both in scale and quality, as necessary, through several phases: Phase I from December 1996 to November 1999; Phase II from December 1999 to March 2003; and after three months of a bridging period, Phase III started in 1 July 2003 upon signing of the final agreement with each Vietnamese counterpart organization on June 27 of the same year.

Phase III was formulated, upon request by the Vietnamese government, in consideration of the several lessons learned through experiences in Phase I and Phase II, and based on the results of repeated consultations held between the Japanese and Vietnamese sides. It consisted of two pillars of legislative support and human capacity building. At the stage of Phase II it had already been well recognized that in providing legal technical assistance, only legislative support or assistance in drafting bills was not sufficient and a concurrent assistance in the development of human resources who actually operate law was extremely important. Although human resources development was included in Phase II, it was much more expressly emphasized in the following stage. As a result, Phase III was structured and embodied having two pillars of assistance in legislation and in human capacity building with the following contents:

- (i) Counterpart organizations
  - Ministry of Justice (MOJ) (including the Judicial Academy [JA])
  - Supreme People's Procuracy (SPP)
  - Supreme People's Court (SPC)
  - Vietnam National University, Hanoi (VNU)
- (ii) Assistance activities (the term in parenthesis refers to the corresponding counterpart organization)

Component A – legislative support

A1 Civil Code (MOJ)

A2 Intellectual Property Regulations (MOJ)

A3 Civil Procedure Code and the Law on Enterprise Bankruptcy (SPC)

A4 Law on Immovable Registration, Law on Registration of Secured Transactions, Judgment Execution Code, and State Compensation Law (MOJ)

Component B – human capacity building

B1 Building curricula and compiling textbooks (JA)

Compiling a procurators' manual (SPP)

B2 Standardization of judgment documents, research on the development of court precedents (SPC)

B3 Support in the management of the Japanese law course at VNU (VNU)

## II. SUBSEQUENT DEVELOPMENT OF PHASE III

### A. Announcement of Resolutions No. 48 and 49, 2005, by the Politburo of the Central Committee of the Communist Party

An outstanding event during the development of Phase III may be the two extremely important resolutions adopted successively by the Politburo of the Central Committee of the Communist Party on 24 May and 2 June 2005: Resolution No. 48, 2005 titled “Legal System Development Strategy”, and Resolution No. 49, 2005 under the title “Judicial Reform Strategy”, for the improvement of the legal and judicial system of Vietnam. These two resolutions created a clear orientation as a roadmap for improving the legal and judicial system of Vietnam, which had been in a chaotic state until then, and showed directions and goals not only for the relevant government agencies in Vietnam, but also for donor countries and organizations of legal technical assistance for Vietnam.

These two resolutions were extremely ambitious and innovative for Vietnam. In fact, it was said that their contents were so radical that the Communist Party itself seems to have refrained from publicly disclosing them after their adoption. They were kept confidential until finally being declassified upon strong requests by several international organizations a couple of months after being adopted.

The adoption of these resolutions was not irrelevant to Japan’s legal technical assistance, because Phase II of the Project was involved in the assessment survey implemented on the premise of which the said resolutions were taken. Resolutions No. 48 and No. 49 were based on the result of a large-scale survey on the Vietnamese legal system titled “Comprehensive Needs Assessment for the Development of Vietnam’s Legal System to the Year 2010 (LNA)<sup>2</sup>”. This “LNA” is the first comprehensive survey on the legal system of Vietnam organized jointly by the United Nations Development Programme (UNDP) and other donor organizations, including JICA, in support of the MOJ of Vietnam, from the end of 2000 to the end of 2002. Upon request from the MOJ, the project office of Phase II had then JICA long-term experts dispatched to Vietnam join this survey, making certain contributions thereto. The LNA was greatly significant in that the country by itself extracted and analyzed the wants of its legal and judicial system, with aids by donors, by sorting out problems existing in their system in general, ranging from those in the legal and judicial systems to



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<sup>2</sup> The official title of the survey is as indicated, and it is abbreviated as “Legal Needs Assessment” or just “LNA” in many cases.

their functions, legislative methods, legal education, citizen's access to justice, etc. The final large report on the LNA completed in March 2003 was offered to the Community Party for its review, leading to the above-mentioned adoption of two resolutions after more than two years<sup>3</sup>.

## **B. Progress and final result of the project**

In the meantime, the JICA's legal technical assistance project actively continued. Without waiting for the English translation of the above two resolutions and its distribution to donor organizations in the autumn of 2005, several activities were carried out, based on the result of the LNA, in both fields of legislative support and human capacity building. Nevertheless, the adoption of the two resolutions undoubtedly backed up or created the direction of the project activities, giving impetus thereto. The subsequent progress and final result of Phase II is overviewed below.

### **1. Legislative support**

#### **a) Civil Code**

Assistance in drafting the Civil Code had already been included in Phase II, and at the time of its evaluation implemented at the end of the phase the third draft code had already been completed. However, at the final stage of Phase II, the MOJ, which had conventionally intended only partial amendment to the 1995 Civil Code, decided to undertake a radical amendment of the code, given advice from the "Joint Working Group for the Amendment of the Civil Code of Vietnam<sup>4</sup> (hereinafter Civil Code WG)" of Japan, by extending its scheduled drafting period. Thus, the drafting assistance of the Civil Code was succeeded as the first priority issue in the legislative support of Phase III.

The drafting process was at its last stage, and as the MOJ drafting team of Vietnam had no time to visit Japan for training, assistance was given in the form of written comments by the above Civil Code WG or by holding workshops in Vietnam with the participation of Japanese scholars of the said WG. What was the most effective at the last

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<sup>3</sup> It is noteworthy that, upon the results of the LNA, the Politburo of the Central Committee of the Communist Party not only formulated Resolution No. 48 "Strategy for Legal Development", but also "additionally" adopted Resolution No. 49, "Strategy for Judicial Reform". In fact, Resolution No. 48 would have sufficed as a strategy in response to the result of the LNA, and each donor expected only such a resolution. However, unexpectedly for donors, the Communist Party adopted quite ambitious Resolution No. 49 with special focus on the strengthening of the court system and its functions. Furthermore, the latter resolution indicated in the opening the delay in the improvement of the Vietnamese justice in strong language as if the Party were denouncing such a delay. Interestingly enough, it can be observed in the Resolution that the Party had a strong sense of crisis about their fragile justice.

<sup>4</sup> This is one of the working groups established since Phase II as a form of human input in the project, and composed of outstanding civil law scholars of Japan, having Professor Emeritus Akio Morishima of Nagoya University as its chief. It has been renamed "Joint Working Group on the Civil Code" in the currently ongoing "Project of Technical Assistance for the Legal and Judicial System Reform" and examines and gives advice to the Vietnamese side on draft laws as its main mission. In addition to this working group, the following three working groups were established in Phase III: "Joint Working Group on the Code of Civil Procedure" (till its enactment), "Joint Working Group for the Standardization of Judgment Writing and Development of Court Precedents" and "Joint Working Group for Judicial Training".

stage of the project were workshops held between the Civil Code WG and the Department of Civil and Economic Laws of the MOJ<sup>5</sup>, through the TV-conference facility<sup>6</sup> connecting the JICA HQs and Vietnam. As a result of such continuous exchange of opinions and advice at workshops, the final draft law was completed in 2005, which was subsequently submitted to the plenary session<sup>7</sup> of the National Assembly in the May and June session of the same year. Then, through its enactment on 14 June and promulgation on 27 June 2005, the Civil Code was finally put into effect on 1 January 2006.

The 2005 Civil Code is quite a new law, and not an amendment of the 1995 Civil Code either in format or substance. Greatly different from the former code which was tinged with socialism, the new code corresponds to a market economy.

The biggest amendment is the position of the new Civil Code as the basic law on civil affairs and the total acceptance of the “principle of freedom of contract”.

#### b) Intellectual Property Law

Since the Civil Code contained core provisions regulating intellectual property rights as one of the private rights<sup>8</sup>, assistance in drafting statutory provisions related to intellectual property was given as part of legislative support on the Civil Code. In parallel to this drafting, however, in Vietnam a separate drafting process of the “Intellectual Property Law” was ongoing, covering more detailed substantive and procedural provisions. Thus, the project participated in this process by assisting the MOJ engaging in the drafting of the statute in cooperation with other relevant ministries. A sub-committee on intellectual property was established in the Civil Code WG and member scholars of the sub-committee gave comments on both intellectual-property-related provisions in the draft Civil Code and on the draft Intellectual Property Law. As a result of these dual efforts, the bill was passed and enacted in the plenary session of the National Assembly in autumn 2005, about five months after the enactment of the Civil Code<sup>9</sup>.

#### c) Civil Procedure Code and Revised Law on Enterprise Bankruptcy

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<sup>5</sup> The counterpart office on the Civil Code was the Department of Civil and Economic Laws of the Ministry of Justice, as indicated in the text, but as for Chapter VII of the Civil Code which provides for international private law, the Department of International Law of the MOJ was mainly in charge.

<sup>6</sup> This system is called “JICA-Net” and installed by JICA. It connects the JICA HQs in Tokyo and the JICA Office in Hanoi, Vietnam, enabling meetings between both countries. It is frequently used when JICA long-term experts dispatched to Vietnam participate in WG meetings held in Japan, such as those of Civil Code WG, etc.

<sup>7</sup> The XI<sup>th</sup> National Assembly, 7<sup>th</sup> session of the Socialist Republic of Viet Nam

<sup>8</sup> The 2005 Civil Code still retains fundamental provisions regarding intellectual property in its Chapter VI (Articles 736 through 757).

<sup>9</sup> More precisely, it was enacted on 29 November 2005 in the XI<sup>th</sup> National Assembly of the Social Republic of Viet Nam at its 8<sup>th</sup> session

The drafts of these two statutes were completed in the beginning of Phase III and they were passed and enacted in the plenary session of the 2004 National Assembly<sup>10</sup>. The SPC was in charge of drafting both laws and thus assistance was given through the project in the form of training in Japan, in-country workshops, written comments, etc. for the drafting group of the SPC.

With regard to the Civil Procedure Code, legislative support for the statute started when the project was still in Phase II, but assistance was provided more actively in Phase III by strengthening the support system through establishment of the Joint Working Group on the Civil Procedure Code, and repeatedly holding training sessions in Japan or in-country workshops. Consequently, the first Civil Procedure Code containing a lot of factors of the adversarial system was enacted, in comparison to the conventional civil procedure strongly influenced by the inquisitorial system<sup>11</sup>.

As to the revised Law on Enterprise Bankruptcy, the Asian Development Bank (ADB) used to give legislative support before commencement of Phase III, and their project had finished before completion of the final draft law. Upon request by the SPC, assistance in this field was included, succeeding ADB's project, in the JICA Project, and through in-country seminars and written comments by Japanese experts the draft law was finalized. Being relatively compact, the enacted Law on Enterprise Bankruptcy includes advanced contents targeting enterprises<sup>12</sup> and covering the system for corporate rehabilitation as well.

d) Law on Immovable Registration, Law on Registration of Secured Transactions<sup>13</sup>,

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<sup>10</sup> Both laws were enacted at the 5th session of the XI<sup>th</sup> National Assembly closed on 15 June 2004 (See ICD NEWS No.21, pp. 126 on the Civil Procedure Code, and ICD NEWS (Japanese version) No. 18, pp. 74 on the revised Law on Enterprise Bankruptcy.)

<sup>11</sup> No statute regulating civil proceedings, except an ordinance of the National Assembly Standing Committee, "Ordinance on Procedures for Settlement of Civil Cases", had existed in Vietnam until enactment of this code. Traditionally, Vietnam used to divide lawsuits into five areas, that is: civil litigation, economic litigation, labor litigation, administrative litigation and criminal litigation and had a procedural law for each area. Among them, the law regulating criminal litigation had taken a form of a code earlier compared to those for litigation of other areas, which used to be governed by ordinances of the National Assembly Standing Committee. The Civil Procedure Code mentioned in the text was elevated to a statute covering the ordinances in three areas: civil litigation, economic litigation and labor litigation. Upon this change, only administrative litigation remained regulated not by a law, but by an ordinance of the National Assembly Standing Committee; provided, regarding this area of litigation, a legislative plan of replacing the current "Ordinance on Procedures for Settlement of Administrative Cases" for the "Administrative Procedure Code" has already been officially approved by the National Assembly.

<sup>12</sup> In Vietnam, consolidation, elimination and privatization of state-run enterprises were top priority issues in the course of transition to a market economy, and focus was placed on an urgent establishment of a legal system regulating corporate bankruptcy for the purpose of investment promotion and accession to the WTO. On the other hand, there is still no statute on the bankruptcy of individuals.

<sup>13</sup> This ordinance regulates the controlling system of the registration of secured transactions. In this system, secured transactions are registered in a concentrated manner at the National Registration Agency for Secured Transactions as a measure of public notice of security rights, and such a system was governed by a government decree, not by a statute at the time of Phase III. Although the decree functioned well to a certain degree, a necessity to amend it arose in parallel to the enactment of the new Civil Code and to the drafting process of the Law on Immovable Registration, and thus assistance thereto was included in Phase III. At first it was planned to draft not a law but an ordinance of the National Assembly Standing Committee. However, at the final stage of Phase III the plan was changed to drafting a law, not an ordinance. Therefore, while the basic agreement of Phase III named it "Ordinance on Registration of Secured Transactions", it is re-renamed "Law on Registration of Secured Transactions" here.

## Judgment Execution Code and State Compensation Law

Compared to the above-mentioned statutes, the drafting of these civil-affairs-related laws faced hard going. MOJ agencies, such as the National Registration Agency for Secured Transactions, and the Department of Civil and Economic Laws, were in charge of drafting the Law on Immovable Registration and the Law on Registration of Secured Transactions, and the Judgment Execution Code and the Statute Compensation Law, respectively.

As the Law on Immovable Registration and the Law on Registration of Secured Transactions are closely related to each other especially in their contents of registration of security rights over immovable properties, they were addressed in parallel efforts in Phase III and comments or advice were given on their draft laws at in-country workshops by the members of the Civil Code WG and at workshops by JICA long-term experts. With regard to the Law on Immovable Registration, controversies occurred in the government and National Assembly in relation to the concept of immovable registration and the public notice system and no consensus was obtained thereon. Therefore, the draft law once submitted from the MOJ to the government secretariat was withdrawn and its drafting was removed from the legislative plan of the National Assembly. As a direct result, the bill was forced to experience a considerable delay in its drafting process, causing the drafting of the other law to be drastically delayed. After all, Phase III of the Project had to be finished without waiting for the commencement of the drafting process of their final drafts, and thus legislative support thereto was continued in the following project.

With regard to the Judgment Execution Code, a significant change was seen in its drafting policy during the implementation of Phase III, which led to the procrastination of its legislation plan and no formulation of the final draft. As for judgment execution, the enactment of a statute encompassing the execution of both civil and criminal judgments was proposed in accordance with the Vietnamese unique understanding of “execution”<sup>14</sup>, and in Phase III assistance was continuously given to the field limited to civil judgment execution through workshops by long-term experts, etc. However, as the conflict of opinions on this code was not resolved either at the government and National Assembly levels and its drafting was delayed, no final draft was made by the end of Phase III. The opinion conflict was mainly seen in the field of criminal judgment execution, rather than in the field of civil judgment execution, between the MOJ and the Ministry of Public Security. While the former insisted that they should control and

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<sup>14</sup> While in Japan, civil execution is understood as an execution of the winning party’s right as an extension of the exercise of a private right, and criminal execution as an exercise of the state’s punitive right, in Vietnam, it is understood that “execution” is the complete realization of “judgment”, which is a state’s act or order, whether it is a civil or criminal judgment. Moreover, they have a concept that a judgment is something to be observed by all stakeholders, and that defendants or debtors themselves shall execute the judgment imposed thereon in a criminal or civil case, respectively.

supervise the execution of both civil and criminal judgments in a unified manner, transferring the jurisdiction of criminal judgment execution from the Ministry of Public Security to the MOJ, the latter argued that it was inappropriate to move the jurisdiction of criminal judgment execution to the former as it had no experience of correction service. After all, at the end of Phase III the Vietnamese government decided to regulate civil and criminal judgment execution separately, and thus legislative support for the “Civil Judgment Execution Code” was included in the following JICA project.

The drafting of the State Compensation Law was also delayed significantly, due to the fact that, different from that of other laws where severe conflict of opinions in the government and National Assembly influenced the drafting progress, simply the burden of drafting other laws and ordinances was heavy for the MOJ till the first half of Phase III, and thus drafting of the State Compensation Law had to be postponed. It was in the last year of Phase III that finally the drafting work was started upon formation of a drafting team of the State Compensation Law within the Department of Civil and Economic Laws of the MOJ. Since then, the drafting process went smoothly given advice by the members of the Civil Code WG or by long-term experts through in-country seminars or monthly workshops conducted on schedule. However, even with nine months of extension of Phase III, completion of only Chapter I was the best the drafting team could do, and thus legislative support on this law was also succeeded in the following new project.

## 2. Capacity building

### a) Building curricula and compiling textbooks at the Judicial Academy (JA)

The JA is a training institute of judicial professionals under the control of the MOJ, and the conventional Legal Professionals Training School (LPTS) was reorganized into this new academy in 2003 by government order. The LPTS was a training school of lawyers, and judicial officials, such as notaries and bailiffs, working for agencies under the jurisdiction of the MOJ. When it was reorganized as the JA, they decided to carry out training for prospective judges and procurators as well with aid by the SPC and SPP. Then, the MOJ requested that Japan provide assistance in 1. formulating partially common curricula, in reference to the educational system of the Legal Training and Research Institute of Japan’s Supreme Court, for candidate judges, procurators and lawyers who had been trained separately; and in 2. drafting a textbook to be used in the new educational system, in order to improve training at the JA.

In response to this request, the Joint Working Group for Judicial Training was established consisting of incumbent and former professors of the Legal Training and Research Institute of Japan’s Supreme Court, and assistance was provided through



in-country seminars, written comments, etc. by this WG members in collaboration with JICA long-term experts. In the first half of Phase III, they engaged in drafting a curriculum for the JA, and consequently a new curriculum was formulated unifying approximately 20% of basic subjects among the overall training materials for the prospective three titles of legal professionals, and it

was going to be put into effect in 2007. Following this, assistance was given to draft four textbooks on the Civil Code, Civil Procedure Code, handling skills of civil and criminal cases. Finally they were completed by the end of Phase III.

However, the above-mentioned partially unified curriculum has never been put into effect as it should have been. While this curriculum was originally designed on the premise that candidate judges, procurators and lawyers would receive training at the JA during the same period (one year), in the end candidate lawyers had to be trained separately because: the newly adopted Law on Lawyers shortened the training period for prospective lawyers to six months; and while many candidate lawyers took the night course working during daytime, candidate judges and prosecutors studied mainly in the daytime course because they were officials dispatched from courts or procuracies. Moreover, around 2008 after the completion of Phase III, courts and procuracies discontent with the education of the JA brought back their conventional training system at their own institutes for respective candidates<sup>15</sup>, resulting in the collapse of the partially unified curriculum from the ground.

#### b) Compiling a procurators' manual

The compilation of a procurators' manual was included in project activities as capacity building assistance for procurators. Conventionally there were few materials useful for the execution of their duties and such problems as inconsistencies of prosecution services existed among prosecutors. Therefore, in Phase III assistance was provided to compile a procurators' manual on investigation and first-instance trial, mainly through workshops and written comments on the draft manual by long-term experts, and the manual was completed almost on schedule, leading to the distribution of eight thousand bound copies thereof to procurators nationwide. In the presently ongoing new project, assistance in drafting its sequel in the field of appeal-instance trial and

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<sup>15</sup> As their own training institutes, the courts run the Court Officials Training School, and procuracies run the Procuratorial College. Traditionally these institutes used to provide pre- and post-appointment training separately for judges and prosecutors. While the JA trained legal apprentices, the above institutes provided only continuing education for incumbent judges and prosecutors. Later on, however, as stated in the text, they re-started pre-appointment training.

direction and supervision of execution is scheduled.

c) Joint research on the standardization of judgment writing and the development of court precedents

Both of these activities were implemented jointly with SPC, the counterpart organization.

Vietnam is a civil law country, and they had no concept of “court precedents” as a source of law. In addition, it is deemed that, although written judgments were not closed to the public, they had no t culture of having an accumulation of judgments to be opened to the public or of referring to adjudication samples of similar cases in trials. However, as “court precedents” started to draw attention in Vietnam from the end of 1990s, and overseas donors heightened calls for opening court judgments from the standpoint of judicial transparency, a movement was seen toward the opening of written judgments to the public<sup>16</sup>. Furthermore, examination was started on whether or not it was possible to use court precedents as a supplementary to formal sources of law, such as statutes, etc<sup>17</sup>. Hence, the SPC requested JICA to assist them in studying desirable “court precedents” under the Vietnamese legal system. In parallel to this, they also expressed their desire to improve “judgment writing” which was not consistent or not clear in its logical structure partly because judgments were not supposed to be openly published. JICA was also aware that judgment writing needed to be improved so that they would be clear enough to be general standards as court precedents, as a precondition for Vietnam to use precedents in the future. Based on such recognition and through consultation with the SPC, it was decided to include in the project activities the standardization of judgment writing and research on the court precedent system as being closely linked with each other.

For these activities, the Joint Working Group for Standardization of Judgment Writing and Development of Court Precedents was established in Japan, and in cooperation with long-term experts, assistance through numerous written comments, in-country seminars, workshops by long-term experts, etc. was provided. Consequently, at the end of Phase III the judgment writing manual was almost completed and a study

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<sup>16</sup> It may be the “Support for Trade Acceleration (STAR) Project” launched by USAID that made distinguished contributions to the opening of judgments. In the said project, they succeeded in convincing the Vietnamese side on the necessity to open written judgments to the public, thereby having judgments rendered in the cassation procedure published as a casebook. The cassation procedure is conducted by the Judicial Council of the Supreme People’s Court, the highest adjudicative panel in Vietnam to correct errors in the application of laws and regulations in courts’ legally effective judgments or decisions. It is said that this procedure has its origin in the cassation court system in France and is similar to the extraordinary criminal appeal system in Japan. The above-mentioned Resolution No. 48 of 2005 by the Politburo of the Central Committee of the Communist Party also clearly states the promotion of opening judgments to the public.

<sup>17</sup> Regarding “court precedents”, Resolution No. 48 also holds that it will contribute to supplement and improve law to study the possibility of using and exploring court precedents, common practices (practices in international trade, including general rules), and rules of various professional associations, and clearly recognizes the necessity to study court precedents as supplements of statutes.

report titled, “Japan –Vietnam Joint Study on the Development of Court Precedents in Vietnam” was compiled. However, binding and publication of the judgment writing manual was carried over to the following project because the final decision thereon by the SPC directive board was not gained by the end of Phase III.

One noteworthy point of these activities related to written judgments and court precedents is the synergetic effect created among activities by several donors. At the time of Phase III, alongside the JICA project, three assistance projects, namely: STAR by USAID, legal technical assistance project by DANIDA and CEG Facility of AusAID,<sup>18</sup> were concurrently in progress in this field. Among them, STAR devoted all its energy to the opening of judgments resulting in the publication of a casebook. DANIDA mainly contributed to the strengthening of the information sharing and disclosure system through assistance in the introduction of IT at courts. CEG promoted compilation of a bench book for judges and online procedures. On the other hand, the JICA project assisted in the improvement of quality of judgments and in the study of court precedents. Thus, these projects were interrelated to each other, although not intentionally, with mutual synergistic effects as follows: STAR took the initiative in the opening of judgments adding an impetus to their publication avoiding “allergic” reactions by judges against it; DANIDA further promoted such information sharing and disclosure system; CEG attained to establish an online disclosure system of the casebook as well as the bench book; and thereby being supported physically and psychologically by other projects, the JICA project assisted in the improvement of judgment quality. Future examination may be necessary, however, on to what extent such synergistic effects were actually effective.

d) VNU Japanese Law Course

Although this activity is categorized as one of the activities for legal capacity building in a broad sense, it may slightly differ from other activities in its background and purpose. The Japanese law course at VNU first initiated when a long-term expert dispatched to Hanoi during Phase II of the project, almost voluntarily taught, upon request by the Faculty of Law of VNU, the basics of Japanese law in an extra-curriculum course to its law students. Later on, this activity was developed to be officially included in Phase III. After the onset of this phase, with some delay in the designing of course details, etc., it was formally initiated in September 2004. This law course including Japanese law course<sup>19</sup> is acknowledged as the formal curriculum of VNU law faculty, and all students are selected from among applicants who have studied bachelor-level

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<sup>18</sup> “Capacity Building for Effective Governance Facility” by the Australian Agency for International Development

<sup>19</sup> Its official title is “Bachelor Course (Vietnam-Japan Jurisprudence) of the Faculty of Law of the Vietnam National University”.

Japanese in Vietnam. In addition to taking the same mandatory law subjects as those for ordinary law students for the first two years, they regularly attend lectures given by Vietnamese professors specialized in Japanese law and JICA long-term experts in the first year, and receive six intensive lectures in total on the Civil Code, Intellectual Property Act, Commercial Code and the Companies Act given by Japanese scholars, mainly from the Civil Code WG, in the second year. Finally by succeeding in the final exam and graduation thesis, they are granted a bachelor's degree.

During Phase III, though there were some dropouts in the course, 10 students and another 10 students in the 1<sup>st</sup> and 2<sup>nd</sup> class respectively finished the course successfully, and some of them entered local Japanese enterprises and others continued their study to be admitted to the bar. Moreover, two students from the 1<sup>st</sup> class and one from the 2<sup>nd</sup> class are currently studying law, etc. in Japanese universities.

In and after the 2<sup>nd</sup> year of the 3<sup>rd</sup> class, JICA has offered follow-up assistance, and the Japan External Trade Organization (JETRO) has taken over the assistance activity afterwards.

### **III. FORMATION OF A NEW PROJECT**

#### **A. Completion of the Project “Technical Cooperation Concerning the Legal and Judicial Field” (Phase I, II, and III) and lessons gained**

The technical cooperation project in the legal field for Vietnam, after about 10 years of experience from Phase I through Phase III, finished at the end of March 2007 producing a lot of results and lessons.

Japanese legal technical assistance for Vietnam, which started with no clear vision in 1994, was developed into a formal project of JICA in 1996 when the first long-term expert was dispatched to stay in Hanoi. Since then, accurate information on the legal system and its operational practices in Vietnam became available and gradually assistance methods were formulated. In Phase II, with more counterpart organizations and long term experts with a professional background as a judge, prosecutor and lawyer in place, assistance activities combining the following five methods for technical transfer were almost fixed in practice with consent of both the Japanese and Vietnamese sides: 1. daily advice by long-term experts; 2. workshop by long-term experts; 3. in-country seminar by short-term experts; 4. comments or advice by Japanese assistance committees; and 5. training session in Japan inviting counterpart officials. This approach of combining five methods was continued in Phase III and in the current project as well, subject to occasional changes in individual technical transfer methods and contents as necessary.

With regard to the contents of assistance activities, they have greatly changed in

accordance with assistance development from Phase I through Phase III. In the transitional period from Phase I to II, activity contents naturally changed due to the increase of counterpart organizations, etc. Furthermore, assistance in this period is characterized by more focus on legislative support, and by the provision of information on Japanese law in broader areas in response to the requests from the Vietnamese side changing every moment. Figuratively speaking, assistance in those days can be described as “having a wider entrance, but being shallower inside”. This type of assistance may be positively evaluated as it responded well to the situation against the backdrop where the Vietnamese side had not determined their basic policies on the improvement of their legal system; Vietnam needed to speed up legislation in quite a lot of fields; and coordination or sharing of roles among donors was not well organized.

In Phase III, on the contrary, assistance contents were changed to the direction of “having a narrower entrance, but possessing depth”<sup>20</sup>. That means, in Phase III target laws for legislative support were clearly specified and no assistance was provided for legislation of other laws or ordinances, in principle. Moreover, more emphasis was placed on and clear goals were set for human capacity building. This change can be attributed to the fact that around Phase III, the Vietnamese side drastically had improved their legislative planning skill; role sharing was arranged among donors based on the Vietnamese side’s choice; and while important laws were being enacted, the focus of their needs gradually shifted from legislation to implementation of laws.

Thus, in Phase III, with specific assistance targets and goals, individual assistance activities were developed actively and in depth through interactive dialogues between the Japanese and Vietnamese side, based on the relationships of trust that had been strengthened by the end of Phase II. Of course, such a method in Phase III had its limit, which is inevitable when project targets and activities are clearly specified, thereby intending to improve the effect and efficiency of individual activities. Therefore, it is not desirable to criticize the project design itself due to the inherent limits of the project’s nature. Even so, maybe the following two demerits of the method of Phase III can be pointed out:

1. As the counterpart organizations and assistance issues are strictly limited, assistance may not be directly provided to meet the needs in areas closely related to the target assistance areas. As a result, in cases where there are no donors assisting such closely

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<sup>20</sup> This can be made clear by comparing themes of seminars or workshops in Phase I and II, and those in Phase III. It can be observed that, in Phase I and II, seminars and workshops were held under a large variety of themes and a broad range of information was offered. In Phase III, on the contrary, seminars and workshops were organized on the topics agreed upon by both sides in the beginning. That is, seminars or workshops were held repeatedly under limited themes. Regarding such assistance of broader entrance as in Phase I and II, it was criticized by the Japanese side as being a “please-everyone policy” in the evaluation at the end of Phase II, which led to the limitation of targets in Phase III. However, against the above-mentioned background it was rather logical that such a policy was taken, and it should not have been criticized so emphatically.

related areas, they may be left unattended.

This phenomenon actually happened to the “Housing Law” during the operation of Phase III. The Housing Law was being drafted under the jurisdiction of the Ministry of Construction, and despite its needs, no legislative assistance was offered by any donors, neither by JICA. Accordingly, the draft Housing Law was enacted without sufficient approximation with the closely related Law on Immovable Registration or the Civil Code, and retaining certain provisions inconsistent with such a law or draft law. Such inconsistencies casted a dark shadow on the drafting process of the Law on Immovable Registration.

2. Regarding human capacity building, as Phase III addressed only the central agencies, such as the MOJ, SPC and SPP, as counterpart organizations, and its activities also targeted only these agencies, improvement in practice hardly extended to local institutions, especially courts, etc. that were actually involved in first-instance trials or in legal practices. This was also unavoidable under the project design. Although efforts were made to compensate such a weakness by organizing workshops in local areas, etc. within the budgetary allowance, obviously such efforts had their own limit. All counterpart organizations had a strong sense of crisis regarding the necessity of personnel and institutional capacity building in local areas, and many calls were heard for assistance to local areas during Phase III.

## **B. Launch and the structure of the Project of Technical Assistance for the Legal and Judicial System Reform**

Of the above-mentioned two weak points, the first one may not be overcome right away, and should be resolved through close partnerships between Vietnam and the donor community. With regard to the improvement of personnel and institutional capacity in local areas in the second point, it could be addressed to a certain degree. Focusing on this second weak point, the “Technical Assistance for the Legal and Judicial System Reform (hereinafter “new Project”)” was launched on 1 April 2007 immediately after the end of Phase III having local capacity building as an important pillar.

It can be considered that the new Project was structured under the awareness of the following four challenges:

- (i) To focus on human and institutional capacity building in local areas as well;
- (ii) To have an effect promoting partnerships between central and local institutions;
- (iii) To have an effect promoting mutual cooperation among legal and judicial institutions in Vietnam; and
- (iv) To contribute to the general improvement of the legal community in Vietnam.

The new project is characterized by its further focus on human capacity building than in Phase III, but this does not mean the withdrawal of legislative support. The amendment and enactment of major laws in Vietnam are only half complete. Legislative support is still an important factor in Japan's legal technical assistance for Vietnam, and as stated above, since final draft laws were not completed in Phase III, assistance in legislative drafting remained important in designing the new project. However, it is true that the proportion of legislative support in the whole scope of the new project was relatively reduced compared to the predecessor project from Phase I through Phase III.

What can be recognized as the "key element", that is, the characteristic point of the new project, is capacity building assistance in local areas through the "pilot area" method, aimed at contributing to enhance the general level of the legal community in Vietnam, by organically associating such method with other assistance issues.

After consultation with the Vietnamese side, Bac Ninh Province located in the northeast side of Hanoi was selected as the pilot area. While the MOJ, SPC and SPC are project counterpart organizations, the People's Court, People's Prosecution Office<sup>21</sup> and legal affairs institutions under the control of the MOJ (notaries, registration officers of the Provincial People's Committee, bailiffs, etc.) and lawyers in Bac Ninh Province were selected as the target of assistance activities. The concept of the whole project envisages the following effects:

- (i) To sort out problems in legal and judicial practices at local institutions in Bac Ninh Province and explore and propose resolutions thereto;
- (ii) To feed back the result of the above to the central agencies so that it can be used when the central agencies give guidance and advice to local institutions nationwide; which may lead to the strengthening of central agencies' directive capacity;
- (iii) The result of 1 above shall be used for legislation and judicial training at the central agencies.

Thus, activities in the new project are roughly divided into the following mutually-related four areas:

- (i) Human and institutional capacity building in the pilot area, Bac Ninh Province;
- (ii) Strengthening the capacity of central agencies
- (iii) Legislative support
- (iv) Judicial training

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<sup>21</sup> Currently Vietnam adopts the two-instance and three-levels trial system and the following three levels exist in the court system: district people's court (procuracy), provincial people's court (procuracy) and the Supreme People's Court. The court and procuracy mentioned in the text are provincial ones, and one court and one procuracy of this level are located in each of the 63 provinces nationwide. They handle first-instance trials of important cases meeting certain requirements, and appeal trials of other cases. Moreover, they control district courts and district procuracies under their jurisdiction.

<sup>23</sup> With regard to the outline and pre-assessment of the project, visit [http://www.jica.go.jp/activities/evaluation/tech\\_ga/before/2007/pdf/vie\\_01.pdf](http://www.jica.go.jp/activities/evaluation/tech_ga/before/2007/pdf/vie_01.pdf)

During the extended period of Phase III of the former project from around July 2006 to March 2007, JICA repeatedly held consultations with the Vietnamese side to embody such a concept and formulate the plan. Finally the new project commenced on 1 April 2007 based on a written agreement signed by both sides on 30 March 2007<sup>23</sup>.

#### **IV. PROGRESS STATUS OF THE NEW PROJECT**

The assistance scheme in the new project inherited the assistance form in Phase III of the former project, stationing three long-term experts (a judge, a prosecutor, and a private lawyer), and one project coordinator in the project office in Hanoi, Vietnam, who daily engage in their duties such as organizing workshops, etc. In Japan, the “Civil Code WG” and the “Working Group for Improvement of Judicial Practices” provide assistance by giving advice to the local JICA office or giving lectures at in-country seminars, in relation to the legislative support on civil-code-related laws and to capacity building at Bac Ninh Province and central agencies, respectively. Moreover, the International Cooperation Department of the Research and Training Institute continuously back up assistance activities through organization of training sessions in Japan and dispatch of lecturers to in-country seminars.

As for the progress of the project, except for the assistance for lawyers which had not been able to commence until 2009 due to a large delay in the inauguration of a union of bar associations, generally it has proceeded as planned and expected, even though there are some minor problems. The progress status of each assistance activity area is as below:

##### **A. Pilot area in Bac Nihn Province**

In Bac Ninh Province, workshops for problem finding have been actively held by long-term experts at the provincial court and procuracy, and especially court-related activities have been active. So far, long-term experts have organized a survey jointly with the working group of the Bac Ninh Provincial Court to sort out problems, and have found almost all of the issues in both civil and criminal procedure that judges consider to be difficult to solve in their daily duties. In the future plan, the result of this survey will be used to analyze and examine what resolution each problem requires, that is, whether it is a statutory defect and needs to be solved through legislation, or it is an interpretation issue of the current law and should be resolved through guidance or formation of court precedents by the SPC, and in the former case the problem shall be reflected in the future legislative support, and in the latter case, advice shall be given to the SPC on its directive method, formation of court precedents or textbooks for judicial training.

Furthermore in August 2008, a training course was organized in Japan inviting a group composed of judges of the SPC and the People’s Court of Bac Ninh Province to discuss the

operation of the Civil Procedure Code and the Criminal Procedure Code, etc.

## **B. Capacity building at central agencies**

In the area of capacity building at central agencies, upon the above survey result in Bac Ninh Province, guidance know-how has been accumulated at the SPC to some extent. For procuracies, assistance has been provided for their study to establish a criminology center, a logistic support institute of criminal justice and prosecution practices, as already incorporated in the project as part of capacity building activities for central agencies. For such purpose, a training session was organized in Japan in June 2008, the curriculum of which included an exchange of opinion and provision of information on the actual publication of white papers on crime by the Research Department of the Research and Training Institute.

## **C. Legislative support**

In this area, priority is given to the assistance for the MOJ in drafting the Civil Judgment Execution Code, Law on Immovable Registration, Law on Registration of Secured Transactions and the State Compensation Law, which has been inherited from Phase III of the predecessor project, and support has been given primarily through workshops held by long-term experts. Among the four statutes, the final draft of the Civil Judgment Execution Code was passed and enacted at the National Assembly on 14 November 2008. With regard to the Law on Immovable Registration and the Law on Registration of Secured Transactions, while their legislation plan is still in an unpredictable situation as discussions are still continuing at the National Assembly and the government level, the revising process of their drafts is gradually moving forward. As for the State Compensation Law, as a result of such activities as numerous workshops held by long-term experts, in-country seminars having members of the Civil Code WG as lecturers, and a study trip to Japan in November 2007 inviting the Director of the Department on Civil and Economic Laws, general manager of the drafting team, and its officials, the draft law was submitted to the National Assembly for hearing of opinions in November 2008, and the draft was passed by the National Assembly in 2009..

In relation to the revised Criminal Procedure Code, Administrative Procedure Code and the revised Civil Procedure Code, which are included in the legislative support plan of the new project, it is necessary to observe their future drafting process. Regarding the first one, a drafting committee has already been formed in Vietnam, and one training session was already held in Japan in March 2009 for SPP officials in charge of its drafting.

## **D. Judicial training**

With regard to the assistance for judicial training, currently a teaching manual for

lecturers of the Judicial Academy is ongoing under the guidance of long-term experts. However, as the unified curriculum of this institute for which assistance was provided in the former project actually became useless, as mentioned above, it is necessary, upon consultation with the Vietnamese side, to re-examine the direction of assistance.

## V. FUTURE PROSPECTS AND CHALLENGES

As already mentioned, the new project formulated for the purpose of overcoming the weaknesses of the former project, responding to the new needs of the Vietnamese side at the same time, will mark its second year since its commencement soon, and has progressed to a certain degree despite the existence of some problems. In the future, the scheduled activities will be actively promoted always being aware of the problems which the new project is based on.

Through our activities in the past ten years, relationships of mutual trust have been sufficiently fostered between Japan and Vietnam, and JICA projects have been highly evaluated by Vietnam and other donors. Moreover, each counterpart organization is fully getting acquainted with JICA assistance methods and activity forms. Thus, it would be fair to say that the circumstances surrounding the JICA project is in good condition. But, issues remain which need careful consideration.

Since long-term experts will be inevitably replaced upon completion of their terms, it is a big issue that how smoothly experts to be newly dispatched will take over project activities in the field. Since activity contents and assistance levels for Vietnam have been upgraded to a considerable degree, long-term experts themselves are required to have very high expertise, and as no activity may be accomplished only by long-term experts, a back-up system within Japan must be further strengthened.

As legal technical assistance for Vietnam has been highly upgraded and become increasingly complex, donor coordination is becoming more important than ever before. It is true that, even in areas where the new project is involved, none of them may be radically improved only through assistance by a single donor, and the constant necessity of cooperation and involvement by multiple donors is one of the prominent characteristics of legal technical assistance for Vietnam.

Fortunately, in Vietnam donor coordination is relatively well-organized around the UNDP project, which may be considered as the largest-scale assistance among all donors in Vietnam. As for JICA, its current project continuously provides assistance for courts, in close cooperation with the JUDGE Project by CIDA<sup>24</sup>, which incorporates in their activities

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<sup>24</sup> It refers to the “Judicial Development and Grassroots Empowerment Project” by the Canadian International Development Agency, mainly assisting institutional capacity building of judicial institutions, and improvement of access to justice.

assistance for improvement of judicial administration by courts. In addition, the JICA project collaborates with DANIDA in the area of judicial practice improvement through sharing information, etc.

Such donor cooperation is important, and should be further expanded, not only to avoid futile assistance overlaps, but above all, to attain a synergetic effect through collaboration among several donors, upon understanding that Vietnam needs assistance by multiple donors in the same area. In this regard, as a senior donor in the area of legal technical assistance for Vietnam, Japan needs to fully recognize that it is required to exercise leadership as a representative donor.



## Chronological Table of Legal Technical Assistance for Vietnam

As of the end of Dec. 2008

		Events	Assistance projects, etc.		
1976	Jul.	Reunification (Establishment of the Socialist Republic of Viet Nam)	Till commencement of the Japanese Legal Technical Assistance Project for Vietnam		
1977	Sep.	Accession to the United Nations			
1980	Dec.	Enactment of the Constitution			
1986	Dec.	Adoption of the "Doi Moi" (renovation) policy at the 6th National Assembly of the Communist Party			
1992	Apr.	Amendment to the Constitution			
		The Minister of Justice of Vietnam requested legal technical assistance to the Minister of Justice of Japan			
1994	Oct.	The Ministry of Justice (MOJ) of Japan started assistance and held the 1st training session in Japan (on the outline of civil-related laws of Japan)			
1995	Jul.	Official accession to ASEAN (Association of Southeast Asian Nations)			
	Aug.	Study on the Economic Development Policy in the Transition toward a Market-Oriented Economy by JICA (through March 2001)			
	Oct.	The 2nd training session in Japan (outline of the Nationality Law, etc. of Japan)			
1996	Aug.	Seminar on criminal-related laws (Penal Code, Criminal Procedure Code)	Japanese Cooperation to Support the Formulation of Key Government Policies on Legal System (Phase I)		
	Sep.	The 3rd training session in Japan (outline of the Commercial Code, Japanese court system, and judicial training)			
	Oct.	Conclusion of the Record of Discussions (R/D) with MOJ of Vietnam			
	Dec.	Commencement of Phase I of Technical Cooperation in the Legal Field (from 1 December 1996 to 30 November 1999) Dispatch of a JICA long-term expert (lawyer) (till April 2000)			
1997	Jun.	The 4th training session in Japan (family registry, registration, deposition)		Japanese Cooperation to Support the Formulation of Key Government Policies on Legal System (Phase II)	
	Oct.	The 5th training session in Japan (Civil Execution Code, Code of Civil Procedure)			
1998	Jun.	The 6th training session in Japan (Companies Act, Securities and Exchange Law)			Japanese Cooperation to Support the Formulation of Key Government Policies on Legal System (Phase II)
	Oct.	The 7th training session in Japan (intellectual property rights )			
	Nov.	Official accession to APEC (Asia-Pacific Economic Cooperation Conference)			
1999	Jun.	The 8th training session in Japan (criminal procedure)			
	Oct.	The 9th training session in Japan (civil liability)			
		Training course for the Supreme People's Procuracy (SPP) (criminal procedure and roles of prosecutors)(JICA and UNDP joint project)			
	Nov.	Seminar on Japan-Vietnam Civil and Commercial Law (held in Hanoi jointly by the Research and Training Institute [RTI], JICA, International Civil and Commercial Law Center Foundation and MOJ of Vietnam)			
		Conclusion of R/D with MOJ of Vietnam Conclusion of the Memorandum of Understanding (MOU) with the MOJ, SPP and the Supreme People's Court (SPC) (The latter two institutes have been newly added as counterpart organizations.)			
Dec.	Commencement of Phase II of Technical Cooperation in the Legal Field (from 1 December 1999 to 30 November 2002, extended till 31 March 2003)				
2000	Feb.	Dispatch of a JICA long-term expert (project coordinator) (till April 2003)	Japanese Cooperation to Support the Formulation of Key Government Policies on Legal System (Phase II)		
	Apr.	Dispatch of two JICA long-term experts (prosecutor, lawyer) (till April 2001)			
	Jun.	The 10th training session in Japan (Japanese judicial system, family registry and criminal records system)			
	Sep.	The 11th training session in Japan (attorneys system, issue of accession to the WTO)			
	Oct.	The 12th training session in Japan (Japanese prosecution, criminal procedure)			
		Dispatch of a JICA long-term expert (judge) (till June 2002)			
Nov.	The 13th training session in Japan (Japanese court system )				
2001	Jan.	Exchange program with SPP - Japan session (one official invited)		Japanese Cooperation to Support the Formulation of Key Government Policies on Legal System (Phase II)	
	Mar.	Legal Needs Assessment (LNA) presided over by the Minister of Justice of Vietnam (till 2002)			
	Apr.	Dispatch of a JICA long-term expert (prosecutor) (till April 2003)			
	May	The 14th training session in Japan (roles of prosecutors in civil and criminal cases and human resource development)			
	Jun.	Dispatch of a JICA long-term expert (lawyer) (till June 2003)			
		The 15th training session in Japan (judicial training and the attorney system )			
	Sep.	Exchange program with SPP - Japan session (two officials invited)			
		The 16th training session in Japan (civil procedure)			
Nov.	Exchange program with SPP - Vietnam session (two officials dispatched)				
Dec.	Amendment to the Constitution				

### Chronological Table of Legal Technical Assistance for Vietnam

Events			Assistance projects, etc.
2002	Jan.	Conclusion of MOU with the MOJ, SPP, and SPC (extension of Phase II)	Japanese Cooperation to Support the Formulation of Key Government Policies on Legal System (Phase II)
	Feb.	Exchange program with the SPP - Japan session (two officials invited)	
		The 17th training session in Japan (joint study of Civil Code revision)	
Mar.	Exchange program with the SPP - Japan session (one official invited)		
May	The 18th training session in Japan (criminal regulations on the economy to develop a market economy)		
Jun.	Dispatch of a JICA long-term expert (judge) (till March 2004)		
	The 19th training session in Japan (legal system and its operation surrounding securities exchange market)		
Sep.	The 20th training session in Japan (civil procedure)		
Oct.	Joint study of Japanese and Vietnamese judicial systems with the SPC (three officials invited to Japan)		
Nov.	Exchange program with the SPP - Vietnam session (three officials dispatched)		
2003	Jan.	Invitation of a former Minister of Justice of Vietnam (H.E. Dr. Lock, and one more official from the MOJ) by JICA	Preparation for Phase III
	Feb.	The 21st training session in Japan (legal system on secured transactions and its operation)	
	Mar.	Exchange program with the SPP - Japan session (one official invited)	
	May	Dispatch of a JICA long-term expert (prosecutor [RTI professor]) (till May 2004)	
	Jun.	Conclusion of R/D with the MOJ, SPP, SPC and Vietnam National University, Hanoi (VNU)	
	Jul.	Commencement of Phase III of Technical Cooperation in the Legal Field (from 1 July 2003 to 30 June 2006, extended to 31 March 2007)	
		Exchange program with the SPP - Japan session (one official invited)	
	Nov.	Exchange program with the SPP - Vietnam session (two officials dispatched)	
Dec.	Invitation of the Minister of Justice of Vietnam (H.E. Dr. Luu and three MOJ officials) by the RTI and JICA	Japanese Cooperation to Support the Formulation of Key Government Policies on Legal System (Phase III)	
2004	Feb.		The 22nd training session in Japan (judicial training)
	Apr.		Exchange program with the SPP- Japan session (two officials invited)
	May		Dispatch of a JICA long-term expert (judge) (till May 2005)
			Dispatch of a JICA long-term expert (prosecutor [RTI professor]) (till March 2007)
	Jun.		Passage and enactment of the Civil Procedure Code and the revised Law on Enterprise Bankruptcy
	Jul.		Dispatch of a JICA long-term expert (program coordinator) (till June 2006)
	Aug.		Exchange program with the SPP - Vietnam session (two officials dispatched)
	Sep.		Commencement of Japanese law course at the Faculty of Law, VNU
Nov.	Dispatch of a JICA long-term expert (lawyer) (till June 2006)		
2005	Jan.		Joint study of the civil procedure of Japan and Vietnam with the SPC (three officials invited)
			The 23rd training session in Japan (judicial training)
	Feb.		The 24th training session in Japan (joint study of the amendment of the Civil Code)
	May		Dispatch of a JICA long-term expert (judge) (till March 2007)
			Adoption of Resolution No.48, 2005 "Legal System Development" by the Politburo, Central Committee, Communist Party
	Jun.	Adoption of Resolution No. 49, 2005 "Judicial Reform Strategy" by the Politburo, Central Committee, Communist Party	
		Passage and enactment of the revised Civil Code	
	Jul.	Exchange program with the SPP - Japan session (two officials invited)	
Sep.	The 25th training session in Japan (standardization of judgment writing)		
Oct.	Exchange program with the SPP - Vietnam session (two officials dispatched)		
2006	Feb.	The 26th training session in Japan (judicial training)	
	Mar.	Joint study of the civil code of Japan and Vietnam with the SPC (three officials invited)	
	Apr.	Conclusion of the Minutes of Meetings (M/M) with the MOJ, SPP, SPC and VNU (extension of Phase III)	
	Jun.	Exchange program with the SPP - Japan session (two officials invited)	
	Jul.	Dispatch of a JICA long-term expert (program coordinator) (till October 2007)	
		Training and joint study of judicial system with the SPC (four officials invited)	
	Oct.	Exchange program with the SPP - Vietnam session (two officials dispatched)	
	Japan-Vietnam Joint Announcement "Strategic Partnership for Peace and Prosperity in Asia"		

## Chronological Table of Legal Technical Assistance for Vietnam

		Events	Assistance projects, etc.
2007	Jan.	Official accession to the World Trade Organization (WTO)	
	Mar.	The JICA long-term expert (prosecutor [RTI professor]) received the Judicial Project Memorial Award from the Minister of Justice of Vietnam (for the first time for a Japanese)	
		Conclusion of R/D with the MOJ, SPP and SPC	
2007	Apr.	Commencement of the Project of Technical Assistance for the Legal and Judicial System Reform (1 April 2007 to 31 March 2011)	The Project of Technical Assistance for the Legal and Judicial System Reform
		Dispatch of two JICA long-term experts (a prosecutor [RTI professor], a lawyer)	
	May	Dispatch of a JICA long-term expert (judge)	
	Jun.	Exchange program with the SPP - Japan session (two officials invited)	
		Dispatch of a JICA long-term expert (program coordinator)	
	Nov.	Exchange program with the SPP - Vietnam session (two officials dispatched)	
		The 27th training session in Japan (drafting of the State Compensation Law)	
Launch of the "Joint Announcement on the Deepening Relationships between Japan and Vietnam" including the "Agenda for the Strategic Partnership between Japan and Vietnam"			
2008	Jun.	The 28th training session in Japan (criminology)	
	Aug.	The 29th training session in Japan (measures for improvement of judicial practices and provision of information on court precedents, etc.)	
	Sep.	Exchange program with the SPP - Japan session (two officials invited)	
	Nov.	Passage and enactment of the Civil Execution Law	
	Dec.	Exchange program with the SPP - Vietnam session (three officials dispatched)	

※Re: Working groups  
(Phase II, III)

1. Joint Working Group for the Amendment of the Civil Code — from July 2000 to March 2007, 62 meetings were held in total.

(Phase III)

1. Joint Working Group on the Civil Procedure Code — from June 2003 to December 2005, 18 meetings were held in total.
2. Joint Working Group for Judicial Training — from November 2003 to March 2006, 13 meetings were held in total.
3. Joint Working Group for Standardization of Judgment Writing and Development of Court Precedents — from January 2004 to March 2007, 48 meetings were held in total.

(The Project of Technical Assistance for the Legal and Judicial System Reform)

1. Joint Working Group on the Civil Code — From April 2007 to the present, one meeting every two months on average is held (to be continued).
2. Working Group for Improvement of Judicial Practices — From April 2007 to the present, one meeting every two months on average is held (to be continued).



## **CAMBODIA**

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### **I. BACKGROUND<sup>1</sup>**

#### **A. Characteristics of legal technical assistance for Cambodia**

Cambodia was under the control of Pol Pot's government from 1975 to 1979, and thereafter was in a state of war till 1991, ruinously damaged during these 15 years of chaos and violence. In the judicial field, under the rule of Pol Pot, a situation continued for a long period where legal and judicial systems and the infrastructure supporting such systems were abolished and ceased to function, causing serious shortage of human resources due to the persecution of intellectuals including legal professionals. Against this background, approaches taken for the state instauration in the 1990s had to deal with reconstruction of the judicial system, training of legal professionals, etc. from zero. In this sense, legal technical assistance for Cambodia encountered problems greatly different from those existing in other countries.

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<sup>1</sup> With regard to the status of legal technical assistance for Cambodia around July 2004, see an article written by Azumi Misawa (former ICD government attorney) in ICD NEWS (Japanese version) No. 16, pp. 7 and onwards. Based on this article, this paper discusses the status of legal technical assistance thereafter.

## **B. Outline of Japanese legal technical assistance projects for Cambodia**

Until today, Japanese legal technical assistance for Cambodia has been implemented in the form of a project within the framework of technical cooperation for developing countries by the Japan International Cooperation Agency (JICA), as in the following three projects currently underway in parallel<sup>2</sup>:

### 1. Legal and Judicial System Development Project (hereinafter “Drafting Project”)

It started in March 1999 and through renewals currently Phase III is ongoing (from 9 April 2008 to 31 March 2012).

### 2. Legal and Judicial Cooperation with the Cambodian Bar Association Project (hereinafter “Bar Association Project”)

The project duration is from 11 June 2007 to 10 June 2009. As preliminary steps to the project, a small-size development partnership program, “Legal and Judicial Cooperation with the Bar Association” from July 2001 for one year, and a development partnership program, “Legal and Judicial Cooperation with the Cambodian Bar Association Project” from September 2002 to August 2005 were implemented.

### 3. Project for Improvement of Training in Civil Matters at the Royal School for Judges and Prosecutors (hereinafter “RSJP Project”)

It started in November 2005 and through renewals currently Phase II is ongoing (from 1 April 2008 to 31 March 2012).

## **C. Drafting Project**

The Drafting Project mentioned in the above 1 started with focus on legislative support on the Civil Code (CC) and the Code of Civil Procedure (CCP), two major basic laws, as its main purpose, having the Ministry of Justice (MOJ) of Cambodia as the project counterpart.

In order to draft the two codes, the Japanese side established working groups consisting of front-line law scholars, judges, lawyers, as well as government attorneys of the Civil Affairs Bureau of the Japanese MOJ, government attorneys of the International Cooperation Department (ICD), etc. In Cambodia as well, a working group was formed with participation of excellent personnel from courts and the MOJ. Thus, the drafting process of the two codes proceeded through a joint work approach between both countries taking a lot of time and energy.

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<sup>2</sup> Basic information on each project is available at [http://gwweb.jica.go.jp/km/km\\_frame.nsf/FrsWebIndex?OpenFrameset](http://gwweb.jica.go.jp/km/km_frame.nsf/FrsWebIndex?OpenFrameset) in the JICA Knowledge Site, and click “Project Information”, “Country”, “Cambodia”, “Field or Issue”, “Governance” and “Law and Justice” in this order.

The completed draft codes were submitted to the Council of Ministers (which corresponds to the Cabinet in Japan) in 2003, and the draft CCP was passed by the National Assembly in June 2006 and its application started in July 2007. As for the draft CC, it was passed by the National Assembly in December 2007 and currently is waiting to be applied.

In the drafting process of both codes, it was aimed at, upon requests from the Cambodian side, drafting laws capable of enduring international evaluations. While the completed CC (1,305 articles in total)<sup>3</sup> and CCP (588 articles in total, including provisions on civil execution and preservative relief)<sup>4</sup> of Cambodia contain many articles in common with the CC, CCP, Civil Execution Act and Civil Preservation Act of Japan, quite a few of the articles were drafted in consideration of the Cambodian side's opinions presented in the numerous discussions held during the drafting process and local factual reports. For example, with regard to the CCP, numerous differences exist in the CCP of Cambodia compared to that of Japan, such as: totally different procedure to render a default judgment; mandatory preparatory proceedings for oral argument; the principle of fixation of parties instead of the principle of assumption of suit by successor, the principle of assumption of burdens instead of the principle of extinction of burdens in relation to mortgage, etc. placed on an immovable property after its compulsory disposal, etc.<sup>5</sup>

The CC of Cambodia also greatly varies from the Japanese CC, partly because most parts of the Japanese Code were enacted in the Meiji Period (1868-1912). For example, provisions of the Cambodian CC regarding obligation or contract are greatly influenced by the UN Convention on Contracts for the International Sale of Goods (Vienna Sales Convention), etc., and those on the burden of risk, termination, warranty against defects, etc. are considerably different from those of the Japanese code. With regard to the regulations on object and real right as well, such differences exist as: a building is regarded as part of the land, not as an independent immovable property; a registration is a requirement of effect, not a requirement to duly assert against third parties in a sale of real estates; existence of Cambodian unique real rights as "permanent tenancy", etc.

#### **D. Legal professionals training project (focusing on the RSJP project)**

Through the Drafting Project, the draft CC and CCP were completed. However, from the viewpoint that an appropriate operation of these statutes would not be possible without judges and lawyers who understand and are capable of making full use of them, two projects

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<sup>3</sup> The draft Civil Code of Cambodia as of 30 June 2003 is available in ICD NEWS (Japanese version) No. 11, pp. 9 and onwards.

<sup>4</sup> The Code of Civil Procedure of Cambodia is available on the website of the International Civil and Commercial Law Centre Foundation (ICCLC) at [http://www.icclc.or.jp/equip\\_cambodia/index.html](http://www.icclc.or.jp/equip_cambodia/index.html).

<sup>5</sup> With regard to the actual drafting process of the Code of Civil Procedure of Cambodia and details of its differences from the Japanese Code, see an article written by Toshio Uehara, professor of Hitotsubashi University: "*Kambojia Minjisoshu-hoten no Seiritsu – Kiso Shien Sagyo wo Furikaette [Enactment of the Code of Civil Procedure of Cambodia – Reflecting back on the legislative support on the Code]*", Jurist No.1358, pp. 26 and onwards.

for human capacity building were successively started.

First, the Bar Association Project started having the Cambodian Bar Association as the counterpart. It aims at assisting in improving training at the Lawyers Training Center, which was inaugurated in 2002, and the project has been implemented mainly by the Japan Federation of Bar Associations.

Secondly, the RSJP Project started having the Royal School for Judges and Prosecutors (hereinafter “RSJP”) and its superior institute, Royal Academy for Judicial Profession (hereinafter “RAJP”) as the counterparts of the project. This project aims at improving training in civil matters at the RSJP opened in November 2003, and is carried out by ICD government attorneys as the main administrators of the project.

Below focus is placed on the RSJP Project in which the ICD is deeply involved.

1. Before the inauguration of the RSJP, most incumbent judges and prosecutors in Cambodia had not received any special training to become legal professionals, and had been selected from among teachers and the like. Since the establishment of the RSJP, trainees of the 1<sup>st</sup> and 2<sup>nd</sup> intake have already graduated and currently trainees of the 3<sup>rd</sup> and 4<sup>th</sup> intake are being trained at the RSJP. In terms of their number, when graduates of the 4<sup>th</sup> intake are appointed as judges and prosecutors, the number of judges and prosecutors who are graduates of the RSJP will outnumber those who are not RSJP graduates. Considering this fact and others, for example, that after profoundly studying the CC and CCP during two years of training at the RSJP, graduates will immediately sit on the bench, improving training in civil matters at the RSJP is regarded as an extremely important and effective, from the viewpoint of not only training legal professionals but also ensuring appropriate operation of the new CC and CCP in actual trials.

2. The ICD started its involvement in the RSJP when one of its government attorneys was dispatched to the school in Phnom Penh several times as a JICA short-term expert to survey the actual situation of the school and explore assistance direction. Through this process, the RSJP Project started in November 2005, and subsequently in February 2006, another ICD government attorney was dispatched to the RSJP as a JICA long-term expert (hereinafter “long-term expert”) to stay in an office within the RSJP for over two years engaging in such activities as stated below (II, 2)) together with another long-term expert in charge of program coordination and a few Cambodian assistants. In April 2008 a succeeding government attorney was dispatched to the RSJP as the 2<sup>nd</sup> long-term expert with the same mandate as that of the 1<sup>st</sup> one. Moreover, a cooperation system was established within the ICD where two other ICD government attorneys in charge of Cambodia had daily contact with the long-term expert.

In addition, an advisory group was formed by judges, professors of the Legal Training and Research Institute (LTRI) and lawyers of Japan to give advice to the

above-mentioned acting members of the ICD.

3. The following three issues were pointed out in the beginning of the RSJP Project as the main challenges to address:

- (i) There was no well-established training curriculum and only ad hoc training was provided;
- (ii) No full-time trainers were in place and lectures were frequently cancelled without prior notice due to trainers' busy schedules for their primary duties; and
- (iii) A shortage of teaching materials<sup>6</sup>.

As to the above-mentioned first issue on the curriculum, not only the long-term expert dispatched from the ICD gave advice on a daily basis, professors of the LTRI provided information in terms of its contents such as “what should be taught to train judges”, as well as curriculum preparation method, for example, “to count the total number of classes to assign the necessary teaching hours for each subject”. These advisory activities have enabled the RSJP Academic Affairs Section to design the training curriculum by themselves. Thus, the preparation of the curriculum has been generally left in the hands of the RSJP, although there is still some room for assistance to improve its contents. Hence, the actual approaches taken to address the second and third issues are discussed in “actual status and problems” in II below.

## II. ACTUAL STATUS AND PROBLEMS

### A. Drafting Project

As stated above, in Cambodia the CC and CCP were already enacted by the National Assembly, and it has been about one and half years since the commencement of operation of



the latter code. It is said that they are highly evaluated by the Cambodian government, not only for their contents but also for the joint work approach taken between Japan and Cambodia<sup>7</sup> for their drafting.

As legislative support on both codes has been completed, the next challenges of the Legal and Judicial System Development Project

<sup>6</sup> See an article written by Noriko Shibata, public prosecutor of the Tokyo District Public Prosecutors Office and former JICA long-term expert: “*Kanbojia Saibankan /Kensatsukan Yosei Shien [Assistance in training judges and prosecutors of Cambodia]*”, Jurist No. 1358, pp. 34 and onwards

<sup>7</sup> See the presentation paper by H.E. Mr. Ang Vong Vathana, Minister of Justice of Cambodia at the 8<sup>th</sup> Annual Conference on Technical Assistance in the Legal Field, ICD NEWS (Japanese version) No. 31.

presented in I. B. 1. above are: (i) legislative support for related laws and regulations necessary for the operation of both codes and assistance in the improvement of infrastructure supporting such laws; and (ii) assistance in their dissemination.

## 1. Actual status

a) In relation to legislative support for related laws and regulations mentioned in (i) above, four draft laws related to the CCP (Bailiff Law, Personal Status Litigation Law, Civil Fine Procedural Law, Non-Suit Civil Case Procedure Law) and draft Ordinance regarding the Judicial Bailment Procedure were completed with Japanese support. Among them, the Civil Fine Procedure Law was passed by the National Assembly and put into effect in March 2008, while the other three drafts and the draft Ordinance regarding the Judicial Bailment Procedure have already been delivered to the Cambodian side and are currently under examination. In the CC-related field, the draft law on the application of the CC has been prepared with Japanese assistance, and delivered to the Cambodian side for examination.

b) In relation to the assistance for dissemination of the CC and CCP as mentioned in the above II. A. (ii), the following support has been provided from the Japanese side:

Re: CCP

(i) Commentaries on each article of the code and of the related four statutes, and a textbook on the code<sup>8</sup> were drafted and already delivered to the Cambodian side;

(ii) Seminars for better understanding of the code were organized numerous times by the Cambodian MOJ for the first-instance courts in several places with participation of Japanese long-term experts as trainers;

Furthermore,

(iii) The members of the Japanese working group on the code have visited Cambodia to give lectures.

Re: CC

Draft commentaries on each article of the CC have been almost completed by the Japanese side, and a textbook on the code is under preparation.

## 2. Problems

With regard to the drafting of civil-code related laws and regulations, since the infrastructure supporting such statutes also needed to be improved, difficulties were

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<sup>8</sup> Commentaries on each article of the four statutes and the textbook on the Code of Civil Procedure are available on the website of the ICCLC referred to in the footnote 4.

anticipated from the beginning. For example, at the time when the CC was being drafted, it assumed an urgent establishment of an immovable registration system. However, it is way behind schedule, which could be detrimental to smooth application of real-right-related provisions in the code. In addition, in the field of civil execution or preservative relief as well, the above mentioned delay may adversely affect smooth operation of execution or provisional attachment against immovable properties, because these types of disposition are generally conducted through registration against properties owned by debtors.

Another problem is a shortage of human resources in the MOJ. In the Drafting Project, a working group was formed also in Cambodia to draft the CC and CCP through joint work approach between Japan and Cambodia, aimed at fully reflecting the actual condition in and requests from Cambodia, and also expecting this working group, which has deep knowledge of both codes, to take a central role in drafting related laws and regulations, and in disseminating the codes afterwards. However, after the completion of the drafting work, unexpected circumstances occurred where the working group members were appointed to important offices, such as secretary of state, justice of the Supreme Court, etc. (a judge was appointed as a justice of the Supreme Court at the age of 32), and were unable to bear such roles as mentioned above due to busy schedules of their main duties. Undoubtedly the shortage of human resources mentioned at the beginning of this paper was much more serious than expected. Actually this problem has caused great impediments on various occasions, for example, in the drafting of related laws and regulations, negotiation with other ministries concerned regarding laws conflicting with the two codes, dissemination thereof, etc. It is a challenge to develop human resources with capacity second to the working group members as early as possible.

## **B. RSJP project**

### **1. Actual status**

#### **a) Busy trainers and the scheme to train prospective trainers**

The shortage of human resources presented a big problem in the RSJP as well. Most of the seven trainers on civil matters doubled as members of the working group for the Drafting Project, and became too busy to share enough time for the RSJP due to their primary important duties in the MOJ and courts. As a result, they had to frequently cancel classes, and RSJP top officials and its Academic Affairs Section used to ask the Japanese long-term expert to give lectures on their behalf. However, the Japanese expert refused such requests in principle, except for minimum cases of giving substitute lectures, because, in addition to her many other tasks, she had no time available to give lectures to trainees, and such assumption of lectures was against the basic policy of the RSJP Project aiming at self-sustainability of the school.

In the course of exploring possible solutions against this serious shortage of trainers, the Japanese side proposed to build a structure of “prospective trainers” to train future trainers, and upon such, the RSJP selected seven prospective trainers in total, one incumbent judge with five years of experience on the bench, and six judges from among the 1<sup>st</sup> intake graduates from the RSJP. Then, since around March 2006, working group sessions were held weekly between the Japanese long-term expert and prospective trainers, and training courses in Japan and in-country seminars were held several times a year by ICD government attorneys, to draft mock records of first-instance civil litigation and provide information on the CCP and CC. These activities basically targeted the above-mentioned prospective trainers, and intensive training was conducted with provision of information exclusively for them, in principle. In due course, the long-term expert and ICD government attorneys came to agree that the prospective trainers had certainly improved the quality of their questions and opinions through working group sessions and seminars. Thus, they got best acquainted with the two new codes in a short period of time, next to the above-mentioned drafting working group members and RSJP trainers, and the Japanese side urged the RSJP to have the prospective trainers be in charge of lectures as soon as possible. However, RSJP top officers and the Academic Affairs Section reacted in a negative way to such a proposal, maybe due to their deep-rooted consciousness of seniority, arguing that they would not be able to let those with almost no practical experience on the bench be on the faculty, and the afore-mentioned situation of sudden cancellation of lectures on short notice continued for a while.

On the other hand, in 2007 during the course of discussions regarding the contents of assistance for Phase II of the RSJP Project, the RSJP and RAJP, RSJP’s superior organization, requested the Japanese side to assist them in (i) the training in civil matters in the newly-to-be-established training course of the Royal School for Court Clerks (RSCC)<sup>9</sup> and in the Royal School for Bailiffs (RSB) to be opened; and in (ii) the dissemination of the new CCP through continued training of incumbent judges from 2008, in addition to the training of prospective judges at the RSJP. However, the Japanese side decided to refuse the request in principle because, although the requested assistance was urgently necessary, training at the RSJP was the best the long-term expert could do, and there was no prospect for securing human resources in the Japanese side to dispatch an additional expert (With regard to the training seminar for incumbent judges, which was composed of six sessions and each session lasted for five days, the long-term expert took charge of a lecture for a half-day in each session). Thus, at the stage when

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<sup>9</sup> The new training course for court clerks at the Royal School for Court Clerks started in June 2008.

the demand for trainers significantly increased, not only for training prospective judges but also for other training courses, RSJP top officers and its Academic Affairs Section might have finally recognized the need to take some urgent measures to secure sufficient members of the faculty. Finally a new mechanism was adopted in the first half curriculum for the 4<sup>th</sup> intake of the RSJP starting in May 2008, where trainers and prospective trainers took charge of each class in pairs. Upon commencement of this curriculum, trainers began to entrust lectures with their partners quite often, thereby letting the prospective trainers be naturally part of the faculty. In the new training course for court clerks at the Royal School for Court Clerks started in June 2008, two prospective trainers were appointed to its faculty, and since October 2008, prospective trainers also took charge of part of lectures in the seminar for incumbent judges. In consideration that RSJP top officers and its Academic Affairs Section at first held onto an attitude of not letting their prospective trainers give lectures even to RSJP trainees, it was a surprising policy change for the Japanese side that they went so far as to allowing prospective trainers to be in charge of training incumbent judges.

In the end, as the demand for trainers for various seminars was on the rise and prospective trainers developed their professional skills under the shortage of human



resources, partly because there were no other alternatives available, naturally they got actively involved in judicial training. Accordingly, this system of prospective trainers achieved results at a surprising speed even for the Japanese side, and it was verified again that the Japanese approach of intensively training prospective trainers

instead of giving lectures to all RSJP trainees was effective.

In May 2008, seven graduates of the RSJP 2<sup>nd</sup> intake were selected as the 2<sup>nd</sup> intake prospective trainers to join the working group sessions held among the long-term expert and the 1<sup>st</sup> intake prospective trainers. They also participated in the training course held in Japan in October 2008, the curriculum of which included a visit to civil trials and provision of information on the CC and CCP.

b) Preparation of teaching materials

Mainly the following teaching materials were prepared at the RSJP:

- 1) Manual on the procedure of first-instance civil litigation
- 2) Records of first-instance civil litigation
  - (i) Mock records of court procedure (loan)

- (ii) Mock records of first-instance civil litigation associated with i. above.  
(loan)
- (iii) Mock records of court procedure (lease)
- 3) Demonstration DVD of first-instance civil litigation
- 4) Lecture resume on the CC
- 5) Lecture resume on the CCP
- 6) Practice questions on the CC

The manual on the procedure of first-instance civil litigation (1) above) is the most basic material on the operation of the CCP for judges, and it had been drafted since before the commencement of the RSJP Project through a joint-work approach between the Cambodian (members of the drafting working group, etc.) and Japanese sides (long-term experts, ICD government attorneys, etc.), repeated exchange of opinions on the occasion of training courses in Japan, etc. Its first version was completed in February 2006 with very easy-to-use contents, constituting one of the important teaching materials in the project. Due to its nature, however, the manual will need to be revised in the course of further operation of the Code.

Mock records of first-instance trial (2)(i) above) is positioned as the mock record associated with the manual on the procedure of first-instance civil litigation. It was drafted with considerable time and effort through such a method where, based on the Japanese format of civil trial records, the Cambodian side (1<sup>st</sup> intake prospective trainers, MOJ officials, lawyers) conducted mock trials drafting complaints, court records, judgments, etc. on the occasion of working group sessions or training in Japan, with advice by the Japanese side (long-term experts, ICD government attorneys), and the actual status of Cambodia was reflected therein to the extent possible.

The demonstration DVD of first-instance civil litigation (3) above) was prepared by filming the civil procedure actually performed by the ICD Director and government attorneys, using the model case in the mock records of first-instance civil litigation (2)(i) above), and dubbing it into Khmer in cooperation with Cambodian students living in Japan. Shown this DVD on the occasion of training in Japan, etc. prospective trainers have become able to conduct mock preparatory proceedings for oral argument and mock interrogation procedure incredibly much more smoothly than before, which proved the effectiveness of this material.

As for lecture resumes on the CC and CCP, and practice questions on the CC (4) to 6) above), their original drafts were prepared by RSJP trainers, because of the nature that the materials would be used by trainers in giving lectures and conducting practice questions to students, and were completed incorporating comments from the Japanese side.

- c) Outline of the activities of the long-term expert and ICD government attorneys in and after May 2008

The long-term expert focuses on working group sessions held once a week with the 1st and 2<sup>nd</sup> intake prospective trainers, while ICD government attorneys in Japan engage mostly in organizing training courses in Japan, in-country seminars, and seminars through the JICA-Net (TV telephone), primarily for prospective trainers based on the above-mentioned policy, in principle.

Through these activities, since May 2008 the project has developed with focus on (a) mock trials and preparation of model cases for them; and (b) preparation of materials on civil execution and preservative relief.

Assistance in conducting mock trials mentioned in (a) has been regarded as the pillar of the RSJP Project activities since its beginning. As a mock trial has such an effect



that prospective legal professionals, who have studied the CCP to some extent, can understand the procedure flow by actually performing the court procedure, and figure out quite clearly which part of the procedure they need to learn more, it can be considered as an important part of the curriculum bridging the study on procedural law and

judicial practices and is used in the law schools and legal apprenticeship in Japan as well. Especially at the beginning of the project, it seemed that a lot of incumbent judges conducted the civil procedure in a quasi-conventional way, without being able to fully understand the new CCP, and RSJP trainees observed such trials on a daily basis during their training. Thus, there is a necessity for trainees to gain an understanding of the court procedure flow in compliance with the new code, and it may be meaningful for them to perform the court procedure under the guidance of Japanese legal professionals, including the long-term expert and ICD government attorneys. Against this background, mock trials have been organized as below (the description in parentheses refers to the type of seminar and participants):

- (i) June 2005 (in-country seminar, joint participation of the RSJP 1<sup>st</sup> intake trainees and trainees of the Lawyers Training Center)
- (ii) February and July 2007 (training in Japan each, joint participation of the RSJP 1<sup>st</sup> intake trainees, MOJ officials and lawyers)
- (iii) December 2007 (in-country seminar, joint participation of the RSJP 2<sup>nd</sup> and 3<sup>rd</sup> intake trainees)
- (iv) October 2008 (training in Japan, the RSJP 2<sup>nd</sup> intake prospective trainers)

- (v) December 2008 (in-country seminar, joint participation of the RSJP 3<sup>rd</sup> and 4<sup>th</sup> intake trainees)

In the beginning, the long-term expert took the initiative in preparatory lectures and guidance in ex-post reviews in order for participants to perform the court procedure in compliance with the new code. Later, however, in the mock trial on the occasion of the above (iii), the RSJP 1<sup>st</sup> intake prospective trainers, who had conducted a mock trial using the same case model in (ii) above, took charge of reviews and proudly gave proper comments to about 120 students of the 2<sup>nd</sup> and 3<sup>rd</sup> intake trainees (it can be inferred that the top officers of the RAJP and RSJP, who observed the 1<sup>st</sup> intake prospective trainers giving comments, improved their evaluations on them, and subsequently had them practically be in charge of lectures for the 4<sup>th</sup> intake trainees or give lectures in the training courses for incumbent judges). In the mock trial of (iv), since the 2<sup>nd</sup> intake prospective trainers were informed in advance that they would be in charge of reviews at the mock trial in (v), they enthusiastically worked on the training, and thus their good performance in the mock trial in (v) is anticipated<sup>10</sup>.

The preparation of materials on civil execution and preservative relief in (b) above was considered as another pillar of project activities along with the activities mentioned in (a) in May 2008. Since the application of the CCP in July 2007, Cambodian judges and prospective trainers have frequently asked and are continuously asking questions on the new code to the Japanese long-term expert, and most of those questions have been concerned with civil execution and preservative relief from the beginning. While both procedures are complicated and thus difficult to operate only by understanding their flows based on the statutory provisions, both of them assume high importance because winning a case in the civil procedure may become meaningless without smooth execution of a judgment, and preservative relief is indispensable for the effective execution of a judgment. It seemed that the Cambodian side also became quite frustrated because a lot of statutory provisions were incomprehensive, despite of their importance.

Under these circumstances, in the JICA-Net seminar held in September 2007 and in-country seminar in February 2008 which dealt with civil execution and preservative relief, participants were more enthusiastic in their note-taking than ever before, and endless questions were raised beyond the scheduled closing time. Thus, in order to fulfill their needs, since May 2008 assistance has been given by providing information on the civil execution and preservative relief procedures to prospective trainers, and based on which they have been working on the drafting of mock records and manuals pertaining thereto. In the course of this assistance, such an interactive approach has been taken as

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<sup>10</sup> This paper was written in early December 2008, before the mock trial in (v) above.

follows: the Japanese side (the long-term expert and ICD government attorneys) first gives lectures on the manuals to be drafted; and based on which prospective trainers draft mock records and manuals, which are later corrected by the Japanese side.

With regard to the activities of the long-term expert, he engages in various matters as (i) attending weekly working group sessions as mentioned above; (ii) communication in writing with prospective trainers for the preparation of case models for mock trials, and preparation of teaching materials on civil execution and preservative relief, all of which are undertaken during working group sessions; (iii) answering questions asked daily by judges and prospective trainers (as the latter has started to give lectures, now they make many more questions before and after giving lectures); and (iv) discussions with RSJP top officers and its Academic Affairs Section regarding management of the school. Recently, the long-term expert is also in charge of lectures on preservative relief in the seminars for incumbent judges at the RSJP through relay interpretation in English and Khmer. Thus, the expert has a quite busy schedule.

## 2. Problems

The RSJP's goal since its foundation has been autonomous school management, curriculum improvement, preparation of teaching materials, etc. by the RSJP itself (top officers, Academic Affairs Section and trainers), making the school's self-development possible, and for which realization, I must say, there is still a long way to go.

First, there is no full-time trainer in the RSJP, and all seven trainers on civil-related subjects are part-time teachers with other primary duties as judges or MOJ officials. Even the 1<sup>st</sup> and 2<sup>nd</sup> intake prospective trainers go to the school only part-time to participate in weekly working group sessions and to give lectures while sitting on the bench as their main job. Without any full-time trainer, no personnel of the school will be able to devote enough time to prepare lectures and draft teaching materials, and no information provided from the Japanese side will be accumulated at the school. However, RSJP top officers do not seem to fully recognize the necessity of having full-time trainers.

Furthermore, the Cambodian side should be able to decide the general direction of training on civil matters and of improvement of their curriculum, policy on the drafting of teaching materials, etc. at the RSJP as soon as possible. It is deemed important for self-development of the school to, for example, hold trainers' meetings organized by the President of the RSJP, as the deliberation and decision-making body on such matters as above. Such meeting was once organized in June 2008 driven by the Japanese side, but not all trainers could attend it due to their busy schedules, and no further meeting was held thereafter.

Therefore, it may be one of the big challenges at present to improve the RSJP's

autonomous management capacity by its top officers and Academic Affairs Section through continuous approach and encouragement by the Japanese side.

With regard to the drafting of teaching materials, while it is one important issue to decide what teaching materials should be drafted first from among many options, using the limited human resources in the Japanese side, it is also important to decide, focusing on the goal of RSJP's self-development and the actual situation in Cambodia, what methods should be used to draft teaching materials.

For example, in drafting mock records and a manual on compulsory disposition of immovable properties among several subjects of civil execution, such methods of drafting would be possible as: (i) prospective trainers make the draft from the beginning and reflect on their draft Japanese comments to be given afterwards; or (ii) the Japanese side drafts all records and the manual which must be then translated into Khmer to deliver them to the Cambodian side. In the first method, as such procedure as civil execution is new and difficult for the Cambodian side to understand based only on statutory provisions, preparing the draft itself will come to a standstill, and even if such a draft is completed, its revising process until the draft reaches a certain level in both terms of correctness and usefulness would be daunting. It may not be an exaggeration to say that the first method would take more than ten times the length of time and effort than the second one. On the other hand, in the latter method, while its merit is being able to draft records and the manual with comparatively less effort by referring to the already-existing Japanese records and teaching materials, there will be a risk that the Cambodian side, upon abruptly receiving such drafts prepared by the Japanese side, would not understand them to make full use of them. Thus, currently an eclectic approach of the above two methods is taken as follows in the drafting process: (i) The Japanese side gives lectures to the prospective trainers on the possible contents of the manual; (ii) Prospective trainers draft in Khmer the parts assigned to each of them; (iii) The drafts are translated into English; and (iv) The Japanese side revises the drafts. In this approach, there are cases where, during the lectures mentioned in (i) above, questions concentrate on trivial matters irrelevant to the main issues that the Japanese side expects to be included in the manual; such trivial matters make up a large part of drafts; or their drafts show that prospective trainers have totally misunderstood lectures by the Japanese side. On the other hand, this approach has its own merits as the Japanese side understands the difficult points to understand for prospective trainers and also the actual judicial practices in Cambodia. Therefore, this mixed method may be better at present, though laborious, and assistance activities are proceeding with appropriate initiatives by the Cambodian or Japanese side depending on the characteristics of materials to be drafted.

### **III. FUTURE ACTIVITIES**

### **A. Linkage of the three projects**

Currently the following activities of the three projects, namely, “Dissemination of the CC and CCP by the MOJ” in the Drafting Project; “Training in the CC and CCP at the Lawyers Training Center” in the Bar Association Project; and “Training in the CC and CCP for RSJP trainees” in the RSJP Project, are in progress in parallel being closely related to each other.

These three projects have been continually coordinated through information sharing with each other because: some members of the working groups on the CC and CCP in the Drafting Project also hold posts in the advisory group of the RSJP Project and in the committee of the Bar Association; and long-term experts dispatched to Cambodia for each project frequently exchange their information with each other. Looking at concrete examples of such information sharing, for example, questions from the Cambodian side on the CCP can basically be answered by the ICD government attorneys who were originally legal practitioners (prosecutors and judges), while differences between the Cambodian and Japanese CCP as stated in I. C, may be difficult to be dealt with by ICD government attorneys. In such cases, ICD government attorneys ask the members of the working group on the CCP on the interpretation of the statutory provisions concerned, legislative purposes, etc. to obtain appropriate answers. Moreover, personnel in the Japanese side in charge of the Drafting Project and the RSJP Project engage in collaboration in the preparation of the manual on the procedure of first-instance civil litigation, selection of sample formats to be used in the civil procedure, etc. Between the RSJP Project and Bar Association Project as well, they cooperate with each other by sharing teaching materials or resumes used in seminars in both projects, or by exchanging information on the feedback of participants in seminars.

Thus, further and closer partnership of this kind among the three projects will be necessary in the future.

### **B. Expansion of human resources in Japan**

As mentioned above, the CC and CCP of Cambodia and those of Japan have a lot of provisions in common. Therefore, it may be possible to consider that a person with certain knowledge on the Japanese codes can, with short-term training, etc. play a great role for the dissemination of the two new codes in Cambodia. It is desirable that this fact will be broadly recognized among legal practitioners in Japan so that a wider range of human resources can participate in our projects.

Particularly in terms of the CCP, it has been more than one and half years since the commencement of its application, and Cambodian judges on the bench have asked a lot of

questions to the long-term expert on urgent matters arising in their practices of civil procedure, including preservative relief, and it is being broadly recognized that a smooth operation of the new civil procedure may not be possible unless it is understood not only by judges and lawyers, but also by court clerks, bailiffs, etc. In order to properly meet these needs in the field regarding civil procedure practices, participation of wider-ranging professionals is increasingly required.

On the other hand, with regard to both codes, as already explained in I. C. above, there are certain differences between the Cambodian and Japanese codes, and thus it would be very helpful for Japanese human resources newly participating in the dissemination of the two codes in Cambodia, if there were a commentary (such literature as mentioned in footnote 5, for example) listing the statutory differences between the Cambodian and Japanese codes, purports of such differences, etc. It is deemed that, especially after the application of the new CC in Cambodia in the near future, many more questions on this code will be asked. It is hard to say that questions regarding the differences between the Cambodian and Japanese codes can be satisfactorily answered by ICD government attorneys, and so such literature as above is highly anticipated.

### **C. Language barrier, human resources development in Cambodia**

It is beyond discussion that in legal technical assistance a large language barrier exists between the donor country and the recipient country. While there are not many interpreters and translators between Khmer and Japanese, when it comes to personnel who can instantaneously interpret explanations including legal terms at seminars or translate law books, their number is quite limited in both Japan and Cambodia.

Thus, it is important to nurture “interpreters and translators with legal knowledge”. At the same time, it may be reasonable to consider the possibility of training Cambodian legal practitioners to master Japanese, which could be a breakthrough of several problems presented in this paper. Once such personnel is developed, they may be able to answer most of the questions that the long-term expert currently receives from Cambodian judges and prospective trainers, and also be able to draft teaching materials by themselves by referring to Japanese materials. Thus, developing Cambodian legal practitioners with Japanese language ability should be urgently considered as one of the effective measures to realize the Cambodian side’s self-development.

## Chronological Table of Legal Technical Assistance for Cambodia

As of the end of 15 December 2005

		Events	Assistance projects, etc.
1863	Aug.	Cambodia became a protectorate of France and French law was introduced.	Background to Cambodian requests for legal technical assistance to other countries
1953	Oct.	Cambodia became independent from France as the Kingdom of Cambodia, "Buddhist Socialism"	
1970		Prime Minister Lon Nol ousted King Sihanouk, abolished his monarchy, and established the Khmer Republic.	
1975	Apr.	Pol Pot overturned the government of Lon Nol, established Democratic Kampuchea, and discarded the conventional legal system, massacring the intellectual including lawyers, etc.	
1979	Jan.	Heng Samrin set up a new government, but the civil war with three anti-Vietnam groups continued.	
1991	Oct.	Paris Peace Agreements were concluded and transition from the socialist planned economy to a market economy took place.	
1992	Mar.	UNTAC (UN Transitional Authority in Cambodia) started its activities.	
1993	Sep.	The Constitution of the Kingdom of Cambodia was enacted and UNTAC completed its activities. <u>The enactment of basic laws and building of a legal system became national issues.</u>	
1994		The Japan Jurist League for Cambodia was established and around that time the Ministry of Justice (MOJ) of Cambodia requested legal technical assistance to the Japanese government.	Preparation stage of Japanese legal technical assistance for Cambodia
1995		Within Japan, the Ministry of Foreign Affairs, Japan International Cooperation Agency (JICA), the Japan Federation of Bar Associations (JFBA), MOJ and the Supreme Court constructed an assistance framework	
1996	Feb.	The 1st training session in Japan (3 weeks) (The Japanese MOJ received Cambodian MOJ top officials, judges, etc. within the framework of JICA, in collaboration with the Supreme Court and JFBA, to introduce the Japanese legal system, etc.	
	Apr.	The International Civil and Commercial Law Centre Foundation (ICCLC) was established.	
	Aug.	The JICA Legal System Survey Team was dispatched to Cambodia.	
	Nov.	The 2nd training session in Japan (3 weeks)	
1997	May	An assistance committee was established within Japan for the Legal and Judicial Development Project (Drafting Project) for Cambodia (composed by JICA, law scholars, MOJ, Supreme Court, and JFBA).	
	Dec.	A JICA short-term expert (university professor) was dispatched to Cambodia (3 months).	
1998	Jan.	The 3rd training session in Japan 3 (3 weeks)	
	Feb.	The JICA Preliminary Survey Team was dispatched to Cambodia (1 week).	
	Mar.	A JICA short-term expert (lawyer) was dispatched to Cambodia (3 months).	
	Sep.	Training in Japan for the Cambodian counterpart of the Drafting Project	
	Oct.	Working groups (WG) were established for drafting the Civil Code (CC) and the Code of Civil Procedure (CCP).	
	Dec.	A JICA long-term expert was dispatched to Cambodia (till Sep. 2002). <u>The 1st meeting of CC WG (monthly or bimonthly meetings; In total 109 meetings were held by Dec. 2008.)</u>	
1999	Jan.	The 1st meeting of CCP WG (monthly or bimonthly meetings; In total 90 meetings were held by Dec. 2008.) <u>The 4th training session in Japan (3 weeks)</u>	
	Mar.	A JICA short-term expert (lawyer) was dispatched to Cambodia (for preliminary survey).	
1999	Mar.	The JICA Implementation Survey Team was dispatched for cooperation to support the formulation of key government policies of Cambodia, "Technical Cooperation concerning the Legal and Judicial Development Project (Drafting Project)", the Record of Discussions (R/D) was signed with the MOJ of Cambodia, and the Drafting Project, Phase I was implemented till 4 March 2002 (assistance in drafting CC and CCP). The 1st in-country workshop (WS) on CC The 1st in-country WS on CCP	Drafting Project for Cambodia, Phase I
	Jun.	The 2nd in-country WS on CCP	
	Jul.	The 2nd in-country WS on CC	
	Aug.	The 3rd in-country WS on CC The 3rd in-country WS on CCP	
	Oct.	A JICA long-term expert (lawyer) was dispatched to Cambodia (till January 2002).	
	Nov.	The JICA Survey Team on the Drafting Project was dispatched to Cambodia. The 4th in-country WS on CC	
2000	Dec.	The 4th in-country WS on CCP	Assistance in drafting the Civil Code and the Code of Civil Procedure
	Jan.	The 5th Training Session in Japan (1 week; within the JICA framework, the MOJ of Japan received Cambodian WG and intensive lectures and discussions on the draft CCP were held with Japanese CCP WG	
	Mar.	The 5th in-country WS on CC The JICA Evaluation, Planning and Survey Team was dispatched to Cambodia	
	Apr.	The 5th in-country WS on CCP	
	May	The 6th in-country WS on CC	
	Jun.	The 7th in-country WS on CC	
	Jul.	The 8th in-country WS on CC The 6th training session in Japan (2 weeks) The 9th in-country WS on CC	
	Aug.	The 6th in-country WS on CCP	
	Sep.	The 7th training session in Japan (2 weeks)	
	Oct.	The 10th in-country WS on CC	

## Chronological Table of Legal Technical Assistance for Cambodia

		Events	Assistance projects, etc.
2000	Nov.	The 7th in-country WS on CCP The 11th in-country WS on CC	Drafting Project for Cambodia, Phase I
	Dec.	The 12th in-country WS on CC Field survey on CC	
2001	Jan.	The 8th in-country WS on CCP The 13th in-country WS on CC	
	Feb.	The 8th training session in Japan (2 weeks) Counterpart training for H.E. Mr. Ang Vong Vathana and H.E. Mr. Suy Nou, then Secretaries of State of the MOJ	
	Mar.	The 15th in-country WS on CC	
	Apr.	The JICA Evaluation, Planning and Survey Team was dispatched to Cambodia.	
	May	The 9th in-country WS on CCP	
	Jul.	The 10th in-country WS on CCP The JICA Small-size Partnership Project "Legal and Judicial Cooperation with the Bar Association" was implemented (1 year)	
	Aug.	The 9th training session in Japan (2 weeks)	
	Oct.	The 11th in-country WS on CCP	
	Nov.	Field survey by CC WG (2 weeks) The JICA Evaluation, Planning and Survey Team was dispatched to Cambodia.	
	Dec.	The 10th training session in Japan (3 weeks)	
2002	Jan.	The JICA long-term expert (lawyer) completed his term of office.	Assistance in drafting the Civil Code and the Code of Civil Procedure
	Feb.	A JICA long-term expert (lawyer) was dispatched to Cambodia (till Feb. 2004 for the Drafting Project).	
	Mar.	The JICA Final Evaluation Team on the Drafting Project was dispatched to Cambodia (and the project duration was extended for one year). The 12th in-country WS on CCP	
	May	The 13th in-country WS on CCP	
	Jun.	The draft CCP (Khmer version up to the chapter on adjudication procedure) was submitted to the MOJ of Cambodia.	
	Jul.	The 16th in-country WS on CC Field survey by CC WG	
	Sep.	The JICA long-term expert completed his term of office. A JICA long-term expert was dispatched to Cambodia (till Sep. 2003). A JICA Development Partnership Project "Legal and Judicial Cooperation with the Bar Association of the Kingdom of Cambodia Project" was implemented (till Aug. 2005)	
	Oct.	A national seminar to commemorate the delivery of the draft CC and CCP was held in Cambodia (2 days)	
	Nov.	The 11th training session in Japan (3 weeks)	
	Dec.	The 17th in-country WS on CC	
2003	Mar.	The Drafting Project was completed and the draft CC and CCP (Khmer versions including the chapters on <u>execution and preservative disposition</u> ) were submitted to the Minister of Justice of Cambodia.	Preparation stage of the Drafting Project, Phase II
2003	Mar.	The JICA 1st Preliminary Survey Team on the Drafting Project (Phase II) was dispatched to Cambodia. The 12th training session in Japan (3 weeks)	
	Sep.	The JICA long-term expert completed his term of office. The JICA 2nd Preliminary Survey Team on the Drafting Project (Phase II) was dispatched to Cambodia (2 weeks to research the actual system in relation to the ancilliary laws and regulations, etc. )	
	Nov.	The Royal School for Judges and Prosecutors (RSJP) was established.	
	Dec.	The JICA 3rd Preliminary Survey Team on the Drafting Project (Phase II) was dispatched. The 1st in-country WS for the dissemination of the draft CCP (at Phnom Penh)*	
2004	Jan.	The 2nd in-country WS for the dissemination of the draft CCP (at Prey Veng Province)* A JICA long-term expert was dispatched to Cambodia (for coordination of the Drafting Project till April 2007). A JICA short-term expert (a government attorney of the Research and Training Institute [RTI government attorney]) was dispatched to Cambodia (for preparation of assistance for the RSJP) till 30 July	
	Feb.	The 3rd and 4th in-country WS for the dissemination of the draft CCP (at Kratie Province and Sihanoukville)* The JICA long-term expert (lawyer) finished his term of office.	
2004	Apr.	The Drafting Project for Cambodia (Phase II) started.	
	Jul.	H.E. Mr. Ang Vong Vathana, Secretary of State was appointed as Minister of Justice of Cambodia in the formation of a new Cabinet.	
	Sep.	Training for counterparts (Ms. Kim Sathavy, Director of the RSJP; Mr. Hy Sophea, Trainer of the RSJP and Secretary of State of the MOJ, etc. )	
	Nov.	The 14th in-country WS on CCP A JICA short-term expert (RTI government attorney) was dispatched to Cambodia (for preparation of assistance for the RSJP till 30 April 2005)	
2005	Jan.	The Royal Academy for Judicial Professions (RAJP) was established. A JICA long-term expert (lawyer) was dispatched to Cambodia as a legal adviser till April 2007 The 13th training session in Japan (3 weeks)	

## Chronological Table of Legal Technical Assistance for Cambodia

Events		Assistance projects, etc.
2005	May	A JICA short-term expert (RTI government attorney) was dispatched to Cambodia (for preparation of assistance for the RSJP till 18 September 2005) The 1st meeting of the study group on legal education (ST-LE) (afterwards held approx. once every three months)
	Jun.	The 1st in-country seminar for the RSJP (by a lawyer and RTI government attorneys)
	Sep.	The 1st training session in Japan for the RSJP (3 weeks)
	Nov.	R/D on the Project for the Improvement of Training on Civil Matters at the RSJP (RSJP Project) was concluded. A JICA long-term expert was dispatched to Cambodia (for assistance of the RSJP and project coordination till April 2007)
2006	Jan.	Joint study with the RAJP (President and Secretary General of the RAJP) on legal training system
	Feb.	The 14th training session in Japan (2 weeks) A JICA long-term expert (RTI government attorney) was dispatched to Cambodia for assisting the RSJP till 31
	Apr.	The 1st JICA-Net seminar for the RSJP (by RTI government attorneys)
	May	The draft CCP was passed by the Plenary Session of the National Assembly.
	Jun.	The draft CCP was passed by the Senate.
	Jul.	The Cambodian King signed the imperial decree for promulgation of CCP, and CCP came into force throughout the country.
	Aug.	The 3rd in-country seminar for the RSJP (special lectures, etc. given by SG-LE members and RTI government attorneys)
	Sep.	Deliberation on the draft CC was completed at the Council of Ministers. Prof. Takeshita, Chairman of CCP WG, and Prof. Morishima, Chairman of CC WG, received awards from the President of JICA for their contributions to legal technical assistance for Cambodia.
	Oct.	The JICA Final Evaluation Team on the Drafting Project was dispatched and decided to extend Phase II for one year.
	Dec.	The 1st to 4th remote-seminars on CCP (by CCP WG members) The Cabinet decided to submit the draft CC to the National Assembly. The 2nd JICA-Net Seminar for the RSJP (by RTI government attorneys)
2007	Jan.	H.E.Mr. Ang Vong Vathana, Minister of Justice, and H.E. Mr. Hy Sophea, Secretary of State of the MOJ, were invited to Japan to attend the 8th Annual Conference on Technical Cooperation in the Legal Field, and the 10th Anniversary Celebration of the International Civil and Commercial Law Centre Foundation (ICCLC)
	Feb.	The 2nd training session in Japan for the RSJP (2 weeks) R/D on the Legal and Judicial Cooperation with the Cambodian Bar Association Project (Bar Association Project) was concluded.
	Mar.	The 1st to 4th CCP dissemination seminar (by CCP WG members) The JICA Consultation Team on the Drafting Project was dispatched to Cambodia. The 1st CCP dissemination seminar for first-instance courts (at the RSJP)*
	Apr.	The 2nd and 3rd CCP dissemination seminar for first-instance courts (at the RSJP)* The 1st and 2nd CCP dissemination seminar for the Supreme Court and Appellate Courts (at the MOJ)*
	May	The 3rd JICA-Net seminar for the RSJP (by SG-LE members, RTI government attorneys) The 4th CCP dissemination seminar for first-instance courts (at the RSJP)* The 3rd and 4th CCP dissemination seminar for the Supreme Court and Appellate Courts (at the MOJ)*
	Jun.	The Bar Association Project started (till 10 June 2009). The 5th and 6th CCP dissemination seminar for first-instance courts (at the RSJP)* Primer Minister H.E.Samdech Hun Sen visited Japan and a joint statement was issued on a new partnership between Japan and Cambodia.
	Jul.	The 3rd training session in Japan for the RSJP (2 weeks) Application of CCP started throughout Cambodia. The 5th to 7th CCP dissemination seminars for the Supreme Court and Appellate Courts (at the MOJ)*
	Aug.	The 5th to 7th remote seminars on CCP (by CCP WG members) The 8th CCP dissemination seminar for the Supreme Court and Appellate Courts (at the MOJ)* The 1st CCP dissemination seminar for first-instance courts (at Battambang) (held by the MOJ)*
	Sep.	A JICA long-term expert (lawyer) was dispatched (to the the MOJ of Cambodia) The 4th JICA-Net seminar for the RSJP (by RTI government attorneys) The 2nd to 4th CCP dissemination seminars for first-instance courts (at Kampong Cham, Kratie Province and Sihanoukville) (held by the MOJ)*
	Oct.	The draft CC was passed by the Plenary Session of the National Assembly. The JICA Final Evaluation Team on the RSJP Project was dispatched to Cambodia. The 5th CCP dissemination seminar for first-instance courts (at Phnom Penh) (held by the MOJ)*
	Nov.	The draft CC was passed by the Senate. The 4th in-country seminar for the RSJP (by RTI government attorneys)
	Dec.	The Chairman of the Senate, on behalf of the King in his absence, signed the imperial decree for promulgation of CC and CC came into force throughout the country. The 5th in-country seminar for the RSJP (by SG-LE members, RTI government attorneys)
	Jan.	The 5th and 6th CCP dissemination seminar (by CCP WG members) The JICA Preliminary Survey Team on the Drafting Project (Phase III) and RSJP Project (Phase II) was dispatched to Cambodia.

Drafting Project, Phase II

Assistance in the legislation and dissemination of the Civil Code, the Code of Civil Procedure, and in drafting ancillary laws

RSJP Project, Phase I (since November 2005)

## Chronological Table of Legal Technical Assistance for Cambodia

		Events	Assistance projects, etc.	
2008	Mar.	Japan-Cambodia joint study on civil justice (inviting RSJP 1st intake trainees) The 1st seminar on CCP held by the MOJ* Promulgation and enforcement of the Civil Fine Procedural Law Completion of the RSJP Project The JICA long-term expert for the RSJP Project completed her term of office. The 1st CCP dissemination seminar held by the MOJ (at Svay Rieng Province)*		
	Apr.	Completion of the Drafting Project (Phase II). The draft CC and CCP (Khmer version including the chapters on execution and preservative disposition) were submitted to the Minister of Justice of Cambodia.		
2008	Apr.	The RSJP Project (Phase II) started. A JICA long-term expert (RTI government attorney) was dispatched to the RSJP A JICA long-term expert was dispatched for coordination of the RSJP Project. The Drafting Project (Phase III) started. A JICA long-term expert was dispatched to the MOJ of Cambodia for the Drafting Project The draft Personal Status Litigation Law and the draft Non-Suit Civil Case Procedural Law were submitted from the MOJ of Cambodia to the Council of Ministers.	Drafting Project, Phase III	
	May	The 3rd and 4th CCP dissemination seminars held by the MOJ (at Banteay Meanchey Province and Kampong Province)* A JICA long-term expert was dispatched to the MOJ for coordination of the Drafting Project A JICA long-term expert was dispatched for the Bar Association Project		
	Jun.	The 5th CCP dissemination seminar held by the MOJ (at Kampong Thom Province)* A National Seminar for CC and CCP Dissemination was held at the Phnom Pen Hotel (Cambodian participants: Prime Minister H.E.Samdech Hun Sen; H.E. Mr. Ang Vong Vathana, Minister of Justice; other ministers; the Supreme Court; Appellate Courts; Provincial Courts; the Supreme Prosecutor Department; Provincial Prosecutor Departments; Bar Association; Council for Legal and Judicial Reform; judges, etc.; Japanese participants: Ambassador; Prof. Morishima, Chairman of CC WG; JICA, etc.; Participants from other countries: ambassadors, donors (French Cooperation, AusAid, USAID, EWMI, etc.; approx. 300 participants in total)	Assistance in the dissemination of the Civil Code and the Code of Civil Procedure, and in the drafting of ancillary laws	
	Jul.	The 4th national election		
	Aug.	JICA short-term experts were dispatched to the MOJ	RSJP Project, Phase II	
	Sep.	The 5th JICA-Net seminar for the RSJP (by RTI government attorneys)		
	Oct.	The 4th training session in Japan for the RSJP (2 weeks)		
	Dec.	Final evaluation survey of the Bar Association Project Dispatch of the JICA Consultation Team on the Drafting Project The 6th in-country seminar for the RSJP (by RTI government attorneys) JICA-Net seminar on the ordinance regarding the judicial bailment procedure (by CCP WG members) CC dissemination seminar (by CC WG members and lawyers)		
	2009	Feb.	The 7th in-country seminar for the RSJP (by SG-LP members, RTI government attorneys) The 15th training session in Japan (for 2 weeks)	
		Mar.	The 5th training session in Japan for the RSJP (10 days)	

In-country WS on CC refers to those held with participation of Japanese CC WG members as JICA short-term experts.

In-country WS on CCP refers to those held with participation of Japanese CCP WG members as JICA short-term experts.

(In-country WS with asterisk "\*" refers to those held by the Cambodian WG with assistance by JICA long-term experts.

JICA-Net seminar and remote seminar refer to those held through the TV conference system connecting Japan and Cambodia.



## CHINA

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### I. INTRODUCTION

Japan and China have maintained geographically and historically close ties.

In terms of the legal system, from the seventh to eighth century Japan learned the law system of Tang (the then Chinese dynasty) called the *Ritsuryo* system and enacted several statutes including the *Taiho* Code in 701. Afterwards, under the warrior rule customary law was mainly abided and the *Ritsuryo* system became a mere façade. However, it was maintained as a legal system, and Japan had been governed by the *Ritsuryo* system till 1885 when the *Daijo-kan* system (constitutional form of government) was abolished to shift to the cabinet system in 1885.

From the nineteenth to the beginning of the twentieth century, while Japan attained its “modernization” by quickly introducing Western law, China undertook its “modernization” during the “reform movement” after the Sino-Japanese War (1894-1895) where they intended

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\* The author was transferred to the Tokyo District Public Prosecutors Office as of 1 April 2009.

to build a modern legal system modeled after the Western legal system, drafting several codes, etc. with advice by Japanese law scholars invited to the Imperial Capital University (current Peking University), such as Asataro Okada (criminal law), Yoshimasa Matsuoka (civil law), Ogawa (prison law) and Shida (commercial law), etc., but such intent ended in failure due to the Chinese Revolution.

The dispatch of such Japanese law scholars had quite different features as those of the current legal technical assistance of Japan, but in a sense, it could be considered as the beginning of legal technical assistance because it had certain similarities to the measures currently taken in the present legal technical assistance: for example, upon request by the Government of Qing (the last Chinese dynasty), the Japanese government selected suitable personnel and dispatched Okada, professor of Tokyo Imperial University, and others to engage in legislative support and legal training.

Thus, Japan and China have also deepened their relationships in the legal field, and in 2006, upon an official request for legal technical assistance from China, the “Civil Procedure Law and Arbitration Law Improvement Project (hereinafter “Project”)” commenced in November 2007.

The outline of the Project and its prospects and issues for the future are discussed below.

Please note that any opinions conveyed in this paper are the author’s personal opinion and do not represent the official views of the government or the Ministry of Justice of Japan.

## **II. CIVIL PROCEDURE LAW AND ARBITRATION LAW IMPROVEMENT PROJECT**

### **A. Background to the Project**

#### **1. Relationships between the “Reform and Liberalization” policy since the founding of the People’s Republic of China till the 1990s and improvement of its legal system**

In the People’s Republic of China (hereinafter “China”) founded on 1 October 1949, in the early years under the 1954 Constitution, the importance of enactment of statutes and the sound and legitimate legal system (“All state organizations and public servants must deal with matters in accordance with law”, “There must be law to be based on”, “If there are laws, they must be abided”) were emphasized by Liu Shaoqi and others. However, in the subsequent Cultural Revolution brought about by the proletarian class, such as Mao Zedong, the Gang of Four, etc., the principle of preference for politics was advocated under the slogan, “politics are the soul of law”, and the establishment of the legal system delayed, causing social disruption and economic stagnation for a long time.

In 1<sup>st</sup> session of the 5th National People’s Congress (hereinafter “NPC”) on 5 March 1978, the 1978 Constitution was adopted where, as in the 1975 Constitution, the leadership,

position and roles of the Communist Party were regarded as the nucleus of the nation, and strengthening the restructuring efforts of “socialist democracy and legal system” was advocated aiming at departure from the cultural reform policy and “four modernization (building of a strong socialist nation based on the modernization of agriculture, industry, national defense and science and technology by the end of the 20<sup>th</sup> century)”. Under the 1982 Constitution succeeding the stance of the predecessor, legislation of criminal law and other laws, economic reform and liberalization were moved forward.

However, due to the expansion of economic disparities between urban and rural areas, inflation, corruption and other social injustices, the above-mentioned efforts were sluggish and the “socialist democracy and legal system” was not promoted as scheduled.

Against such a social situation, the 2nd Tiananmen Square Protests occurred on 3 June 1989 where a large-scale military crackdown by the People’s Liberation Army took place against the citizens gathered in demand for democracy, causing further economic and social stagnation. Having the sense of crisis about this incident, Deng Xiao Ping made the southern tour (from 18 January to 21 February 1992), through which the “reform and liberalization” was accelerated again, practically leading to the introduction of a “market economy” in the 1990s.

Accompanied with the advance of “reform and liberalization” and “market economy” in the 1990s, statutory revision and enactment were conducted successively, such as the amendment to the Civil Procedure Law in April 1991, Criminal Procedure Law in March 1996, Criminal Law in March 1997, Administrative Appeal Law in April 1999, and enactment of the Company Law in December 1993, State Compensation Law in May 1994, Labor Law in July 1994, Securities Law in December 1998, etc.

The Constitution also went through three revisions, and in the Constitution amended in the 2<sup>nd</sup> session of the 9th NPC in 1999, four Chinese characters meaning “state control by law” were inserted to expressly provide “the People’s Republic of China shall execute state control in accordance with law and build a socialist law-abiding nation”.

For reference, please note that in the political report in the 15<sup>th</sup> National Convention of the Communist Party held in September 1997, which provided the background to the above constitutional revision, Jiang Zemin emphasized the necessity of improvement of legal system for the “state control by law” under the constant guidance of the Communist Party, and the departure from the “national conditions” of China. It should be kept in mind that China does not have an intention to simply introduce legal systems of Western countries or Japan, or international standards.

## 2. Improvement of the legal system accompanied with the accession to the WTO in 2001

In striving for maintaining its high economic growth, China has further promoted the

cultivation of market economy and deepened its international mutual dependency. Its accession to the World Trade Organization (hereinafter “WTO”) on 11 December 2001 in the course of globalization meant that any disputes arising among member states shall be disposed of in accordance with the WTO dispute resolution procedure in principle, and thus it was urgently necessary for the nation to improve its domestic legal system and advance judicial reform to ensure “a fair and rational judicial review”, which is required to all WTO member states.

To this end, China is planning to continually implement new legislation and amendment to existing laws in harmony with gradual market liberalization, as required in the WTO protocol for accession, upholding, as a national goal, the construction of a legal system suitable for socialist market economy by around 2010.

On the other hand, along its cultivation of market economy, China faces a lot of problems, such as simple provisions of the current Civil Procedure Law unable to deal with the drastic increase of several types of civil disputes, and issuance of circular notices by the Supreme People’s Court to supplement the statutory provisions, or unorganized execution and the preservation system, etc. Thus, it was deemed necessary to improve their legal systems, including the arbitration system, for the broader resolution of civil disputes.

Thus, the Standing Committee of the 10th NPC formulated 76 legislative plans to be implemented during its term of office between 2004 and 2008, and positioned the amendment to the Civil Procedure Law and the Arbitration Law as one of the 59 plans in the 1<sup>st</sup> category of “draft laws with special priorities to be deliberated in the NPC in the current term”. Especially with regard to the Civil Procedure Law, 90 bills were submitted to request its total revision. In response to such a request, the Commission of Legislative Affairs (hereinafter “CLA”) of the Standing Committee of the NPC partially amended the parts of civil execution and retrial procedure in 2007, which were regarded as emergent revision matters in the said bills, and it was decided to carry out full-fledged revision of the said law, including the partially amended parts, in the future.



### 3. Request for legal technical assistance to Japan and commencement of assistance

Under the above-mentioned circumstances, in June 2006 the CLA of the Standing Committee of the NPC in charge of legislation of civil and commercial law requested technical cooperation to Japan, through the Japan International Cooperation Agency (JICA),

in relation to the amendment to the Civil Procedure Law and Arbitration Law.

Conventionally, China had cooperative relationships with GTZ (Germany) and USAID (U.S.) for assistance in the drafting or amendment of the Civil Law and Intellectual Property Law, or in the field of legal training. However, with regard to the Civil Procedure Law, China requested assistance not to the above countries but to Japan, possibly due to the following reasons:

- There were quite a few Chinese officials who had studied civil procedure law in Japan.
- They highly evaluated the Japanese experience in successfully making a shift of focus on the inquisitorial system to the adversarial system.
- When the CLA submits law drafts to the NPC, it is customary to attach materials on the legal systems of Japan, the U.S. and Germany.
- China evaluated Japanese experience of “not imposing” but “interactive-type” legal technical assistance in Vietnam, Cambodia, etc.

For Japan, the following situation in China existed as one impediment to Japanese investments to China; while more and more Japanese companies were expanding their businesses to China and more disputes were arising in relation to the violation of intellectual property rights or labor management, they were running unpredictable legal risks due to defective legal systems, administrative adjudication based on the so-called “interpretation” circular notice to supplement the defective legal systems, judicial corruption, gaps in legal awareness in the central and regional areas, etc. Therefore, in order to improve the confidence in the Chinese court system, it would be beneficial to build a fair, transparent, and



user-friendly civil dispute resolution system, that is, a structure where unjust adjudication is hardly conducted. In this context, the requested assistance was deemed to meet the policy of “assisting in the establishment of good governance, such as legal systems controlling economic activities, for promotion of economic activities by the private sector, which is the main actor of a market economy”, as one of the “assistance in reform and

liberalization” advocated in the Japan’s Economic Cooperation Plan to China (Cabinet decision on October 2001).

Thus, the MOJ, the Ministry of Foreign Affairs and JICA agreed through mutual consultation to actively respond to the request from China, and dispatched the Preliminary Survey Team to China consisting of officials of the Social Development Department (currently the Public Policy Department) of JICA, Civil Affairs Bureau of the MOJ,

International Cooperation Department (ICD) of the Research and Training Institute (RTI) and the Japan Federation of Bar Associations, from 10 to 20 June 2007.

The Preliminary Survey Team visited the Office for Civil Law (hereinafter “OCL”) of the CLA of the NPC, the Supreme People’s Court, Japan External Trade Organization (JETRO), Honda Motor Co., Ltd., law firms, Renmin University of China, GTZ, etc. to conduct interviews and discussions, and based on the results of which the “Civil Procedure Law and Arbitration Law Improvement Project” for China was structured. Subsequently in November of the same year JICA and the CLA of the NPC, the counterpart organization of the Project, signed the Record of Discussions.

## **B. Outline of the Project**

### **1. Commission of Legislative Affairs (CLA) of the NPC, counterpart organization of the Project**

The CLA of the NPC was chosen as the counterpart organization of the Project.

In China, the people’s democracy dictatorship holding “all rights belong to the people” and democratic centralism are adopted, and the NPC is considered as the supreme organ of state power.

The NPC has the power to exercise the national legislative power, amend the Constitution and supervise its enforcement, enact and amend basic laws and other laws.

Moreover, the NPC has the power to elect, appoint and remove the responsible officers of national administrative agencies, courts, procuratorates and military agencies, and supervise the above-mentioned and other state organs, and these national agencies assume the obligation to be subject to the supervision by the NPC and to report to the NPC.

The state power is united and indivisible, and the separation of powers is not accepted. Since they adopt the four powers division system of legislature, executive, judicial (justice), and prosecution powers, the concept of judicial independence cannot be immediately drawn from this system.

The NPC has a quorum of 3,000 members, consisting of deputies who are elected in each province, autonomous region, municipality directly under the Central Government, special administrative district and the army, and there is no career politician.

The term of office of the NPC is five years, and generally the NPC meets in session once a year for two weeks. As this is not enough for state management, there is a standing committee as the permanent body of the NPC.

The Standing Committee meets approximately once every other months, and it exercises the supreme state power and legislative power when the NPC is not in session.

The Committee is composed of a Chairman, Vice Chairmen, Secretary-General and other members. They are all elected by the NPC from among its deputies, and are career

politicians responsible for and reporting to the NPC.

The Standing Committee is a great organ, having almost the same powers as those of the NPC, and in addition, the power to interpret the Constitution and other laws, the power to repeal administrative regulations or local statutes, power to legislate ordinary laws, and even the power to amend basic laws enacted by the NPC. The organization that actually engages in legislative drafting as a working body of the Standing Committee is the CLA, and its OCL is in charge of the Civil Procedure Law, etc.

## 2. Goals, period, results and assistance structure of the Project

The Project aims at promoting the establishment of an efficient civil procedure and arbitration system in harmony with international rules, including Japanese ones, and its superior goal is establishing an expeditious civil dispute resolution system based on a fair, efficient and productive adjudication, thereby promoting a proper and smooth resolution of civil disputes in China.

The Project term is for three years from 1 November 2007 to 31 October 2010. It is expected, as an achievement of the Project, that persons involved in legislation understand the issues to be amended in the Civil Procedure Law and the Arbitration Law to enact a revision draft taking advantage of Japanese and Chinese expertise. Its activities consist of comparative review of laws, regulations and judicial practices in Japan and China, which are useful for the amendment of the two statutes, and examination of issues to be subject to legislative deliberation.

In the Project it was decided to conduct training in Japan and in-country seminars, and an assistance committee was established in Japan consisting of 12 members in total, Chairman Professor Toshio Uehara of the Graduate School of Law of Hitotsubashi University, and other members such as scholars of civil procedure law (most of which had an experience of engaging in the legislative support of the Code of Civil Procedure of Cambodia), legal practitioners such as judges and lawyers, and government attorneys of the Civil Affairs Bureau of the MOJ, and of the ICD. Moreover, since April 2007 a lawyer fluent in Chinese has been dispatched to Beijing as a long-term JICA expert for communication and coordination with the OCL of the CLA.

## 3. Issues to address

Within the framework of the Project, it is scheduled to comparatively review the Japanese and Chinese laws, regulations and arbitration practices which may contribute to the amendment of the Civil Procedure Law and Arbitration Law of China, and to examine issues subject to legislative deliberation. Concretely, the following issues have been raised through interviews with the counterpart as the issues to be examined in the Project:

(i) Re: Civil Procedure Law

Civil execution, preservation, retrial, trial instance system, small claims, summary procedure, litigation for public interest, evidence system, procedure for arrangement of points at issue, etc.

(ii) Re: Arbitration Law

Independence of the arbitration committee, provisional arbitration, position of the Arbitration Association, arbitration agreement, rights and obligations of parties, arbitration tribunal and arbitrators, code of ethics of arbitrators, execution and preservation of arbitration awards, etc.

I will omit here the details of the reasons for which the above-mentioned issues have risen to the surface (Please refer to Akemi Kojima, “*Gendai Chugoku no Minji Saiban*” [*Civil Action in the Modern China*], Seibun-do, for details). What I can say based on my experience in legal technical assistance for Vietnam and other Asian nations is that the following issues may exist as the background to the above-mentioned points to be examined for statutory amendment:

- China is precisely in transition from the continental law- and inquisitorial system-type to common law- and adversarial system-type management of civil trial;
  - Generally in socialist countries, the court procedure has not sufficiently developed because disputes are regarded as contradictions in society, and thus people have resorted to alternative dispute resolution systems rather than court judgments;
  - As in criminal trials, there is a tendency to demand the finding of truth in civil trials as well;
  - Big disparities exist between the central and provincial areas, causing difficulty in the familiarization of laws, if any;
  - Room for intervention in justice by the government or the Communist Party;
  - Not sufficient capacity of courts (judges) to dispose of cases;
  - Not sufficient judgment execution system in place;
- and others.

As these backgrounds and issues commonly exist in the Asian countries for which Japan has provided legal technical assistance, and Japan has also experienced and intended to solve some of them to some extent since the Meiji period (1868-1912) up to now, it seems meaningful that Japan offers legal technical assistance to China in the above field.

### **C. Progress of the Project**

1. The 1<sup>st</sup> training course in Japan: from 12 to 21 November 2007

Five officials from the OCL of the CLA of the NPC and three from the Supreme People’s Court, were invited to attend lectures on the Japanese civil procedure of first

instance and the 1996 amendment to the Code of Civil Procedure, to visit the Tokyo District Court, etc.

2. In-country seminar: from 23 to 29 March 2008

Five short-term experts were dispatched to Beijing.

3. The 2<sup>nd</sup> training course in Japan: from 18 to 31 May 2008

Six officials from the OCL of the CLA of the NPC, one from the State Council, one from the Supreme People's Court and one from the China International Economic and Trade Arbitration Commission (CIETAC) were invited to attend lectures on the Japanese Civil Execution Act, Civil Preservation Act and Arbitration Act, to visit the Nara District Court, etc.

4. The 3<sup>rd</sup> training course in Japan: from 5 to 15 November 2008

Two officials from the General Office of the CLA of the NPC, five from the OCL, two from the Supreme People's Court and one from the Commission of Legislative Affairs of the Local People's Congress were invited to attend lectures on the appeal procedure in the second and third instance and retrial procedure of Japan, discussions on the shift of the burden of proof, to visit the Osaka High Court, etc.

5. Training approach

Since Chinese trainees are more highly educated for law than those from other Asian countries to which the ICD provides legal technical assistance, and some of them have studied in Japan, they are provided in advance with Chinese translations of Japanese statutes, such as the Code of Civil Procedure, Civil Execution Act, Civil Preservation Act, Family Affairs Adjudication Act, Arbitration Act, etc., so that they can be familiar with such Japanese statutes before coming to Japan.

For the purpose of designing training sessions in Japan, trainees are requested to provide the Japanese side in advance, through the long-term expert dispatched to Beijing, with the matters of their interest or questions, explanation on the background to their interest or questions and their purports, which can be referred to in structuring training curricula.

As for their questions, first the long-term expert or ICD government attorneys prepare answers thereto, and upon confirmation or revision by the assistance committee, they are presented to trainees as "basic answers" beforehand. Based on this pre-information, assistance committee members give lectures to them in training courses in Japan on higher level of knowledge in relation to their questions.

Quite a few questions presented by Chinese trainees reflect unique circumstances of

China. As it is important for the Japanese side to understand the purpose of their questions, from the 3<sup>rd</sup> training course we have decided to invite Chinese scholars on the Japanese Code of Civil Procedure studying in Japan to the training sessions, so that they can act, together with the long-term expert, as a bridge between China and Japan, to promote trainees' understanding and improve training courses.

For example, the following question was once asked by the Chinese side: "When a party to litigation files an appeal in the second or third instance, how does it affect the original judgment? Is it possible to demand the execution of the original judgment before the appeal court renders a new judgment?"

As the purport of this question, they explained that under the Civil Procedure Law of China, it is provided that the judgment of first instance becomes effective when no appeal has been filed upon elapse of the appeal period, and the judgment of second instance comes into effect when rendered; As the Japanese Code has different provisions from those of the Chinese law in relation to the time when a judgment becomes effective, they wanted to know how the effect of the original judgment is understood when a party files an appeal of second or third instance in Japan.

With regard to this question, a Chinese scholar on the Japanese Code studying in Japan explained the background of the question as follows: under the Civil Procedure Law of China, while there is a preliminary execution system applicable after a suit has been filed and before the judgment becomes final in specific cases where the right and obligation relations are clear and it is required to immediately satisfy the right concerned (e.g. a case of claim for alimony), there is no system equivalent to the declaration of provisional execution of Japan; However, in practice the abuse of the right to appeal for the purpose of impeding an early satisfaction of the winner's right is getting serious; Therefore, the prevailing opinion in China (especially in the court) is to establish the system of declaration of provisional execution in reference to foreign laws; In addition to the system under the Japanese law, it is necessary to introduce the monetary payment order system as a sanction against an illegitimate appeal abusing the right to appeal. Through such explanation, it may be possible for lecturers to better understand the awareness of and background to the problem of the Chinese side, and thereby to give better lectures.

After taking training sessions in Japan, trainees prepare reports and present them to the NPC. These reports are translated into Japanese by the long-term expert and submitted to the Japanese assistance committee, so that they can be used to confirm trainees' level of understanding and to improve the following training courses.

### **III. PROSPECTS AND ISSUES OF FUTURE LEGAL TECHNICAL ASSISTANCE FOR CHINA**

#### **A. Future activity plan**

For the purpose of the Project, assistance for the amendment to the Civil Procedure Law and the Arbitration Law of China will be continued in and after the next year through annual or biannual training courses in Japan, in-country seminars, advice by the long-term expert, etc. In order to improve training courses and other activities, not to mention the necessity of efforts and inventive approach by both sides, it is especially important for both sides to deepen their understanding about the legal systems of Japan and China.

Thus, while it is not within the framework of the Project, the RTI of the MOJ conducts contract research by commissioning the Chairman of the assistance committee, Professor Uehara, and Chinese scholars on civil procedure law, to translate into Japanese the commentaries on the articles of the Civil Procedure Law, which was compiled by the OCL, CLA of the NPC, and other research, and the results of which will be reflected in the Project in the future. Within the Project it is planned to translate textbooks or law books introducing commonly adopted theories and precedents in relation to execution, preservation and the Code of Civil Procedure of Japan, into Chinese.

In the course of the Project, the above-mentioned materials offered from the Chinese side may be useful to enable the Japanese side to deepen its understanding on the Civil Procedure Law of China, and thereby structure training courses in Japan bearing in mind the differences between the Chinese and Japanese statutes. Similarly, the materials on Japanese statutes translated into Chinese may serve as effective tools for self-preparation and self-study for Chinese trainees to study more effectively and efficiently in Japan.

#### **B. Issues**

Different from other Asian countries for which ICD provides legal technical assistance, China is one of the world's top powers while still being a developing country. In the field of law it has enacted sufficient laws for the cultivation of a market economy, along with its accession to the WTO, though there are still problems in their substantive or operational aspects. The members of the OCL, CLA of the NPC, the project counterpart, have sufficient legislative experience and capacity. Because of these factors, China itself desires to have "interaction" or "exchange of opinions" on an equal footing with Japan, rather than in the form of "aid" or "assistance".

Moreover, the Chinese side takes great pride in that the OCL of the CLA assumes more important roles in legislation than scholars of civil procedure law (in practice scholars are involved in legislative drafting or offer public comments in legislation), and does not expect

scholars to play important roles in legislation, as in the Legislative Council of Japan. Therefore, they have a tendency to prefer equal “interactions” with government officials of Japan, such as those of the Civil Affairs Bureau of the MOJ. Through training courses held three times in Japan so far, hopefully the Chinese side may have considerably understood the expertise of and importance of roles played by scholars in Japan, but it is necessary in the future to continuously emphasize that Japanese legal technical assistance is supported by voluntary activities of many scholars.

From the standpoint of the Japanese side, there may be some opinions questioning the necessity of assistance for China through Official Development Assistance.

In this context, it may be true that ODA for the development of infrastructure for China has finished its role. However, from the standpoint of “good governance”, such as human rights or the rule of law, there still remain a lot of aspects to be improved in China. As the



establishment of a trustworthy judicial system for the development of a sound market economy also greatly contributes to the safety and development of Japan, legal technical assistance as part of ODA in the non-physical aspect for China may be important in the future as well.

While the ownership of China should be respected in the implementation of legal technical assistance, Japan should actively give necessary advice to China as one of its neighboring country, in the light of its experience in harmonizing the continental law and common law, and in legal assistance for other countries.

Certainly it cannot be assured that sufficient information has been offered from the Chinese side on the direction of amendment they aim at or problems they have. As there has been a case where a person who had shown a law draft to a donor was punished under the State Secret Law, in consideration of their special national conditions or with only one year of experience in legal technical assistance for China, it may not be reasonable for the Japanese side to simply compare assistance for China with those for Vietnam or Cambodia. However, in building a relationship of trust in the future, it will be important to receive sufficient information from the Chinese side to offer proper advice to them.

On this point, it is a positive sign in fostering confidence between both sides that the CLA of the NPC, which once questioned the necessity of the long-term expert at the visit of the Preliminary Survey Team to China, currently understands its role and shows their appreciation for its activities. Thus, its continued efforts and success are highly expected.

On the other hand, as the priorities of policies often change in China, it is also an item on

the agenda that how and to what extent flexible response to such changes is necessary in the future.

The Standing Committee of the 11<sup>th</sup> NPC published its legislative plan (5-year plan) on 29 October 2008, which included 64 laws (new enactment and amendment plans). Among them, 49 laws are classified into the “first type”, which is scheduled to be deliberated during the current term (March 2008 to March 2013), and 15 laws fall under the “second type”, the drafting of which will be examined first, and deliberated at an appropriate time. It was confirmed that the Civil Procedure Law is classified into the first type and is positioned as one of the top priorities, but the Arbitration Law was ruled out of the plan.

In this regard, the OCL of the CLA has informed us that the Arbitration Law has not been deleted from the prospective agenda of request for legal technical assistance of Japan because the legislative plan may be changed in midstream, and they would continue in-house examination on the Law. Thus, it may be necessary to re-consider the priorities of assistance contents in light of input efficiency in the Project.

#### **IV. CONCLUSION**

In addition to the above-mentioned legal technical assistance, the ICD is involved in the organization of the Japan-China Civil and Commercial Law Seminar as one of China-related programs, which I will briefly explain below.

This seminar has been organized annually since 1996, alternatively in Japan and China, in cooperation with the International Civil and Commercial Law Centre Foundation, an important partner of the ICD in its legal technical assistance activities, and JETRO, and jointly held or supported by the National Development and Reform Commission of the State Council of China.

The seminar has been attended by a lot of participants, scholars, business people, lawyers, officials of the government agencies concerned, etc. in both Japan and China, who have presented and discussed the result of studies on annual themes.

As for seminar themes, well-timed subjects have been chosen as follows: Impact of China’s accession to the WTO on its legal aspect and its countermeasures (2004); Comparison of the actual legal systems of Japan and China in relation to business combination, such as merger, acquisition of companies, etc. and future challenges (2005); The Japanese legal system and its actual operation fostering a “resources cycling society”, covering an efficient use of resources, energy saving and environment preservation (2006); Enactment of the Chinese Law of Realty and its impact on the economic activities by foreign investors (2007); 1. How should cartels be controlled? ; 2. Control of abuse of the market dominant position and how should a merger be conducted?; 3. Case examination techniques,

and how should other types of law execution be conducted? (2008).

The details of seminars have been provided to ICCLC member companies through distribution of its journals, and seminars have received a favorable response from them.

Through my experience in legal technical assistance and in the organization of the above-mentioned seminar, I have become aware that globalization is in progress not only in economy but in the legal field as well, and such cooperative relationships and exchange of studies between Japan and China will be further actively promoted, and it is also desirable.

## Chronological Table of Legal Technical Assistance for China

As of the end of December 2008

		Events
1921	Jul.	Foundation of the Communist Party of China
1949	Oct.	Establishment of the People's Republic of China
1954	Sep.	Adoption of the Constitution in the 1st session of the 1st National People's Congress (NPC) ("the 1954 Constitution")
1972	Sep.	Joint communiqué of Japan and China
1975	Jan.	Adoption of the Constitution in the 1st session of the 4th NPC ("the 1975 Constitution")
1978	Mar.	Adoption of the Constitution in the 1st session of the 5th NPC ("the 1978 Constitution")
	Aug.	Treaty of Peace and Friendship between Japan and China
1982	Mar.	Adoption of the "Civil Procedure Law of the People's Republic of China (tentative)" in the 20th session of the 5th NPC
	Dec.	Adoption of the Constitution in the 5th session of the 5th NPC (insertion of four characters meaning "state control by law") ("the 1982 Constitution")
1989	Jun.	The 2nd Tiananmen Square Protests
1991	Apr.	Adoption of the "Civil Procedure Law of the People's Republic of China" in the 4th session of the 7th NPC.
1992	Jan. to Feb.	Southern tour by Deng Xiao Ping (acceleration of the reform and liberalization policy)
1996	Nov.	The 1st Japan-China Civil and Commercial Law Seminar (in Tokyo) (organized by the International Civil and Commercial Law Centre Foundation [ICCLC] and supported by the Research and Training Institute [RTI])
1997	Oct.	The 2nd Japan-China Civil and Commercial Law Seminar (in Beijing) (organized jointly by the National Economic System Reform Commission and the ICCLC, and supported by the RTI)
1998	Nov.	The 3rd Japan-China Civil and Commercial Law Seminar (in Tokyo) (organized by the ICCLC and supported by the RTI)
	Nov.	Japan-China Joint Declaration on Building a Partnership of Friendship and Cooperation for Peace and Development
1999	Jun.	The 4th Japan-China Civil and Commercial Law Seminar (in Beijing) (organized jointly by the Department of Economic System Reform of the State Council and the ICCLC, and supported by the RTI)
2000	Nov.	The 5th Japan-China Civil and Commercial Law Seminar (in Tokyo) (organized by the ICCLC and supported by the RTI)
2001	Sep.	The 6th Japan-China Civil and Commercial Law Seminar (in Beijing) (organized jointly by the Department of Economic System Reform of the State Council and the ICCLC, and supported by the RTI)
	Oct.	The Government of Japan prepares an economic cooperation plan for China.
	Dec.	China accedes to the WTO.
2002	Sep.	The 7th Japan-China Civil and Commercial Law Seminar (in Tokyo and Osaka) (organized jointly by the ICCLC and RTI in cooperation with the Department of Economic System Reform of the State Council and the National Economic Trade Committee)
2003	Nov.	The 8th Japan-China Civil and Commercial Law Seminar (in Tokyo and Osaka) (organized jointly by the ICCLC, Japan External Trade Organization (JETRO) and the RTI in cooperation with the National Development and Reform Commission of the State Council)
2004	Sep.	The 9th Japan-China Civil and Commercial Law Seminar (in Beijing) (organized jointly by the National Development and Reform Commission of the State Council, the ICCLC and the RTI)
	Oct.	Invitation of an expert in the practice of intellectual property of China (till 22 Dec.)(for the study of the legal systems of Japan and China in relation to intellectual property rights)(at RTI)
	Dec.	Open lecture by the invited Chinese expert on "the comparison and prospects of the intellectual property law systems in Japan and China" (organized jointly by the RTI and ICCLC)
2005	Sep.	The 10th Japan-China Civil and Commercial Law Seminar (in Tokyo and Osaka) (organized jointly by the ICCLC, JETRO and the RTI in cooperation with the National Development and Reform Commission of the State Council [Department of Laws and Regulations])
2006	Jun.	Request for technical cooperation by the Government of China
	Sep.	The 11th Japan-China Civil and Commercial Law Seminar (in Beijing) (organized jointly by the National Development and Reform Commission of the State Council, the ICCLC and the RTI)
2007	Jun.	Dispatch of the Preliminary Survey Team of the Project to China

## Chronological Table of Legal Technical Assistance for China

		Events
	Sep.	The 12th Japan-China Civil and Commercial Law Seminar (in Tokyo and Osaka) (organized jointly by the ICCLC, JETRO and the RTI, in cooperation with the National Development and Reform Commission of the State Council)
	Oct.	Adoption of the revised Civil Procedure Law in the 30th session of the 10th NPC
	Nov.	Conclusion of the Record of Discussions (R/D) between the Commission of Legislative Affairs of the NPC and JICA on the Civil Procedure Law and Arbitration Law Improvement Project (for three years)
	Nov.	The 1st training course in Japan
	Nov.	Establishment of the Project Assistance Committee in Japan
2008	Jan.	The 1st meeting of the Assistance Committee (afterwards meetings have been held approximately once every three months.)
	Mar.	In-country seminar (in Beijing)
	Apr.	Dispatch of a JICA long-term expert (lawyer) (for 2 years)
	May	The 2nd training course in Japan
	Oct.	The 13th Japan-China Civil and Commercial Law Seminar (in Beijing) (organized jointly by the National Development and Reform Commission of the State Council, the ICCLC and the RTI)
	Nov.	The 3rd training course in Japan



## **INDONESIA**

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### **I. FROM THE COMMENCEMENT OF LEGAL TECHNICAL ASSISTANCE TO THE DRAFTING OF A POLICY PAPER AT THE 5<sup>TH</sup> SEMINAR ON COMPARATIVE STUDY OF JUDICIAL SYSTEM BETWEEN JAPAN AND INDONESIA**

After the end of the development dictatorship by the Suharto administration in May 1998, Indonesia went through four constitutional revisions, aiming at the realization of a democratic and fair society by correcting authority centralization of the president, promoting decentralization of power, etc. Among such measures, the legal and judicial system reform has, with a view to improving the investment climate and strengthening credibility in the judicial system, constantly been regarded as one of the top priority issues. This is also clear in the fact that the “building of a democratic society based on law”, the contents of which include “to reform the legal system and ensure fair and nondiscriminatory enforcement of law, especially in consideration of the poor”, is advocated in one of the seven goals of the National Long-Term Development Plan of Indonesia (2005 to 2025).

In undertaking its legal and judicial system reform, Indonesia requested Japan to provide them with legal technical assistance. In response to such a request, a survey team consisting of officials of the Supreme Court, the Ministry of Justice and the Japan Federation of Bar Associations (JFBA), was dispatched by the Japan International Cooperation Agency (JICA) to Indonesia in January 2002 and January 2003, to implement field surveys regarding the actual situation of its judicial system and general issues of its judicial system reform, and to examine the direction of Japanese future cooperation with Indonesia<sup>1</sup>. This is how Japan started its assistance for the legal and judicial system reform in Indonesia.

Moreover, in order to further explore the possibility and contents of legal technical assistance for Indonesia in detail, the International Cooperation Department (ICD) of the Research and Training Institute (RTI) annually conducted, in cooperation with JICA, a training course in Japan titled, “Seminar on Comparative Study of Judicial System between Japan and Indonesia (hereinafter “Seminar”)”, from 2002 to 2006.

Below is the outline of the content of each seminar and assistance activities related thereto:

**A. The 1st Seminar (for approx. 3 weeks in July 2002)**

Eleven participants consisting of officials of the Ministry of Justice and Human Rights (MJHR), judges, public prosecutors and lawyers made presentations on the judicial system, legal apprenticeship and training system, civil procedure, criminal justice system, anti-corruption measures, lawyers system, the status quo and issues in relation to the judicial reform in Indonesia, etc., and held discussions with Japanese participants on the problems in the judicial field in Indonesia, and expectations toward Japanese assistance.

In addition, lectures were given by Japanese legal practitioners, university professors, etc., on the Japanese legal system, legal apprenticeship, civil procedure, criminal justice system, anti-corruption approach, lawyers system, etc<sup>2</sup>.

**B. The 2nd Seminar (for approx. 1 month from June to July 2003), and Seminar on Comparative Study of Alternative Dispute Resolution (ADR) between Japan and Indonesia (hereinafter “ADR Seminar”)(for approx. 2 weeks in October 2003)**

Upon examination of the results of the 1<sup>st</sup> Seminar and of the JICA field survey, it was found that judicial stakeholders in Indonesia had a strong interest in ensuring judicial independence, transparency and efficiency, rationalization of the appeal system which may contribute to the resolution of a backlog of cases in courts, improvement of the mediation system and case management, establishment of anti-corruption measures, etc.

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<sup>1</sup> See ICD NEWS (Japanese version) No.3, pp. 117 and onwards on the details of the survey conducted in January 2002.

<sup>2</sup> See ICD NEWS (Japanese version) No. 8, pp. 103 and onwards on the details of the 1<sup>st</sup> Seminar.

Based on this finding, the 2<sup>nd</sup> Seminar was held on the theme of “comparative study of the fair and efficient management of the court system”, inviting 17 participants, namely, officials of the MJHR, judges, public prosecutors, lawyers, etc. In the seminar, lectures were given by Japanese legal practitioners, university professors, etc. on the Japanese settlement and conciliation system, ADR system, appeal system, case management, anti-corruption measures, etc., and also an open workshop was held to give participants an opportunity to present the management of civil procedure, lawyers system, prosecution system, and the status quo and issues of the judicial system reform in Indonesia<sup>3</sup> to the Japanese audience.

In the ADR Seminar, in order to respond to their strong interest in the court-annexed settlement and conciliation system, which was heightened due to the increase in the backlog of civil cases in Indonesia, four participants, mainly Justices of the Supreme Court of Indonesia, were invited to attend lectures by and exchange opinions with Japanese legal practitioners on the judicial settlement and conciliation system, ADR system, etc. and on their part made presentations on the judicial situation in Indonesia.

On the other hand, a JICA project formulation advisor was dispatched to Indonesia in September 2003 for a period of one year to research the actual status of the judicial system and the judicial reform of Indonesia, and to make assistance plans<sup>4</sup>.

### **C. The 3<sup>rd</sup> Seminar (for approx. 1 month from June to July 2004)**

Based on the results of the 2<sup>nd</sup> Seminar, ADR Seminar, and of the field survey by the above-mentioned JICA project formulation advisor, in October 2003 the Supreme Court of Indonesia announced the “blueprint”, which included the analysis on the status quo and plan of the court reform, and the following matters were made clear therein:

- The “existence of a huge backlog of cases at the Supreme Court” was positioned as an important issue to be resolved; and
- A proposal was made, as a measure to reduce the backlog of cases, to promote the ADR system including mediation, and to impose stricter requirements for appeal to the Supreme Court.

Thus, based on this blueprint, a three-year plan was designed with focus on the “comparative study regarding the fair and efficient management of the civil dispute resolution system”, aimed at making detailed proposals for the realization of such a system in Indonesia by fiscal year 2006. This plan included the introduction of the settlement and conciliation system of Japan, a mechanism for rationalization of appeal cases through restrictions on appeal, etc., simple trial systems targeting smaller size disputes, such as the

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<sup>3</sup> See ICD NEWS (Japanese version) No. 12, pp. 191 and onwards on the details of the 2<sup>nd</sup> Seminar.

<sup>4</sup> See ICD NEWS (Japanese version) No. 16, pp. 17 and onwards on the result of the survey regarding the status quo of the Indonesian judicial reform as of the first half of 2004, and the examination status regarding the direction of Japanese future legal technical assistance.

small claims system of Japan, etc., and exchange of opinions with judicial stakeholders of Indonesia for the above objective.

In the 3<sup>rd</sup> Seminar, which was conducted in the first year of the above three-year plan, Japanese legal practitioners, university professors, etc. gave lectures on the Japanese settlement and conciliation system, persuasive mediation skills, the appeal system, etc. to 12 participants, which included MJHR officials, judges, lawyers and others. The participants were given an opportunity to observe the conciliation procedure, etc. at summary courts, and to make presentations on the judiciary, the status quo of and problems in the judicial system reform in Indonesia<sup>5</sup>.

On the other hand, another JICA project formulation advisor was dispatched to Indonesia in October 2004 for the duration of two years, to continuously research the actual situation of its judicial system and judicial reform, and to examine assistance plans. Moreover, he engaged in assistance in the revision of the bench book (a guideline on the court procedure and court management) till March 2006 for smooth case management by Indonesian courts.<sup>6</sup>

#### **D. The 4<sup>th</sup> Seminar (for approx. 2 weeks in December 2005)**

As the results of the 3<sup>rd</sup> Seminar and the field survey conducted by the above-mentioned JICA project formulation advisor, the following facts were made clear:

- The judicial administrative authority over lower courts was transferred from the MJHR to the Supreme Court in May 2004, thereby establishing the basic structure where the whole court system would make concerted efforts for judicial reform.
- The “accelerated resolution of a backlog of cases at the appeal instance” was incorporated in the activities for the Program of Capacity-building of Judicial Institutions and Other Law Enforcement Organizations”, among national development priority issues for the “creation of democratic and fair Indonesia”, one of the three agendas of the Medium-term National Development Plan (2004 to 2009); and
- As a measure to promote the mediation system, the Supreme Court regulation PERMA, No. 2, 2003, which prescribed the implementation of mediation in the opening of the first-instance procedure, was enacted and put into force in September 2003.

Based on these findings, the 4<sup>th</sup> Seminar, which was conducted in the 2<sup>nd</sup>-year of the above-mentioned three-year plan, dealt with the actual situation of the settlement and conciliation system, the special procedure, such as the small claims procedure, at the

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<sup>5</sup> See ICD NEWS (Japanese version) No. 17, pp. 28 and onwards on the details of the 3<sup>rd</sup> Seminar.

<sup>6</sup> See ICD NEWS (Japanese version) No. 30, pp. 135 and onwards on the research of the status quo of the judicial system and judicial reform, examination of assistance plans, assistance in the revision of the bench book, etc. which were conducted for two years from October 2004.

summary courts in Japan, etc., and the provisions of information thereon, by Japanese legal practitioners to 12 participants, mainly MJHR officials, judges and lawyers.

These participants had an opportunity to visit summary courts and to make presentations on the status quo of the practice of mediation in Indonesia. Based on such exchange of information and discussions with Japanese legal practitioners, the participants prepared policy proposals for promoting court-involving ADR procedure.

In the course of such discussions, the participants presented several opinions for improving the mediation system; For example, they expected to:

- immediately improve the quality of mediator judges through training;
- revise the above-mentioned Supreme Court regulation, which had been criticized as being problematic and difficult to apply in judicial practices, since it did not allow judges in charge of specific cases to conduct mediation in the course of adjudication, etc.; and
- broadly disseminate the content of the Supreme Court regulation, etc.

On the other hand, the summary court system was regarded as an issue to be examined with a long-term view in the revising process of the Civil Procedure Code, etc.<sup>7</sup>.

Meanwhile, in Aceh, after being severely affected by the earthquake off the coast of Sumatra and the resulting tsunami that occurred in December 2004 and in March 2005,



numerous inheritance-related disputes occurred beyond the capacity of courts since early 2006, and ADR was deemed to be an effective early resolution thereof. Against this background, JICA organized, in cooperation with the JFBA, etc., the “Seminar on ADR for affected people in Aceh”, where Japanese

legal practitioners, university professors, etc. introduced the Japanese ADR system, practical dispute disposition models, etc. to judges, lawyers, etc. in Aceh, using JICA-Net, the TV conference system, and received a lot of response to it.

#### **E. The 5<sup>th</sup> Seminar and drafting of a policy paper (for approx. 2 weeks in July 2006)**

Through the 3<sup>rd</sup> and 4<sup>th</sup> Seminars, it was made clear that among possible solutions for the accelerated resolution of a backlog of cases at courts, that is, the summary court procedure for small-size disputes, restrictions on appeal and the mediation system, Indonesia had much interest in the immediate improvement of the mediation system.

Moreover, in fiscal 2006, the last year of the above-mentioned three-year plan, it was

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<sup>7</sup> See ICD NEWS (Japanese version) No. 26, pp. 32 and onwards on the details of the 4<sup>th</sup> Seminar.

aimed to make detailed proposals for the realization of an efficient civil dispute resolution system in Indonesia.

Therefore, it was decided to focus, in the 5<sup>th</sup> Seminar, on the compilation of a draft policy paper for improving the mediation system in Indonesia, based on the knowledge and information to be provided on the actual status of settlement and conciliation in Japan,

Specifically, the following activities were included in the seminar curriculum for 12 participants consisting of MJHR officials, judges and lawyers, who were selected from among the participants in the past four seminars:

- Lectures given by Japanese legal practitioners on the actual situation of settlement and conciliation practices at courts, bar associations, etc. of Japan;
- Mock mediation using textbooks and a DVD for training mediators, which were prepared by the JFBA and the Japan Commercial Arbitration Association in commission by the Ministry of Economy, Trade and Industry; and
- Observation of the conciliation procedure, etc. at summary courts, etc.

Through these activities, the participants divided into three groups of MJHR officials, judges and lawyers prepared and presented their draft policy paper regarding proposals on the future actions to be taken to improve the mediation system in Indonesia, the outline of which is explained below;

- (i) In order to revise the Supreme Court regulation PERMA No.2, 2003, which had been criticized as being problematic for practical application, a special team will be established and the introduction of the Japanese judicial settlement system, etc., will be examined;
- (ii) The mediation system will be integrated in the civil procedure through legislation in the future;
- (iii) The medication system will be disseminated to mediators through training courses, seminars, etc.;
- (iv) The relationships among bar associations, university law faculties and courts will be strengthened to give lectures, etc. on the mediation system to law students, etc.;
- (v) In order to enhance the mediation system, opportunities for discussions will be given to stakeholders.
- (vi) Collection of literature and studies on the ADR system will be conducted.
- (vii) Legislation regarding the ADR system covering arbitration, settlement and mediation will be enacted.
- (viii) A private ADR agency will be established by bar associations.

(ix) A free legal aid service center will be established by bar associations<sup>8</sup>.

Thus, through five seminars in total and other activities, judicial stakeholders of Japan and Indonesia conducted comparative studies, exchanged opinions on the judicial systems of both countries, and examined measures for improvement of the Indonesian legal system, etc. Based on which, proposals were made on the detailed action plans to improve the mediation system of Indonesia, which was conducive to the creation of an appropriate environment for the formulation of a new Japanese legal assistance project for the country.

## **II. AGREEMENT ON THE COMMENCEMENT OF THE PROJECT ON IMPROVEMENT OF MEDIATION SYSTEM IN INDONESIA**

Based on the above-mentioned presentation of the draft policy paper, a JICA ex-ante evaluation study team, which included an ICD government attorney, was dispatched to Indonesia for the project on improvement of mediation system from 24 to 30 September 2006, and discussions were held with the Supreme Court of Indonesia, the beneficiary of the project, for the formulation of the project. Moreover, questionnaire surveys were conducted at the non-governmental training institutions for mediators certified by the Supreme Court (hereinafter “mediator training institutions”) and other related agencies.

Consequently, the Minutes of the Meeting between the above team and the Supreme Court of Indonesia were signed on the 29<sup>th</sup> of September to commence the Project on Improvement of the Mediation System (hereinafter “Project”)<sup>9</sup>.

Below is the outline of the content of the agreement concluded in the above-mentioned meeting, which incorporated the nucleus of the presented policy paper as project components and activities:

1. Duration: 2 years from March 2007
2. Beneficiary: the Supreme Court of Indonesia
3. Project objective: The court-annexed mediation system will be improved.
4. Components to attain the project objective:
  - (i) The revised Supreme Court regulation PERMA No. 2, 2003 (hereinafter “the revised regulation”), will be drafted.
  - (ii) The devices necessary for training of mediators will be improved.
  - (iii) The court-annexed mediation system will be disseminated to the general public.
5. Detailed activities for each component
  - (i) Drafting the revised regulation

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<sup>8</sup> See ICD NEWS (Japanese version) No. 30, pp. 114 and onwards on the details of the 5<sup>th</sup> Seminar and the draft policy paper.

<sup>9</sup> See the report published in ICD NEWS (Japanese version) No. 30, as indicated above (Note 8) regarding the outline of the background to the commencement of the Project.

- To set up a working group (WG) within the Supreme Court to revise the said regulation;
  - To conduct workshops for collecting the necessary materials to draft the revised regulation;
  - To draft the revised regulation including articles on the mediation procedure, qualifications and selection of mediators, and mediation fee;
  - To prepare a Q&A book on the revised regulation as a dissemination tool and material for training mediators
  - To conduct workshops to solicit inputs from wider stakeholders
- (ii) Improvement of the devices necessary to train mediators
- To set up a WG within the Supreme Court to make necessary devices for the training of mediators;
  - To examine and improve the curriculum for the training of mediators;
  - To examine and improve materials for training mediators;
  - To conduct training for mediator trainers, including judges, lawyers and others
- (iii) Dissemination of the court-annexed mediation
- To prepare dissemination materials on the court-annexed mediation system
  - To hold workshops and seminars to disseminate the contents of the revised regulation and the new training system of mediators

## 6. Project implementation structure in Indonesia

At the conclusion of the agreement on the commencement of the Project, the Chief Justice of the Common Civil Court of the Supreme Court was appointed as the project director, and a WG consisting of 17 members, including Justices of the Supreme Court and judges of district courts, lawyers, university professors, representatives of the mediator training institutions, etc., was set up to revise the Supreme Court regulation PERMA No. 2, 2003. The revision work preceded other two components of the Project.

## 7. Project implementation structure in Japan

- (i) Dispatch of one long-term expert (to give advice for improvement of the mediation system, to organize workshops, etc.)

After the conclusion of the agreement, it was decided to dispatch a practicing lawyer to Jakarta for two years from March 2007.

- (ii) Dispatch of short-term experts (to give advice for improvement of the mediation system, to provide technical guidance, etc.)
- (iii) Annual training in Japan in cooperation with the RTI and the JFBA
- (iv) Set-up of a domestic assistance committee (“Advisory Group for the Project on Improvement of Mediation System”, hereinafter “Advisory Group”, to give

advice on local assistance activities, dispatch short-term experts, etc.)

After the conclusion of the agreement on the commencement of the Project, it was decided to establish an advisory group with the following members:

- Yoshiro Kusano, professor of the Law School, Gakushuin University (former judge of the Hiroshima High Court)
- Kazuto Inaba, professor of the Law School, Chukyo University (former judge of the Osaka District Court)
- Mr. Kimitoshi Yabuki, Vice Chairman of the Committee on International Relations, JFBA
- Mr. Tsutomu Hiraishi, practicing lawyer
- Government attorney in charge of Indonesia in the ICD

With regard to the administration of the Advisory Group and administrative affairs in relation to training courses in Japan, the International Civil and Commercial Law Centre Foundation (ICCLC) took charge thereof jointly with JICA<sup>10</sup>.

### **III. IMPLEMENTATION STATUS OF THE PROJECT (MARCH 2007 TO DECEMBER 2008)**

#### **A. Drafting of the revised regulation (Component 1)**

Among the three components of the Project, activities to revise the Supreme Court regulation, which provided for mediation at the beginning of the first-instance trial procedure, preceded those of other components.

Since April 2007, just after the arrival of the long-term expert in Indonesia, the Indonesian WG for the revision of the said regulation started its full-scale activities, including monthly or bi-weekly meetings with the long-term expert at the Supreme Court of Indonesia till the middle of March 2008. In these meetings, the WG first collected information regarding the mediation system in Japan and similar systems in other countries from the long-term expert and the Advisory Group, and based on such information and results of door-to-door surveys conducted at several district courts, they extracted problems of the said regulation and repeatedly held discussions on the desirable direction for its revision. In parallel, they undertook the revising work of the Supreme Court regulation by reflecting the

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<sup>10</sup> In addition to the above-mentioned long-term expert and the Advisory Group, the following personnel has also engaged in the Project: 1) Ms. Noriko Yobiko (training coordinator of the Japan International Cooperation Center, an invaluable asset capable of interpreting and translating very precisely, being familiar with legal terms in both Japanese and Indonesian languages), has consistently provided consecutive interpretation service in training courses held in Japan and workshops in Indonesia; and 2) Mr. Sozaburo Kawata, who has an experience in assistance activities in Indonesia, has provided support for the Project by taking minutes at Advisory Group meetings, training in Japan, etc. since 2008. Thus, the continuous and active engagement of such experts in mediation and other personnel in legal assistance for Indonesia has been the biggest drive for the progress of the Project

results of their discussions.

In the process of collection of information, discussion and drafting, the long-term expert and the Advisory Group actively and continuously provided assistance. Between April 2007 and March 2008 five Advisory Group meetings were held, where the long-term expert made detailed reports on the progress of the drafting work by the Indonesian WG, including presentation of the draft revised regulation, and based on which the Advisory Group offered such assistance as: provision of their knowledge on the Japanese settlement and conciliation system, giving comments on the draft revision, and planning and coordination of training courses in Japan, etc.

In August 2007 and March 2008, in-country seminars were held jointly by the Supreme Court of Indonesia and JICA in Jakarta through preparation by the long-term expert based on the results of discussions with the Advisory Group. In both seminars Professor Kusano and an ICD government attorney participated as short-term experts. In terms of their contents, in the former seminar, Professor Kusano gave lectures on the Japanese settlement and conciliation system to Indonesian WG members, judges, jurists, mediators, etc. followed by questions and answers with the participants. Moreover, after WG draftsmen explained the status quo of discussions on the draft revised regulation, the participants gave a lot of comments thereon based on their practical experiences<sup>11</sup>.

In the following in-country seminar held in March 2008, Professor Kusano gave lectures to participants composed of WG members, judges, jurists, mediators, etc., on the important issues of the Japanese settlement and conciliation system and of the “settlement in the appeal instance”, “immediate settlement” and mediation skills which drew special attention during the drafting process of the revised regulation, and subsequently a Q&A session was held. In addition, WG draftsmen explained the content of the draft revised regulation, which had been almost completed.

In between these two seminars, in relation to the Project the first training course was held in Japan by the ICD, RTI, in cooperation with JICA, from 22 October to 2 November 2007, with focus on the following contents:

- Provision of knowledge and information regarding the Japanese settlement and conciliation system and discussions for the purpose of revising the Supreme Court regulation (component 1); and
- Provision of knowledge and information regarding the Japanese settlement and conciliation techniques for improving the necessary devices to train mediators (component 2, to be explained).

In the above-mentioned first activities, 12 participants in total consisting of WG

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<sup>11</sup> See ICD NEWS (Japanese version) No. 32, pp. 219 and onwards on the details of the 1<sup>st</sup> in-country seminar in 2007.

members, that is, judges, lawyers, law professors, etc., had opportunities to visit a summary court and bar associations to be taught about the Japanese conciliation procedure, etc. by legal practitioners, and to attend lectures on the Japanese settlement and conciliation system by the long-term expert and Professor Kusano. Accordingly, the participants discussed the direction of revision on each issue pointed out by the long-term expert in relation to the draft revised regulation as of the time when the training course was held, and elaborated their draft by reflecting on comments given by Professor Kusano<sup>12</sup>.

The revised regulation drafted by the WG through a series of these activities was submitted to the Judicial Council of the Supreme Court in April 2008, and thereafter till the end of July 2008 further detailed examinations and amendments were conducted at the said Council and on the occasion of the 2<sup>nd</sup> training course in Japan (held from 7 to 18 July 2008).

Finally on 31 July of the same year, the revised Supreme Court regulation PERMA No. 1, 2008 regarding the court-annexed mediation procedure was put into force with a signature by the Chief Justice of the Supreme Court.

The outline of the major revised points is as follows:

- (i) Judgments rendered without referring cases concerned to the mediation procedure as prescribed in the revised regulation shall be void;
- (ii) Parties concerned shall have the right to choose mediators from among judges (including judges of the court of suit), lawyers, jurists and non-lawyers (experts in disputes);
- (iii) Mediators shall need to have a mediator certificate in principle, which can be obtained upon completion of training implemented by the mediator training institutions (provided, however, on the assumption that no certified mediator is available in provincial courts, etc., it is also prescribed that in case of no certified mediator, a judge can serve as a mediator);
- (iv) The mediation period shall be, after the selection and appointment of mediators, 40 days in principle; provided, however, in case of an agreement by both parties concerned this period may be extended for up to 14 days;
- (v) Mediators shall not just wait for the result of mediation, but actively engage in mediation. Concretely, they shall plan mediation sessions, conduct alternate interviews with parties concerned, encourage them to settle their cases, declare the failure of mediation and others;
- (vi) Even in case of failure in mediation, the judge handling the case concerned shall urge the parties to reach an agreement or try mediation at any stage throughout the court procedure till rendition of a judgment;

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<sup>12</sup> See ICD NEWS (Japanese version) No. 34, pp. 146 and onwards on the details of the 1<sup>st</sup> training seminar held in Japan in 2007 in relation to the Project.

- (vii) In case of an agreement by both parties concerned, mediation can be tried at the second, third instances and retrial until a judgment is handed down; and
- (viii) When parties concerned have prepared a mediation agreement through an out-of-court dispute resolution with an aid of a certified mediator, they may file a suit before the competent court by submitting the mediation agreement in order to seek a mediation judgment.

Consequently, the revised regulation incorporated the expertise of the Japanese settlement and conciliation system (referral of cases to conciliation during the court procedure, settlement in the appeal instance, immediate settlement, all-time attempt of mediation till rendition of a judgment, etc.) in a harmonious way with the civil procedure of Indonesia.

On the other hand, with regard to the Q&A book on the revised regulation, with the intent to use it as a dissemination device and mediator training material, an editing team was set up in the middle of February 2008 composed of Supreme Court officials, including WG members, and officials of the mediator training institutions. Through repeated meetings with the long-term expert, the editing team completed the commentary and Q&A book in September of the same year, which mainly consisted of 1) an explanation on the contents of the revised regulation; 2) Q&A on the contents of the revised regulation, etc; 3) sample court document formats; and 4) a procedure flow chart. At present, they are expecting to obtain a signature of the responsible official of the Supreme Court for their publication<sup>13</sup>.

## **B. Improvement of devices necessary for training mediators (Component 2)**

With regard to Component 2, at the conclusion of the agreement on the commencement of the Project, the activities mentioned above in II. 5. (ii) were scheduled on the premise that the Supreme Court of Indonesia, the beneficiary of the Project, itself would plan, design and implement mediator training courses. However, through surveys conducted by the long-term expert, it was found that the Supreme Court itself did not organize such training, but it just certified its related mediator training institutions, which were totally vested with the power to plan, design and implement training for mediators. Since it was difficult for Japan, within the framework of the Project, to provide technical assistance to such mediator training institutions without any involvement of the Supreme Court, the project beneficiary, discussions were held among the Supreme Court, the long-term expert, the Advisory Group, etc., to build a technical assistance plan as follows with the involvement of the Supreme Court by around April 2008:

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<sup>13</sup> It has been necessary to obtain a signature of the Chief Justice of the Supreme Court for their printing and publication. However, as this post has been vacant after the retirement of the then Chief Justice in October 2008, it is under examination whether or not it can be substituted by Deputy Chief Justice's signature.

- (i) The Supreme Court shall designate four district courts located near Jakarta as pilot courts where mediation practices shall be promoted based on the revised regulation and its progress shall be monitored.
- (ii) Each pilot court shall select five judges and four court clerks in charge of mediation based on the revised regulation to have them take training courses for trainers of mediators (three training courses, which lasted 88 hours in total for judges, and 40 hours for court clerks, were held between August 2008 to March 2009), which are conducted by the mediator training institutions. Upon completion thereof, participants will obtain a certificate as trainers of mediators, while judges will also acquire a qualification as mediators (Those who have completed the said training are expected to be trainers in the training seminars for trainers of mediators based on the revised regulation, which will be organized by the Judicial Training Center of the Supreme Court as explained later).
- (iii) The WG to be set up within the Supreme Court for improvement of the necessary devices for training mediators shall newly prepare a syllabus, curriculum and teaching materials in relation to the above-mentioned training courses for trainers of mediators. The materials to be prepared shall be the commentary and Q&A book as mentioned in Component 1, and a training DVD on mediation skills.

The new creation of the said DVD was driven by the increased awareness of the participants in the 1<sup>st</sup> training course held in Japan for the Project, as explained in III. A. above, on the fact that participatory programs, such as role playing, are effective to learn elaborate mediation skills, and that for that purpose preparation and use of audiovisual aids are helpful. More precisely, the following curriculum of the 1<sup>st</sup> training enhanced their recognition:

- In providing knowledge and information regarding the Japanese settlement and conciliation skills with a view to improving the devices necessary for training mediators, Professor Kusano gave lectures on the Japanese mediation skills and performed mock mediation;
- Professor Inaba presented a mediator training DVD, which he had produced himself in commission by the Ministry of Economy, Trade and Industry, gave lectures on mediation skills; and made a demonstration of mock mediation together with Mr. Hiraishi, practicing lawyer.

The WG for improvement of the devices necessary for training mediators, composed of a researcher of the Supreme Court (currently the Secretary General of the Judicial Training Center of the Supreme Court) and four major staff members of the mediator training

institutions, was established and started its operation in March 2008. They held bi-weekly meetings with the long-term expert till August 2008, and subsequently as necessary, to prepare and revise the syllabus and curriculum for training mediator trainers.

The selection of four pilot courts by the Supreme Court was carried out by May 2008.

Among teaching materials, the drafting of the commentary and Q&A book, as mentioned above, was undertaken by the editing team till September 2008.

Regarding the Indonesian version DVD for training of mediation skills, the draft script and storyboard prepared by Professor Inaba and the Advisory Group through discussions were presented to the Indonesian WG via the long-term expert, and their comments reflecting the actual situation of Indonesia were taken into consideration in revising and further elaborating the DVD.

Moreover, the 2<sup>nd</sup> training course for the Project was held in Japan by the ICD, in cooperation with JICA, from 7 to 18 July 2008. As the activities for improvement of the necessary devices for training mediators were already underway at that time, it was decided, through consultation between the long-term expert and the Advisory Group, to focus on the provision of opportunities to participants to gain more practical information and knowledge on the Japanese mediation skills, the role of court clerks in the settlement and conciliation procedure, mediator training system, etc. More specifically, the following activities were incorporated in this training course for 12 participants in total, which consisted of judges, lawyers, law professors and major officials of the mediator training institutions who were members of the WGs for revising the Supreme Court regulation and for improving the devices necessary for training mediators, and chiefs and deputy chiefs of the four pilot courts:

- (i) Visiting mediation-related institutions such as a bar association, a district court, a family court, the Japan Legal Support Center, to get information on Japanese ADR practices, etc.;
- (ii) Attending lectures by Professor Kusano on Japanese mediation skills, by Professor Inaba on the training methods of mediators using the training DVD, etc., and by three former Chief and Deputy Chief Court Clerks including Mr. Mitsuki Kubota<sup>14</sup>, on the roles of court clerks in the settlement and conciliation procedure in Japan, etc.; and
- (iii) Conducting role plays of settlement (with Professor Kusano) and conciliation (with Professor Inaba), based on the model cases prepared by both professors, and based on which, discussing and sorting out desirable and undesirable skills, etc. with both professors and the above-mentioned former Chief and Deputy Chief Court Clerks<sup>15</sup>.

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<sup>14</sup> Namely, Mr. Mitsuki Kubota and Mr. Kiyoshi Suka, former Chief Court Clerks; and Ms. Kimiko Shigematsu, former Deputy Chief Court Clerk

<sup>15</sup> See ICD NEWS (Japanese version) NO. 36, pp. 178 and onwards on the details of the 2<sup>nd</sup> training course in Japan for the Project

Continuous efforts to reflect the knowledge and information gained through this training course into the syllabus and curriculum of training for mediators, and into the Indonesian version training DVD were made by the long-term expert and WG members for improving the devices necessary for training mediators.

Moreover, for 20 judges and 16 court clerks in total selected by each pilot courts, the first and second training courses for the development of mediator trainers based on the revised regulation were delivered by the mediator training institutions from 25 to 29 August 2008 (till 27 August for court clerks) and from 3 to 5 November (only on 3 November for court clerks) 2008, respectively. In these training courses the syllabus and curriculum newly drafted in the Project and the teaching materials still under preparation were used, and their curricula consisted of (i) explanation on the revised regulation; (ii) training in mediation skills through role play, etc.; (iii) sharing of experiences in the operation of the mediation system based on the revised regulation in each pilot court, which started in September 2008; and others. In the 1<sup>st</sup> training, Professor Kusano gave lectures on the Japanese settlement system, and in the 2<sup>nd</sup> training, Professor Inaba and Mr. Hiraishi, practicing lawyer, who were dispatched to Indonesia as short-term experts, carried out a participatory training program on mediation skills, etc. using Japanese training DVDs, etc.



While these training courses placed emphasis on the provision of information and knowledge for each participant to become a fully-fledged mediator, the 3<sup>rd</sup> training course (final) to be held from 16 to 18 February 2009 will focus on the instruction on teaching methods, etc. with a view to facilitating participants to become mediator trainers in the future. For the organization of the final training course, the long-term expert and the WG for improvement of the devices necessary for training mediators, are preparing a training syllabus, curriculum, etc., and under the guidance of Professor Inaba, they will intend to conduct shooting and other necessary works to complete the Indonesian version training DVD by the end of 2008, so that it can be used in the last training course.

### **C. Dissemination of the mediation system by courts (Component 3)**

Full-scale activities of Component 3 have been developed since the enforcement of the revised regulation, the nucleus of dissemination activities, on 31 July 2008, and to that effect a distribution leaflet containing information on the revised regulation was prepared in the

Indonesian language as a dissemination material<sup>16</sup>.

In addition, the following dissemination activities, including workshops, seminars, etc., were organized by the Supreme Court of Indonesia:

- (i) From 4 to 7 August 2008, the National Judicial Conference was held in Jakarta, where the revised regulation was presented and the above-mentioned leaflets were distributed to approximately 1,800 judges, and lectures were given on the revised regulation in the session on civil procedure.
- (ii) On 21 October 2008, a dissemination seminar on the revised regulation was held in Jakarta, where about 140 judges, mediators, arbitrators, etc. received the above leaflet and attended lectures on the revised regulation, the court-annexed mediation system, etc.
- (iii) On 3 November 2008, a dissemination seminar on the revised regulation and the ADR system was organized in Bandung City for the city medical association, lawyers, etc., where the afore-mentioned leaflets were distributed and explanation was given on the revised regulation to about 150 doctors, lawyers, etc.
- (iv) In November 2008, on the occasion of guidance in provincial areas, Supreme Court Justices carried out dissemination activities on the revised regulation by distributing leaflets, etc.

Currently, the long-term expert and the Supreme Court are examining the possibility of organizing dissemination seminars for the Japanese community, bar associations and in local areas.

#### **IV. ACTIVITIES PLANNED BY THE END OF THE PROJECT (END OF MARCH 2009) AND FUTURE CHALLENGES**

##### **A. Drafting the revised regulation (Component 1)**

Following the enforcement of the revised regulation, it has been planned, within the framework of the Project, to print and publish a commentary and a Q&A book on the revised regulation with a signature of a responsible official of the Supreme Court in Indonesia.

On the other hand, while the revised regulation provides that another regulation shall be enacted on the code of ethics of mediators and incentives for successful judge mediators, no collection of information for such purpose or drafting work has been initiated yet. Moreover, no provision or even discussion on the provision of remuneration for non-judge mediators

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<sup>16</sup> The commentary and Q&A book, dissemination materials that have been drafted in the course of the Project, have not been printed and distributed yet due to the absence of, and therefore no signature by the responsible official of the Supreme Court. See Note 13.

(the revised regulation provides for no rewards for judge mediators) has been drafted or started yet. According to the Supreme Court of Indonesia, as the mediation procedure is prescribed in the revised regulation, the court-annexed mediation system can be operated for some time to come without such provisions as above. However, as Indonesia has constantly faced the big challenge of securing judicial integrity and reliability, it is desirable to expeditiously establish provisions on the code of ethics and remuneration for mediators. In addition, it is required to immediately examine and decide the contents of provisions on incentives for judges for further establishment of the court-annexed mediation system based on the revised regulation.

Future legislation on the general mediation system will also be necessary as the court-annexed mediation system is prescribed only at the level of Supreme Court regulations.

With regard to the commentary and Q&A book, although several efforts were made, such as such as provision of comments on each article of the revised regulation, attachment of sample document formats and a procedure flow chart, to make them better than the existing same types of books, etc., appropriate revisions for their practical use will be necessary by further improving explanations on the complicated procedure, such as the mediation system in the appeal instance, etc.

## **B. Improvement of the devices necessary for training mediators (Component 2)**

For the purpose of Component 2, the preparation of a syllabus, curriculum and Indonesian version training DVD is scheduled in order to hold the 3<sup>rd</sup> training course for mediator trainers based on the revised regulation in February 2009.

In addition, after the implementation of the 3<sup>rd</sup> training course for mediator trainers, it is also planned within the Project activities to: 1) sort out points to be improved in the syllabus, curriculum and teaching materials used in the training course; and upon examination thereof and of the problems in relation to the practice of mediation to be found in the examination process at the pilot courts<sup>17</sup>; and 2) revise such syllabus, curriculum and teaching materials appropriately in order to: i) be used in the training of mediator trainers to be conducted by; and to ii) be kept at the Judicial Training Center of the Supreme Court. This activity plan has been formulated in response to the request from the said training center to Japan from summer through November 2008. The Judicial Training Center intends to organize training of mediator trainers for dozens of judges and court clerks after spring 2009, and for this purpose they are planning to appropriately revise the syllabus, curriculum and teaching materials of the last training course to be finished on 18 February 2008, by reviewing and extracting

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<sup>17</sup> Examination has been conducted twice so far, but not a significant volume of information has been accumulated due to the elapse of a very short time period since the commencement of mediation practice at the pilot courts. Therefore, it is planned to continually examine problems in practice after 2009 as well.

problems thereof, so that such revised syllabus, curriculum and teaching materials can be used in the future training by the said center. In the course of such planning, they requested Japan to assist them in the preparation and implementation of their training courses, and Japan decided to accept it based on the idea that such assistance would be necessary as part of the “improvement of the devices necessary for training mediators”.

At present, selection and examination of i) points to be improved in the above-mentioned syllabus, curriculum and teaching materials to be used in the last training course and of ii) problems in practice in each pilot court are scheduled from the end of February to the middle of March 2009 for their revision.

However, as multiple problems that cannot be overlooked have been found, there is a concern that many more problems will be detected in the future examination at the pilot courts and in the review of training courses for mediator trainers. Therefore, it may be a big challenge whether or not the syllabus, curriculum and teaching materials can be substantially revised in a short time resolving such problems found.

Aside from this issue, how the Judicial Training Center of the Supreme Court can be equipped with a mechanism, sufficient budget, and capacity to autonomously and continually prepare and implement such training in the future will be another big challenge.

Furthermore, in order to promote and establish the mediation system based on the revised regulation, it is required to actively promote the mediation system, and continuously examine and feed back the result of such promotion for a certain period of time at the designated pilot courts. In addition, it may be necessary to carry out a similar process as above in a broader area than the areas where the pilot courts are located. Thus, it may be also a major issue how the Supreme Court can establish the necessary system, budget and capacity to plan, implement and manage operations of pilot courts in broader areas.

Below is the outline of the already-found problems that cannot be ignored as mentioned above:

- (i) In the training courses for mediator trainers conducted so far, their curricula have lacked a practical approach such as the sharing and review of successful and failing experiences deemed necessary for judges and court clerks to put them into practice in the actual management of mediation, and to train their colleagues, or role plays on how to handle difficult cases, etc.
- (ii) The quality of training for court clerks is poor and it is also difficult to secure enough trainers for them.
- (iii) Due to a lack of intensive provision of information and knowledge regarding the introduction of new systems for Indonesia, such as the use of immediate settlement or settlement in the appeal instance, as prescribed in the revised regulation, these systems have not been fully used in the practical operation of mediation in the pilot

courts.

- (iv) It has been only three months or so since the commencement of practical operation of mediation based on the revised regulation at the pilot courts. Therefore, no sufficient practical cases with sufficient quality have been accumulated to appropriately review examples of mediation success and failure.

### **C. Dissemination of the mediation system by courts (Component 3)**

Dissemination activities of the mediation system have been developed so far to a significant degree for judges in the capital, Jakarta and its neighboring areas, and it is examined, as part of the project activities, whether or not it is possible to implement dissemination seminars for the Japanese community, bar associations, and in local areas. As the Japanese community (especially company stakeholders) may expect an expeditious and appropriate resolution of civil and commercial disputes through mediation in Indonesia, and practicing lawyers will be involved, with a high possibility, in mediation as the representatives of parties concerned or mediators, it is necessary to disseminate the new mediation system to them. Moreover, in order to further promote the establishment of the new mediation system in Indonesia, a country with a vast area of land, dissemination of the new system in local areas is crucial. It presents another big challenge to consider to what extent dissemination activities can be expanded in both quality and quantity to such people concerned.

## **V. CONCLUSION**

As explained so far, legal technical assistance for Indonesia has been developed, supported by the enthusiasm of the persons concerned in the judiciary in both Japan and Indonesia, through implementation of numerous seminars, and finally in the form of a project. After the commencement of the project as well, significant achievements have been made thanks to the strenuous efforts by the judicial officials and legal professionals involved in both countries.

At the same time, however, it must be admitted that a lot of issues still remain unresolved for the mediation system based on the revised regulation to be firmly established.

In Indonesia, where it has not been so long since its democratization, as already partly found through implementation of seminars, there seem to be many elements that need to be improved, in consideration of assistance from other donor countries, in terms of legislation, law enforcement, dissemination of law to citizens, legal training, and legal education.

As a result of the evaluation of the Project in November 2008, it was decided to finish the Project by the end of March 2009. However, constant attention needs to be directed to the

court-annexed mediation system based on the revised regulation for its promotion and establishment and it may also be necessary to explore the future direction of Japanese legal technical assistance based on the recognition of the actual status of, and awareness of the problems existing in the legal and judicial system reform in Indonesia.

## Chronological Table of Legal Technical Assistance for Indonesia

As of the end of December 2008

Events (forms of address are omitted)		Assistance projects, etc.
1602		The Netherlands established the Dutch East India Company (VOC) in Batavia and became the dominant European power.
1945		Declaration of independence of Indonesia
1967	Aug.	Accession to ASEAN
1968-1998		Governance by President Suharto
1989	Nov.	Accession to APEC
1995	Jan.	Accession to the WTO (Accession to GATT on 24 February 1950)
1997		Asian currency crisis
1998	May	Suharto resigned and Habibie took the presidency.
	Oct.	Training course for Indonesia (on economic law) (for about 2 months till 25 November for 20 judges, public prosecutors, etc. regarding bankruptcy law, security law, market-related law, judicial and non-judicial dispute resolutions, etc.)
1999	Apr.	Judicial survey in Indonesia (by a government attorney of the Research and Training Institute [RTI] till 3 May)
	Oct.	Wahid took the presidency
	Oct.	Amendment to the Constitution (1st amendment)
2000	Jun.-Oct.	Study group on the antitrust law of Indonesia (a workshop was held in Jakarta on 24 and 25 October by the Ministry of Economy, Trade and Industry [METI] and the Institute of Developing Economies)
	Jul.	The 1st APEC Economic Law Symposium in Jakarta co-hosted by the METI, Japan External Trade Organization (JETRO), the Ministry of Foreign Affairs (MOFA) of Indonesia, etc.
	Aug.	Amendment to the Constitution (2nd amendment)
2001	Jan.	Mr. Koumura, Minister of Justice of Japan, visited the Minister of Justice and Human Rights of Indonesia.
	Feb.	Field survey in Indonesia by ADR Study Group (by Lawyer Ohara and one more member till 25 February, co-hosted by the International Civil and Commercial Law Centre Foundation [ICCLC] and the International Cooperation Department [ICD])
	Jul.	Megawati took the presidency.
	Nov.	Amendment to the Constitution (3rd amendment) The Minister of Justice and Human Rights of Indonesia visited the Minister of Justice of Japan, Ms. Moriyama.
2002	Jan.	Dispatch of the JICA Preliminary Survey Team (consisting of 3 members including an ICD government attorney, for 2 weeks till 19 January)
	Jul.	The 1st Seminar on Comparative Study of Judicial System between Japan and Indonesia (Seminar) (for 3 weeks till 30 July for 11 judges, public prosecutors, etc., comparative study of the legal systems and their operation in Japan and Indonesia) The 2nd APEC Economic Law Symposium (in Jakarta till 12 July, co-hosted by the METI, JETRO, MOFA of Indonesia, etc. in Jakarta)
	Aug.	Amendment to the Constitution (4th amendment)
	Dec.	Joint seminar by JICA, UN Asia and Far East Institute for the Prevention of Crime and the Treatment of Offenders, and Indonesia (till 21 Dec. for over 100 legal professionals, including the Chief Justice of the Supreme Court of Indonesia)
2003	Jan.	Dispatch of the JICA Preliminary Survey Team (consisting of 6 members including an ICD professor, for 12 days till 6 Feb.)
	Mar.	The Chief Justice of the Supreme Court of Indonesia visited Japan (till 29 March, upon invitation by JICA and MOFA of Japan)
	Jun.	The 2nd Seminar (for approx. 1 month till 4 July for 17 judges, public prosecutors, etc., comparative study on the fair and efficient management of court systems)
	Jun.	Law Professor Hikmahanto Juwana of the University of Indonesia visited Japan and stayed till 31 October as a visiting professor of the Graduate School of International Development, Nagoya University
	Sep.	Dispatch of a JICA project formulation advisor (for assistance in judicial reform for 1 year till 10 September 2004) Field survey in Indonesia by the Study Group on the Intellectual Property Law (co-hosted by the ICCLC an ICD, Prof. Saen of Osaka University, etc.) till 17 September
	Oct.	The Supreme Court of Indonesia announced the "Blueprint" including the status quo and the plan of court reform. Seminar on Comparative Study of ADR between Japan and Indonesia (for 12 days till 31 October for four Justices of the Supreme Court, comparative study on ADR [especially the court-annexed compromise and conciliation system])
2004	Jun.	The 3rd Seminar (for 1 month till 2 July for 12 judges, court clerks, practicing lawyers, etc., comparative study on the management of a fair and efficient civil dispute resolution system)
	Jul.	Commencement of the "Project on Competition Policy and Relaxation of Regulations" (for 2 years till 6 July 2006 in cooperation with the Japan Fair Trade Commission)
	Sep.	Commencement of Assistance in Research for Revision of the Bench Book of the Supreme Court (till March 2006)
	Oct.	Dispatch of a JICA project formulation advisor (for judicial reform, 2 years till 3 October 2006) Yudhoyono took the presidency (6th President, 5 years)
	Dec.	The 2004 Sumatra earthquake occurred.
Mar.	The 2005 Sumatra earthquake occurred.	

## Chronological Table of Legal Technical Assistance for Indonesia

Events (forms of address are omitted)			Assistance projects, etc.	
2005	Jun.	Announcement of the Japan-Indonesia Joint Statement "Partners for new challenges"		
	Dec.	The 4th Seminar (for 12 days till 16 December for 12 judges, practicing lawyers, etc., comparative study on the building and management of a fair and efficient civil dispute resolution system)		
2006	Mar.	"Seminar on ADR for Aceh Affected People" (held 5 times by JICA in cooperation with the Japan Federation of Bar Associations, Japan Association of Arbitrators, RTI, etc.)		
	May	An earthquake occurred in the central part of Java.		
	Jul.	The 5th Seminar (for 12 days till 14 July for 12 judges, practicing lawyers, etc., comparative study on the building and management of a fair and efficient civil dispute resolution system, preparation of a draft policy paper by participants)		
	Sep.	Dispatch of a JICA Preliminary Survey Team (for 1 week till 30 September, 3 members including an ICD government attorney)		
	Nov.	Visit of President Yudhoyono to Japan, Announcement of the Japan-Indonesia Joint Statement, "Strategic Partnership for Peaceful and Prosperous Future"		
2007	Mar.	Commencement of the Project on Improvement of Mediation System ("Project")(for 2 years till 31 March 2009)		Project for improvement of the court-annexed mediation system
		Dispatch of a JICA long-term expert, Ms. Kakuda, practicing lawyer (for 2 years till 30 March 2009)		
		Dispatch of a JICA project formulation advisor, Mr. Yamanishi (for 2 years till 31 March 2009)		
	Jun.	Set-up of an advisory group for the "Project" (composed of Prof. Kusano, Law School of Gakushuin University; Mr. Yabuki, Vice Chairman of the Committee on International Relations, Japan Federation of Bar Associations; Prof. Inaba, Chukyo University; Mr. Hiraishi, practicing lawyer; and an ICD government attorney)		
		The 1st meeting of the advisory group		
	Jul.	The 2nd meeting of the advisory group		
	Aug.	The 1st in-country seminar (in Jakarta, Indonesia, till 18 August, by short-term experts: Prof. Kusano and an ICD government attorney)		
		Summit between Japan and Indonesia (in Jakarta, Indonesia) Announcement of the "Joint-Statement at the Signing of the Agreement between Japan and the Republic of Indonesia for an Economic Partnership"		
	Sep.	The 3rd meeting of the advisory group		
	Oct.	Training course for the Project (for 12 days till 2 November for 12 judges, lawyers, etc.; discussions on the draft revised Supreme Court regulation and practices for training mediators, etc., advisory group meeting on the project progress on 1 November)		
Dec.	The 4th meeting of the advisory group			
2008	Jan.	Golden year of Friendship 2008 Indonesia - Japan (till 31 December)		
	Feb.	The 5th meeting of the advisory group		
	Mar.	The 2nd in-country seminar (at Jakarta, Indonesia, till 15 March by short-term experts: Prof. Kusano and an ICD government attorney)		
	May	The 6th meeting of the advisory group		
	Jun.	The 7th meeting of the advisory group		
	Jul.	The Agreement between Japan and the Republic of Indonesia for an Economic Partnership came into force.		
		The 2nd training course for the Project (12 days till 18 July for 12 judges, lawyers, etc.; additional discussions on the draft revised regulation, participatory program on mediation, etc. )		
	Aug.	The Supreme Court regulation PERMA No.1, 2008 of Indonesia (regulations on the court-annexed mediation) was signed by the Chief Justice of the Supreme Court and put into effect.		
		National Judicial Conference (at Jakarta, Indonesia, till 7 August; presentation of the revised Supreme Court regulation PERMA No.1, 2008)		
		The 1st training course for mediator trainers (at Depok City, Indonesia, till 29 August for 20 judges and 16 court clerks from the pilot courts, lectures by Prof. Kusano)		
	Sep.	The 8th meeting of the advisory group		
	Oct.	Dissemination seminar on the revised Supreme Court regulation PERMA No. 1, 2008 (at Jakarta, Indonesia, with the attendance of approx. 140 judges, mediators, etc.)		
		Dissemination seminar on the revised regulation PERMA No. 1, 2008 and ADR for the medical association, lawyers, etc. (at Bandung City, with the participation of approx. 150 doctors, lawyers, etc.; lectures on medical disputes ADR and Q&A by short-term experts: Prof. Inaba and Lawyer Hiraishi )		
	Nov.	The 2nd training course for mediator trainers (at Jakarta, Indonesia, till 5 November for 20 judges and 16 court clerks from the pilot courts; participatory program on mediation, lectures and Q&A with participation of short-term experts: Prof. Inaba and Lawyer Hiraishi)		
		Dispatch of the JICA evaluation team of the Project (till 22 November, 3 members including an ICD government attorney)		
Dec.	The 9th meeting of the advisory group			



**IV. INTERNATIONAL AFFAIRS IN RELATION TO  
LEGAL ASSISTANCE  
AND  
LAW AND DEVELOPMENT STUDIES  
AS A BASE FOR CONSIDERATION OF  
JAPAN'S LEGAL ASSISTANCE\***

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*Law School, Keio University*

- I. INTERNATIONAL AFFAIRS IN RELATION TO LEGAL ASSISTANCE**
- II. BACKGROUND, GOALS AND CHALLENGES OF LEGAL ASSISTANCE**
- III. WHAT ARE LAW AND DEVELOPMENT STUDIES?**
- IV. JAPANESE APPROACH TO LEGAL ASSISTANCE**

**I. INTERNATIONAL AFFAIRS IN RELATION TO LEGAL ASSISTANCE**

Good afternoon, ladies and gentlemen. I am Mr. Hiroshi Matsuo from Keio University. I would like to express my sincere gratitude to you for providing me with such an opportunity to give you this lecture. It's a great honor for me to talk to you on the subject, "International Affairs in relation to Legal Assistance and Law and Development Studies", in the red brick building where the headquarters of the Ministry of Justice is located, the Ministry that constructed the foundation for Japan's modernization.

Today I would like to talk about, though time is limited, the status quo and challenges of legal assistance, and my daily thoughts on how we should face such challenges.

First, I will briefly explain the international affairs in relation to legal assistance. Legal assistance, though it's simple to say, has a broader meaning these days. Speaking of it, first the establishment of statutory provisions will come to mind. If this kind of assistance is classified as Type I, recently there is an increasing movement for assisting in the improvement of legislative process, courts and enforcement bodies that operate law, and to that end human resources development such as training of legal professionals, etc., which may be classified as Type II.

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Please note that the excerpts in this paper and the PowerPoint slides are translated from the Japanese translation of the original drafts written in foreign languages. Therefore, the quoted sentences may be different from the original ones.

\* This is a record of a lecture under the above-mentioned title delivered at the Headquarters of the Ministry of Justice on 29 August 2008. The lecturer expresses his sincere gratitude to Mr. Yoshinobu Onuki, President of the Research and Training Institute, Mr. Kazuo Inaba, Public Prosecutor of the Supreme Public Prosecutors Office (former Director of the International Cooperation Department) and Mr. Kenichi Kikegawa, government attorney of the International Cooperation Department, for providing the lecturer with the valuable opportunity of giving a lecture at the Ministry.

Next, the capacity of law receivers or civil society should also be strengthened. Assistance in such activities as improving legal education or access to courts or other legal service providers, or strengthening their capacity to monitor the exercise of power by government, etc. is also becoming increasingly active. This kind of assistance may tentatively be called Type III.

Furthermore, at a more basic level, such activities as preparing law dictionaries, law textbooks, case books or law books, improving legal information systems and law-related infrastructure for the above-mentioned purposes, and as a premise thereof, conducting social surveys, can also be included in legal assistance in a broader sense. This is tentatively classified as Type IV.

As explained above, today a wide range of activities are implemented within the framework of legal assistance. Now let me confirm the organizations that are currently involved in it. As you can see in Slides 4 through 8, a huge variety of subjects ranging from international and regional institutions, to governments of various countries, private companies and NGOs, are engaged in legal assistance activities. As I cannot introduce all of them one by one, due to time constraints, let me just introduce you to a few representative ones.

For example, in terms of international organizations, it has been the World Bank Group (hereinafter “WB”), that has played a central role in legal assistance. In this group, the International Bank for Reconstruction and Development has been the most active player financing about 12 billion dollars a year. The International Development Association has also provided loans of approximately 9 billion dollars annually to least developed countries in poor condition, and a significant amount of them have been allocated to legal assistance.

It is said that, during the 1990s only, about 3 billion dollars had been spent for over 300 legal assistance projects, which WB calls symbolically, “Rule of Law Projects”. Looking at Rule of Law Projects implemented by WB, one project costs between 5 million and 50 million dollars. Among them, most projects cost approximately 10 million dollars, and are run for the duration of two to three years. While most of those projects aim at the establishment of rules for promotion of market economies, in direct and indirect relation to it, assistance for strengthening legislative functions or assistance substantially related to democratization has also been provided - through expanded interpretation of the World Bank charter, though such involvement in “political affairs” is prohibited under its Article IV, section 10.

On the other hand, among UN-related agencies, it has been the United Nations Development Program (hereinafter “UNDP”) that has conventionally been most energetically involved in these activities. Broadly speaking, while WB focuses on the transition to a market economy, the UNDP places importance on democratization or democratic governance, and it has been reported that the latter spends about half of its 3 billion dollars annual budget for promoting democratic governance. It is said that out of the 135 UNDP offices around the globe, about 133 offices implement institutional reform projects for democratic governance. This may show how much focus they place on this field. In addition, the UNDP intends, in

implementing their projects, to coordinate with WB projects to avoid overlapping of projects in the area of micro-financing for poverty reduction.

To supplement these global organizations, I have listed four regional development financial institutions: Inter-American Development Bank (IDB), European Bank for Reconstruction and Development (EBRD), Asia Development Bank (ADB) and African Development Bank (AfDB). While the USA is the biggest donor of the first two banks, the latter two are sponsored mainly by Japan.

Among them, ADB, the most familiar or closest bank for Japan, has been focusing on financing in the fields of law, economic management and public policies since 1991, and has committed themselves most to legal assistance projects. They have intended to allocate about 10 % of their annual budget of nearly 6 billion dollars, to the development of law, economic management and public policies.

On the other hand, the EBRD was established in 1991 for promoting markets and democratization in the former Soviet Union and Eastern Europe. As its main purpose is to strengthen the improvement of legal systems, which is the basis for support of their market cultivation and democratization, they quite actively implement legal assistance. A considerable part of their 4.3 billion Euros annual budget, is used for legal assistance, such as drafting lease contract law, security law, bankruptcy law, etc.

However, the most central subjects of legal assistance are the governments of various countries. Today, many countries have become involved in legal assistance, and I listed only some representative countries in Slide 6. For convenience they are divided into common law, continental law and North European law countries, the meaning of which will be explained later.

The table in the slide shows the department or agency in charge of legal assistance in each government with letters, “F”, “I” and others in the right column. There are slight differences in terms of how legal assistance is positioned in each government agency. “F” means a group performing legal assistance in the framework of policies made mainly by the Ministry of Foreign Affairs. “FT” means a ministry, which is the combination of the Ministry of Foreign Affairs and another ministry, which is equivalent to the Ministry of Economy, Trade and Industry of Japan. “I” means an independent ministry for international development, and “M” refers to an international development agency under the co-jurisdiction of multiple related ministries.

Looking at legal assistance implemented by governments from the standpoint of agencies in charge, many countries (marked “F”) , including the USA, Canada, France, Japan and Sweden, deliver legal assistance as part of foreign policies of their Ministry of Foreign Affairs. In contrast, the UK is characteristic because it has an independent department in charge of international development. This indicates their philosophy is that development should be promoted as independently as possible from external policies, that is, from a so-called global viewpoint. France used to have such a principle, but during the 1990s it decided to suspend

preferential policies for their former colonies. Now France implements legal assistance through the Directorate-General for International Co-operation and Development, an agency re-integrated in the Ministry of Foreign Affairs.

The most unique case is Germany. The German agency, Deutsche Gesellschaft für Technische Zusammenarbeit (GTZ) takes the form of a limited company administered by a board commonly run by the Federal Ministry for Economic Cooperation and Development, the Foreign Office, the Federal Ministry of Finance, the Federal Ministry of Economics and Labor, etc. It implements various development cooperation projects, and legal assistance is one of them.

In the case of the USA, the United States Agency for International Development (USAID) under the Department of State has been the major player of legal assistance in the fields of 1. democracy and governance; and 2. economic growth and international trade. It spends approximately 200 million dollars a year for the promotion of democracy and governance. It is estimated that a much larger amount is spent for legal assistance for the purpose of economic growth and international trade.

In comparison to this, in the case of Germany it is said that they devote not so much budget to legal assistance. There may be several views on this and the conclusion may vary depending on analysts. According to the analysis by Mr. Schmiegelow, former German



Ambassador to Japan, Germany used to spend about 5 million marks annually, which is equivalent to 500 million yen. It may seem a bit small amount. Since this has been reported in the context that while the USA has attained limited success spending so much budget, Germany has achieved a lot with little money, this report may need some verification. Well, it is certainly true that

there are large differences in the type of human resources and budget devoted to legal assistance.

In France, as mentioned earlier, currently the Directorate-General for International Co-operation and Development within the Ministry of Foreign Affairs is in charge of legal assistance. The newly established Priority Solidarity Fund has contributed around 700 million Euros to the Directorate between 2000 and 2005. Out of this contribution, two million Euros have been used to support the training institute of judges, to reform the legislature, and to launch a law school in Cambodia. I will discuss it in detail later.

Private companies have also begun to participate in these activities. They get involved in legal assistance, rather than from an independent position, but in association with WB, UNDP, and other international donors or governments of several countries as explained above, sometimes as their execution forces. For example, PricewaterhouseCoopers (PwC), a famous

accounting firm, has very close ties with WB, and is commissioned to organize numerous projects acting as the eyes and ears of development and legal assistance around the globe.

Moreover, a firm called Bearing Point is deeply associated with USAID. In 2002, the firm was awarded a project of nearly 5 billion yen which ran for five years for the purpose of reforming customs duties in Afghanistan. It became a hot issue that in 2003, although Afghanistan had only an interim government, it applied for accession to the WTO, supported by USAID, and with assistance implemented by BearingPoint. Some firms such as Adam Smith Institute in the UK have also achieved satisfactory results in the field of legal assistance. Moreover, in concert with the projects and others by UNDP, as I presented earlier, private banks, financial institutions and manufacturers are also involved in these activities.

Lastly, NGOs with varying administrative forms also play very important roles in legal assistance. Some NGOs are operated through co-funding of several governments – they are sometimes characterized as intergovernmental organizations – and others are run with contributions from totally private companies. Law societies, bar associations in various countries and the International Bar Association (IBA), which is an aggregate of the first two groups, etc. have put considerable effort into these activities by launching rule-of-law projects. What is worth mentioning is that the World Justice Project launched mainly by the American Bar Association and the International Bar Association held a conference in Vienna in July of this year. They have started an approach to create comprehensive rule-of-law indicators to rank countries around the world, and are making preparations for it.

I have roughly introduced legal assistance subjects. Regarding the relations of their activities, it seems that they mutually complement each other as one tendency, or there is an expanding tendency for the sharing of roles or solidarity and cooperation among them. On the other hand, there are also cases of overlapping, insufficient coordination or consciously competing in similar projects in one country. In practice, there is still a strong tendency for competition with varied degrees. Today, I will explain about the competition in legal assistance divided into two levels. One is the war of advice, and the other is a different level of competition called “institutional competition” in a sense that different legal systems conflict with one another at a macro level.

First, I will introduce some examples of the war of advice. In 1992 a British newspaper, “The Financial Times”, published an article with a quite shocking title, “the war of advice attacks Russia; Foreign advisers must fight to draw attention”. It was about the war of advice regarding the privatization program of Russia.

During the period of the former Soviet Union, the “500-days plan” was created by Yavlinsky and others. In August 1991 the then President Gorbachev was detained and subsequently released in a political upheaval (attended coup), and subsequently the former Soviet Union collapsed within the same year. In the course of such movement, Yeltsin took the initiative in the privatization of state enterprises to carry out a radical market reform. This was moved forward mainly by Gaidar, who remained as an acting prime minister, although he

was expected to be prime minister. He proceeded with the “Shock Therapy” under the strong partnership with the market economy promotion group of the USA, WB, etc.

Later in 1992, quite a number of international donors and foreign advisers rushed into Russia for cultivation of a market. In my slides I put only main donors, such as WB and USAID, the latter of which got involved in assistance for Russia in cooperation with Harvard University, financial institutions like Ford Foundation, Credit Suisse, Goldman Sachs, etc., and British entities such as the London School of Economics and British Know How Fund.

The problem was that foreign advisers from these donor organizations worked in quite different settings, rather than under fully elaborated plans for privatization and cultivation of a market. This was also attributable to Russia. The Russian side was not unified under radical policies for transition to a market economy, and there was also a conservative group against radicalization. Chernomyrdin, who became new Prime Minister after Acting Prime Minister Gaidar, took a cautious approach. It is said that he was closely related to the economic adviser to former President Gorbachev. Under his administration, domestic policies of Russia changed a little bit supported by several groups and each of them had different counterparts. Among national agencies, while the National Privatization Committee was trying to radically proceed with the cultivation of a market, the International Development Cooperation Agency and the Economic Reform Committee stayed away from the first committee. Thus, under such inconsistent policies, none of these national agencies could see beyond their pursuit of policies, causing unfavorable circumstances for effective legal assistance. Of course, this phenomenon can be observed in various scenes of legal assistance. Such an unorganized situation has led to rather scandalous problems, which I will explain later.

On the other hand, a small macro problem is the institutional competition mainly between common law and continental law systems. The “Wall Street Journal” in 1995 published an article under the title, “Two business styles struggle for mastery in East Europe - Motives for which Americans and Germans want to impose their law”, to the effect that the traditional Code Napoleon or the continental law tradition inherited from Roman law, is conflicting with the totally different tradition of Anglo-Saxon law, especially American law, by mutually invading each other. Their first “battlefield” was in Georgia. I inserted a map in one of my slides to show where Georgia is located. It is located in between the Black Sea and the Caspian Sea. Recently there have been reports in newspapers every day on Georgia as the political battleground between the USA and Russia. In terms of legal assistance, it has been a battlefield between the USA and Germany over the Georgian Civil and Commercial Code. As Georgia is one of the countries forming the Commonwealth of Independent States (CIS), first it intended to draft their civil and commercial code to adopt the model law of CIS countries. However, such a model law did not suit the reality of the country and thus Germany started to provide strong support to their effort.

Against this movement, the USA tried to recover from a setback by introducing American-type rules, especially corporate rules. What was commonly believed among them

was a jinx, “He who writes the laws gets the business.” It was commonly thought that once laws quite similar to those of the donor country were drafted in the recipient country, it would create a very advantageous condition to the companies of the donor country intending to do business in the recipient country. This is why competition became very intense. It is said that, under these circumstances the legal situation in Russia and Eastern Europe after the collapse of the Berlin Wall was again divided into the two major camps in a sense. One is the German type that introduced Germany-type civil and commercial law, and also introduced, in terms of a financial system, corporate financing mainly by banks under the control of a central bank. I have listed representative countries that adopted the German-type system, such as Poland, Hungary, Czech, Slovakia, Slovenia, Croatia and Latvia.

Against this, as explained earlier, the USA which originally had intended to promote legislation for the cultivation of a market in Russia and other countries, tried to recover from a setback in the “battlefield” in Georgia, Croatia, etc. The USA especially had the intention of introducing American-type rules through corporate law or securities exchange law, thereby making rules that would directly support the corporate finance mechanism. It was based on their belief that their rules most accorded to the principle of free competition and thus was rational, and also on the grounds that they would facilitate American banks, financial institutions and companies to expand their businesses into the recipient country.

According to the article in the “Wall Street Journal” I presented earlier, the USA spent over 4 billion dollars for legal assistance in Central and Eastern Europe between 1993 and 1995. In contrast, Germany devoted 8 billion marks (5.68 billion dollars) in the previous five years to 1995, excluding its contribution to the EU. This figure is much larger than the annual spending of only 5 million marks as indicated by Mr. Schmiegelow. The latter figure may refer only to the budget for legislative support projects and others directly implemented by GTZ, and may not include assistance for financial system reforms, etc. by financial institutions, and so the difference between these two figures may stem from the difference in their calculation methods. It seems to be true that, if the costs of institutional building assistance in a broad sense are included in the calculation, Germany has also participated in the competition at a huge expense.

Evaluation by each side on the superiority of the German and American systems significantly varies. Former professor Rolf Knieper of the University of Bremen, now retired, was one of those who led legal assistance by the German government. He criticized that the USA was selling an excessively complicated system that required proliferation of a large number of lawyers. According to him, the USA was making detailed and arbitrary rules on purpose that only lawyers could understand, in order to create job opportunities for lawyers. In response to this, the USA argued that while German companies were trying to imitate the behavior patterns of Anglo-American companies after competing with them, Germany was introducing their obsolete financial system into East European countries, which was paradoxical. Thus, they started to accuse each other.

What is more noteworthy was that the recipient countries in Eastern Europe in question were quite level-headed in their analysis in accepting legal assistance. For example, in the case of Croatia, while they officially received assistance from Germany, and drafted the Civil and Commercial Law and Financial Law in close cooperation with Germany, there was an office for an Anglo-Saxon mole within the Ministry of Finance where constant opportunities were provided to learn about American rules, such as lectures given by Australian officials in charge of legal assistance, to conduct careful comparative analyses on American rules. According to the Minister of Finance of Croatia, the German system was very conservative, and credit for companies was offered mainly by banks, not by shareholders. As a result, companies were controlled by banks, and it was exemplified by the fact that banks forced companies to have concealed reserve funds. In that sense, he added that, the Anglo-Saxon system would be partially an excellent model.

These kinds of disputes in the field were reflected in the academic world, and in the USA some study reports have been published advocating the superiority of the Anglo-Saxon law. For example, there is a report titled “The Quality of Government” published in 1999 by La Porta and others of Harvard University. The report compared differences between legal systems, such as the common law, Scandinavian law, German-type continental law, French-type continental law and the socialist law system, as one of the decisive factors of government performance facilitating economic growth. In the end the report concluded that in multi-ethnic countries located near the equator, and where ethno-linguistically heterogeneous factors are mixed, French-type continental law or socialist law is used, and the ratio of Catholics or Muslims showing a strong tendency of fundamentalism is high in the whole population, their governments tend to show poor performance, allowing room for indirect interpretation that the Anglo-Saxon law was advantageous to promote development. It seem that this study report very strongly reflected WB policies as well, and was severely criticized by the afore-mentioned German ambassador, Mr. Schmiegelow.

Now let me explain how Germany responded to this argument by the USA. GTZ in charge of German legal assistance, jointly with Deutsche Stiftung für Internationale Rechtliche Zusammenarbeit (IRZ) – although I notionally included it in the category of NGOs in the table of donors in my presentation slides, it is a foundation established by the German Federal Ministry of Justice as its main investor in 1992 for the purpose of assisting the former Soviet Union and East European countries in their institutional transition, and has made very important achievements in the field of legal assistance – has promoted legal assistance in Eastern Europe. GTZ achieved its first victory by successfully reaching an assistance agreement with Georgia in 1993 to reform its Civil and Commercial Codes. In 1994, it concluded agreements for legal assistance mainly in relation to civil and commercial laws with 12 CIS countries, currently called New Independent States (NIS), which consist of former Soviet Union member countries, except for three Baltic States.

In 1996, by way of integrating all such agreements, GTZ launched a legal reform project

in countries in transition, and subsequently incorporated Mongolia and China in the project. It was the “Bremen Decision” made on 5 March 1997 that formulated the basic policies of the project. I will omit my explanation on the detailed contents of the decision here due to time constraints, and let me just confirm what was agreed on three important points in the Decision.

The first point is to position the legal system as the top priority for development, as it is the basis for both a market economy and democracy. The second point is the sequencing of law reform. They agreed to proceed with law reform, firstly from the drafting of the civil code followed by the commercial code, including company law, and then, by bankruptcy law, security law, securities exchange law, civil procedure law, etc.

Secondly, they confirmed that law reform was the first stage of legal development, and that the second stage would be legal education and training of legal professionals. In order to actually pursue this common direction as concretely as possible, Germany and those 12 countries agreed to build a very strong legal assistance structure in cooperation with other related organizations.

Under these circumstances, in Eastern Europe legal assistance was provided mainly by Germany. As I mentioned earlier, later the USA broke into this region to hit rewind. For example, there was a news report that in Georgia, a commercial law scholar dispatched from USAID succeeded in having the country adopt some American rules at the very last moment of amendments to their statute after entertaining the then Minister of Finance.

Against this movement, the German side issued a warning that the recipient country should be careful not to draft civil and commercial codes under the inducement of international legal experts giving inappropriate information. They criticized the fact that, while the recipient country should not be bound by certain legal traditions, such as those of German law or French law, the American way of legislation, for example, which allows discretionary procedures or interpretations by legal experts, or in a way that creates job opportunities for legal practitioners, or drafting individual statutes without sufficient consideration of their overall uniformity, was not always a good way. The German side continued its severe criticism that a lease contract law, etc. actually embodied the above-mentioned risk, and suggested that the recipient country should start from making comprehensive and general rules, such as a civil code and a commercial code.

In the meantime, in the Russian case explained earlier a scandalous incident happened. USAID committed to provide 57 million dollars to the Center for International Development of Harvard University for five years between 1992 and 1995 as the fund for privatization- and securities-related legal assistance in the former Soviet Union, or Russia, and the project already started. However, later it was alleged that the staff in charge of the project misappropriated part of the fund, or some American staff purchased Russian bonds using the fund, or diverted part of the fund to a company managed by their acquaintances or friends, or a hedge fund company run by the wife of an economist of Harvard University, one of the

authors of the afore-mentioned thesis, “The Quality of Government”. Then, the U.S. Federal judicial authorities investigated the case and a civil action was to be brought against the university. It is said that the unused part of the fund, 14 million dollars was cancelled.

This scandal may have happened just by coincidence, but at the same time, it may suggest that the current war of legal assistance has a tendency to easily cause such situations. To begin with, the war of assistance has been caused due to the difference in the awareness of stakeholders on for what or for whom legal assistance should be provided. One thing that I can say about the current legal assistance situation is that there is a big gap in the idea on the purpose of legal assistance. I am not saying which one is good or bad, but there is a large difference on both sides in what they are doing and in what they believe.

For example, one of the noteworthy characteristics of American legal assistance is that its basic policies are prepared and assistance is led by economists, and consulting firm specialists are used to put basic policies into practice. Therefore, contracted consulting firms will perform their mission within a limited period of time and budget, which shall naturally lead to the principle of individual legislation. And then, they objectively show the results to make their goal clear, that is, the transition to a market economy in the recipient country, to create a good investment climate for their own financial institutions and enterprises. It is a movement where, involving international financial institutions to which the USA makes the biggest contributions, such as WB, or regional financial institutions, they are trying to make so-called American type business standards. Critics argue that, in the course of such movement, for example, when intending to enact or revise securities exchange law, the staff in the forefront of legal assistance may feel tempted to use their position or information to buy good securities by using the fund available for legal assistance. This is just an assumption but it may be possible.

On the other hand, in Germany the government and research institutions themselves engage in legal assistance, driven mainly by legal professionals. Therefore, they argue that they need not use so much money hiring consulting firms, and have a long-term vision with focus on comprehensive codes. Some German staff in charge of legal assistance have frankly told that they intend to diffuse their law in countries with a common base with Germany, and East European countries are part of Europe, as they say. As you can see in the map in my presentation slides, among CIS (NIS) countries constituting the former Soviet Union, Kyrgyzstan, Kazakhstan, Tajikistan and countries around that area are part of Europe for Germany, and they strongly believe that those countries have cultural and legal bases common to Germany and so it is well-grounded that they intend to disseminate their law in that region. It looks like they get a strong feeling of pride in having fellow countries with German comprehensive, deliberate, and good systematic law in Asia, such as Uzbekistan, Mongolia, China, Korea, Taiwan, and maybe Japan, too. Well, I am not sure if Japan is also included. Interestingly enough, against this trend, even within Germany there has been self-criticism that it is legal imperialism (Rechtsimperialismus).

Thus, while the interest in and problems of legal assistance all look the same, in reality their contents significantly vary. Knowing this reality, you may strongly feel that there may be some other better ways of legal assistance, or at least, in terms of what legal assistance aims at, first it may be necessary to seek an appropriate method of legal assistance for the future of recipient countries, and based on which, to explore interests and goals shared commonly among all stakeholders, including donor countries and related organizations. Then, if you ask whether there has been any movement for mutual cooperation or partnership among donors, surely there have been some, but very limited cases applied only to some specific regions, subjects or projects. For example, there are some projects like, for example, the national reform project of Syria, where UNDP, in cooperation with NGOs and the local government, has intended regional construction or micro-finance institutionalization. But at present such movement is very limited.

Talking about some movements for coordination among donors to mitigate the inefficient and competitive situation of legal assistance, actually some of the international donors I presented earlier attempted to take the initiative. For example, WB organized international conferences for two years consecutively to coordinate legal assistance implemented by several donors, one in Washington D.C. in 2000, and the other in Saint Petersburg in 2001, where Japan also participated. However, it seems that such intent was not continuously supported by many countries or donor organizations, maybe due to their WB-centered, and most influentially, U.S.-centered rule making as its background. In that sense WB did not succeed in taking a global initiative.

In contrast, what is noteworthy is the recent movement of the UN General Assembly. While the 2000 Millennium Declaration advocated promotion of good governance and the rule of law at both national and international levels in general and abstract terms, upon a series of reports by the Secretary General on the international promotion of the rule of law, etc. in the 2005 World Summit Outcome document it was proposed to promote the “rule of law”, along with human rights and democracy. Since then, certain advancement was made, such as the establishment of agencies specialized in the concretization of the proposal. Moreover, in the UN General Assembly in December 2006, a resolution was made to promote the rule of law at both national and international levels, including measures for its step-by-step implementation in the form of a program. Since 2007 this movement has been in full swing, and in the Sixth Committee (legal) of the UN General Assembly committed to make preparations for the concretization of the resolution, discussions were started on the definition of the rule of law and its effective assistance methods. For its consistent implementation and coordination, eight UN-related agencies involved in the promotion of the rule of law (subsequently one more agency joined) seconded their personnel to set up the Rule of Law Coordination and Resource Group, and it already started its activities together with the Rule of Law Assistance Unit established under the UN Deputy Secretary General to assist the said group. Their current focus is on how they should coordinate legal assistance projects

implemented by the UN agencies, and the promotion of the rule of law at the international level in the field of international criminal law or international human rights law, etc. What is more remarkable is that the international society, including UN agencies, is beginning to take an interest and is getting involved in the making of domestic legal order in each country – though at the level of UN-related agencies, it is limited to the fields of administrative institutions, public law, judicial administration or law enforcement. This may be a so-called global, new form of law-making forefront or interface, and an extremely important or historical movement when seen in the future. Looking from these perspectives, legal assistance by donor countries may be becoming the driving force of legal formation in a more general and new form – so-called [global] legal formation through partial sharing of [national] law.

If this movement by the UN General Assembly is tentatively characterized as the movement for coordination from the above, the so-called bottom-up movement is also becoming active in concert with the movement from the above in a timely manner. For example, the activities of the World Justice Project launched mainly by IBA, which I presented earlier, the Hague Institute for the Internationalization of Law in Holland – which exactly focuses on the “internationalization of national law” as their concept – etc. are also worth noting. It seems that the rule of law promoted by NGOs stresses the bottom-up viewpoint more, such as the legal entitlement of civil society or improvement of legal aid services, etc. In any case, in the past one or two years, the rule of law has suddenly emerged as the common slogan of legal assistance and has attracted the attention of the international community, including the UN and international NGOs.

On the other hand, you should note that the UN-related agencies, regional institutions, donor countries and NGOs have already reached a general agreement to aim at good governance as their common goal of legal assistance since the 1990s. The question here is the relation between good governance, the common goal conventionally shared among them and the rule of law suddenly gaining attention these days. How do international organizations or donor countries understand it? In fact, it seems that only the slogan stands on its feet without any organized discussion about it.

Good governance is also ranked in a very high position in the ODA Charter of Japan, as the charter states as follows in the first item of “2. Basic Policies” following “1. Objectives” in “I. Philosophy” in the beginning; “the most important philosophy of Japan’s ODA is to support the self-help efforts of developing countries based on good governance, by extending cooperation for their human resource development, institution building including development of legal systems, and economic and social infrastructure building, which constitute the basis for these countries’ development.” The UN Millennium Declaration already incorporated the building of good governance at both national and international levels (Clause 13), and the Millennium Development Goals as the standard to monitor the realization of the Declaration includes “national and international commitment to good

governance” (Indicator 12) in its Goal 8 “Develop a global partnership for development”. As already mentioned, the Millennium Declaration also included the promotion of the rule of law at both national and international levels (Clause 9), so in that sense I am very curious about how the relation between good governance and the rule of law should be organized or understood, whether or not good governance or the rule of law is worth being the goal of legal assistance by international donors or donor countries, and if so, what exactly or in what form they are meant to be. I myself have had a certain viewpoint on these subjects and presented it verbally and in writing. Still now I maintain one interpretation. Briefly concluding, good governance is related, as a goal of legal assistance, to the governance of a whole nation, including good government, efficient markets and companies supported by a good government and a mature civil society capable to monitor their government, and is ultimately the basis of global governance that can maintain the world order without the existence of a world government. On the other hand, the rule of law is a multi-layered, gradual and dynamic process indispensable to construct good governance, and it consists of a series of laws formalized based on the conventional rules approved and abided by citizens, organizations that revise, abolish, adjudicate and enforce such laws, good contents of law for the purpose of protection and realization of citizens’ rights, and a system that constantly inspects the contents of law. Simply saying, good governance as the goal of legal assistance and the rule of law through good governance can be realized through penetration of the national and international rule of law scheme. I would like to save my talk on further details for another day, and today limit myself to confirmation that it is an ideological and normative situation in the current international movement that the building of good governance and the promotion of the rule of law are emerging as the goals of legal assistance at both national and international levels.

Against such discussion status on the normative world, in reality fierce competition is still observed in relation to legal assistance. Summing up the current international situation, as I explained part of it, on a macro level common law rules of the USA and others, and continental law rules of Germany, etc. are conflicting with each other. However, as you can see in the reaction of recipient countries, they are trying to choose and integrate good points of these two types. They want to incorporate good rules for themselves and do not have the intention to totally depend on one party. This is quite natural and in a sense desirable, and Japan may also have adopted such a policy. Therefore, we should take the initiative in exploring a possibility to harmonize these two legal systems, because each of them has its own merits. For example, the common law based on case law is stable and flexible as a legal order. In fact, the idea of the rule of law has been created based on the common law system. In the common law system, the term “law” weighs more than simple legislation by the legislature. In other words, the principle that has been formed as a so-called “upper load” of an accumulation of judgments rendered by courts over hundreds of years is precisely “law”. Therefore, it shall not change so easily. The idea that even the king can be ruled by law is the notion of the rule of law, not the rule of king, or rule of God. This means, it is an idea that law

is so stable that it binds even the king.

Then, how should “law” be coordinated in accordance with the actual social movement? Sometimes it can be coordinated through flexible interpretation of case law. In other cases when the application of “law” reaches its limit, especially when it is necessary to respond to rapid economic and social changes or to counter movements in foreign countries or in EU recently, a mechanism to coordinate, through statutes, differences between common law and such social changes or movements has been established as an annex system to secure flexibility in the legal system. Of course, their public position is that statutes cannot change common law, and this is how the common law system is characterized; its stability and flexibility have been maintained through the above-mentioned way. However, as case law is the nucleus of the legal system, talking about consistency or contradiction in the whole legal system, a systematic problem emerges in relation to the coordination between statutes and case law. Moreover, at first glance it is extremely difficult to figure out what the City Planning Law or Land Law of England is like. This is where the *raison d’être* or roles of lawyers are found, but the common law system has problems in its consistency and transparency.

In comparison, the continental law system emphasizes statutes as deliberate legislation as a legal system. In other words, in continental law countries, the most important origin of



“law” is statutes. The origin of its thought is derived from the Roman law formed mainly by jurisprudence and its reception, and contains very highly consistent and transparent rules, especially in terms of the system of rights. On the other hand, generally the continental law system lacks stability in a sense that the content of law changes through legislative enactment or abolishment. On the other hand, as rules

themselves may not change without going through legislature, it may rather lack flexibility in a political situation where conservatives control the legislature for a long time.

Considering as above, both common law and continental law systems have their own merits and demerits. What is happening around the globe may potentially indicate, as an awareness of a problem, the question of whether or not, in the course of conflict between the two systems, a new common law model with combined merits of the two systems can be formulated. In other words, as a phenomenon the conflict may look like a fight in relation to legal policies affected by economic and political reasons mainly between the USA and Germany, but in reality such a consciousness of problem may lie hidden in the depths of its background.

## **II. BACKGROUND, GOALS AND CHALLENGES OF LEGAL ASSISTANCE**

I have spent quite a long time to give you a broad overview of international affairs in relation to legal assistance. Based on which, I would like to explore the things that are currently driving those international donors, governments and NGOs to legal assistance, and its background.

From the latter half of the 1980s to the 1990s legal assistance has become active around the world. It is said that this phenomenon has been caused due to the following reason: After the collapse of the Berlin Wall, the cultivation of markets and democratization in former socialist countries became an issue; Moreover, due to the fall of the Cold-War structure, regimes without backing have been undermined and civil wars have broken out, and thus, a rising number of nations have more unstable domestic order. In addition to this, the disparities among nations are expanding. Among them, there are some, so-called “failed nations” or “collapsed nations”, which cannot be governed any more. In fact, some analysts attribute global-scale problems such as terrorism, environmental problems or population problems to the above-mentioned phenomenon as their primordial factor. The fact that the question of who on earth should support nations or people unable to sustain themselves is becoming a serious global issue that seems to be the root cause of the activization of legal assistance.

My presentation slides show, though they are only an overview, part of human development indexes published annually by UNDP since the 1990s. The life expectancy at birth, school enrollment ratio, literacy rate and GDP are factors constituting the said indexes. Slides 50 through 52 briefly show the differences in the indexes of ten countries in the last few years. In 2005 Norway was ranked top, but Japan was No. 1 in terms of life expectancy while the lowest was Swaziland with only 32.5 year life expectancy. As to the school enrollment ratio and literacy rate, Niger and Burkina Faso showed the lowest ratios, 21% and 12.8%, respectively. With regard to GDP per capita, Luxemburg was exceptionally outstanding with over 60,000 dollars, while the lowest country was Sierra Leone with less than 600 dollars. Looking at the data of a few years later, it shows only slight, not significant changes.

Let’s take a brief look at GDP changes in 15 years, which is shown in Slide 53. From 1990 to 2005 the global average GDP has just doubled. It has increased more than double in developed countries, and as much as 2.1 times in developing countries on average. However, looking at the data of the least developed countries, for example, in sub-Saharan African countries, the increase is less than double. In the case of the poorest countries, the growth rate is much less than double. This means, while rich countries are getting richer and richer, poor countries enjoy less and less growth rate in comparison. Here you can confirm that disparities between the rich and the poor are getting bigger and bigger in a short period of time. Of course, this may be just a tiny, indirect, and not necessarily accurate clue to estimate the real movement of the international community. However, if these figures are true, there is a concern that the above-mentioned disparities constitute a factor of unstable international order,

indicating that we are rapidly heading in the wrong direction. It may directly or indirectly cause international problems such as terrorism, etc.

If this is true, this problem is what is causing the expanding disparities. This is a difficult problem common to both economists and jurists. Economist Douglass North takes this seriously, even saying that it is the central puzzle of human history. I myself also think that it is a noteworthy serious and deep-rooted problem. I mean, in the period where human beings were engaged in hunting or gathering, every one had a similar lifestyle everywhere. However, in only 10,000 years a big change has occurred, causing more disparities between rich areas getting richer and richer, and poor or unchanged countries staying very poor. In other words, human beings have evolved, as time goes by, into radically different societies in terms of religion, ethnicity, culture, politics and economics, and their differences are further expanding. What are the causes of these disparities? What conditions will turn such phenomenon into convergence, or in other words, lead to the development of poor regions?

There are many theories regarding the origin from which the disparities between rich and poor countries are derived. For example, difference in natural conditions or available natural resources. It is true that oil-rich countries are rich, but there are also rich countries without substantial oil wealth. It may be attributed to the national character or diligence. What is drawing attention here is institutional differences.

I inserted a picture only in Slide 55 to add some color to my colorless lecture material. I tried to find a photo related to legal assistance which may attract your attention, but it was in vain. So I put my favorite picture. This looks like sea, but it is the Mekong River. I took the photo on the Laos side at the border between Laos and Thailand, and on the other side on the horizon over the river is Thailand. The river around this area measures over 1 km in width. I used to be buried in thought at the river bank, and I sometimes wondered what was causing such a big difference in the people's lives on each side of the river although they are so close. Of course, I am not comparing them to say which is better, but there is a large difference in their lifestyles, and administrative and medical services. For example, there is a significant gap even in the services available at hospitals. Luckily or unluckily, I carelessly pulled my Achilles(') tendon during my stay in Laos, and unexpectedly experienced the literal difference between this and the other side of the river. First I went to a hospital in Laos, but the doctor could not precisely diagnose my injury, and thus could not operate on my leg, and after bothering so many people to take me to several hospitals, I had to leave the country hanging my head in shame. In Thailand, they had a system in place to operate on my leg only one day after a brief examination of my injury. There were some hospitals with marvelous facilities which made me wonder where I was. It was a really lukewarm and shameful experience for me engaging in development.

The border between countries over a river may create differences in the people's lifestyle, and such disparities may be caused not only by a river, but just by narrower borderlines, wire fences or walls. Are such invisible institutional differences causing the disparities between

countries? This is enigmatic.

In this case, institution refers not only to law but also to rules including everything ranging from folkways to ethics, religion, or what people believe in, sense of value, behavior patterns and others.

Of all institutions, informal ones that evolve over a long period of time account for a large percentage, and those including the general standard of our behavior, behavior patterns, ethics or belief actually control our daily life. In contrast, formal rules, such as law, that are artificially created may constitute only a tiny part of them. However, both of them are very important, and play their roles and repeatedly interact with each other under a tense relationship to maintain society. All of such rules linked to each other may constitute institutions in each country, and their differences may influence people's daily lives, each of their behavior patterns and cause disparities in their lifestyles.

Why do institutions exist? They exist partly because they are important devices that we have created in order to reduce uncertainties in our life, because if we could not foresee others' behavior, it might cause a lot of stress, costs and inconvenience in our community life. It is considered that informal rules have evolved due to such reasons. Contrary to this, the other type of rules, that is, formal rules may build a momentum to give new incentives to people's conduct in order to change informal rules at the internal or external demand of a society.

I will give you an example to show why differences in institutions cause disparities in lifestyle. Let's say, there is a factory manufacturing textile products. When one part of the manufacturing machine has broken, a problem will arise as to how long it would take to source a substitute part. According to a survey in Peru in the 1980s, if one acted legally, that is, in conformity with law, it would take 18 months, because it was necessary to obtain permission of several authorities and to pass through the customs. However, by giving bribes three or four times to the officials of the customs or others, it would take two weeks. In the USA, the same part could be obtained within only 12 hours. What causes such difference in costs is the differences in rules, both formal and informal rules, to get parts.

If there are such differences in just getting one part, when thinking about the whole institutions of a nation, you can easily imagine that how much institutional differences may influence the economic activities or production results or cause huge differences in the whole country. This is why the importance of institutional reform should be reaffirmed in development.

However, an institutional reform will cause very difficult problems at the same time. What is most difficult is the problem that institutional differences are deeply ingrained in the peoples' mind. This is also an analysis of Mr. North. I have introduced earlier a report that the development ratio of GDP is low in sub-Saharan African countries. There is also a report that the people in those countries have a characteristic belief on the norm of distribution. According to their normative belief, fortune is not something you can get through your effort

or creativity, but should be distributed equally among people. Why do all of them think that way? As a provisional answer, it is because, if the circumstances are extremely different and fixed between persons who can enjoy enormous amount of fortune without much effort, and others who, no matter how much effort they make, may not be able to, beyond all reason, obtain the fortune commensurate with their effort, and if such enormous disparities continue to exist for generations, in such a society the norm that fortune is acquired through hard work would not be formed at all. In other words, when considering the fortune that you would not be able to obtain definitely, no matter how hard you work, you would think fortune is not a product of diligence, but a product of coincidence or a result of luck. If it is thought that, people with money are lucky and that people's effort, creativeness or skills are attributed to luck, such a distributional norm that the lucky people should share their fortune, the result of their luck, with other people, would be taken as quite natural and being in the interests of justice. This situation totally contrasts with countries where, for example, Jewish or Christian tradition exists, or where the Confucian ethic has been cultivated. It can be considered as a radically different, or rather contrasting ethic from a structure where, as Max Weber stated in his work, "The Protestant Ethic and the Spirit of Capitalism", the cycle of diligence and accumulation of fortune is created. In this cycle, based on the interpretation that the creation of wealth is a proof of celebration by God, you are devoted to accumulate your wealth, which further encourages diligence, leading to the accumulation of greater fortune. This is why realizing an institutional reform is not as easy as just saying it.

Then, a restless skepticism will cross my mind on whether an institutional reform is definitely impossible, an institutional reform through legal assistance is nothing more than just an illusion, or I am just a Don Quixote, etc. To be honest, I think that an informal institution that is so deeply penetrated into people's ideology may not be changed so easily. However, we cannot stop our assistance, or give up easily either, so aren't there any good measures? I don't know if there is a meager hope in doing so, but even if there is, it is said that the following two points are important to bear in mind.

The first point is the fact that an institutional reform is always path dependent. In other words, it is impossible to make a fresh start from zero by erasing all of the memories penetrating into people's ideology, and there is no other way than starting from the current scaffold. This means that, an institutional reform should start based on the rules effective in each country, no matter how irrational, unreasonable, obsolete or inefficient they may be. That is, you must be aware that an institutional reform is essentially and constantly incremental.

The second point is that, as I mentioned earlier, formal rules may be changed by moving politicians, the legislature that will eventually amend law. On the other hand, to change the code of conduct embedded in and deeply burned into peoples' minds, and in some cases integrated in the genetic information will be extremely difficult. Its process must be considered very carefully and with patience. However, certainly there have been cases where such informal rules or codes of conduct have been changed through learning.

Now, suppose that the feasibility of institutional reform cannot be denied, though it is extremely difficult, what should be considered together is why other countries should support such reform of one country. If this is regarded as a problem of legal right and obligation, the grounds for the duty to assist shall become an issue. Several discussions have been held on this point as well, but it seems no agreement has been reached so far. For example, (a) the theory that it is a compensation for a past invasion can be established under only limited conditions, such as between countries where illegal invasion, etc. was committed; (b) The national interests of donor countries may vary in their contents or in the existence or nonexistence of the duty to assist, depending on how the contents of “national interests” are interpreted; and (c) The humanitarianism may not be suitable to be imposed as a duty on persons who do not voluntarily accept it. Thus, none of the above may be appropriate grounds for legal right or obligation.

On the other hand, as a theory on the grounds for legal right and obligation there has been an argument that (d) developing countries that have been subject to international dependency have the right to entitlement against developed countries. However, as the reality of international dependency varies from country to country, in consideration of its existence or nonexistence, or varied degrees in different countries, it may involve certain difficulties to prove their entitlement to the provision of assistance as being evident. Against this argument, there is an opinion based on the progress of globalization as the commonly shared direction these days. It is an argument based on the recognition that, in the globalized world, even the strongest or wealthiest country may not maintain its existence any more on its own without considering its relations with other countries or interests of the whole international community. On the basis of such necessary awareness of the globalized community, the following viewpoints exist as: (e) focusing on the disparities among countries, wealthy countries bear the obligation of re-distribution to poor countries to realize international distribution of justice; and (f) while it cannot be immediately concluded that the entire globe has become one community to justify distribution of justice, the maintenance of a global system or a tacit agreement on it may be the grounds for the duty to assist as the theory of justice.

I myself support a stand close to (f). That is, in the process of globalization, we are at the stage where, I am not going as far as to tell that a global government is necessary, but the access to, realization and maintenance of global governance is required in order to maintain stable international order or international relations. For such purpose, a legal duty emerges to assist countries that are fighting for their very existence or whose governments are having great difficulty in providing effective leadership. In other words, it is my understanding that the duty to assist as a legal obligation based on global governance is the legal (theoretical) grounds for legal assistance.

In this case, it becomes important again how to consider and define globalization. How is globalization different from the conventionally used term “internationalization”? If the transnational or borderless traffic of goods, people and services, and the formation of

inter-national relations of legal subjects are called internationalization, it can be considered that globalization may have a meaning surpassing internationalization, and goes one step further from inter-national. It may be based on the recognition that the entire globe is becoming, rather than just one simple society, but community-like. The problem lies in thoroughly pursuing to what extent this recognition can be persuasive to explain why we have to assist other countries.

You may not certainly feel that you are in the same society with someone you have never met before. However, what constitutes our daily life may in fact be established on the tacit premise of various invisible international and domestic affairs. In one of them a kind of “free ride” situation may have evolved. If so, we need to precisely confirm its existence or extent. I think this is an argument with certain reality. It may become one of the important points that to what extent this argument can be deepened in the future in order to develop legal assistance in a persuasive manner.

In any case, it is necessary to note that approving globalization never denies the sovereignty or identity of each nation. In other words, it is quite possible that we live in a more community-like global world and also belong to multiple communities, such as a country, company, municipality or a volunteer group at the same time. One of such communities we belong to may be a global community-like world. As I have mentioned, the central theme of “The Lexus and the Olive Tree” of Thomas Friedman precisely represents it. Lexus is a car brand name of Toyota in the USA, which is the symbol of the crown of globalized technologies and industries. The olive tree is the symbol of sovereign nations that can provoke multinational wars over the attribution of one tree, which grows in the barren border land of the Middle East. This means that, our demand for a global standard and for adherence to one country to which we each belong should never contradict each other.

On the other hand, there is criticism that globalization is in fact an imposition of the American standard, and it is easy to just go along with such an idea; therefore, we are just taken in by globalism which cleverly conceals the profits gained by certain self-interested people or groups. It is certainly very dangerous to easily believe in globalization, but despite that, there are certain benefits we enjoy in the course of globalization, or normative significance that cannot be ignored, and they must be evenly and fairly considered. For example;

- (i) it is true that, by reducing transaction costs, goods, services and information of good quality are available much faster with much less costs than ever before;

More over, it cannot be ignored that it is common interests for us that:

- (ii) assurance of human rights can be standardized; and
- (iii) multiculturalism, an idea that equally respects different cultures, is being developed.

As a result,

- (iv) the norm on the necessity of promotion of international cooperation can be established, which will lead to the theory on the grounds of legal assistance that its

goal, governance of the entire globe, must be realized.

Regarding how this global governance can be established, there is already a pioneering argument; the likely base of international peace is the international society as the *foedus pacificum* consisting of the alliance of good nations, which is based on the establishment of civil status of good governance in each nation. This is the concept for “perpetual peace” presented by Kant in 1795, which could be precisely the pioneering concept of global governance. There are already a significant number of accumulated arguments regarding the goals of legal assistance.

Then, what does it mean to establish good governance in a nation? Here it may be necessary to organize arguments as to the differences between good governance and a good government. I have placed a simple diagram in Slide 72. Thinking about good governance in a state, part of it may be due to a good government. However, good governance does not come down to a good government. The reason why we need a good government is because, for one thing, we need to make, adjudicate and enforce common rules or national law in order to protect and realize citizens’ rights to property or personhood, and to encourage a market and companies to function well. When the same law is operated in a uniform manner in a nation, and if a dispute arises over the law, a fair adjudication, a fair judgment and compulsory enforcement can be expected, and thereby citizens can live at ease, and the market and companies can provide in a fine balance better goods, services and information faster at lower costs, creating expansion of affluence: This is the reason for the existence of a government and for such purpose the government must firstly be strong and legitimate.

However, it is necessarily associated with a problem on how to supervise a strong government to avoid its abuse of power or deviation, or how to balance a strong, but legitimate government. One of its instruments is the rule of law, but as it is a control tool within a government, for the ultimate supervision of a government, not only economic organizations such as a market and companies - usually they have close ties with a government in mutually supportive relationships -, but also third organizations, that is, the civil society as a non-governmental and non-economic institution must be matured. The idea is that good governance can be made possible in a nation only when 1. a good government, 2. an efficient market and companies, and 3. a mature civil society are in place.

Thus, if as many nations as possible get closer to a state of good governance, the global governance as the *foedus pacificum* of good governance may possibly be realized. However, as at present there are less and less nations that can autonomously realize good governance, this is why legal assistance or legal cooperation has its meaning. This may be the concept existing behind the activation of legal assistance. But, if so, there are some problems that require re-evaluation of legal assistance currently implemented. One of the problems is the question of, when various assistance subjects, including international organizations, governments and NGOs, aim at good governance, whether they clearly and concretely understand the content of good governance or not, or how they consider the relationship

between good governance and the rule of law, which have been recently included in the slogan on the goals of legal assistance. In fact, this is not a simple problem. It cannot be advocated so easily that the rule of law is a good thing, and so it can be added as a goal of legal assistance.

This problem is called “dilemma of good government”. If you look at the recent situation of Pakistan, you may understand it better. In Pakistan, President Musharraf maintained his dictatorship, replaced justices of the Supreme Court who had opposed the execution of his policies or re-election, or suspended the function of the Supreme Court, and against which the demand for democratization increased, leading to his resignation. However, this was never conducive to the solution of problems or realization of good governance. His resignation has caused an unstable society and inconsistent policies for economic growth, and consequently the assurance of civil rights or rights of domestic and foreign companies have become unstable. Under the present political situation the promotion of social development cannot be assured. However, this does not mean that Musharraf should have been supported. The situation is very complicated. In other words, building a strong and legitimate government, and building a benign government that takes the popular will into consideration are not so easily compatible. Therefore, it cannot be said with ease that creation of a good government or the rule of law may also be added as the goals of legal assistance.

However, in the scene of development, you must take a further step to find a detailed answer to the question on how to construct good governance. This is the most important challenge imposed on legal assistance. There is a concern that unless we find an answer to it, we may end up just proposing mere goals or slogans.

In order to find an answer to this issue, I have listed up individual challenges of legal assistance as follows, which need to be discussed in the future: securement of good planning, consistency and transparency of legal assistance, establishment of mutual cooperative relationships, clear setting of goals, emphasis on the process and well performed evaluation, coordination between donors and recipient countries, etc.

### **III. WHAT ARE LAW AND DEVELOPMENT STUDIES?**

It is the discipline called “Law and Development Studies” that is expected to give answers to the above-mentioned challenges of legal assistance. It is said that this discipline has developed since the end of the 1950s in the USA. In the earliest years, it had a more practical feature as a methodology of law reform for economic growth or democratization, but there were some who intended to build its holistic paradigm. In the meantime, several definitions or characterizations were intended with regard to law and development studies, and one noteworthy intention of such was the idea of comparative law and social change defined by John Merryman in his thesis published in 1977. His idea emphasized the aspect of making clear how in detail a society changes or does not change through law reform, and how

social changes are influenced by the differences in several prerequisites in each society. Merriman regarded social change into a progressive direction as development, understood development as a form of social changes from a neutral and objective standpoint, and tried to derive the causal relation of various factors conducive to development. His theory clearly shows a sign of remorse and intention to reinforce the theoretical importance of law and development studies, against its practice-oriented trend in those days.

According to Merryman, law and development studies date back to earlier years than thought, and in fact, the concept of progress, movement for law reform, disciplines on law and society such as socio-legal study, legal history, forensic anthropology and legal policy studies, and subsequently social engineering through law, and practice of foreign assistance existed as the precursor of law and development studies. In addition, he regarded colonial administration, experiences of occupational forces, experiences in domestic regional development, etc. as well as resemblances to law and development studies, as being conducive to this study.

Then, where do the differences exist between those pioneering disciplines that had conventionally existed and law and development studies? For example, the comparative law study has thoroughly discussed, as a theory on legal system, that law of various countries can be divided into continental law and common law, and the characteristics of each of them. On the other hand, legal history has analyzed the definitions or causes of the reception of law or legal transplants, such as the reception of Roman law, the reception of European modern law by the non-European world, etc. The difference between the above-mentioned disciplines and law and development studies lies in the purpose and challenge of the latter, which is; by making good use of the basic knowledge of comparative law study, legal history, legal sociology, etc., law and development studies provide a theory based on comparative analyses, which is useful to formulate a program that concretely makes clear what kind of reform will lead to what kind of social development in what way in a certain country.

Why are such program formulation, and therefore a study like law and development studies required now? In my opinion, it is because in a globalized society, such a situation is being created where one country must make rules, in constant consideration of its relationships with other countries or international society, under the supervision common to all of them. I have described it in Slide 82, and laid down the definition of law and development studies from such standpoint as above. In other words, the study aims at, on the premise of the globalized society, the realization of good governance in each country, in order to get closer to the realization of global governance, and clarifies its concrete method in view of the history and actual status of each country. For this purpose, discussions based on the full use of the attainment of the conventional disciplines are necessary. In this sense, law and development studies can be characterized as the interface of several disciplines, or can be paraphrased as the study of building good governance, or “jurisprudence for the building of good governance.”

With regard to the present issues in law and development studies, please look at Slide 83 and onwards. I hope you will read the materials that I presented on major arguments, especially on how to embody each of the issues divided into four types. Today, I have to limit myself to the confirmation of just part of them.

One of the focuses of today's arguments is on whether there is a common law reform model. In one example, whether a certain country can establish a rule-of-law system where a well-organized right system is formed and does not end up just being a subject, but is adjudicated by courts, enforced, and adhered to by the people. Further in-depth discussions must be held as for this law reform model.

Another argument focuses on the issue of how the sequencing and pace of law reform should be considered, as presented in Slides 87 through 89. At present there are several opinions on this, and as shown in the Bremen Decision, though just as one model, one rough convergence tendency may be found. For example, one argument considers that one model sequencing as below may be possible:

- (i) As a basic rule, first define people's right to personhood or property, get approval of it, and establish it;
- (ii) Enact procedural law which can be enforced through a lawsuit when some problems arise over the right stated in (i) above.
- (iii) Based on such private-law or civil-matters rules, to make public-law rules by which a state supervises economic activities by private persons and coordinates them from the standpoint of public interest.

Here again, it involves the problem that I mentioned is not so easy to be solved by just building a good government, and against which a slightly more flexible opinion than conventional arguments has emerged. In other words, there are some cases where a nation faces two problems at the same time: to protect rights, and to control people's rights for the sake of the nation's public interest. For example, suppose that an investor has a right. Then, there can be cases where, by controlling the investor's right, a government exercises its discretionary power which may force development from the standpoint of the public interest of the nation concerned. The current difficulty lies in the fact that such a way cannot be refused as being undesirable in promoting the rule of law. This is an extremely difficult argument. Since the two matters, that is: 1. the government is "arbitrary" in its exercise of rights; and 2. government policies are "flexible"; are a story on the two sides of the same coin, it may be the most difficult question, when being forced to make a decision in the course of legal assistance, whether flexible development policies can be pursued by drawing a clear line in between the two sides of the coin.

As a conclusion to this argument, we are always required to answer the question: what do we aim at in a law reform? Eventually the question leads to the so-called ultimate question of how to define the goal of development based on the definition of human welfare. I think anyone involved in legal assistance may be worried about this problem; What on earth am I

doing?

Here I will show you an old story. In the work “*Biruma-no-tategoto*” [*The Burmese Harp*], Japanese soldiers after a battle began to discuss in a prison camp in Thailand: Whether such a way of a nation, as theirs, of controlling other countries to gain economic interests is good or not, or such a way of life, as Burmese, being very religious and placing a great value on the religion, is better. We end up with a fundamental question: which can be considered better as a human being: a position that tries to dominate everything absolutely on one’s own, or a world where human beings try to blend into the universe larger and deeper than human beings.

As to the ultimate goals of development, they must be always taken into consideration in law and development studies as well. As I don’t have enough time to explain it today, let me just make a few references to the actual discussion status on the subject. With regard to the goals of development, quite a number of discussions have been made so far, and as one *terminus ad quem*, I would like to show you the view of Amartya Sen. Sen deems that the goal of development lies in happiness, equal to “well-being”. It does not mean wealth itself, or it is not necessarily the same as such utility as getting a lot of pleasure, contentment or satisfaction of desire by using wealth, because human beings may not always feel happy no matter how much wealth or utility they have. The most important thing is whether a human being has a chance to choose his own capability by himself, and whether such a chance expands or not. Sen called it freedom as an expansion of potential capability.

This precisely means how realistic a better life or well-being can be for us. However, it does not mean to have a society consist of good people. Making a society better or a good society is not only too unrealistic, but may also run a risk of sacrificing individual freedom, and easily cause an abuse of power accompanied by the question of who should judge right or wrong. In fact, there may be good and bad people in a society, but an overwhelming part of them are good sometimes, and think bad things other times, but in most cases they may be foolish. A society where several kinds of people can be as they are, or a society where one can choose one’s own life based on their own goals or interests, as long as they do not infringe upon others’ freedom or rights, as meant by Sen, may be deemed as a society that offers more freedom.

In this sense, a society that guarantees people’s freedom to live and exist better may be considered as an essentially individualistic society. It is never incompatible with a community, nor can be contrasted to communitarianism. A work of Hayek, “Individualism: True and False”, straightforwardly describes individualism in that sense. True individualism evaluates very highly, rather than denies, the value of efforts by groups of people, including families or middle entities, to voluntarily participate and cooperate with each other. Therefore, if it is prematurely determined that such value theory is Westernized, or foreign to the Asian sense of value or communitarianism, it may run a risk of keeping people’s wants away. Thus, truly fair discussions and modest exploration thereof may be necessary.

As explained so far, it can be concluded that the mission imposed on law and

development studies is to actually find an answer to the question on how concretely institutions should be reformed in a nation through law reform, and to study development always bearing in mind perspectives on and openly discussing the ultimate goals of development through law reform, and also modestly accepting criticism or requests for modification.

#### **IV. JAPANESE APPROACH TO LEGAL ASSISTANCE**

Based on what we have overviewed about the international affairs surrounding legal assistance, background to its necessity, and the challenges and status quo of law and development studies as a discipline answering the question on the method and goals of legal assistance, lastly, we would like to think about what Japanese legal assistance should consider in the future. Although I have no capacity, and experience, or am not prepared to make a big statement, I would like to present three points as follows as the basis for further discussion.

First, the problem that may necessarily emerge as an important focal point in the midst of the international situation surrounding the current legal assistance may be how to harmonize continental-law and common-law factors to construct a better legal system. If at all, Japan has significant advantages. This is because the Japanese legal order is considered to have been formulated in the form of a hybrid of the two legal systems. It is said that during the Meiji era Japan mainly incorporated continental law factors, and then common law factors mainly in the post World War II period, but in fact, it is deemed that factors of both legal systems have mingled in the course of their acceptance not only through legislation but also through legal interpretation of precedents or reception of doctrines on a wider number of occasions. Japan has barely combined them in a way conducive to development. This must be a very useful experience.

Second, there is a question of harmonizing universal rules and traditional rules. This is also what Japan has realized in dire distress. For example, how to coordinate traditional communitarianism and individualism is a problem that emerges and faces us in various forms as a problem under substantive law. Say, there is a problem regarding how to coordinate inquisitorial rules and adversarial rules in the realm of civil procedure law. I think that by using these experiences Japan may present its know-how to develop long-term systematic legal assistance in each country.

To this end, it is necessary to elaborate strategies. Currently the Council of Overseas Economic Cooperation is exploring strategies for legal assistance. The point is first to evenly reflect on the sales points or merits of Japan, and organize them in a transmittable way. For example, including the problem of coordination between continental and common law systems, Japan needs to make clear how many experiences it can share based on its practice of formation of good governance led by its good government. At present, strategic discussions are held in relation to foreign or economic policies, but legal assistance may have goals superior to them.

From this viewpoint, I suggest that the access to global governance should be clearly stated in the strategies of legal assistance as one goal. This view should be more actively advocated by lawyers involved, or interested in legal assistance as a philosophy that motivates those engaging in legal assistance from their heart. I guess it may animate persons related to legal assistance more strongly than general goals, such as international security or peaceful international society. Or, there may be some more suitable expressions, so it deserves further discussion.

Since the outbreak of conflicts in Afghanistan and Iraq, operational plans for the cleanup of terrorism have been advocated as strategies for peace. I wonder if they are excellent “strategies”. The term “cleanup” makes my hair stand on end, because in addition to the questionable nature or unreality of the strategies themselves, they may necessarily cause more serious reaction and destruction, and further aggravate conflicts, and it is unlikely that they will lead to a solution. It may be much more “strategically” excellent to raise a big question on the right or wrong of such strategies, and concurrently, or if possible in lieu of such strategies, to improve, if only a little, the situation creating the source of terrorism. In this context, it should be consciously emphasized that legal assistance can be a strategically very efficient “weapon” or “another way to peace”.

For this purpose, it is necessary to construct a mechanism to train and secure personnel engaged in legal assistance in a continual and stable manner. This may be another important point as part of strategies of legal assistance. I have mentioned earlier that Germany has attained significant results in legal assistance, but this does not mean that they have not had any problems. Their legal assistance for Eastern European countries was once suspended in 2004, due to a lack of human resources, and maybe due to the retirement of Professor Rolf Knieper (University of Bremen), who was the main leader of legal assistance. It suggests how difficult it is to continually secure and train personnel involved in legal assistance, and Japan also must consider it seriously. The Japan International Cooperation Agency used to offer a course on legal assistance as one of its courses to train technical assistance experts. There have been quite a few lawyers who got involved in legal assistance through this training course. This is very pleasant news, but unfortunately the course was suspended. It will be necessary to develop such an approach, and build a mechanism to accumulate and organize Japanese know-how on legal assistance, and cultivate human resources who will succeed such know-how.

As quite a few of you may be involved in legal assistance, I suppose you may have the same understanding as mine: legal assistance may provide us with very useful experience from various aspects, and sometimes in an unexpected way. It may offer you chances to gain knowledge, experience and senses that are necessary as a lawyer, but that cannot be acquired in one country. This may also apply to a government or an entire nation. For example, legal assistance offers very useful feedback assets in the form of very advantageous recognition for the legal reform currently ongoing in Japan. In this sense as well, cultivation of human

resources in the field of legal assistance may be well-grounded.

Let me conclude now by telling you a story.

French philosopher Voltaire discussed an ideal nation in the 18<sup>th</sup> century. He developed his argument under the setting where a French alderman discussed with an Indian Brahmin monk, who the alderman met by chance on his way back to France from Pondicherry in the south of India under French colonization. The European alderman asked the Indian monk, “In what kind of nation would you like to live?” Then, the monk answered unconcernedly, “Wherever except in my country.” He meant that it was meaningless to live in his country where people’s freedom or rights were infringed upon by rulers. However, when the alderman insistently asked, finally the Brahmin monk said, “I want to live in a state where people obey only law.” When the alderman responded, “it’s a clichéd answer”, the Indian monk said, “It’s not a bad answer.” He might have meant that there had been no more appropriate answer than this. When the alderman asked, “Where can we find such a country?” the Brahmin monk answered, “We need to find it”, and continued his journey.

If we are asked the same question now, how should we answer? This answerer, “J” – which may represent Japanese, jurist, or Ministry of Justice? – will have to answer under a lot of pressure being involved in legal assistance, “We need to construct it”. In the course of globalization, the choice of looking for a Utopia somewhere is already losing its meaning. Now that the domestic society where we live daily is becoming the “world” itself, there would be no other choice for us but to accumulate small but steady efforts to realize good governance. If you, upon learning a diversity of legal systems with various merits and demerits, integrate their factors to continuously approach the world order in the recipient country of legal assistance, and back in your home country, such intent may become a new form of legal formation created through legal assistance.

Thank you very much for your attention.

**INTERNATIONAL AFFAIRS  
IN RELATION TO  
LEGAL ASSISTANCE  
AND  
LAW AND DEVELOPMENT  
STUDIES  
—AS A BASE FOR CONSIDERATION OF  
JAPAN'S LEGAL ASSISTANCE—**

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**I INTERNATIONAL  
AFFAIRS IN RELATION TO  
LEGAL ASSISTANCE**

**A. Status quo of legal assistance**

**1. Forms of legal assistance**

Type I	Type II	Type III	Type IV
Establishment of statutes (enactment and abolishment of laws and regulations, modernization of law, etc.)	Improvement of law operation institutions (improvement of legislative, judicial and enforcement bodies, human resource development, capacity building, legal education, counter-corruption, etc.)	Capacity building of civil society (legal education, improvement of access to law, surveillance of government, etc.)	Improvement of law-related infrastructure, such as law dictionaries, textbooks, law books, case books, legal information systems, etc., ex-ante, and ex-post social survey

## 2. Subjects of legal assistance

### a) International donors

UN-related	UNDP UN General Assembly (UNGA), Sixth Committee (legal), Rule of Law Coordination and Resource Group (RLCRG), Rule of Law Assistance Unit (RLAU), UNCITRAL, UNHCR, ILO, UNEP, UNIDO, WHO, UNESCO, UNICEF, WTO, WIPO
International financial institutions	WB Group IMF
Others	OECD, DAC

### b) Legal assistance by regional organizations

Financial institutions for regional development	IDB ADB AfDB EBRD
Regional security organization	OSCE
Regional integration organization	EU

### c) Legal assistance by governments

F: Ministry of Foreign Affairs, FT: Ministry of Foreign Affairs and Trade, I: independent ministry, M: multiple ministries

Common law	USAID	F
	CIDA	F
	DFID	I
	AusAID	FT
Continental law	GTZ	M
	DgCiD	F
	KOICA	FT
	JICA	F
North European law	SIDA	F
	DANIDA	F

d) Legal assistance by private companies

Law firm, accounting firm, consulting firm, etc.	PwC BearingPoint Adam Smith Institute
Companies in general	Banks, oil companies, computer- related companies, manufacturers, etc.
Global business organizations	International Chamber of Commerce (ICC)

e) Legal assistance by NGOs, etc.

Inter- governmental organizations	IDLO HiIL
Lawyers associations	IBA, bar associations in several countries IDEA WJP
Foundations	Ford Foundation, Carnegie Endowment for International Peace, Open Society Institution, Soros Foundations, Hans-Seidel Foundation, Konrad-Adenauer- Stiftung, IRZ, ICCLC

**3. Competition and exploration of legal  
assistance cooperation**

a) "War of advice" and "institutional  
competition"

- 1) "The war of advice attacks Russia:  
Foreign advisers must fight to draw  
attention" (*The Financial Times*, 21 Dec  
1992)

## Russian Democratization Program

The “500 days-plan” of the former Soviet Union (Oct. 1990),  
 Coup by the old guard crony (19 August 1991), Failure and  
 dissolution of the former Soviet Union (25 December 1991),  
 “Shock therapy (Jan. 1992)

Russian side	Foreign governments, foundations, companies, etc.
President (Yeltsin) Former Acting Prime Minister (Gaidar)	WB
New Prime Minister (Chernomyrdin) Economic advisor to a former President	USAID, Harvard University Ford Foundation
Vice-Prime Minister (National Privatization Committee)	Credit Suisse First Boston
Vice-Prime Minister (International Cooperation Development Agency)	Goldman Sachs
Economic Reform Committee	LSE, BKH Fund

## 2) “Two business styles struggle for mastery in East Europe – Motives for which Americans and Germans want to impose their law” (*Wall Street Journal*, 3 April 1995)

- “The tradition of the Code Napoleon in the  
 European Continent is forced to fight against  
 Anglo-Saxon Common Law”
  - Battle over legislation of civil and commercial  
 codes in Georgia
  - Regulations against hostile buyout
  - Strengthening of directors’ powers, etc. –
  - Institutional competition over CF and CG
- “He who writes laws gets the business” theory



Legal situation in Russia and East Europe after the collapse of Berlin Wall: division into two major camps  
<German-type>(civil and commercial law, establishment of universal banks, ...): Poland, Hungary, Czech, Slovakia, Slovenia, Croatia, Latvia  
<American-type>(democratization, securities exchange law, ...): Russia

“Bet... While the USA has spent over 4 billion dollars for legal assistance in Central and Eastern Europe between 1993 and 1995, Germany has spent nearly 8 billion marks (5.68 billion dollars) over the previous 5 years (excluding contributions to EU).”

- “The USA is selling an excessively complicated system that needs proliferation of a large number of lawyers” (R. Knieper)
- “Germany is recommending (its own) obsolete financial system when German companies are beginning to imitate the behavior patterns of Anglo-American companies after competing with them.”
- “Anglo-Saxon mole” at the Ministry of Finance of Croatia  
“The German system is very conservative ... Companies are controlled by banks. Credit tends to be provided not by shareholders but by banks. Companies need concealed reserve funds. The Anglo-Saxon system may be partially an excellent model for us”.

### 3) Report by La Porta, “Quality of Government” explains the superiority of Anglo-Saxon law

“In countries which are poor, located near the equator, and where ethno-linguistically heterogeneous factors are mixed, French law or socialist law is used, and the ratio of Catholics or Muslims is high in the whole population, their governments tend to show poor performance.”  
(Rafael La Porta, Florencio Lopez-de-Silanes, Andrei Shleifer and Robert Vishny, “The Quality of Government,” *JLEO*, v. 15, 1999)

## The so-called Washington Consensus

(John Williamson, *The Political Economy of Policy Reform*, 1994 )

1) Establishment of ownership law	7) Stabilization of exchange rate and abolition of regulations
2) Liberalization of international trade	8) Reduction of government spending, correction of budget deficit
3) Liberalization of investment	
4) Liberalization of finance	9) Government spending for education, health, and infrastructure
5) Privatization of state enterprises	
6) Easing of regulations	10) Tax reform

### 4) Legal assistance by GTZ and IRZ, and “Bremen’s Decision”

1993 Conclusion of an agreement to reform the Civil and Commercial Code of Georgia

1994 Conclusion of agreements with Armenia, Azerbaijan, Kazakhstan, Kirghiz, Moldova, Tajikistan, Turkmenistan, Uzbekistan, etc.

1996 Legal reform projects in countries in transition

1997 “Bremen’s Decision” (5 March)

- The legal system is a prerequisite for the establishment of a market economy and democracy.
- The legal reform shall be proceeded in the order of civil and commercial law, company law, bankruptcy law, security law, securities exchange law and the code of civil procedure
- The next phase of law reform is legal education and training of legal professionals

### 5) “Universality and specificity of legal assistance cooperation”

(R. Knieper, *Juristische Zusammenarbeit: Universität und Kontext*, 2003)

“ It is important that all countries try to avoid drafting (civil and) commercial code(s) misguided by inappropriate information given by international experts. No country should rely on the tradition of “Germany” or “France”, and should not enact laws on individual contract types. Unfortunately, lease contract laws enacted in some countries under the advice by USAID clearly show that this risk is very realistic.”

6) "An American jury thoroughly investigates an assistance project for Russia administered by Harvard University"

(Wall Street Journal, 5 Feb 1999)

1992 USAID decided to provide \$ 57 million to the Center for International Development (CID) of Harvard University, as the fund to revise the Civil and Commercial Code of the former Soviet Union and for the Market Economy Establishment Project for Russia (1992-1997)

1997 Because of the misuse of the project fund (purchase of Russian bonds, misuse of the fund by staff), the judicial authorities investigated the case, civil action was brought against Harvard University and the unused \$ 14 million was cancelled.

### Differences between the two major camps in relation to legal assistance

(American type): led by economists, use of specialists such as consulting firms, etc., the principle of individual legislation, principle of objective evaluation of results, part of economic policies, development involving international financial institutions, "Americanization" of business standards, such as international trade, investment, finance, etc.

(German type): mainly by lawyers, implementation by government or research institutions, emphasis on comprehensive codes, long-term plan, international political motives, ... expansion to East Europe and Central Asia (countries with "common" tradition of continental law) ... "Principle of Legal Empire"?

#### b) Trial of individual partnership

Trial of "partnership" projects by UNDP, governments, NGOs, etc. (e.g. Support for the reform of local systems, journalism, microfinance lending mechanism, customs duty, etc. in the "national reform" of Syria)

#### c) Is it possible to establish a comprehensive cooperation system?

Organization of international conferences by WB, "Comprehensive Legal and Judicial Development" (Washington D.C., June 2000), "Capacity Building, Security and Opportunity through Law and Justice" (Saint Petersburg, July 2001)

## **B. From competition to cooperation in legal assistance ?**

### **1. UN movement --- arrangement from above?**

- a) The Millennium Declaration (2000) Clauses 9 and 13:  
Promotion of good governance and the rule of law at both national and international levels  
Millennium Development Goals (2000) Goal 8, Target 12
- b) A series of reports by the UN Secretary General regarding the promotion of the rule of law
- c) Document of 2005 World Summit Outcome (Clause 134): Rule of law, human rights and democracy at both national and international levels
- d) Resolution of the UN General Assembly in 2006  
Promotion of the "rule of law at both national and international levels" (A/RES/61/39):

- e) Commencement of discussions on the rule of law at the Sixth Committee (Legal) (2007~)
- f) Establishment of the Rule of Law Coordination and Resource Group (RLCRG) (2007)
- g) Establishment of the Rule of Law Assistance Unit (RLAU) within the Office of the UN Deputy Secretary General (2007)
- h) Seminar on the Rule of Law (2008) and others

### **Background to the theory of the "rule of law at both national and international levels"**

1. Since the latter half of the 70s: Formation of interstate rules in relation to trade, finance, communication, energy, ocean, environment, etc.
2. Since the latter half of the 80s: Increase of legal assistance projects mainly for countries in institutional transition, interest in the establishment of domestic law
3. Since the latter half of the 90s: 1) Expansion of disparities due to economic globalization and cultivation of markets, aggravation of terrorism, unstable international relations, global warming, etc. Necessity of the rule of law in the fields of international trade, criminal affairs, peace-building and environment; 2) Escalated institutional competition, discrepancies in legal assistance projects, Washington Consensus and criticism thereon, etc. Increasing interest by the international society in the building of domestic order

## Discussions at the Sixth Committee (legal)

Ubiquity of the principle that “all persons, institutions and entities, including the state, are accountable to laws publicly promulgated, equally enforced, and independently adjudicated” (Asha-Rose Migiro)

1. Focus on international criminal justice, building of peace and activities for maintaining peace
2. Focus on technical assistance and capacity building for domestic legislation
3. Focus on the progress of human rights

Emphasis on UN activities as the “critical interface between domestic and international order” and the ownership of each nation

## the Rule of Law Coordination and Resource Group

“Strengthening of coordination” for further  
“consistent and efficient” rule-of-law  
assistance

1. “Guidance Note on the UN Approach to Rule of Law assistance”
2. “Joint strategic plan for 2009 to 2011”  
under formation

## List of Rule-of-Law Assistance by UN entities (12 March 2008)

64 agencies support promotion of the rule of law at national and international levels.

### I. Preface

II. List of current activities addressing the promotion of the rule of law at national and international levels by various agencies, entities, offices, departments, funds and programmes within the UN system.

A. Activities for promotion of the rule of law at international level

1. Activities for teaching, dissemination and promotion of international law
2. Assistance activities for domestic implementation of international law
3. Activities for dispute resolution at international level
4. Activities for conflict resolution and justice in transition

B. Activities for promotion of the rule of law at national level

1. Activities for enhancement of the executive branch (institution), public law and governance issues
2. Activities in relation to judicial administration and law enforcement

**2. Movement of international NGOs --- bottom-up arrangement?**

Launch of rule-of-law projects by IBA, ABA, WJP and HiiL with focus on the access to law through development of rule-of-law indexes, legal empowerment of civil society, legal aid, etc.

### **3. Good governance and the rule of law as the mainstream and shared goal**

#### **a) Good governance**

The concept was developed mainly by WB and other international financial institutions. At first, it consisted of (i) the control of the public sector (capacity and efficiency), (ii) accountability, (iii) the legal framework for development (predictability), (iv) transparency and information (WB, *Governance and Development*, 1992; WB, *Governance*, 1994)

Subsequently, its meaning expanded to include governance of the private sector and civil organizations. Governance indicators were developed and adopted by many donor organizations.

#### **b) Rule of law**

Developed mainly by the UN General Assembly, etc.

- 1) From the multi-level rule of law,
- 2) to the multidimensional rule of law

## **Multi-level rule of law**

### **I . Rule of law at national level**

1. Government level (simultaneous necessity to establish a strong government and to control government power.
2. Market and company level (establishment and operation of market rules, legitimate corporate activities)
3. Popular level (law dissemination to citizens, compliance of law by citizens, human security)

### **II . Rule of law at international level**

1. Negotiations and rule-formation on international trade, investment, environment, criminal investigation, peace-building and security
2. Rule of law by international organizations

## Multidimensional rule of law

Increase of interest by the international society in the formation of law at national level (1 - 3 of I. in the preceding page), and diversification of involvement form

1. Sharing of statutory provisions through legislation
  2. Sharing of interpretation methods, formation of case law, and coordination skills with customary law
  3. Exchange and sharing of web-based legal information
  4. Expanded law dissemination activities to citizens
- Sharing of partial elements of national law associated with globalization (global community)
- ⇒ Where is the multi-dimensional rule of law heading for?

“It was found that traditional international law, which paid attention only to the relationships among nations, was not sufficient to address new requests from the world community and the world economy. The legal structure of the world community became more complex and multidimensional by two developmental factors: establishment of international organizations whose activities are different from the building of traditional and more simple relations among nations; and appearance of individuals as the subject of international law and their human rights. It was natural and rational that such concepts as “transnational law” (Judge P. Jessup), “world law” (G. Clark and Professor L. Sohn), “universal law” (Dr. W. Jenks) and “global law”, have been presented in order to express various legal aspects more complicatedly intertwined.

- I preferred using the terms “world law, droit mondial, Weltrecht”. The world law consists of common national laws, international private law and international public law. However, the world law is not just a jumble of these three parties. The world law must be developed step-by-step, in accordance with the progress of the world community, by integrating legal territories, components of these three parties, based on the juridical common denominator – which is nothing more than natural law. (Kotaro Tanaka, “Some Observations on Peace, Law, and Human Rights,” in: Wolfgang Friedmann et al. (ed.), *Transnational Law in a Changing Society: Essays in Honor of Phillip C. Jessup*, Columbia University Press, 1972, pp. 243-244)

1. Development from jus gentium, law of nations to international law

Implication of inter-national law by Jeremy Bentham against jus gentium: 1. Only the agreement based on the reciprocal trade between sovereigns is "international" "law"; 2. a single or multiple national laws shall be applied to transnational commercial customary law and maritime law among traditional concepts of jus gentium; 3. natural law (a system of rules derived from natural reason and common to all civilized people) is not law.

2. Development from international law to "world law", "transnational law" and "law of peoples"?

Expansion of law beyond the reciprocal trade between sovereigns, such as "world organization law", "human rights law", etc.

(Re-)presentation of "world law"

"We live not only within the "international" economy, but also in the "world" of mutually dependent domestic economies. . . . the parallel development in national legislation in several countries, along with the adoption of international agreements . . . has substantively contributed to the world law". International trade law (on commodity trading, foreign exchange, financial transactions, foreign direct investment), non-profit world organization law (on medicine, health, human rights, science, engineering, travel, civil rights, political rights, charity, welfare, environmental protection, world peace, sports, leisure), etc. "They may be called "supranational law", but this name does not indicate universality. . . . The world law is partially a law of the world economy, but the world economy is composed of not only "supranational" economies, . . . but also of certain domestic activities." (Harold J. Berman, "World Law," *Fordam International Law Journal*, vol. 18, 1994/5, pp. 1617-1622)

Presentation of the law of peoples

John Rawls

If “world community”, “world economy” ... can be replaced by “globalization”, there is a consciousness of potential problems concerning global governance.

The “legal structure of the world community” becoming “multidimensional” in a sense that diverse legal aspects are more intricately intertwined --- expressed by the concepts of transnational law, world law, universal law and global law

The world law “must be developed step-by-step” in accordance with the progress of the world community, by integrating 1. common national law, 2. international private law, and 3. international common law, based on the “juridical common denominator = natural law” --- “the relevance of the rule of law” as the formation method of “world law” ... to rely on religion and ethics in lieu of the rule of law is nothing more than idealism, and to rely on politics and economy is nothing more than realism.” (Tanaka, op. cit. p. 242)

Implication of the “rule of law at both national and international levels”

Emphasis on the rule of law as a measure to build domestic governance, against the background of the interest therein as part of good governance (global governance) of globalizing international society

Recognition of the decisive importance of the “procedure” in the “improvement of legal system”. Importance of “rulemaking (meta-rules, secondary rules) for rulemaking”

... Definitely lacking in the current legal assistance

- 1) Substantive meta-rules
- 2) Procedural meta-rules

## 1) Factors of substantive meta-rules to consider

(i) “Integration” (contact or mixing) of received law and inherent law (customary law, law culture or other informal rules)

(ii) “Integration” (contact or mixing) of common law (factors) and civil law (factors)

... Importance of the “room” for legal assistance as the “forefront” of new (generation’s) legal formation

## 2) Procedural meta-rules

Necessity of the rule-based rule of law construction

Implication of the multi-dimensional rule of law

Ubiquity of the rule of law = «the world where anybody can enjoy, whenever or wherever, legal protection of basic rights » = the rule of law ubiquitous world

The relation between good governance (global, national, etc.) and the rule of law.  
The relation between buildings and designs. The building method is important from the stage of groundwork. The completed buildings may have different colors, forms or sizes, but have common basic attributes as buildings (goals of “good buildings”). Cooperation in construction.

### 4. Possibility to create global law reform models

Possibility to harmonize common law and continental law

Individual legislation (principle) and compilation of comprehensive codes (principle)

	Stability	Flexibility	Consistency	Transparency
Common law	○ (Rule of law)	○		
Continental law			○ System of rights	○

“Where should a law reform start? This is a difficult question to answer in an abstract way, but certain consideration thereof is possible as follows:

- a) A nation needs clear and transparent rules that define criminal and civil offences, and that establish rights to personhood and property.
- b) A nation requires brief and effective measures to file a petition against national public servants.
- c) Moreover, a nation needs a reliable institution to enforce such rules. Once these **basic constructive units** are established in due places,

- d) Furthermore, a nation may establish more sophisticated laws in order to monitor economic activities by private persons and to control its society from the standpoint of public interests.
- e) In addition, a nation may contemplate how to dispose of crimes committed during a civil war or a turbulent period prior to the establishment of a new nation” (underlines and emphases by the quoter)  
Rose-Ackerman, op. cit., p. 209.

## **II BACKGROUND, GOALS AND CHALLENGES OF LEGAL ASSISTANCE**

## A. Why now “legal assistance”

### Expanding disparities

- • • increase of weak nations, failed nations and collapsed nations
- • • primordial factors of terrorism and other social problems?
- • • who (and to what extent) should support nations (and the people) unable to sustain themselves?
- • • as a premise thereof, why are the disparities among countries expanding?

Country name	Human development index	Life expectancy at birth (age)	School enrollment ratio(%)	Literacy rate of 15 years-old or older (%)	GDP per capita (US\$)
Norway	0.963 (1)	79.4	101	99.0	37,670
Luxemburg	0.949 (4)	78.5	96	99.0	62,298
USA	0.944 (10)	77.4	93	99.0	37,562
Japan	0.943 (11)	82.0	84	99.0	27,967
England	0.939 (15)	78.4	123	99.0	27,247
China	0.755 (85)	71.6	69	90.9	5,003
Swaziland	0.498(147)	32.5	60	79.2	4,726
Burkina Faso	0.317(175)	47.5	24	12.8	1,174
Sierra Leone	0.298(176)	40.8	45	29.6	548
Niger	0.281(177)	44.4	21	14.4	835

Source: UNDP, Human Development Report 2005

Country name	Human development index	Life expectancy at birth (age)	School enrollment ratio(%)	Literacy rate of 15 years-old or older (%)	GDP per capita (US\$)
Norway	0.965 (1)	79.6	100	99.0	38,454
Luxemburg	0.949 (12)	78.6	85	99.0	69,961
USA	0.945 (8)	77.5	93	99.0	39,676
Japan	0.949 (7)	82.2	85	99.0	29,251
England	0.940 (18)	78.5	93	99.0	30,821
China	0.768 (81)	71.9	70	90.9	5,896
Swaziland	0.500(146)	31.3	58	79.6	5,638
Burkina Faso	0.342(174)	47.9	26	21.8	1,169
Sierra Leone	0.335(176)	41.0	65	35.1	561
Niger	0.311(177)	44.6	21	28.7	779

Source: UNDP, Human Development Report 2006

Country name	Human development index	Life expectancy at birth (age)	School enrollment ratio(%)	Literacy rate of 15 years-old or older (%)	GDP per capita (US\$)
Norway	0.968 (2)	79.8	99.2	99.0	36,510
Luxemburg	0.944 (18)	78.4	84.7	99.0	60,228
USA	0.951 (12)	77.9	93.3	99.0	41,890
Japan	0.953 (8)	82.3	85.9	99.0	31,267
England	0.946 (16)	79.0	93.0	99.0	33,238
China	0.777 (81)	72.5	69.1	90.9	6,757
Swaziland	0.547(141)	40.9	59.8	79.6	4,824
Burkina Faso	0.370(176)	51.4	29.3	23.6	1,213
Sierra Leone	0.336(177)	41.8	44.6	34.8	806
Niger	0.374(174)	55.8	22.7	28.7	781

Source : UNDP, Human Development Report 2007/2008

#### Change in GDP per capita

	1990	1995	2000	2005	2005/ 1990
Global average	4,110	5,410	6,526	8,229	2.00
Highest (* 1)	17,620	23,760	33,505	62,298	3.54 (2.27)
Lowest (* 2)	410	330	458	548	1.34
Average in all LDCs	1,970	2,591	3,270	4,359	2.21
Average in least developed countries	690	935	1,064	1,328	1.92
Industrialized nations	14,260	15,291	—	—	
Average in high human development countries	—	—	21,799	25,665	
Average in South Asian countries	—	—	2,112	2,897	
Average in sub-Saharan African countries	990	1,346	1,607	1,856	1.87
* 1	USA	USA	Luxemburg	Luxemburg	
* 2	Tanzania	Ethiopia	Sierra Leone	Sierra Leone	

Unit: US dollar (PPP)

Source: UNDP, Human Development Report 1990, 1995, 2000, 2005

“The core challenge in human history is to explain the reason why the historical change course has broadly dispersed. ---The most outstanding character in the past 10,000 years is the fact that we have evolved into societies fundamentally different in terms of religion, ethnicity, culture, politics and economy. And the disparities between rich and poor countries, and developed and underdeveloped countries are as large as, or maybe much larger than ever before. What can explain this dispersion, and .....what conditions ... may create convergence?”(D. North, *Institutions, Institutional Change and Economic Performance*, 1990)

## **B. What causes the disparities between rich and poor countries**

- (i) Natural conditions, abundance of natural resources?
- (ii) National character, diligence?
- (iii) Institutional differences  
Difference in the code of conduct that governs people's behavior, such as law, folkways, morals, religion, ideology, etc.



Focus on the change of international development (cooperation) policies and institutions

- (i) Modernization theory, unilinear developmental stage theory, trickle down
- (ii) BHN approach
- (iii) Structural adjustment
- (iv) Informal institutional reform through formal institutional reform (law reform), re-evaluation of the role of government to that end

## **C. What is “institution”?**

1. “Institution” means
  - a group of rules that actually constraints acts of individuals and organizations in a society.
  - a) Informal institutions are formed gradually
  - b) Formal institutions are artificially created
2. Reasons for the existence of institutions
  - a) Reduce uncertainty
  - b) Grant incentives

3. "When it is costly to transact, institution matters."

For example, when a part of a factory machine is broken, how long would it take and how much would it cost to get a substitute part (during the 80s in Peru, if acted "legally", 18 months, by paying bribes 3 or 4 times, 2 weeks, while in USA, 12 hours!) ••• The difference in overall institutions immeasurably affects trade costs and the whole national economies.

«In development, an institutional reform is important!»

Why are some countries rich and others poor?

"Across sub-Saharan Africa, a series of ideologies regarding re-distributional norm, that is, the belief that fortune should be equally divided among people has evolved. Why has such an ideology evolved? Although there is no clear answer yet, the nearest one would be the fact that due to the existence of huge disparities among the achievements and attributes of people under different circumstances, they have become unable to attribute the acquisition of fortune directly to diligence.

Under these circumstances, such an idea is broadly supported that when a person becomes wealthy, it is because of luck, not because of the person's acquirements. And a norm that lucky people should share it with others tends to evolve. This idea totally contrasts with the Jewish or Christian tradition or the Protestant ethic advocated by Weber that views the achievement of wealth as a product of diligence and thrift." (D. North, "Why Some Countries Are Rich and Some Are Poor," *Chi-Kent L. Rev.* v. 77, 2001-2002)

## **D. How would an institutional reform be made possible?**

### **1. "Path dependence" of an institutional reform**

An institutional reform cannot be started afresh withdrawing the current system, and has no other choice but starting from the present "scaffolding".  
--- An institutional reform can only be proceeded incrementally based on the history and actual situation of institutions in each country.

### **2. Difficulty in changing informal institutions**

"Formal rules may . . . be changed (easily) by moving the political system, as enacting new legislation. However, how can the code or standards of conduct be changed? This is extremely difficult, but very important..." (D. North, op. cit.)

## **E. Why should we support the institutional reform of other countries?**

Grounds for and content of the duty to assist

- (i) Compensation for invasion in the past
- (ii) National interests of donor countries
- (iii) Humanitarianism
- (iv) Obligation to address the entitlement of developing countries
- (v) Implicit agreement to maintain the global system
- (vi) Realization of global distributional justice

## F. What is globalization?

Common points and differences between  
“internationalization” and “globalization”

1. Globalization does not conflict with  
national sovereignty or identity.

(T.Friedman/translated by Kazuki Azumae  
and Kiyomi Hattori, “*The Lexus and the  
Olive Tree*” (two volumes), Soushisha 2000)

2. Shift from the viewpoint of society aspect  
to the viewpoint of community aspect

Does globalization mean “Americanization”?

Several viewpoints and differences in the evaluation on  
globalization

### a) Critical viewpoints

“The global free market is premised on the fact that  
economic modernization means the same in any places.  
It interprets that economic globalization --- expansion of  
industrial production to mutually inter-related market  
economies – is the only type of capitalism of the Western  
world, that is, an inevitable progress of American-type  
free market. ✓The actual history we see is closer to its  
opposite. --- Currently, the global market is splitting  
societies and undermining nations.... The Washington  
Consensus will not continue forever.” (J Gray/translated  
by Masahiko Ishizuka “*The Delusions of Global  
Capitalism*”, Nihon keizai shinbun-sha 1999, pp. 6

“The essence of globalization does not lie in the  
superficial phenomenon of the borderlessness of  
markets in the course of its worldwide expansion. The  
USA’s “forcible intent” of continuously being hegemon  
relying on the residual image of the Cold-War type  
ideology, even after its end, is causing today’s  
globalization.... The reason why hegemony without  
the existence of cold war still needs to be based on  
the market fundamentalism is because it most  
efficiently represents the USA’s self-interest called  
“imposition” of financial deregulation policies, as well  
as the request for market liberalization that stops the  
expansion of trade deficit.” (Masaru Kaneko “*Han-  
gurobarizumu*” [*Anti-globalization*], Iwanami-shoten  
1999, pp. 27)

“... The globalization imposed by major industrialized countries and led by companies is ... hurting many people, invading sovereigns and democratic rights, and causing resistance from many people. ... “Reform” means liberalization of foreign investments, and being subject to globalization dominated by companies. ... The agreement on investors’ rights wrongly named “globalization” and “free trade agreement”, which has been carried out by Western countries...” (N. Chomsky = D. Barsamian/translated by Mariko Fujita “*Gurobarizumu wa sekai wo hakaisuru: puropaganda to mini*” [*Globalism will destroy the world: Propaganda and Public Mind*], Akaishi-shoten 2003, pp. 177, 256, 258

b) Affirmative opinion

“Globalization already has important ethical aspects. Warning that globalization is ruthless and discards the weak is phony, to put it worse, or just an exaggeration, to put it better, but in any case it is a wrong argument./ Having said that, ... globalization will not exert the maximum effect if it is let alone. ... Only when it is appropriately controlled, it will produce further better effect.” (J. Bhagwati/translated by Chikara Suzuki and Rumiko Momoi, “*Gurobaraizeshon o yogo suru*” [*In defense of globalization*], Nihon Keizai Shinbun-sha 2005, pp. 339

c) Neutral opinion

“Even if globalization has flaws, it has many advantages. ... Globalization means ... basically, ... closer integration of nations and people around the world. ... Globalization itself is not good or evil. However, it is true that it has potential to do terrific good deeds. For example, in East Asian countries, as a result that they agreed to accept it and carried it forward at their own pace, despite an intervention by the crisis in 1997, globalization provided them with huge benefits. However, in most parts of the world, such benefits have not been brought. In many countries globalization is regarded as a resemblance to a catastrophe.” (J. Stiglitz/translated by Chikara Suzuki, “*Sekai o fuko ni shita gurobarizumu no shota*” [*Globalization and its Discontents*], Tokuma shoten 2002, pp. 21, 42)

## Normative implication of globalization

- (i) Reduction of transaction costs
- (ii) Standardized assurance of human rights
- (iii) Sharing of multiculturalism
- (iv) Global governance through promotion of international cooperation = cooperation for international security and peace without the existence of a world government ... goals of legal assistance

## G. What is global governance?

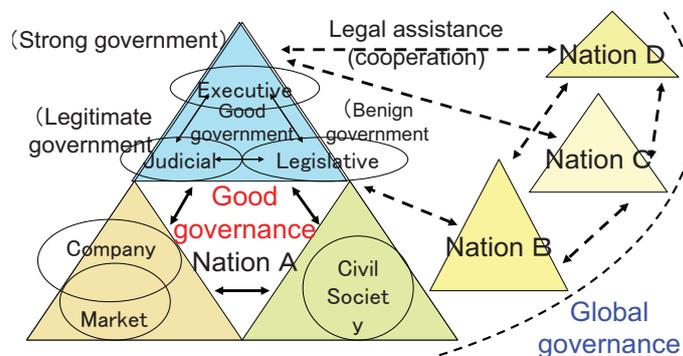
Global governance means ---  
foedus pacificum consisting of sovereign nations with good governance

Good governance of a nation consists of,

- (i) good government,
- (ii) efficient market and companies, and
- (iii) mature civil society, etc.

Good government consists of,

- (i) strong government,
- (ii) legitimate government, and
- (iii) benign government, etc.



From "good government" to "good governance" and "global governance",

## H. Relationships between good governance and the rule of law

### 1. Definition of the rule of law

- a) Formal definition, b) Substantive definition,
- c) Functional definition
- a') Rule-book conception, b') Rights conception
- a'') Thin theory, b'') Thick theory

Definition of the rule of law in the context of “development”

···It is necessary to define “what is the rule of law” by incorporating the dynamics theory of “how can the rule of law be constructed?”.

### 2. Multilayered and gradual rule of law, and good governance

4 <sup>th</sup> layer	Establishment of a system assuring the “good” contents of legal rules (“good rule of law”)		Substantive and expansive understanding of the “rule of law” (Rule of law II)
3 <sup>rd</sup> layer	Establishment of an adjudication and enforcement mechanism of legal rules	Formalistic understanding of the “rule of law” (Rule of law I)	
2 <sup>nd</sup> layer	Formation of legal rules through formalization of rules		
1 <sup>st</sup> layer	Formation of rule-abiding attitude (confirmation of existing rules abided)		

### 3. Strained relations between good governance and the rule of law

- a) Strained relations between the maintenance of social order by **government** and the freedom of assembly, association and expression of **citizens**
- b) Strained relations between the (flexible) exercise of discretionary power by **government** in accordance with economic and social situation, and international affairs, and assurance of **civil and corporate** rights
- c) Strained relations between the cultivation of **markets and companies** by **government** and training of **civil society** (democracy)
  - should also be called “dilemma of good governance”

“In order to realize impersonal exchange, an institution where an agreement can be enforced by coercive intimidation is required. Under such environment, an enormous scale of economy exists in the course of supervision and enforcement of agreement by a government body that uses coercion in order to act as a third party and enforce agreement. However, there is an underlying dilemma of economic growth. [In other words,] we cannot dispense with a nation, nor endure a nation. How can we have a nation behave as a fair third party”

(Douglass C. North, *Institutions, Institutional Change and Economic Performance*, Cambridge University Press, 1990, p. 58/ translated by Kumi Takeshita, “*Seido, Seido Henka, Keizai Seika*”, Koyo Shobo 1994, pp. 78, underlined by the quoter)

“Nations need to balance the necessity of protection of investors (‘ ownership), flexibility in forming policies, .....(especially) taxation affecting returns on private investments and the government’s discretionary power to carry out regulatory activities..... The rule of law does not mean a series of strict and invariable rules.”

Susan Rose-Ackerman, “Establishing the Rule of Law,” in Robert I. Rotberg (ed.), *When States Fail: Causes and Consequences*, Princeton University Press, 2004, p. 191 (underlined by the quoter)

## **I. Challenges of legal assistance**

1. Construction of the rule-based good governance and rule of law
2. Securement of good planning, consistency and transparency
3. Clear goals, emphasis on process and appropriate evaluation
4. Building of a base for exchange of information and cooperation (legal assistance cooperation network) among parties concerned
5. Smooth communication between donors and recipient countries (how to overcome language barrier, etc.)
6. Securement and training of human resources, etc.

### III WHAT ARE LAW AND DEVELOPMENT STUDIES?

#### A. Establishment and development of law and development studies

Origin of law and development studies

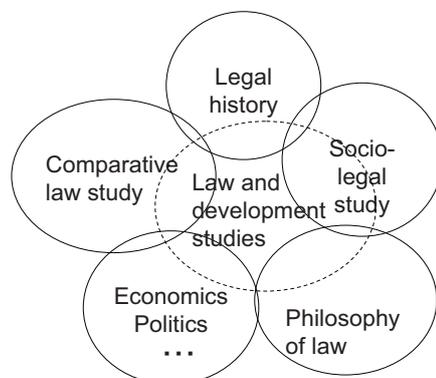
- i) Conception of "progress"
- ii) Movement for law reform
- iii) Sciences regarding the relationships between law and society (socio-legal study, legal history, forensic anthropology, law and economics, legal policy studies, law and psychology)
- iv) Social engineering through law
- v) Practice and theory of foreign assistance

Resemblance to law and development studies

- i) Administration of colonies
- ii) Experience of occupation forces
- iii) Control of the residence of domestic minorities
- iv) Regional development
- ⑤ Study of one's own national development

Promotion of law and development studies as comparative/law and social change

(J. Merryman, "Comparative Law and Social Change," *AJCL*, v. 25, 1977)



## **B. Definition and issues of law and development studies**

### **1. Definition and characteristics of law and development studies**

A discipline that explores the content and method of law reform in accordance with the history and actual situation of each country, in order to, on the premise of globalized society, construct good governance in each country, and thereby realize global governance as a peaceful international order, through norm formation networking by legal assistance cooperation

Its characteristics are: being an interface of related disciplines to gain holistic knowledge regarding law and social change, and requiring feedback of theory and practice.

--- "Jurisprudence for the building of good governance"

### **2. Issues of law and development studies**

**Issue 1** Clarify the role of a legal system in the social structure and social change mechanism (general theory of law and social change)

**Issue 2** Clarify, based on the general theory of law and social change, what kind of economic, political and social change (result) can be anticipated through a specific law reform, and their micro-level causal relation

**Issue 3** Formulate a concrete, comprehensive and long-term program based on the legal assistance strategies for individual nations: who should implement law reform by what measures and through what process

**Issue 4** Explore universal normative theories on the goals of development to be realized through a series of law reform.

## **C. Model of law reform**

### **1. Construction of the system of rights**

A model law reform focusing on ownership (private right)

### **2. Establishment of the rule of law**

Necessity to make the rule of law flexible

The system of rights and the rule of law as a model law reform

《System of rights》		《Rule of law》
<b>Individual civil rights</b>	<b>a) Right of freedom</b> (freedom of economic activities, assembly and association, expression, ideology, conscience and religion, ...) <b>b) Social right</b> <b>c) Suffrage</b>	Rule of law II 
<b>National civil rights</b>	<b>a) Legislative power</b> <b>b) Jurisdiction</b> <b>c) Executive power</b>	
<b>Private rights</b>	<b>a) Moral right</b>	Rule of law I 
	<b>b) Real right</b> (ownership, limited real right, possessory right)	
	<b>c) Claim</b>	
	<b>d) Right under family law</b> (parental power, guardian's right, ...)	

Flexibilization of the “rule of law” through its multilayered, gradual and dynamic understanding

4 <sup>th</sup> layer	Establishment of a system assuring the “good” contents of legal rules (“good rule of law”)	Formalistic understanding of the “rule of law” (Rule of law I) Substantive and expansive understanding of the “rule of law” (Rule of law II)
3 <sup>rd</sup> layer	Establishment of an adjudication and enforcement mechanism of legal rules	
2 <sup>nd</sup> layer	Formation of legal rules through formalization of rules	
1 <sup>st</sup> layer	Formation of rule-abiding attitude (confirmation of existing rules abided)	

**D. Sequencing and pace of law reform**

“Where should a law reform start? This is a difficult question to answer in an abstract way, but certain consideration thereof is possible as follows: 1) A nation needs clear and transparent rules that define criminal and civil offences, and that establish rights to personhood and property. 2) A nation requires brief and effective measures to file a petition against national public servants

3) Moreover, a nation needs a reliable institution to enforce such rules. Once these basic constructive units are established in due places,  
4) Furthermore, a nation may establish more sophisticated laws in order to monitor economic activities by private persons and to control its society from the standpoint of public interests.  
5) In addition, a nation may contemplate how to dispose of crimes committed during a civil war or a turbulent period prior to the establishment of a new nation” (Susan Rose-Ackerman, “Establishing the Rule of Law,” in R. Rotberg (ed.), *When States Fail*, 2004)

Conflict of the “rule of law” and “strong government”  
•••How to solve the dilemma of “good government”  
“Nations need to balance the necessity of protection of investors(‘ ownership), flexibility in forming policies, ..... (especially) taxation affecting returns on private investments, .... and of the government’s discretionary power to carry out regulatory activities..... The rule of law does not mean a series of strict and invariable rules.” (Susan Rose-Ackerman, op. cit.)  
The “flexibility” and “arbitrariness” in the exercise of discretionary power are the two sides of the same coin!•••a proof of heading for “good governance” is rapidly required.

## **E. What should a law reform aim at?**

“While one tries to dominate everything absolutely on one’s own, the other intends, renouncing oneself, to blend into the deeper and larger universe than human beings --- By the way, which of these mental attitudes, behaviors, approaches to the world and life is better? Which is more advanced? Which is superior as a citizen or a human being?” (Michio Takeyama, 1948 “*Biruma-no-tategoto [Harp in Myanmar]*”)  
As a fundamental question, what is the ultimate goal of development?

## What are the goals of law reform?

Goals of development:

1. View of S·Huntington: (i) Economic growth  
(ii) Equity (fairness) (iii) Democracy (iv) Stability  
(v) Autonomy = “One image of a good society”
2. View of A·Sen: Development=happiness (well-being)=Expansion of the freedom of self-selection of one’s potential

Not necessarily the same as enrichment or utility  
(pleasure, content, satisfaction of wants...)

“We would drift about without a principle to rely on ... the individualism... it is a social institution that uses all people as they are, who are diverse and complicated, sometimes good, other times bad or smart, but most frequently foolish. . . . Unless human beings are omnipotent, the only way where an individual can be granted freedom ... is to define the scope, through general rules, where individuals have the power of decision....”

“The true individualism affirms the value of efforts common to families, small communities or groups... A spontaneous cooperation could much better dispose of it.” (F·A·Hayek, “Individualism: True and False”)

## **IV JAPANESE APPROACH FOR LEGAL ASSISTANCE**

## **A. Arrangement, accumulation and use of experiences**

1. Experience in the harmonization of continental-law and common-law elements
2. Experience in the coordination of “universal” and traditional rules  
E.g. a) Individualism and communitarianism (substantive law)  
b) Adversary system and inquisitorial system (procedural law)
3. Use of the know-how of long-term, planned, and systematic legal assistance, and building of a cooperation system among related subjects  
E.g. a) Starting with formation of meta-rules for making rules (laws)  
b) Know-how on the combination (simultaneous implementation) of individual legislation and compilation of comprehensive codes

## **B. Necessity of legal assistance strategies**

1. Merits (sales points) and philosophy of Japanese legal assistance  
Solution of the dilemma of “good government”, use of experience in building “good governance”
2. Policy positioning of legal assistance strategies
  - a) Diplomatic policy b) Relevance with economic policies  
•••discussions at the Council of Overseas Economic Cooperation
  - c) Relevance with security policies  
•••”strategies” as a process to find truth  
Legal assistance as “another path to peace”  
Issue of global justice

## **C. Building of a training system of human resources engaged in legal assistance**

1. Difficulty in continuously securing human resources engaged in legal assistance and in handing on its know-how
2. Necessity and utility of a training system of experts in legal assistance cooperation •••by using the experience in JICA’s “training courses for developing technical cooperation experts (legal assistance course) as well, institutional accumulation of the know-how for building good government and good governance, and human resources development through transmission of such know-how are indispensable,  
----- Experiences in legal assistance will give useful feedback to both individual lawyers and the nation.

A dialogue between a learned alderman of Pondicherry and an educated Brahmanic monk (Voltaire, *Dictionnaire philosophique*, 1764)

Alderman: In what kind of country or under what control would you like to have a better life?

Monk: Any country except in my country....

Alderman: .... I ask you once more. What kind of country would you like to choose?

Monk: *Where people obey only law.*

Alderman: That's a cliched answer.

Monk: But it's not a bad answer.

Alderman: Where can we find such a country?

Monk: We need to seek it.

J: We need to construct it!?

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# **V. ACTIVITIES OF THE INTERNATIONAL COOPERATION DEPARTMENT AND INTERPRETATION AND TRANSLATION SERVICES**

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## **I. INTRODUCTION**

This paper is based on the author's lecture on the interpretation and translation services necessary for the activities of the International Cooperation Department (ICD) of the Research and Training Institute (RTI) of the Ministry of Justice of Japan. The lecture was delivered to the students of Osaka University studying interpretation and translation skills on legal affairs during their visit to the ICD. In the lecture the author provided explanations on the theme with sample cases of her duties in relation to the "Seminar on Comparative Study of Law for Central Asia" [in Russian], "Japan-Korea Partnership Seminar" [Korean], and "Symposium on International Civil and Commercial Law" [in multiple languages], based on her professional experience and opinion.

## **II. ACTIVITIES OF THE ICD AND INTERPRETATION AND TRANSLATION SERVICES**

While "legal technical assistance" accounts for a large part of activities of the ICD, the department also engages in the organization of "international seminars and symposia". In any of the ICD activities high quality interpretation and translation services are quite essential.

### **A. JICA technical cooperation project**

The Ministry of Justice provides legal technical assistance mainly to Southeast Asian countries, such as Vietnam (Vietnamese), Cambodia (Khmer), Laos (Lao) and Indonesia (Indonesian). In providing legal technical assistance to those countries, communication in English is difficult in many cases. Moreover, while interpreters between English and the languages of recipient countries are available in some cases, there are few personnel capable to interpret the languages of recipient countries directly into Japanese. Interpreters are usually arranged by the Japan International Cooperation Center (JICE), an organization commissioned to implement international cooperation activities. However, there are cases where only certain particular interpreters are capable of providing the required high level interpretation, and training sessions cannot be programmed unless the availability of such

interpreters are confirmed.

## **B. Organization of international seminars and symposia**

In addition to the projects implemented by the Japan International Cooperation Agency (JICA), that is, ODA projects, the ICD organizes several international seminars and symposia as the unique activities of the Ministry of Justice. As these are not related to JICA, interpreters are provided not by JICE but by private companies.

As mentioned above, the ICD does not have in-house interpretation or translation personnel, and interpreters or translators are arranged only when there is a necessity. On the other hand, the ICD is staffed with one linguistic adviser of English. This is because ICD staff members are required to use English in our daily duties to communicate with the ODA project counterparts or overseas invitees via e-mail, etc. to prepare training courses or symposia.

## **C. Example 1: Seminar on Comparative Study of Law for Central Asia (Russian)**

### **1. Outline**

This seminar aims at securing legal predictability in Central Asian countries through presentations and exchange of opinions by participants on the outline, status quo and practices of corporate law systems in those countries.

Participants consist of judges and judicial officials of state organs such as the Ministry of Justice of Kazakhstan, Kyrgyzstan, Tajikistan and Uzbekistan. After making presentations on the outline of legal systems in their respective countries, they compare each legal system through discussions. When intending to make transactions with the global community, after making the transition from communist planned economy to a market economy, they need to know the features of their legal systems in comparison with those of other countries, and Japanese companies also need to obtain legal predictability when expanding their businesses to Central Asia.

Central Asian countries became independent from the former Soviet Union in 1991. Their official languages vary from Kazakh in Kazakhstan, to Kirghiz in Kyrgyzstan, Tajik in Tajikistan, Uzbek in Uzbekistan, and also Russian in Kazakhstan and Kyrgyzstan. No matter whether Russian is an official language or not, it is broadly used in these countries, especially in the legal field. Currently there is a movement to use their national languages, but it seems that such linguistic change of legal terms has not progressed as expected since there are no equivalent vocabularies of Russian terms in their original languages.

### **2. Problems**

#### **1) Unification of terms**

In Japan, the decision-making body of a company is called the “board of directors”. However, in this seminar the corresponding body in the companies of Central Asia is translated into a term meaning the “board of supervisors”, “panel execution organ”, etc. Even though it is an “organ similar to a board of directors”, its authorities are not always the

same. Therefore, in order to avoid confusion, it is necessary to discuss among related parties to decide and unify new terms.

## 2) Words existing in Japanese, but not in Russian

What actually became a problem in the seminar is the term “standing to sue”. When it was translated as the person who can sue, participants answered, “anybody whose right has been violated can sue”, and it took several days for the Japanese side to obtain an appropriate answer from them. It may attribute to the difference in our concepts about trial, rather than a problem of interpretation, and it was so difficult to exactly transmit our point, and the Japanese side felt like they were running in circles. Another example of difficult words to translate is “prima-facie evidence”, a word meaning proof with weaker evidential power than “evidence”.

## 3) Words existing in Russian, but not in Japanese

In Central Asia, economic cases arising from commercial activities are categorized separately from ordinary civil cases. Some countries have a Supreme Economic Court in addition to a Supreme Court. While civil cases are under the jurisdiction of ordinary courts under the control of the Supreme Court, economic cases fall under the jurisdiction of economic courts under the control of the Supreme Economic Court. Even when no supreme economic court system exists, there are cases where economic cases are tried by courts with broader territorial jurisdiction, which are different from ordinary courts.

The name of the court is translated “economic court” for convenience here, but the literal translation of the Russian term is “arbitration court”. When the Japanese side visited Central



Asia for field survey, they were asked whether they wanted to visit an arbitration court, and they answered, without prior knowledge, that they had no intention to visit an arbitration court because the target of their seminar was economic courts. This misunderstanding happened because no list of words for translation was available for local JICA office staff, though it had been provided to their accompanying interpreter in advance.

Another example is the term “inter-district court”, which was not always translated in the same way, and the Japanese side was not sure for a time whether the translated terms referred to the same court or not.

## 4) Corresponding terms with a slight difference in their meaning

This also happened in the seminar. When an “enterprise” was translated into Russian as “*Предприятие*” to mean a private company, trainees pointed out that the Russian term referred only to state-run companies. This was surprising even for the experienced interpreter who had engaged in a project for Uzbekistan for a long time. Fortunately trainees understood what we meant, but if not, there would have been mutual misunderstanding.

## 5) Lengthy words

This may occur in other languages as well. Russian words or sentences are longer than those of Japanese, and especially in case of simultaneous interpretation, interpreters have difficulty in keeping up with Japanese speakers. When the Japanese side prepared a comparison table of legal systems in the four Central Asian countries and in Japan, the table in Russian became much larger than that in Japanese. Moreover, when the result of the seminar was published in the form of a report, the Japanese side's request for printing the title of the seminar on the spine of the report was rejected because the title in Russian was too lengthy to fit on the spine.

### **D. Example 2: Japan-Korea Partnership Seminar (Korean)**

#### 1. Outline

This seminar aims at the enhancement of knowledge of Japanese and Korean trainees through discussions on the systematic and practical problems in relation to seminar subjects (registration, family registration, deposition and civil execution), thereby using the attainments of seminars to contribute to the development of the systems and improvement of practices related to seminar themes. It also aims to foster cooperative relationships between both countries.

Trainees consist of five officials from the Headquarters of the Ministry of Justice, the legal affairs bureaus, the Supreme Court and inferior courts of Japan, and other five officials from the Supreme Court and inferior courts of Korea.

Every year both a "Japan session" and a "Korea session" are held, where the Japanese side answers questions from the Korean side, and vice versa, respectively. Moreover, lectures and visits to related institutions are included in the curricula.

#### 2. Problems

##### 1) When written in Kanji

In the historical development, Korea used to apply Japanese law, and the current Korean legal system is also based on the law of Japan. Since the legal systems of both countries have a common base, similar problems have occurred. This is why this seminar was introduced in order to draw sample solutions of the other country applicable to their respective problems. Moreover, many legal terms of Korea are written in Kanji and are almost the same as those of Japan with similar pronunciation. Therefore, they were quite comprehensive for Japanese people, though some terms contain different Kanji.

In the seminar each trainee has one-to-one discussions with their partner from the other country, but only two or three interpreters are available for five pairs of trainees. Even so, there is an advantage that they can communicate with each other by means of writing because many legal terms of Korea use the same Kanji as Japanese legal terms. While Korea uses difficult Kanji and China uses simplified Kanji, Japanese Kanji is in the middle of both. Therefore Korean and Japanese may mutually guess the meaning of Kanji used in the other

country.

However, care must be taken because there are some catchy terms. For example, such words as “transaction”, “procedure” and “attachment” in Korean use different Kanji from Japanese words. Basically such terms need to be replaced with their corresponding terms in Japanese, but in some cases it is better not to translate them into Japanese and use the original terms as they are. For example, “取締役 (director)” in Japanese corresponds to “理事” in Korean (in Japanese, it means a person who represents an organization or an entity taking control of its business. In a joint stock company, it corresponds to a director) or “董事” in Chinese, but those words are left as they are in a Japanese text. Another example is “法院” (court) in Korean. and Chinese.

When this term is used in a proper noun, such as “Seoul Central District Court”, it should not be replaced with the Japanese term, “裁判所” (court).

## 2) When written in Hangul letters

On the other hand, when Japanese is translated into Korean in Hangul letters (Korean characters), a problem of homonym may arise. For example, the meaning of homonyms in Japanese, such as “債権” and “債券” (both are pronounced “*Saiken*” but mean a “claim” as a right, and “securities”, respectively) or “供託所” and “供託書” (pronounced “*kyotakusho*”, meaning “deposit office” and “application form for deposit” respectively) can be differentiated by their Kanji, but the former two words and the latter two terms are written in the same way in Hangul. Therefore, translated texts from Japanese to Korean in Hangul letters must be checked with focus on homonyms.

## 3) Code

When codes are used for itemizing, for example, “a. when written in Kanji” and “b. when written in Hangul”, such codes as “a. ...., b....” should be replaced with the corresponding codes in Japanese or Korean. However, when used to refer to a certain judgment as, “大法院 ○年○月○日宣告だ○○号判決” (= judgment by the Supreme Court on (dd/mm/yy), *Senkoku Da No. XX*), the numbering code should not be replaced and should be written as it is. This also applies to Russian. When codes are used to itemize a text, they are replaced with “a, b, c, ...”, but when specifying statutory articles, such as Article XX- д, they are left as they are in some cases.

## **E. Example 3: Symposium on International Civil and Commercial Law (multiple languages)**

### 1. Outline

This symposium aims to compare legal systems in the civil and commercial law fields in the Asia - Pacific region, and to that end invited overseas experts make presentations and hold panel discussions with Japanese law professors and lawyers.

On 9 March 2009, a symposium on the derivative action system was held inviting scholars and lawyers from China, Korea, Singapore and Taiwan, and simultaneous

interpretation was provided in Japanese, English, Chinese and Korean.

## 2. Problems

With regard to a problem in a symposium held in multiple languages, it all comes down to the problem of relay interpretation. As Japanese and Korean have the same word order, they can be interpreted almost at the same time, but in the case of interpretation between languages with different word order there is a time lag. When interpreting a presentation, no major problem will occur because it is a unilateral communication and presentation manuscripts are available in many cases. However, in the case of panel discussion, several problems may occur.

For example, there was a case where, when a panelist from Singapore posed a question to a Chinese panelist, the question was first interpreted from English to Japanese, and then from Japanese to Chinese. As there was not a large time lag between the question and its interpretation into Japanese, the audience finished listening to the question in Japanese just a few seconds after the Singaporean completed his question. Then, when the audience looked to the Chinese panelist for her answer, she was still listening to the question because there was a larger time lag in the relay interpretation from English to Japanese and from Japanese to Chinese. As the audience cannot choose multiple channels of earphones for interpretation, it was difficult to know when the interpretation to other languages finished. Another example is that, when a Korean panelist made a question to a Japanese panelist, even though the relay interpretation from Korean to Japanese and from Japanese to English or Chinese did not finish, the Japanese panelist was starting his answer.

Moreover, in cases where no manuscript is available, no matter how excellent an interpreter is, his/her simultaneous interpretation into Japanese may not be quite natural. When such unnatural Japanese is relay-interpreted into other languages, it is doubtful whether the intention of the original speaker is precisely transmitted to the listener.

### **III. CONCLUSION**

The problems presented in this paper should be kept in mind, not only by students aspiring to become interpreters for improving their skills, but also by users of interpretation or translation services. Building a relationship of trust between service users and providers would be an important factor for betterment of service quality.

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