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- I. Contributions -

LEGAL TECHNICAL ASSISTANCE AND "UNITED NATIONS GUIDING PRINCIPLES ON BUSINESS AND HUMAN RIGHTS" - ALL FOR THE RIGHTS OF PEOPLE -

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INTRODUCTION

According to Japan's "Basic Policies on Legal Technical Assistance" (hereinafter "Basic Policies")[1], Myanmar is considered one of the focal target countries of legal technical assistance. The country

[1] "Basic Policies on Legal Technical Assistance (Revised)" May, 2013
http://www.mofa.go.jp/mofaj/gaiko/oda/bunya/governance/hoshin_1305.html (Japanese text).
http://www.moj.go.jp/content/000115321.pdf (provisional English translation by the International Cooperation Department of the Ministry of Justice)
This paper is written based on the Japanese text.

is called the last frontier in Asia, and its emerging market is one of those drawing greatest attention from Japanese companies. In the general election held in the autumn of 2015 in the country, the National League for Democracy (NLD) led by Aung San Suu Kyi won a landslide victory. Subsequently, the current administration was inaugurated in March 2016 with a civilian president without a military background for the first time in decades. In the history of Myanmar, where human rights had been oppressed under the military regime, "Special Rapporteurs on the situation of human rights in Myanmar" have been appointed since 1992[2]. The Special Rapporteurs have reported numerous cases of human rights violations to the UN Commission on Human Rights and to its successor since 2006, UN Human Rights Council. The reported cases included, but not limited to, detention without warrant, execution of punishment without trial, restraint of the freedom of speech, forced labor, child labor, and persecution of minorities.

In February 2013, Mr. Tomás Ojea Quintana, the then Special Rapporteur on the situation of human rights in Myanmar, visited Japan prior to his trip to Myanmar to hold discussions with the Ministry of Foreign Affairs; Ministry of Economy, Trade and Industry; JICA and so on. On that occasion, Mr. Quintana presented the "UN Guiding Principles on Business and Human Rights" (hereinafter "Guiding Principles") to Japanese government officials, who were involved in the official plan of extending large-scale assistance and investment towards Myanmar. Why did the Special Rapporteur on the situation of human rights in Myanmar seek to exchange opinions with Japanese officials in charge of development assistance? And what did he indicate?

This paper introduces the Guiding Principles and contemplates their implications to Japan's official development aid, in particular, legal technical assistance.

I. "UN GUIDING PRINCIPLES ON BUSINESS AND HUMAN RIGHTS" (RUGGIE FRAMEWORK)

A. Background of the Guiding Principles

In 2008 UN Human Rights Council unanimously welcomed the UN "Protect, Respect and Remedy: a Framework for Business and Human Rights." This framework is called the "Ruggie Framework" after its proponent Mr. John Ruggie, UN Secretary-General's Special Representative on the issue of human rights and transnational corporations and other business enterprises. The Guiding Principles were formulated to make this framework operationalized, which were endorsed unanimously by

[2] Commission on Human Rights Resolution 1992/58. The first Rapporteur (1992-1996) was Dr. Yozo Yokota.

member countries, including Japan, of the UN Human Rights Council in March 2011[3].

While there are various approaches to the issue of business and human rights, including the UN Global Compact and ISO26000, the uniqueness of the Guiding Principles lies in that:

- They are UN-prefixed guidance approved by State representatives; and
- They have gained support from a wide range of stakeholders ranging from governments to companies, industry groups, civil societies, labor unions, domestic human rights agencies, and investors.

The Guiding Principles rest on three pillars: the State duty to protect human rights; the corporate responsibility to respect human rights; and an access to remedy.

The Guiding Principles were formulated as a result of approximately 30 year history of divisive debate between the business community and human rights advocacy group within UN arenas. During the 1960s and afterwards, companies in developed countries began expanding businesses into the third world countries. With their increasing impact on local societies, developing and socialist countries began requesting the establishment of international standards to regulate activities of transnational corporations. Upon a resolution by the UN Economic and Social Council (UNESC), in 1976 the Commission on Transnational Corporations was established, to begin negotiations concerning the UN Code of Conduct on Transnational Corporation at the Intergovernmental Working Group in 1977. A Draft Code of Conduct was submitted by the Working Group to the Council in 1982. However, as gaps in opinions and positions among developed, developing and socialist countries had not been filled, the Draft Code was de facto repealed upon a resolution of the UNESC in 1993[4]. In 2003, the UN Sub-Commission on Human Rights approved the "Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights,[5]" which imposed on companies, directly under international law, the same range of human rights duties that states had accepted for themselves under treaties they had ratified, and provided for the monitoring of business activities by the UN to secure the performance of obligations by enterprises. In the following year the draft of said norms was not approved by the UN Commission on Human Rights, because of the opposition from developed countries where many multinational companies were based. The conflict was deadlocked between enterprises and

[3] Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework, A/HRS/17/31. In this paper, this report shall be called "Ruggie Report."

[4] Concerning the negotiation process of the UN Code of Conduct on Transnational Corporations, see Karl P. Sauvant, The Negotiations of the United Nations Code of Conduct on Transnational Corporations, *The Journal of World Investment and Trade* 16 (2015), pp. 11-87.

[5] Norms on the responsibilities of transnational corporations and other business enterprises with regard to human rights, UN Doc. E/CN.4/Sub.2/2003/12/Rev.2 (2003).

developed countries demanding an investment environment favorable to them, and civil society organizations seeking for corporations obligations to protect human rights. In order to break this impasse, in 2005 the UN Commission on Human Rights requested the UN Secretary-General to appoint Mr. John Ruggie to be a Special Representative of the UN Secretary-General. Accordingly, the international framework regarding business and human rights was formulated by Mr. Ruggie[6]. Through dialogue thereon held repeatedly with a wide range of stakeholders, the Ruggie Framework was published three years later in 2008.

B. Three Pillars of the Guiding Principles

The Guiding Principles intend to address "the governance gap," which is considered providing the permissive environment for wrongful acts by companies. This refers to the gap between the scope and impact of economic forces and actors, and the capacity of societies to manage their adverse consequences. The Guiding Principles are formulated to lessen and fill in the gap to the maximum extent possible. It is set forth that: "The Guiding Principles' normative contribution lies not in the creation of new international law obligations but in elaborating the implications of existing standards and practices for States and businesses; integrating them within a single, logically coherent and comprehensive template; and identifying where the current regime falls short and how it should be improved[7]." The Guiding Principles consist of 31 principles in all: 1 to 10 regarding the State duty to protect human rights; 11 to 24 on the corporate responsibility to respect human rights; and 25 to 31 on access to remedy.

The first pillar of the Guiding Principles refers to "the State duty to protect against human rights abuses by third parties, including business enterprises, through appropriate policies, regulations, and adjudication."

The second pillar is "the corporate responsibility to respect human rights," which means that "business enterprises should act with due diligence to avoid infringing on the rights of others and to address adverse impacts with which they are involved." It is expressly set forth that in order to meet their responsibility to respect human rights, business enterprises should have in place the following: a policy commitment to meet their responsibility to respect human rights; a human rights due diligence process to identify, prevent, mitigate and account for how impacts on human rights are addressed; and processes to remediate any adverse human rights impacts. Human rights due diligence means the process including the regular assessment of human rights impacts by business enterprises and their relevant entities (in value chain, etc.), integrating findings from impact

[6] Concerning the development of the Guiding Principles, see Emi SUGAWARA, *Bijinesu to jinken ni kansuru kokuren shido gensoku no keisei to tenkai* (The Formation and Development of the UN Guiding Principles on Business and Human Rights), *Ajiken World Trend*, No.223 (May 2014), pp.5-8.

[7] Ruggie Report, Introduction, paragraph 14.

assessments into business enterprises, tracking responses to their performance, and communicating them externally (reporting).

The third pillar is "the need for greater access by victims to effective remedy, both judicial and non-judicial." It is stated: "Each pillar is an essential component in an inter-related and dynamic system of preventative and remedial measures: the State duty to protect because it lies at the very core of the international human rights regime; the corporate responsibility to respect because it is the basic expectation society has of businesses in relation to human rights; and access to remedy because even the most concerted efforts cannot prevent all abuse."[8]

II. THE STATE DUTY TO PROTECT HUMAN RIGHTS

In order to examine the implications of the Guiding Principles for Japan's legal technical assistance, which is implemented as part of Official Development Assistance (ODA), a focus herein will be placed on the first pillar: the State duty to protect human rights.

Principle 1 provides for the States' international human rights law obligations, with following principles 2 and 3 setting out States' explicit expectation that businesses respect human rights, and the implementation of policy measures to enable enterprises to respect human rights.

Principles 4 to 6 require that the State, as an economic actor, conduct human rights due diligence in transactions in capital and contractual relationships, government procurement and so on. Principle 7 holds that special measures are necessary in conflict-affected areas prone to human rights abuses. And principles 8 to 10 provide that the State should secure coherence in all State policies to meet the duty to protect human rights, which tends to be considered falling under the jurisdiction of part of limited State agencies.

The following quotes principles 1 to 10.

The State duty to protect human rights

1. States must protect against human rights abuse within their territory and/or jurisdiction by third parties, including business enterprises. This requires taking appropriate steps to prevent, investigate, punish and redress such abuse through effective policies, legislation, regulations and adjudication.

[8] Ruggie Report, Introduction, paragraph 6.

2. States should set out clearly the expectation that all business enterprises domiciled in their territory and/or jurisdiction respect human rights throughout their operations.
3. In meeting their duty to protect, States should:
   (a) Enforce laws that are aimed at, or have the effect of, requiring business enterprises to respect human rights, and periodically to assess the adequacy of such laws and address any gaps;
   (b) Ensure that other laws and policies governing the creation and ongoing operation of business enterprises, such as corporate law, do not constrain but enable business respect for human rights;
   (c) Provide effective guidance to business enterprises on how to respect human rights throughout their operations;
   (d) Encourage, and where appropriate require, business enterprises to communicate how they address their human rights impacts.
4. States should take additional steps to protect against human rights abuses by business enterprises that are owned or controlled by the State, or that receive substantial support and services from State agencies such as export credit agencies and official investment insurance or guarantee agencies, including, where appropriate, by requiring human rights due diligence.
5. States should exercise adequate oversight in order to meet their international human rights obligations when they contract with, or legislate for, business enterprises to provide services that may impact upon the enjoyment of human rights.
6. States should promote respect for human rights by business enterprises with which they conduct commercial transactions.
7. Because the risk of gross human rights abuses is heightened in conflict-affected areas, States should help ensure that business enterprises operating in those contexts are not involved with such abuses, including by:
   (a) Engaging at the earliest stage possible with business enterprises to help them identify, prevent and mitigate the human rights-related risks of their activities and business relationships:
   (b) Providing adequate assistance to business enterprises to assess and address the heightened risks of abuses, paying special attention to both gender-based and sexual violence;
   (c) Denying access to public support and services for a business enterprise that is involved with gross human rights abuses and refuses to cooperate in addressing the situation;
   (d) Ensuring that their current policies, legislation, regulations and enforcement measures are effective in addressing the risk of business involvement in gross human rights abuses.
8. States should ensure that governmental departments, agencies and other State-based institutions that shape business practices are aware of and observe the State's human rights obligations when fulfilling their respective mandates, including by providing them with

relevant information, training and support.

9. States should maintain adequate domestic policy space to meet their human rights obligations when pursuing business-related policy objectives with other States or business enterprises, for instance through investment treaties or contracts.
10. States, when acting as members of multilateral institutions that deal with business-related issues, should;
    (a) Seek to ensure that those institutions neither restrain the ability of their member States to meet their duty to protect nor hinder business enterprises from respecting human rights;
    (b) Encourage those institutions, within their respective mandates and capacities, to promote business respect for human rights and, where requested, to help States meet their duty to protect against human rights abuse by business enterprises, including through technical assistance, capacity-building and awareness-raising;
    (c) Draw on these Guiding Principles to promote shared understanding and advance international cooperation in the management of business and human rights challenges.

III. IMPLICATION OF THE GUIDING PRINCIPLES FOR JAPAN'S LEGAL TECHNICAL ASSISTANCE

The Basic Policies revised in May 2013 stress, as one of their basic concepts, the need for legal technical assistance to be developed in a strategic manner. It is stated that assistance should proactively be provided in the field of basic and economic-related laws on the basis of the ODA Charter, which defines Japan's basic policies on foreign assistance, and Medium-Term Policy on ODA and so on. It is noteworthy that one of objectives is to improve the trade and investment environment and to introduce environmental and safety regulations which are beneficial for Japanese enterprises in expanding their businesses overseas. The expression: "beneficial for Japanese enterprises in expanding their businesses overseas," which was not read in the old version of policies as of April 22, 2009, caused controversy in the 15th Annual Conference on Technical Assistance in the Legal Field, held in January 2014[9]. A question was raised concerning: how the logic could be explained between "pursuing legal technical assistance for improving the investment environment" and the traditional philosophy of legal technical assistance. In response to this, a given answer was that this new objective of assistance would not set back the rule of law, democracy, and basic human rights - conventional objectives of assistance. Another point of concern was also expressed regarding reactions from recipient and third countries to Japan's position of highlighting its national interest. In this regard, it was explained that recipient countries

[9] Minutes of the Meeting of the 15th Annual Conference on Technical Assistance in the Legal Field (held on January 24, 2014), in ICD NEWS No.59 (in Japanese)

were pursuing foreign investment as an engine for economic growth, and that improving their investment environment would contribute to not only recipient countries but also third countries.

How can we explain the relationship between legal technical assistance and the expansion of Japanese businesses abroad? How can it be ensured that assistance in improving the trade and investment environment, and in introducing environmental and safety regulations which are beneficial for Japanese enterprises in expanding businesses overseas, may not adversely affect the rule of law, democracy and fundamental human rights in recipient countries? How will trade and investment for economic growth contribute in strengthening the rights of the people in recipient countries? Above all, how should Japan's legal technical assistance be provided from the viewpoint of "improving the trade and investment environment and introducing environmental and safety regulations beneficial for Japanese enterprises overseas" which have been incorporated in the revised Basic Policies?

The Guiding Principles - which explain the roles of the State and enterprises regarding business and human rights - serve as a guideline to answer the above questions, and also as a bridge between Japan's legal technical assistance and the expansion of Japanese businesses overseas. The reason for Mr. Tomás Quintana's visit to Japan, as mentioned above, is not only over a concern of human rights violations by the Myanmar government. There was also a concern about possible negative impacts against human rights, which could be caused by assistance and investment from overseas, in opening the market and promoting economic development. The Guiding Principles, which were shown by Mr. Quintana, present many suggestions to Japanese development assistance, in particular, legal technical assistance as follows:

- First, the implementation of legal technical assistance directly leads to the performance of the Guiding Principles by the Japanese government. In other words, legal technical assistance itself embodies the Guiding Principles. This means that: legal technical assistance itself expects that Japanese enterprises respect human rights; aid donors themselves have duties to respect human rights; and the Basic Policies itself indicate policy coherence of respecting human rights.
- Second, conversely, the Guiding Principles can be used in external policies announced by the government such as the Basic Policies.
- Third, in relation to the second point, legal technical assistance supports recipient countries in realizing the Guiding Principles.

A. Legal Technical Assistance as Embodiment of Guiding Principles

1. Signaling Japanese companies to respect human rights

The Guiding Principles provide that States should set out clearly the expectation that business enterprises domiciled in their territories respect human rights, and that States should take

policy measures to enable enterprises to respect human rights throughout their operations. The commentary of principle 2 explains: "There are strong policy reasons for home States to set out clearly the expectation that businesses respect human rights abroad, especially where the State itself is involved in or supports those businesses. The reasons include ensuring predictability for business enterprises by providing coherent and consistent messages, and preserving the State's own reputation."

The commentary of principle 3 reads: "States should not assume that businesses invariably prefer, or benefit from, State inaction, and they should consider a smart mix of measures – national and international, mandatory and voluntary – to foster business respect for human rights"; "It is equally important for States to review whether these laws provide the necessary coverage in light of evolving circumstances and whether, together with relevant policies, they provide an environment conductive to business respect for human rights. For example, greater clarity in some areas of law and policy, such as those governing access to land, including entitlements in relation to ownership or use of land, is often necessary to protect both rights-holders and business enterprises"; "Laws and policies that govern the creation and ongoing operation of business enterprises, such as corporate and securities laws, directly shape business behavior. Yet their implications for human rights remain poorly understood. For example, there is a lack of clarity in corporate and securities law regarding what companies and their officers are permitted, let alone required, to do regarding human rights. Laws and policies in this area should provide sufficient guidance to enable enterprises to respect human rights, with due regard to the role of existing governance structures such as corporate boards"; "Communication by business enterprises on how they address their human rights impacts can range from informal engagement with affected stakeholders to formal public reporting. State encouragement of, or where appropriate requirements for, such communication are important in fostering respect for human rights by business enterprises"; and "Financial reporting requirements should clarify that human rights impacts in some instances may be 'material' or 'significant' to the economic performance of the business enterprise."

What is of the utmost importance is that the government clearly sets forth, as a signal to enterprises domiciled in its territory and/or jurisdiction, the importance of respecting human rights throughout their operations. If the Japanese government's expectations that Japanese business enterprises respect human rights is set out explicitly, the concern that the overseas expansion of Japanese businesses may adversely impact the fundamental human rights of the people in other countries will not arise. Contrarily, in cases where such government expectations are not clearly set forth, no one would understand what the Japanese government policy is. Thus, legal technical assistance conducted for the purpose of "improving the trade and investment environment and assisting in the introduction of environmental and safety regulations which are beneficial for Japanese enterprises

in expanding businesses overseas," as set forth in the Basic Policies, needs to be implemented with the combination of measures - national and international, mandatory and voluntary – in order to promote respect for human rights by Japanese business enterprises. Legal technical assistance in the basic and economic law fields, in particular corporate and securities laws, which are deemed not directly related to human rights, is precisely the area to which the Guiding Principles should apply.

2. State-related Agencies

The State not only creates and supervises a legal framework for economic activities but also plays the role of economic actor. With regards to the state-business nexus, the guiding principle 4 holds: "States should take additional steps to protect against human rights abuses by business enterprises that are owned or controlled by the State, or that receive substantial support and services from State agencies such as export credit agencies and official investment insurance or guarantee agencies, including, where appropriate, by requiring human rights due diligence." The commentary thereon states: "A range of agencies linked formally or informally to the State may provide support and services to business activities. These include export credit agencies, official investment insurance or guarantee agencies, development agencies and development finance institutions. Where these agencies do not explicitly consider the actual and potential adverse impacts on human rights of beneficiary enterprises, they put themselves at risk – in reputational, financial, political and potentially legal terms – for supporting any such harm, and they may add to the human rights challenges faced by the recipient State." Moreover, the commentary on principle 6 reads: "States conduct a variety of commercial transactions with business enterprises, not least through their procurement activities. This provides States – individually and collectively – with unique opportunities to promote awareness of and respect for human rights by those enterprises, including through the terms of contracts, with due regard to States' relevant obligations under national and international law."

Agencies linked to the State include the Japan International Cooperation Agency (JICA), a government agency that implements Japan's Official Development Assistance. In what way does JICA incorporate respect for human rights into its operation? It is called into question how human rights risks are identified, prevented and rectified, for example, in assessment (in terms of environment and society), public procurement, partnerships with the private sector, and development assistance to the private sector in developing countries. In cases where JICA does not explicitly consider the actual and potential adverse impacts on human rights of beneficiary enterprises to which JICA provides support and services, it may put itself at risk for allegedly supporting human rights harm and aggravate the human rights situation in the recipient country. In legal technical assistance conducted as part of development assistance, human rights due diligence is surely required as well.

When assisting in the improvement of the trade and investment environment and in the introduction of environmental and safety regulations which are favorable for Japanese enterprises in expanding businesses abroad, it is required to identify and prevent abuses or potential abuses of whose and what rights, and in cases of any human rights abuses, to make remedies. In doing so, priority should be placed on rights subject to, or which may be subject to the most adverse impacts from economic activities. These rights may include, for example: rights to education for children not provided with opportunities to express opinions at local consultation; rights of minorities with limited access to information given in official languages; rights of foreign workers with the most vulnerable legal status among all workers and with a language barrier.

The core of human rights due diligence lies in information disclosure and communication. The counterpart of legal technical assistance is the governments of recipient countries, or State agencies with jurisdiction over the legal fields of assistance (e.g. attorney general's office, ministry of justice, courts, etc.). Even if the government of the recipient country is proactive in introducing foreign capital and accepts Japanese assistance for improving the trade and investment environment and in introducing environmental and safety regulations which are beneficial for Japanese companies in expanding businesses in that country, the following questions may arise:

- To what extent is consideration given to the possible impact of assistance?
- Whether assistance may not adversely impact the rights of the people in local society?
- Whether Japanese businesses may not cause distortions?
- Whether assistance may not further maintain the situation where the rights of the people are not fully guaranteed?

In order to address these questions, dialogue with the people in local society beyond the relationship with the counterpart – the government of the recipient country – is required. In other words, engagement with a wide range of stakeholders with an expanded vision (not limited to the inter-governmental ODA framework) may enable development assistance to avoid the risk of adverse impact, and at the same time increase the effect of assistance activities.

3. Ensuring Policy Coherence

The Basic Policies were formulated upon consultation among ministries involved in legal technical assistance, including the Ministry of Foreign Affairs; Ministry of Justice; Cabinet Office; National Police Agency; Financial Services Agency; Ministry of Internal Affairs and Communications; Ministry of Finance; Ministry of Education, Culture, Sports, Science and Technology; Ministry of Agriculture, Forestry and Fisheries; Ministry of Economy, Trade and Industry; Ministry of Land, Infrastructure, Transport and Tourism, and the Ministry of Environment[10]. Principle 8 provides

[10] Footnote 1 of said policies.

that, States should ensure governmental departments, agencies and other State-based institutions that shape business practices are aware of, and observe the State's human rights obligations when fulfilling their respective mandates.

According to its commentary, "There is no inevitable tension between States' human rights obligations and the laws and policies they put in place that shape business practices"; "Vertical policy coherence entails States having the necessary policies, laws and processes to implement their international human rights law obligations. Horizontal policy coherence means supporting and equipping departments and agencies, at both the national and sub-national levels, that shape business practices – including those responsible for corporate law and securities regulation, investment, export credit and insurance, trade and labour – to be informed of and act in a manner compatible with the Governments' human rights obligations."

Regarding principle 9, the following commentary is provided: "Economic agreements concluded by States, either with other States or with business enterprises – such as bilateral investment treaties, free-trade agreements or contracts for investment projects – create economic opportunities for States. But they can also affect the domestic policy space of governments. For example, the terms of international investment agreements may constrain States from fully implementing new human rights legislation, or put them at risk of binding international arbitration if they do so. Therefore, States should ensure that they retain adequate policy and regulatory ability to protect human rights under the terms of such agreements, while providing the necessary investor protection."

The Basic Policies formulated in consultation among ministries related to legal technical assistance should be proof of policy coherence of respecting human rights. In the same manner, policy coherence of respecting human rights is required not only in the policy of development aid including legal technical assistance but also in investment and trade policies.

B. Use of Guiding Principles in External Policies

This part will describe the U.S. case, where the Guiding Principles are effectively used in external policies. In 2013, the Obama Administration published the "U.S. Government Approach on Business and Human Rights 2013[11]." According to this approach, the U.S. government encourages stakeholders to treat the Guiding Principles as a "floor" rather than a "ceiling" for addressing issues of business and human rights, and to recognize that implementing the Guiding Principles should be a continuous process. It is expressly set forth that, as business activities and decisions have

[11] U.S. Government Approach on Business and Human Rights 2013, US Department of State, Bureau of Democracy, Human Rights and Labor, http://www.humanrights.gov/wp-content/uploads/2013/06/usg-approach-on-business-and-human-rights-updatedjune2013.pdf

an impact on national interests, the State Department and other U.S. government agencies will continue to leverage opportunities to work with businesses in pursuit of foreign policy objectives. In particular, they will promote the rule of law, respect for human rights, and a level playing field by encouraging responsible business behavior and inviting engagement by business in venues that advance best practices.

As detailed measures for the above there are regulations through domestic laws, including the Dodd-Frank Act, a regulation to control the trade of conflict minerals. For bilateral engagement, the U.S. provides the other governments with information on the Guiding Principles and other international frameworks. In this manner, the U.S. encourages other governments to develop and implement legislative and regulatory frameworks that support the rule of law, encourage business respect for human rights, ensure a level playing field, and protect citizens. In addition, its trade initiatives include provisions on labor standards within Trade and Investment Framework Agreements.

It is clearly prescribed that respecting human rights is a responsibility companies must take seriously not just as a moral imperative, but because it is beneficial for the company's shareholders, stakeholders, and overall brand. In particular, as a value proposition for direct investment in emerging economies, it is explained: "as U.S. companies seek new markets and investment opportunities, those who do business with them should find there to be an implicit value proposition to doing business with U.S. firms: that operations will be done in a manner that respects the laws of home and host governments, as well as the communities in which a company does business. Respect for human and labor rights should permeate every tier of a company's operations in its home country and beyond."

It is significantly noticeable from the U.S. case that the implementation of the Guiding Principles by the State and companies is included in foreign policies, and which itself explicitly explains its foreign policies. Its proposition is made on the value to be brought by US companies, in helping them develop businesses in emerging economies.

The Leaders' Declaration of G7 Elmau Summit in June 2015[12] included a statement which strongly supported the Guiding Principles, and welcomed the efforts to set up substantive National Action Plans for its implementation.

[12] Translation in Japanese is posted on the website of the Ministry of Foreign Affairs of Japan at http://www.mofa.go.jp/mofaj/ecm/ec/page4_001244.html

C. Legal Technical Assistance Supports Recipient Countries in Implementing Guiding Principles

The Guiding Principles should be applied not only in developed countries but in all countries throughout the world. The Special Rapporteur on the situation of human rights in Myanmar submitted a report to the UN Human Rights Council following his visit to Japan as above mentioned. In the report, the Special Rapporteur made the following recommendations to the government of Myanmar: "With regards to economic, social and cultural rights, while noting progress in the Government's efforts to promote socio-economic development and economic growth, such development or growth should not violate but respect and promote the human rights of people in Myanmar;" "Now is the time to put in place a human rights-based approach to development to ensure that the flow of investment and the opening of businesses and a market is directed towards ensuring the realization of the human rights of the people of Myanmar."[13]

Referring to an increasing number of reports and allegations of violations of land and housing rights across the country due to infrastructure projects and natural resource exploitation, the Special Rapporteur strongly urged the Government to ensure the realization of basic human rights and labor standards as prescribed in the International Bill of Human Rights. He also recommended that the Government implement the Guiding Principles in the development and negotiation of investment contracts with the private sector. Moreover, the Special Rapporteur strongly recommended that: "in relation to economic, social and cultural rights, the Government should:

- integrate human rights in national development policies through applying a human rights-based approach and implementing the Guiding Principles on Business and Human Rights; and
- ensure the protection of land and housing rights, including through impact assessments prior to development projects, consultation with affected individuals and communities, the provision of adequate restitution and compensation, and the conferment of legal security of tenure.

Among all the reports submitted from the Special Rapporteurs on the situation of human rights in Myanmar until that time, this report was the first to recommend the implementation of the Guiding Principles. This highlighted the scale of the impact which could be caused by businesses on the rights of the people in Myanmar; that is, the importance of the relationship between human rights and businesses.

The current administration in Myanmar was formed in spring of 2016, as the result of the general election in autumn of 2015. Much attention is currently being paid to Myanmar, as an Asian country where the establishment of the rule of law is being tested through shared universal values such as

[13] Report of the Special Rapporteur on the situation of human rights in Myanmar, Tomas Ojea Quintana, A/HRC/22/58, submitted to the UN Human Right Council in March 2013.

freedom, democracy, basic human rights. Myanmar is also drawing a great deal of interest from the international community for its attractive market for businesses. Examining National Actions Plans (policy documents) publicized by governments to implement the Guiding Principles, it is observed that Myanmar is given special attention. For example, the National Action Plans of UK, Holland and Denmark[14] incorporate government policies to promote the responsibility of enterprises to respect human rights, highlight the respect for human rights by domestic companies abroad, and promote responsible business activities and investment in Myanmar. The afore-mentioned U.S. approach also provides for Burma Reporting Requirements for Responsible Investment. All these exemplify the attention being paid to Myanmar as an emerging economy.

In what way should Japan extend support to the Government of Myanmar, to which the implementation of the Guiding Principles was urged by the Special Rapporteur? As a developed mature country in Asia, in what manner should Japan use the Guiding Principles to respond to the expectations from the global community? The Japanese government and companies are required to understand and commit themselves to address the issue of human rights and to shoulder responsibilities, in providing development assistance and investment to developing countries and emerging countries, including Myanmar. Japan's Official Development Aid, based on universal values and philosophy – freedom, democracy and basic human rights – increases the competitiveness of Japan. It is tested how Japan's ODA projects including legal technical assistance, and Japanese businesses should be conducted, as well as how they look and how they show themselves.

CONCLUSION – TOWARDS THE AGENDA 2030

As the successor to the Millennium Development Goals (MDGs) which were set in 2001, the Agenda 2030 for Sustainable Development was adopted at the UN Summit in September 2015. The Agenda 2030 holds "Sustainable Development Goals: SDGs[15]" consisting of 17 goals and 169 targets, with the purpose of eradicating poverty and transforming the world into a sustainable planet. They seek to "realize the human rights of all" and in embarking on new endeavors, they pledge "no one will be left behind" on the earth. Japan has announced its policy of "putting forth its best possible efforts, together with the international community, to implement the Agenda, based on

[14] (England) https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/522805/Good_Business_Implementing_the_UN_Guiding_Principles_on_Business_and_Human_Rights_updated_May_2016.pdf
(Holland) https://www.government.nl/latest/news/2013/12/20/national-action-plan-for-human-rights-and-business-knowing-and-showing
(Denmark) http://www.ohchr.org/Documents/Issues/Business/NationalPlans/Denmark_NationalPlanBHR.pdf
[15] A/RES/70/1, Transforming our world: the 2030 agenda for Sustainable Development

its ODA Charter and the concept of human security."[16]

In what way will development assistance, in particular legal technical assistance, contribute to the realization of the goals newly set for sustainable development? From this viewpoint, it will be necessary to re-build the way of presenting legal technical assistance. What lays the foundation for achieving the goals of the Agenda are institutions. In this meaning, all types of legal technical assistance aim to help the recipient country attain the development goals. In particular, Goal 16 of the Agenda: "Promote peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable and inclusive institutions at all levels" should be the ultimate goal for legal technical assistance to aim at.

Targets of Goal 16 include: "Promote the rule of law at the national and international levels and ensure access to justice for all" (16.3); "Develop effective, accountable and transparent institutions at all levels" (16.6); "Ensure responsive, inclusive, participatory and representative decision-making at all levels" (16.7); "Ensure public access to information and protect fundamental freedoms, in accordance with national legislation and international agreements" (16.10); "Promote and enforce non-discriminatory laws and policies for sustainable development" (16.b).

In what way will legal technical assistance contribute towards sustainable development goals? Evaluation of legal technical assistance, and in particular, the social impact of the roles of justice, which is a target of assistance, is required. Civil societies in recipient countries have increased awareness in the issues of gender equality, anti-corruption, transparency, freedom of press, freedom of speech and more. The Guiding Principles can be used as a common language tool in the dialogue with not only the governments of recipient countries (counterparts of assistance) but also with multiple stakeholders including the private sector and civil societies.[17]

The introduction to the Guiding Principles asks: "What do these Guiding Principles do? And how should they be read? Council endorsement of the Guiding Principles, by itself, will not bring business and human rights challenges to an end. But it will mark the end of the beginning: by establishing a common global platform for action, on which cumulative progress can be built, step-

[16] "Official Development Assistance, 2030 Agenda for Sustainable Development" on the Website of the Ministry of Foreign Affairs at: http://www.mofa.go.jp/mofaj/gaiko/oda/about/doukou/page23_000779.html

[17] It is said that the implementation of the new agenda, which is the key to its realization, is supported by concrete policies and actions as outlined in the outcome document of the Third International Conference on Financing for Development, which was held in Addis Ababa during July 13-16, 2015 (Agenda 2030, paragraph 40). The Addis Ababa Action Agenda refers to the importance of public finance as well as private funds in development. It also expressly provides for the fostering of a dynamic and well-functioning business sector, in accordance with relevant international standards and agreements, including the Guiding Principles. A/RES/69/313, Resolution adopted by the General Assembly on 27 July 2015, Addis Ababa Action Agenda of the Third International Conference on Financing for Development (Addis Ababa Action Agenda) http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/69/313

by-step, without foreclosing any other promising longer-term developments."[18]

On the journey toward sustainable development goals with the aim of realizing human rights for all, the Guiding Principles - which are based on the pillars of the State duty to protect human rights, corporate responsibility to respect human rights, and access to remedy – serve as the most important guidelines. And legal technical assistance will lead to the implementation and use of the Guiding Principles, and ultimately, to the realization of people's human rights.

[18] A/HRC/17/31, para 13.

CURRENT SITUATION OF INTELLECTUAL PROPERTY PROTECTION IN ASEAN COUNTRIES AND JAPANESE COOPERATION

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I. INTRODUCTION

Against the background of Vietnam War, ASEAN was established, with the adoption of the Bangkok Declaration in 1967, for the purpose of political stability, promotion of economic growth, etc. in Southeast Asia. At the time of establishment, it was composed of five member countries: Indonesia, Malaysia, the Philippines, Singapore and Thailand. Currently it consists of 10 countries, with the subsequent accession of Brunei (in 1984), Vietnam (1995), Laos (1997), Myanmar (1997), and Cambodia (1999).

The total population of the ASEAN member countries exceeds 600 million people, with over 2 trillion dollars of nominal GDP (approximately 3,000 US dollars per capita). In practice, ASEAN constitutes a major economic community with over 2 trillion dollars of total trade within the region.

At the same time, there exist huge gaps among the member countries in various aspects: population-wise, Brunei's population (approx. 400,000) is less than one 500th of that of Indonesia (approx. 240 million); in terms of GDP per capita, Myanmar and Cambodia's figures (approx. 1,000 dollars) are approximately 2 percent of that of Singapore (approx. 50,000 dollars). Their languages, cultures, and religions are diverse, and their legal systems also vary greatly.

Japan and ASEAN countries are geographically proximate and have historically maintained close relationships in politics, economy, culture and other aspects. The total export amount from Japan to ASEAN exceeded 11.5 trillion yen in 2014. For ASEAN as well, Japan is the second largest trading partner, after China.

It is estimated that the economy in the ASEAN region will continue to grow by an average of 6% per year. On December 31, 2015, the Kuala Lumpur Declaration was signed launching the ASEAN Economic Community (AEC), leading to the abolition of tariffs on more than 90% of goods traded. In this manner, the AEC is expected to become the foundation for further economic growth within the region (according to the websites of the Ministry of Foreign Affairs, IMF and the trade statistics of the Ministry of Finance).

The AEC is comprised of three pillars: the ASEAN Political-Security Community, ASEAN Economic Community and the ASEAN Socio-Cultural Community. ASEAN has taken proactive approaches toward the protection of intellectual property rights (IPRs), including the formulation of the "ASEAN IPR Action Plan 2011-2015" as one of the action plans for the establishment of the AEC. Japan has organized various programs of cooperation in supporting these endeavors.

In this paper, I will overview the current situation of intellectual property (IP) protection in ASEAN countries which are enjoying economic growth, and Japanese cooperation with them. Focus will be placed on industrial property rights, including patent (utility model), design and trademark, referring to the IP international protection framework.

II. INTERNATIONAL PROTECTION OF INTELLECTUAL PROPERTY (IP)

Endeavors have been made traditionally toward IP international protection. In the field of industrial

property rights, in 1883 the Paris Convention for the Protection of Industrial Property was signed (currently with 176 member countries); in the field of copyrights, the Berne Convention in 1886 (currently with 171 member countries).

The Paris Convention adopted three primary principles: “national treatment,” “priority right” and “the independence of rights in each country.” However, it did not include any substantive provisions on the protection of rights, such as the scope, requirements, period, etc. of protection. At the time of its conclusion, it was of the nature of a “gentlemen’s agreement”.

After WWII, many countries emerging from colonial rule, African countries in particular, joined in the Paris Convention. New member countries began to make assertions for their own benefits, worsening the North-South conflict. Moreover, a conflict of interests emerged between developed and developing countries, etc. over “compulsory licenses” and other matters. The “compulsory license” allows the use of another’s IPRs without the rights holder’s consent. In spite of attempts to revise the Convention in the 1980s, no revision has been made since the revision in Stockholm in 1967, with almost no substantive discussions being held.

In the case of Japan, as the trade treaties signed with five countries (the U.S., Russia, Holland, England and France) at the end of the Edo era were of unequal weight for Japan, the Meiji government sought to resolve the issue through negotiations. As one of the conditions for the dissolution of the treaties, the five Western powers demanded Japan accede to the Paris Convention and Berne Convention in order to protect IPRs of foreign nationals in Japan. Against this background, Japan joined in the two treaties in 1899 (Japan was the only Asian country signing both treaties in the 19th century). Almost no ASEAN countries had joined in the two conventions until the 1990s.

The Paris Convention and the Berne Convention are under the jurisdiction of the World Intellectual Property Organization (WIPO), a specialized agency of the United Nations. The WIPO has attempted to revise conventions and signed new conventions in accordance with social changes. During negotiations for signing or revising conventions, conflicts of interests frequently arose between developing countries (which had ratified the Convention Establishing the WIPO) and developed countries, causing suspensions of negotiations. Moreover, even when draft treaties were compiled based on an agreement reached through negotiations, the ratification of treaties was left to the discretion of each member country. Thus, few developing countries (including ASEAN countries) ratified such treaties. Therefore, the effects of treaties drafted by the WIPO were questionable at best.

In particular, in and after the 1980s, the trade amount of goods and services involving IPRs (inventions, designs, brand names, etc.) greatly increased, along with the development of international market.

With the expansion of international trade, counterfeit brand-name products and pirated CDs became serious problems causing great strain to international trade. This was attributed to the lack of effective international rules to protect IPRs.

Accordingly, at the GATT Uruguay Round (negotiations of which began in 1986), discussions were held on the protection of IPRs, as one of the new negotiation items (new field).

Against the demand of developed countries for strengthening IPRs protection through international rules, developing countries required discussions on IPRs protection at GATT (mandate theory, etc.). This conflict of opinions made negotiations between both sides more difficult. Finally, the concessions made by developed countries in the fields of agriculture, fiber, etc. prompted developing countries to participate in negotiations on IPRs protection, and further negotiations continued. In 1995, as Annex 1C of the Marrakesh Agreement Establishing the World Trade Organization (WTO), the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement) became effective.

The TRIPS Agreement is composed of seven parts with salient characteristics, which had not been seen in conventional IP-related international conventions.

One of its characteristics is that the Agreement provides for compliance with existing IP international conventions, including the Paris Convention, the Berne Convention, etc. Thus, WTO member countries which had not acceded to such conventions have become obliged to apply them under the TRIPS Agreement. Moreover, as a basic principle, most favored nation treatment, as well as national treatment, was provided in the TRIPS Agreement. Therefore, bilateral agreements on IP became effective not only between the two party countries but also among the entire TRIPS member countries.

The second characteristic is that it lays down the minimum standard concerning the IPRs protection level (substantive provisions on protection). The protection level provided for in the TRIPS Agreement (including that of patents) is close to that of developed countries. It is much higher than the level provided in other existing international IP conventions or in developing countries, requiring such countries to establish their domestic laws and improve operations in the relevant field.

The third characteristic is the provisions on the enforcement of IPRs. While conventional IP conventions had almost no provisions thereon, the TRIPS Agreement included a wide range of provisions covering general obligations, civil and administrative procedures, provisional measures, special requirements in relation to border measures, and criminal procedures. These provisions with substantial contents are expected to boost the effectiveness of international IPRs protection. However, for developing countries with insufficient judicial systems for IPRs protection, the provisions have

posed a great challenge to establish an IPR enforcement mechanism.

The fourth attribute are the provisions concerning multi-national dispute resolutions. By incorporating provisions on IPRs protection into the basic structure of GATT, it became possible to seek correction of a violation of the TRIPS Agreement through the filing of an action to the Dispute Settlement Body (DSB) of the WTO. In cases where no correction has been made in response to a recommendation from the DSB, sanctions are to be imposed on the violator. This system is expected to provide a proper resolution to disputes over the application of the TRIPS Agreement, as well as compliance with the TRIPS Agreement to avoid the imposition of sanctions. However, for developing countries, non-application of the TRIPS Agreement may result in the imposition of sanctions - withdrawal from the WTO.

The fifth feature is the establishment of separate provisions on transition periods (time limits for applying the Agreement) for developed countries, developing countries, and the least developed countries (LDC). Due to greatly conflicting interests between developed and developing countries, negotiations remained confrontational until the last stage. The TRIPS Agreement set a transition period of one year to all member countries, for the application of the Agreement from the date of entry into force (January 1, 1995). This period was extended for four years for developing countries, and for 10 years for LDCs. Accordingly, developing countries and LDCs became obliged to apply the Agreement on January 1, 2000, and January 1, 2006, respectively. In this manner, an early and effective IP protection has become possible globally (including developing countries).

Regarding the obligation of application of the TRIPS Agreement for LDCs, it has been provided that, upon their request based on justifiable reasons, the transition period can be extended further. Thus, in response to a request from LDCs, in a meeting held in November 2005, the TRIPS Council decided to extend such time limit until July 1, 2013. Furthermore, in the Eighth WTO Ministerial Conference held in December 2011, a political guidance was adopted requesting the TRIPS Council give full consideration to the re-extension of their transition period. In the TRIPS Council meeting held in November 2012, a proposal document was submitted from LDCs requesting an extension of the time limit. In response to this, the TRIPS Council meeting held in June 2013 decided to extend the transition period until July 1, 2021.

According to the Ministry of Foreign Affairs, LDCs are designated, based on the criteria established by the Committee for Development Policy (CDP) of the UN Economic and Social Council (ECOSOC), upon resolution by the UN General Assembly, following deliberations by the above Council. The LDC list is reviewed every three years. According to the criteria formulated in 2012, there are 49 LDCs worldwide, including Cambodia, Laos and Myanmar among ASEAN countries.

III. CURRENT SITUATION OF INTELLECTUAL PROPERTY PROTECTION IN ASEAN COUNTRIES

Upon signing of the above-mentioned international conventions, ASEAN countries (which are WTO member countries) have been required to establish IP systems.

I will discuss the outline of the situation of IPRs protection in ASEAN countries.

The following information is based on *Tokkyo Gyousei Nenji Houkokusho 2015 Nenban (Patent Administration Annual Report, the 2015 edition)* by the JPO; Kosuke Minami/Masanobu Ueda, *Nihon koku Tokkyo-cho no Asean ni taisuru Chiteki-Zaisan Kyoryoku (IP Cooperation from the JPO toward ASEAN)* (Tokugikon No.272, pp. 17 and onwards), and other sources.

A. General Situation of IPRs Protection in ASEAN Countries

As one of the action plans with the aim of realizing the AEC, ASEAN countries formulated "The ASEAN IP Action Plan 2011-2015" (hereinafter "Action Plan"). The Action Plan, which was endorsed at the ASEAN Economic Ministers Meeting held in Indonesia in August 2011, identifies wide-ranging goals as follows:

- Development of a balanced IP system that delivers timely, quality, and accessible IP services;
- Participation of the ASEAN countries in global IPRs protection systems;
- Systematic promotion of IP creation, awareness, and utilization;
- Active participation in the international IP community and strengthening relationships with various organizations;
- Enhancement of human and institutional capacity of IP offices in each country;

Concerning the goal of "participation in global IPRs protection systems," it is held as a goal for each ASEAN country to accede to the Protocol relating to the Madrid Agreement (concerning the international registration of marks), the Geneva Act of the Hague Agreement (concerning the international registration of industrial designs), and the Patent Cooperation Treaty (PCT: a treaty on international patent application) by 2015 (regarding the Geneva Act of the Hague Agreement, it is a goal for seven of the ten ASEAN countries).

Due to the above, even Cambodia, Laos and Myanmar - where the time limit for application of the TRIPS Agreement has not yet elapsed – are required to establish their domestic legal systems and participate in global IP systems in accordance with said Action Plan.

In addition, for the expedition of patent examination within the ASEAN region, the ASPEC (ASEAN

Patent Examination Cooperation) Program was launched in June 2009 within the ASEAN countries.

The ASPEC is a regional patent examination work-sharing program among nine participating ASEAN member states (excluding Myanmar where the patent system has not yet been established). When applicants file applications for the registration of the same patent in several ASPEC participating countries, the program allows for submitting the result of the examination (as reference material) by the patent office of a country which has concluded the examination earlier, to the patent offices in other countries. It is expected that this program will contribute to the improvement of the quality of patent examinations and a reduction in the examination period in ASEAN countries, as they face a serious lack of patent examiners in terms of both quantity and quality.

As explained above, due to the different level of economic growth and legal systems, each ASEAN country has taken different approaches in establishing IP systems for the application of the TRIPS Agreement. I will discuss the outline of the situation of IP protection in each country below, with a focus on industrial property rights.

B. Situation of IP Protection in each ASEAN member country

1. Indonesia

In Indonesia, the Trademark Law was enacted in 1961 (the recent amendment in 2001), the Patent Law in 1989 (amendment in 2001) and the Design Law in 2000. The Directorate General of Intellectual Property Rights (DGIPR) was established within the Ministry of Law and Human Rights in 1998.

Indonesia has the largest population in the ASEAN region, and has a well-known problem of counterfeit and pirated products causing huge amounts of damages. The “2014 Special 301 Report” of the USTR (United States Trade Representative) (a survey report concerning the situation of IP protection in various countries) places Indonesia in the Priority Watch List as the problem of distribution of counterfeit, pirated and other infringing products has not ceased to exist.

In order to address this situation, the government of Indonesia newly established the Directorate of Investigation within the DGIPR in February 2011, by unifying IP investigators who had been in charge of patent, trademark and design separately. In this manner, through cooperation between investigators of the DGIPR and the police, a mechanism was put in to crack down products infringing trademarks, copyrights, design rights and patents.

2. Malaysia

Malaysia adopted the common law system under the influence of the British colonial rule. As such, its IPRs protection system is also largely influenced by the British system. In Malaysia, IP laws

including patent law, trademark law, etc. were enacted and came into force in the 1980s. The MyIPO (the Intellectual Property Corporation of Malaysia) which deals with the registration of patents, etc., is administered as a financially independent entity under the Ministry of Domestic Trade and Consumer.

In Malaysia, the Patents Regulations and Trademark Regulations were revised in February 2011, introducing the electronic application system and early examination system, etc. In July 2013, the revised Industrial Designs Act came into effect expanding the requirement of novelty to the global domain, and extending the period of validity of rights to the maximum of 25 years.

Malaysia also adopted the Modified Substantive Examination (MSE) system. This system enables applicants to be granted a patent in one country (A), by submitting to A's patent office the corresponding patent specification granted through examination by the patent office of a developed country specified by A. This is useful when an applicant applies for the registration of a patent of essentially the same invention in one MSE country (A) and in a developed country designated by A. In the case of Malaysia, the JPO is designated as the corresponding patent office under the MSE system.

3. The Philippines

In the Philippines, the Patent Law was enacted with the establishment of the Patent Office in 1947, following its independence. The country acceded to the Berne Convention (1951) and the Paris Convention (1965), establishing in this manner the IP system relatively earlier than other ASEAN countries. The Intellectual Property Office (IP Office) was established in 1998, taking over the Bureau of Patents, Trademarks and Technology Transfer Board which had been reorganized in 1987.

The country's accession to the Madrid Agreement became effective on July 25, 2012. Under this agreement, the IP Office receives applications for international registrations of trademarks.

4. Singapore

In Singapore, the IP system began with the adoption of the re-registration system of U.K. patents in 1937, during the British colonial era. Along with the enactment of the Trademarks Act in 1939, the Registry of Trademarks and Patents was established. Current IP laws are composed of the new Patents Act (effective in 1995), the new Trademarks Act (1998) and the new Designs Act (2000). The IP Office of Singapore is a board under the Ministry of Law.

In recent years, Singapore has been focusing on the improvement of the patent system. Previously, it adopted a system of entrusting other countries with the search and examination of patent applications, and allowed the registration of patents even when there existed grounds for rejection. Through

statutory revisions, however, it moved to a system of registering only patents with no grounds for rejection, as in Japan. In 2012, Singapore began recruiting patent examiners in an effort to establish the mechanism of conducting substantive examination by itself in the field of bio-technology, information, communications, etc.

In March 2013, the IP Steering Committee established by the Ministry of Law published the "IP Hub Master Plan." The basic plan envisages, as its strategic goals, Singapore becoming a hub for "IP transactions and management," "quality IP filings," and "IP dispute resolution," and thereby becoming a global IP hub in Asia.

The WIPO Singapore Office was established in 2005 as the WIPO's first external office in Asia. The WIPO Arbitration and Medication Center Singapore Office was opened in 2010.

5. Thailand

In Thailand, the IP system began with the enactment of the Trademark and Commercial Trademark Act in 1914. Subsequently, the Trademark Act and the Patent Law were introduced in 1936 and 1979, respectively. However, the country's accession to the Paris Convention was not realized until 2008, with a delay in improving the IP system. Like Indonesia, the USTR's "2014 Special 301 Report" places Thailand in the Priority Watch List due to the issue of infringing products (including counterfeit and pirated goods) as well as the lengthy patent examination procedure before the acquisition of patent rights.

In 1963, a division in charge of patent law was established within the Commercial Registration Department. In 1992, the Department of Intellectual Property was created within the Ministry of Commerce. Moreover, in December 1997, the Central Intellectual Property and International Trade Court (CIPITC) was established to deal with civil and criminal cases involving IP and international trade.

6. Brunei

With regards to patent, partly due to its geographic condition of being located in the north of Borneo Island - the largest island in Southeast Asia, Brunei adopted the re-registration system of patents based on the patent rights registered in England, Singapore and Malaysia. However, in conformity with the ASEAN IP Action Plan 2011-2015, efforts have been made to improve its IP system. In January 2012, Brunei moved to the patent commissioned-examination system, in which it independently conducts formality examination of patent applications, while commissioning substantive examination thereof to the IP Offices in Denmark, Austria and Hungary.

Brunei became a member of the PCT in 2012, and the Hague Agreement in 2013. The jurisdiction over IP, which once belonged to the Attorney General's Chambers Department, was moved to the Economic Development Board. In June 2013, upon the transfer of the jurisdiction over trademarks, the Brunei IP Office was established under the Economic Development Board in order to handle patents, designs and trademarks in a more uniform manner.

7. Vietnam

Vietnam's first IP rule was the "Decree on Innovations to Effect Technical Improvement and Rationalization in Production and on Inventions" enacted in 1981. Following this, the National Office of Inventions was established through a decree on the reorganization of the State Committee of Science and Technology in 1982.

Throughout the enactment of regulations on trademarks and industrial designs, the chapter on industrial property established in the Civil Code in 1995 served as the foundation for the current system. In 2005, the Law on Intellectual Property was enacted which dealt with IPRs, including patent, design, trademark, copyright, etc.

The National Office of Intellectual Property of Vietnam - originated from the National Office of Inventions – currently belongs to the Ministry of Science and Technology.

8. Laos

After the establishment of the Lao People's Democratic Republic, the Prime Minister's Decree on Trademarks Registration, and another Decree on Patent, Petty Patent and Industrial Designs were introduced in 1995 and 2002, respectively. Moreover, the Implementation Regulations of the Decree on Trademarks were enacted in 2002, and those on patents, etc. in 2003. The current IP law was enacted and implemented in 2008.

The Department of Intellectual Property, Standards and Metrology was established in 1990 as part of the Ministry of Science and Technology. In the meantime, industrial property rights are handled by the Department of Intellectual Property. Efforts are currently being made to establish detailed IP rules which have not yet been fully implemented. As of December 2014, there were no patent registered in the country.

9. Myanmar

Due to WWII and subsequent political chaos, currently there is no IP law in operation in Myanmar, nor IPR registration system. Regarding trademarks, however, a declaration on the right to trademark can be made by registering marks to use at the Ministry of Agriculture and Irrigation, and publishing

registered marks in newspapers. The infringement of trademarks is sanctioned by a penal punishment under the Specific Remedy Law, as well as civil remedies, such as an injunction or claim for damages, etc.

It is an urgent task for Myanmar to establish an appropriate system for IPR acquisition and protection, including the enactment of IP laws, establishment of an IP agency, capacity-building of IP agency officers, etc. Discussions have been held at the Ministry of Science and Technology (MOST) and other institutions on how to best address these challenges. As the duties of the MOST were transferred to the Ministry of Education (MOE) through the reorganization of government ministries in March 2016, the MOE will continue these discussions.

10. Cambodia

In Cambodia, the Law concerning Marks, Trade Names and Acts of Unfair Competition, and the Law on Patents, Utility Models and Industrial Designs came into effect in February 2002 and January 2003, respectively.

Along with economic growth, the number of applications for the registration of patents, designs and trademarks has been increasing yearly. In particular, the number of applications for trademark registration has doubled from 2007 (approx. 3,000) to 2013 (approx. 6,000). The number of applications from Japan has also greatly increased (while there are trademarks and designs registered, no patent has been registered to date.)

Trademark is under the jurisdiction of the Department of Intellectual Property Rights of the Ministry of Commerce; patent and design, the Department of Industrial Property of the Ministry of Industry, Mines and Energy; and copyright, the Ministry of Culture and Fine Arts. Under the National Committee for Intellectual Property Rights - which coordinates all these IPs, national IP strategies are formulated in an integrated fashion.

IV. JAPANESE COOPERATION WITH ASEAN COUNTRIES

A. ASEAN-Japan Heads of Intellectual Property Offices Meeting

The amount Japan exports to ASEAN countries is the third largest, following that of the US and China. In fiscal 2013, the increased number of Japanese companies with subsidiaries in five ASEAN countries (Singapore, Thailand, Indonesia, Malaysia, and the Philippines) surpassed the number of that in China. Thus, the ASEAN countries are deemed promising business destinations for Japanese companies.

However, ASEAN countries face various IP-related problems, including delays in the examination of applications, delays in the accession to the international application system of trademarks and designs. From the viewpoint of creating better investment environment in the ASEAN countries, it is necessary to improve and strengthen IP systems in the region.

To this end, in order to promote the improvement of IP systems in the ASEAN region in its entirety (which sets a goal of establishing the AEC), the JPO launched the ASEAN-Japan Heads of IP Offices Meeting in February 2012, as a forum of high-level dialogue among IP offices in the ASEAN region. In consideration of the needs of applicants, the JPO provides assistance in human resource development, IP infrastructure development, etc.

The 5th ASEAN-Japan Heads of Intellectual Property Offices (IPOs) Meeting was held in Nara on May 25, 2015. On the following day, the ASEAN IP Offices Symposium was organized where the heads of ASEAN IP Offices explained to stakeholders (including Japanese corporations) the current status of IP systems, as well as recent efforts for IPRs protection, etc. in each country.

At the meeting, the "ASEAN-Japan Joint Statement on Intellectual Property" was adopted, confirming: 1) the formulation of cooperation programs in the IP field for FY(fiscal year)[1] 2015; and 2) the contribution to the achievement of the AEC through deepening cooperation in the IP field, as well as the strengthening of the bilateral relationship between Japan and each ASEAN country.

The "ASEAN-Japan Joint Statement" shared recognition that the following points would create mutual benefits for both Japan and ASEAN countries, and thus cooperation would be continued in various forms:

- the further strengthening of ASEAN-Japan cooperation for mutual prosperity;
- the importance of an industrial property system which matches the situation of each country, in facilitating trade and investment, and fostering innovation and technology transfer, in order to achieve sustainable economic development; and
- the contribution of ASEAN-Japan deepening cooperation in the IP field to the achievement of the AEC.

B. Outline of Cooperation Toward the Entire ASEAN Region

In order to help address challenges in IP legal systems and in their operations (including the examination mechanism) in ASEAN countries, the JPO has provided various forms of assistance and cooperation, through dispatch of experts, training seminars, etc. since the 1980s.

[1] Japan's fiscal year runs from April 1 to March 31.

As more than 10 years have passed since the obligation of applying the TRIPS Agreement accrued, ASEAN countries have seen progress to some extent in their effort to establish IP laws. However, there still remains room for improvement in the operation of IP systems.

Accordingly, cooperation toward ASEAN countries is being requested with a focus on further enhancing IP laws and strengthening the IP operation system. In particular, for LDCs, as the time limit for applying the TRIPS Agreement has been extended until July 1, 2021, their IP laws are still insufficient with almost no cases of IPR enforcement or operation.

Within the ASEAN region, the IP situation as well as the scope of trade and investment with Japan varies from country to country. Therefore, cooperation which matches the situation in each country is required, with full consideration to the needs in the industrial circle and the priority of countries, fields, etc.

The following are the types of technical assistance and human resource development programs implemented by the JPO in cooperation with the WIPO and JICA. Further improved approaches will be required in the future.

1. Approaches Using ODA Schemes

Approaches using ODA schemes are: "WIPO Funds-in-Trust/Japan" and "JICA Technical Cooperation Projects."

"WIPO Funds-in-Trust/Japan" was founded with the voluntary funds the JPO had offered to the WIPO since 1987. Targeting developing countries which acceded to the WIPO in the ESCAP (the United Nations Economic Commission for Asia and the Far East) region, the Funds has conducted various cooperation activities such as:

- organizing workshops, etc.
- accepting trainees or long-term fellows;
- dispatching experts;
- computerization of IP offices, etc.

(Since FY2008, the target area has been expanded to include the African region.)

"JICA Technical Cooperation Projects" combine three cooperation methods of: dispatch of experts; acceptance of trainees; and the offer of equipment, and are implemented for a specific period of time. Since the 1990s, projects for establishing IP offices, strengthening IPRs protection and enforcement, etc. have been implemented in ASEAN countries including Thailand, Indonesia, Vietnam and others.

2. Cooperation in Human Resource Development

Cooperation in human resource development is implemented by: dispatching experts, inviting trainees for a short-/medium term, and accepting long-term fellows, etc.

Through the schemes of the WIPO Funds-in-Trust/Japan and JICA Technical Cooperation Projects, JPO officers are dispatched to IP offices in developing countries to provide instructions on various IP-related duties. In FY2014, the JPO sent its officers to Laos, Myanmar, the Philippines, Indonesia and Vietnam to train local officers in relation to examination practices and dissemination activities.

Invitation of short/medium-term trainees has been ongoing since 1996, with the aim of personnel capacity-building for strengthening IPRs protection in developing countries. In particular, focus has been placed on the capacity-building of IP examiners and administrative officers. During the 19 years from 1996 to March 2015, 4,661 trainees in total from both public and private sectors from 70 countries and four regions have been invited to Japan.

Regarding long-term fellows, those who are, or will be in a leadership position in the IP field in developing countries are invited to Japan for approximately six months, to conduct research on IPRs. Since 1997, long-term fellows have been invited primarily from the Asia-Pacific region. In FY2014, one fellow has been invited from Cambodia, Laos, India, Indonesia and the Philippines each.

In addition, various types of seminars have been held, including a few examples in FY2014:

- Follow-up seminars for those who have been trained in Japan. These aim to follow and maintain the achievements of training, and to promote cooperation among trainees in assisting dissemination and education activities of the IP system (held in the Philippines, India, Myanmar, Thailand, and Indonesia).
- “Seminar on Intellectual Property, Technology Transfer and Commercialization” (held in Singapore in August 2014 for ASEAN countries);
- “Workshop on the Hague System for the International Registration of Industrial Designs” (held in Singapore in September 2014 for ASEAN countries);
- “Seminar on Effective Use of Trademark Classification System” (held in October 2014 in Brunei for trademark examiners in ASEAN countries); and others.

3. Cooperation in Computerization

Along with the expansion of Japanese businesses in ASEAN countries, further efficient and high-quality IP examinations are required so as to facilitate the proper acquisition of rights by Japanese companies, and economic activities. Against this background, in order to assist in the construction of IT infrastructure which contributes to the improvement of efficiency and quality in IP examinations,

Japan has cooperated with the WIPO since 2013, in launching projects which:

- promote the ASEAN Examination Cooperation Program using the ASEAN IT system base, which was created with Japanese assistance;
- cooperate in building the ASEAN IP portal, which enables across-the-board reference of publicly available data of IP offices in ASEAN countries.

Furthermore, assistance has been provided to improve the IT system of each IP office in ASEAN countries to enable all to participate in the endeavors of the whole region.

Additionally, the Advanced Industrial Property Network (AIPN), which provides IP examination-related information of Japan, has been made available to the IP offices abroad. The introduction of this system aims to reduce duplicated workloads at IP offices overseas, through an effective use of the results of patent examinations in Japan, and thereby to expedite rights acquisition by Japanese companies abroad.

Through this network, IP examiners abroad can have access, via Internet, to Japanese information in English concerning:

- the documents necessary in the patent examination procedure;
- examination progress;
- quoted references;
- the examination of claims after granting patents;
- patent families, etc.

(As of March 2015, it is available at relevant institutions in 66 countries).

C. Outline of Cooperation with Each ASEAN Country

1. Indonesia

In Indonesia, a JICA project to strengthen IPRs protection was implemented from April 2011 to April 2015 in cooperation with the JPO. Efforts were made for:

- strengthening the functions of IP enforcement institutions;
- the capacity-building of the Directorate General of Intellectual Property Rights (DGIPR) of the Ministry of Law and Human Rights for IP examination; and
- promoting the use of IPRs by higher education institutions.

The JPO collaborated with the project by “dispatching its officers as long-term experts,” “dispatching short-term experts as necessary,” and “inviting relevant officials as trainees (to IPR-enforcement courses, etc. targeting only Indonesian officers), etc.

In addition, the DGIPR and the JPO exchanged a memorandum concerning the enhancement of substantive IP examination capacity (such as trademarks, etc.), in August 2014, so as to further strengthen the cooperative relationship. Within this framework, the JPO invited design examiners to study the relevant Japanese system, and dispatched patent examiners in the field of computer software, etc. These efforts have been continued in and after 2015.

Since June 1, 2013, the JPO has been in charge of international search and preliminary examinations of PCT international applications received by the DGIPR of Indonesia.

2. Malaysia

The MyIPC and the JPO signed a cooperation memorandum in January 2015 to further strengthen the cooperative relationship, including the enhancement of substantive examination capacity, assistance in the automatization of format examination, etc. In FY2014, the JPO dispatched patent examiners to the MyIPC in the field of biotechnology and nanotechnology, etc.

Since April 2013, the JPO has conducted international search and preliminary examinations of PCT international applications received by the MyIPC.

3. The Philippines

The IP Office of the Philippines and the JPO concluded a memorandum for strengthening the cooperative relationship in August 2014, including the dispatch of patent examiners and exchange of IP information, etc. In FY2014, the JPO dispatched patent examiners to give lectures on examination practices in the field of mobile technology. It also sent specialists in patent information exchanges.

Since January 2002, the JPO has handled international search and preliminary examinations of PCT international applications received by the IP Office of the Philippines.

4. Singapore

The IP Office of Singapore and the JPO signed a memorandum concerning IP cooperation in July 2012. Since December of the same year, the JPO has conducted international search and preliminary examinations of PCT international applications accepted by the IP Office of Singapore.

Moreover, in August 2014, both institutions concluded a new cooperation memorandum to deepen the cooperative relationship. The memorandum included the enhancement of substantive examination capacity through discussions among examiners from both countries, assistance in training newly-appointed patent examiners, etc.

In FY2014, the JPO dispatched patent examiners in the field of information and telecommunications, as well as experts in assisting the building of a human resource development program. In an effort to strengthen the cooperation in relation to substantive examination, in December 2014, the JPO dispatched a patent examiner to the IP Office of Singapore with a three-year term in the capacity of senior patent examiner.

5. Thailand

Cooperation has been extended to the IP Department in Thailand in various forms since the 1990s. The IP Department in Thailand and the JPO exchanged a memorandum in May 2015, in order to strengthen their cooperative relationship, including cooperation in streamlining patent examination practices and training of examiners.

Since April 1, 2010, the JPO has taken charge of international search and preliminary examination of PCT international applications received by the IP Department of Thailand.

6. Brunei

In May 2015, the IP Office of Brunei and the JPO signed a memorandum to enhance cooperation between the two institutions. The memorandum covered cooperation in international search and preliminary examination of PCT international applications to be received by the IP Office of Brunei, etc.

7. Vietnam

In February 2012, the National Office of Intellectual Property (NOIP) of Vietnam and the JPO concluded a memorandum on IP cooperation. Subsequently in October 2014, another memorandum was signed, which included cooperation in the work-sharing of examination, in addition to the traditional cooperation activities, such as:

- providing advice on policies for the promotion of IP protection;
- streamlining the examination procedure;
- enhancing the IP management system;
- assisting in IP dissemination;
- human resource development.

In accordance with the memorandum, in FY2014 the JPO invited patent/trademark examiners for training in examination practices, and dispatched design examiners, etc.

Moreover, in April 2012, a project was launched to strengthen education on, and control of IPRs in cooperation with the JICA. The JPO dispatched its officers as JICA long-term experts to cooperate in:

- promoting dissemination of IP laws among IP-related institutions and the public;
- the capacity-building of IP administration and enforcement institutions;
- strengthening cooperation among IP-related institutions and review of IPR laws, etc.

Since July 1, 2012, the JPO has been in charge of international search and preliminary examination of PCT international applications received by the NOIP.

8. Laos

In May 2015, the Ministry of Science and Technology of Laos and the JPO exchanged a memorandum to reinforce the cooperative relationship, including assistance in human resource development, improvement of IT infrastructure, IP dissemination and education, etc.

9. Myanmar

In February 2013, the Minister and Vice Minister of Science and Technology of Myanmar, and the JPO Commissioner held a meeting at Naypyidaw, the capital of Myanmar, to advance bilateral cooperation for building an IP system in Myanmar (in August 2014, the Ministry of Science and Technology and the JPO signed an agreement concerning cooperation in drafting IP laws, establishing an IP office, as well as in the operation of the IP office after its establishment. Following this, the JPO has carried on such activities as providing advice on the draft IP laws being prepared by said Ministry, as well as on the administration of the IP office; organizing seminars on the examination of patents, designs and trademarks.)

In October 2013, the JPO established a "Support Team for Organizing Myanmar's IP System" through government-industry-academia collaboration. This Support Team (chaired by myself) compiled and presented a detailed proposal to the government of Myanmar concerning the building of an IP system. The proposal included the enactment of IP laws and bylaws, organization of the IP office, determination of its duties, etc. with most of which being reflected in the draft laws.

Moreover, based on the above agreement, in March 2015, a JPO officer (patent examiner) was dispatched to the Ministry of Science and Technology as a JICA long-term expert, to directly engage in cooperation for establishing an IP system in Myanmar. In order to help establish an IP office, the expert has conducted such activities as providing know-how on the administration and operation of an IP office, which would be useful for its smooth launch and performance of duties.

Through the JICA, various technical cooperation projects are ongoing in Myanmar. One such project is a legal cooperation project which covers the legal system in general. As part of this project, the establishment of an IP-related judicial system has been discussed, primarily by the Supreme Court of

the Union. Japan assists in this process through an "all-Japan" support scheme, with the involvement of lawyers and other legal professionals.

10. Cambodia

In November 2014, the National Committee for Intellectual Property Rights, the Ministry of Commerce of Cambodia and the JPO signed a memorandum to strengthen the cooperation relationship, which included the sharing of experiences in the improvement of IT infrastructure, capacity-building of examiners and other IP officers, etc. In FY2014, the three institutions cooperated in improving the flow of trademark examination, etc.

V. CONCLUSION

I have briefly discussed the situation of IPRs protection in ASEAN countries and the resulting Japanese cooperation. Due to a large difference in the level of economic development and a diversity of languages, cultures, religions, etc., the situation of IP protection varies from country to country. Regarding industrial property rights (including patent [utility model], design, trademark), the "lack of human resources with sufficient ability to administer IP offices (in particular, the qualitative and quantitative lack of examiners) is serious and is a significant point to overcome. Continued cooperation in the administration of IP offices - human resource development, reducing workloads of IP offices, etc. – is indispensable.

Moreover, the "systems for the exercise (enforcement) of IPRs (industrial property rights as well as copyrights)" have not been sufficiently established or operated. Thus, cooperation in building and operating IP-related judicial systems, as well as in the capacity-building of legal professionals (including IP specialist judges), is also essential.

I, myself, have been provided with an opportunity to participate in legal cooperation programs, by serving as a lecturer in local seminars in Thailand and Indonesia, in training seminars in Japan, giving guidance to JICA long-term experts, etc. Currently I am involved in legal cooperation with Myanmar. What consistently strikes me is the importance of having long-term views. Japan has a history of over 130 years with IPs since the introduction of the IP system. At the beginning of the introduction, and for lack of experience, Japan struggled to establish a proper IP system. By facing and solving problems one-by-one, Japan has constructed and improved relevant systems in accordance with changes in society.

The IP systems in ASEAN countries are in the same fledging stage the Japanese system was during

the Meiji era. Improving the systems and their operation will require a significant amount of time. To this end, it would be important to continue our cooperation "not hastily," "jointly (from the perspective of the other country)," "on an equal footing," "with smiles," and "with patience." I am more convinced of the above as being involved in legal cooperation with Myanmar, and seeing officers of the Myanmar government and the Supreme Court of the Union making earnest efforts toward the introduction of new systems.

POSSIBILITY OF DEVELOPMENT OF MEDIATION SYSTEM IN TIMOR-LESTEESE SOCIETY

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I. INTRODUCTION

Timor-Leste (East Timor) is a young country, attaining independence in 2002. After experiencing colonial rule by Portugal, rule by Indonesia and pre-/post- independence upheavals, the country has been advancing infrastructure-building in various fields, through international cooperation with developed countries. The Research and Training Institute (RTI) of the Ministry of Justice of Japan has also cooperated with Timor-Leste for legal development. I was involved in the program of "legislative assistance for mediation law, with the aim of improving legislative capacity" for Timor-Leste[1].

As you may already know, mediation is one method of ADR (alternative dispute resolution). While trial is a compulsory dispute resolution, ADR is a voluntary dispute resolution. In particular, mediation is a voluntary-minded dispute resolution procedure, aiming at reaching agreement between parties through dialogue, with the involvement of third parties. Moreover, facilitative mediation (a type of mediation which has been disseminated and well-established in the U.S., and has been frequently referred to in Japan in recent years) is one model to follow, which excludes opportunities for evaluation and coercion by mediators. This can be considered a procedure

[1] With regards to legal technical assistance to Timor-Leste by the International Cooperation Department, Research and Training Institute, Ministry of Justice of Japan, see: Mikine Eto, *Higashi Timoru Houseibi Shien Kyodo Housei Kenkyu – Jiritsueno Sasayakana Chosen* (Legal Technical Assistance to, and Joint Study of Legal Systems with, Timor-Leste – A Modest Challenge towards Independence), ICD NEWS No.53, 2012, pp. 158-164 (in Japanese); Mikine Eto, Report on Field Survey and Local Seminars in Timor-Leste, ICD NEWS (English edition), January 2014, pp. 133-145; Yasuhiko Tsuji, *Higashi Timoru Chotei-ho Semina* (Seminar on Mediation Law of Timor-Leste), ICD NEWS No. 56, 2013, pp. 7-14 (in Japanese); Yoshitaka Watanabe, Toward Enactment of Mediation Law in Timor-Leste, http://www.moj.go.jp/content/001199401.pdf; Yoshitaka Watanabe, *Higashi Timor Kyodo Housei Kenkyu* (Joint Study of Legal Systems with Timor-Leste), ICD NEWS No. 67, 2016, pp. 136-140 (in Japanese)

promoting the formation of an order based on the autonomy of parties[2]. In order to enable Timor-Leste to develop such mediation procedures - a dispute disposition method based on parties' autonomy, the RTI places a focus on the "improvement of legislative capacity." The intention is to cultivate the decision-making capacity of Timor-Leste, which infers similarity with the philosophy of mediation.

Will mediation ultimately come to be accepted in Timorese society as parties' autonomous dispute-resolution method (I have no objection to the concept of respecting the voluntariness of parties)? Should there be a possibility that Timorese society accepts the mediation system, what is that possibility? When being engaged in legal technical assistance, it will be necessary to understand these points in advance. From these perspectives, this paper will discuss ideal legal technical assistance looking to the development possibility of mediation in Timorese society, in reference to some available materials[3].

II. LAND DISPUTES AND MEDIATION IN TIMOR-LESTE

Timor-Leste has seen drastic improvements in its judicial resources, in terms of both quality and quantity. However, such resources are not wholly sufficient by any means. Valuable judicial resources concentrate in urban areas, with vast other areas having no access to legal practitioners. In Timor-Leste, however, reconciliation, as a traditional conflict-resolution method used since old times, has been applied to a group of conflicts reflecting the complicated modern history of the country. There broadly exists a foundation for dispute disposition based on dialogue in Timor-Leste. Against this background, the overarching institutionalization of mediation system is anticipated in Timor-Leste.

Land disputes have been important yet difficult challenges for people in Timor-Leste, reflecting the modern history of the country. Its historical background of being subject to the colonial rule by Portugal, occupation by Indonesia, independence in 2002 and the crisis of conflict in 2006, has caused the current situation with the existence of overlapping land owners. In other words, conflicts over the ownership of land have occurred between landowners since the Portuguese colonial era

[2] As literature regarding facilitative mediation highlighting party autonomy, see Levin Kobayashi Hisako, *Choteisha Handobukku Chotei no Rinen to Giho* (Handbook for Mediators, Concept and Techniques of Mediation), Shinzan-sha, 1998 (which organizes fundamental thoughts and guidelines on practice); and Hideaki Irie, *Gendaichotei-ron Nichibei ADR no Rinen to Genjitsu* (Theory on Modern Mediation, Concepts and Realities of ADR in Japan and the U.S.), University of Tokyo Press, 2013 (which examines the actual situation of mediation in Japan and the U.S. in recent years).

[3] Despite an increasing interest in Timor-Leste for being involved in legal technical assistance to Timor-Leste since 2012, my understanding towards the country has never been sufficient. In preparing this paper, only a limited amount of materials were available on Timor-Leste. Under these circumstances, I owe to Professor Akihisa Matsuno (Osaka University) my deep thanks for his truly kind advice on reference materials.

or Indonesian occupation and current possessors. Moreover, the current possessors of land and buildings belong to specific ethnicities in some cases, leading to ethnic problems in connection to land disputes[4].

As a countermeasure against land disputes with such complicated historical backgrounds, the possibility of dispute disposition through mediation, along with the establishment of land law and registration system, has been proposed[5].

Land disputes are filed with, and their records are kept by, the Land and Property Unit (LPU) established by the United Nations Transitional Administration in East Timor (UNTAET). Mediation is under the jurisdiction of the LPU. Its staff members, as well as community traditional leaders, including: Liurai (tribe ruler) and Lianain (ritual authority), Chefe de suco (village chiefs), and Chefe de aldeia (community chiefs), are charged with mediation. NGOs may also be involved in some cases. It is said that during mediation sessions with the above-mentioned participants, it is necessary, not to rush towards compensation issues or sharing methods, but rather to encourage parties to listen to, and learn the history of the other party's community, in order to mutually understand respective cases.

In relation to the crisis in 2006, the government dispatched dialogue teams to IDP (internally displaced persons) camps and recipient communities for the return of IDPs. According to available statistics, however, it appears that the country is in a situation where mediation is not fully functioning yet in this arena.

While awareness is increasing on the necessity of improving relevant legal systems to solve land problems, mediation – the "reconciliation"-wise technique – has been used to address many disputes attributable to the complicated history of the nation.

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[4] See Yuzuru Shimada, *Heiwa Kouchiku ni okeru Houseido Kaikaku – Higashi Timoru no Shiho Seido Kouchiku wo Jirei to shite* (Legal Reform in Peace-Building – Judicial Development in Timor-Leste as an Example), Journal of International Development Studies, Vol.20, No.2, pp. 67-69. Quoting Fitzpatrick, Shimada describes the facts that, many refugees from the conflict in 1999 flooded into Dili, capital of Timor-Leste, and occupied vacant houses on the "first-come-first-served" basis; that those from Baucau settled down in empty houses in Dili, causing violent conflicts with the original owners. Shimada considers these events as part of complicated political crisis in Timor-Leste. As literature which articulates and organizes land disputes in Timor-Leste in detail, see Antero Benedito da Silva and Kiyoko Furusawa: Land, State and Community Reconstruction: Timor-Leste in Search of a Sustainable Peace, in Sinichi Takeuchi ed. *Confronting Land and Property Problems for Peace*, Routledge, 2014, pp. 212-241.

[5] Antero Benedito da Silva and Kiyoko Furusawa, *supra* 4 at pp.233-234.

III. RECONCILIATION BY NAHE BITI

After experiencing a series of conflicts as well as an oppressing regime, Timor-Leste addressed human rights violations in the past through "the Commission for Reception, Truth and Reconciliation[6]." In particular, after the national referendum in 1999, many anti-independence group members and their families have resided in West Timor as refugees. In order to resolve any potential remaining rivalry, cross-border "reconciliation" was tried primarily by politicians of the highest level. The "Truth and Reconciliation Commission" is a method that has been tried in many countries under similar situations. It is said that in Timor-Leste, in particular Mr. Xanana Gusmao, then national leader, strongly supported a "reconciliatory" resolution. His position may be attributable to political reasons due to the geopolitical position of Timor-Leste, as well as to the affinity between such reconciliatory solution and the local traditional dispute disposition method.

The "reconciliatory" dispute resolution, which has been traditionally practiced in Timor-Leste, is called "Nahe Biti[7]," which means "spreading a straw mat." This refers to an assembly to which people are invited to sit on a straw mat. I heard that there are two types of "Nahe Biti" – "Biti Boot" (big mat) used to solve family problems in a broad sense; and "Biti Kiit" (small mat) used to solve family problems in a more narrow sense.

"Nahe Biti" is conducted according to the following procedure[8]: A person called "Lianain" begins a ritual by singing a song which invites responses from the audience, chanting a spell and dancing. "Lianain" dresses himself in colorful tais, with anklets of horsehair and breast ornament. He then conducts a solemn act of spreading a mat, which indicates the beginning of proceedings by which both parties to a dispute agree to sit together to resolve their disagreement. This procedure usually begins in the morning, and may continue until midnight according to the seriousness and complicity of cases. When a mat is spread, a straw basket is placed thereon. This basket is a traditional symbol of welcome and betel nuts and leaves, limes, tobacco and palm wine are put therein. After the dispute has been successfully resolved, both parties and Lianain nibble betel nuts, leaves, and drink palm wine. This is done in a gesture of friendship and as a token of the end of conflict, and to publicly show that they are peacefully connected with each other. After this ritual, parties are provided with an opportunity to explain their case to the community. They are usually encouraged to present opinions concerning the circumstances surrounding disputes. Thereafter,

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[6] Regarding the characteristics and limitations of this method, see Akihisa Matsuno, *Heiwa Kouchiku ni Okeru Shinjitsu Tankyu – Funso-go no Higashi Timoru no Jirei kara* (Search for Truth in Peacebuilding – from Cases in Post-Conflict Timor-Leste), in Hideaki Shiroyama, Yuji Ishida, and Inui Endo (Eds.), *Funso Genba karano Heiwa Kochiku* (Peacebuilding in the Field of Conflict), Toshindo, 2007.

[7] Explanations onward are primarily through Dionisio Babo-Soares, Nahe Biti: The Philosophy and Process of Grassroots Reconciliation (and Justice) in East Timor, *The Asian Pacific Journal of Anthropology* Vol. 5, No.1, 2004, pp.15-33.

[8] Chega! Report Part 9: Community Reconciliation, pp.7-8.

the adjudicator or other participants may ask questions to the parties. Subsequently the procedure moves on to the following stage. After the petitioner has been able to convince Lianain, punishment or payment of compensation will be imposed on the perpetrator. Such a punishment or payment is usually banishment from community joint activities or the payment of an amount acceptable for the victim. This procedure is characterized by the involvement of an extensive community in disputes and discussions for solutions. Therefore, publicly manifesting reconciliation through a ritual is an important part of community life in rejuvenating and maintaining social stability.

It is said that Nahe Biti, with ritualistic features of traditional society, is closely related with the world view of Timorese. For them, the world is composed of the mundane life on the earth where creatures are living, and cosmos where the spirit and ancestors are living. They believe that when these two aspects of the world are imbalanced, poor harvest, epidemics or disasters may occur. Phenomena in life are described in association with the life on the earth, including day and night, men and women, life and death, and cosmos. Therein are included: "hum," which means "beginning," "origin," "past," etc.; and "rohan" – "end," "edge," and "future." The balance which should exist in between "hum" and "rohan" may be disrupted due to mistakes in the past. Nahe Biti is positioned in the context of two opposite points: "hum" and "rohan." An error in the past constitutes the beginning of process, and "reconciliation" heals the error.

A Biti (mat) is knitted with various Heda (palm leaves), which depicts several different ideas combined constituting a Biti, but does not cover an agreement-formation stage.

Such a traditional reconciliation method as above has been taken to facilitate the repatriation of refugees from West Timor. Refugees are expected to confront with their own communities and community meetings are held to hear their confessions, which include the reception of political process and disclosure of their involvement in disruptions. These confessions are usually conducted by the representatives of returnees for communities. Thereafter, people are encouraged to voice their opinions on confessions. Hearing such complaints, elders make judgments. Punishments ranging from fines to voluntary services are imposed on criminals, and those who have committed serious crimes are handed over to the UN Civilian Police.

Recovering peace and stability among parties in conflict who have experienced serious oppression and violence, by using a traditional reconciliation method, appears to be an idealistic trial. Even though this method is widely used in Timor-Leste, not all conflicts with complicated historical backgrounds can be solved. Serious crimes are therefore disposed of as criminal cases through national legal procedures. While the Commission for Reception, Truth and Reconciliation investigates primarily grave crimes, those which are considered less serious (such as looting, arson,

etc.) are to be solved through community reconciliation. It can be communicated that refugees in West Timor who were not involved in serious crimes may not be persecuted upon return, while serious crimes are disposed of through the national justice system. In this manner, by sorting out and solving problems according to their gravity, the satisfaction of local population can be secured.

IV. COMBINED USE OF FORMAL DISPUTE RESOLUTION SYSTEM AND TRADITIONAL DISPUTE RESOLUTION SYSTEM

In Timor-Leste, traditional dispute resolution methods (such as Nahe Biti) are widely used, and behind dispute resolutions through Nahe Biti there exists an inherent worldview commonly shared among Timor-Lesteese. It can be inferred that therein exists a basis for building the mediation system. However, the worldview rooted in the traditional society of Timor-Leste may be partly at odds with modern Western values. In particular, human rights abuses against women are serious. In solving disputes according to traditional methods as well, oppression against women has been seen as a problem[9]. In what manner, then, can countermeasures be formulated against disadvantages for women, while making use of traditional dispute resolution resources? Here I will discuss the practices undertaken by lawyers and paralegals belonging to NGOs, in dealing with domestic violence cases, through a Legal Aid program commenced in Timor-Leste[10].

In Timor-Leste, it is difficult for women to adequately reveal their problems and have access to legal aid. Women are often blamed for causing domestic violence, have little voice during the handling of incidents, suffer from a lack of enforcement of rulings by justice bodies, and can be ostracized for taking cases to state authorities. Furthermore, many women remain unaware of their rights, live in communities that place family unity above their protection and consider all but serious harm as a private matter. Upon marriage, women often exchange dependency upon their own family for a dependency on their husband and his family. Should domestic violence occur, the priority of the community has traditionally been to reconcile the couple's families, thereby restoring the flow of values between them and appeasing their ancestors. In many communities the writing up of a reconciliation letter includes the payment of compensation and a detailed description of the offence to not repeat it. However, compensation often goes to the victim's family rather than the victim herself.

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[9] Carolyn Graydon, "Local Justice Systems in Timor-Leste: Washed Up, or Watch This Space?" *Development Bulletin* No.68, 2005, pp.66-70. According to Graydon, in Timor-Leste, incarceration imposed as a punishment is considered as a privilege, for many people engaged in agriculture, as the incarcerated can lodge for free with three meals a day, without the necessity of labor. When perpetrators of domestic violence are incarcerated, it completely deprives the victim and her children of means of support, causing a harsher ordeal to them (p.67)

[10] The information hereinafter is according to Tom Kirk, Taking Local Agency Seriously: Practical Hybrids and Domestic Violence in Timor-Leste, *International Journal on Minority and Group Rights*, Vol. 22, 2015, 435-458.

The Law against Domestic Violence enacted in recent years has required *suco* authorities and Legal Aid organizations to notify state authorities of domestic violence. This has increased space for discussions within communities about domestic violence, made local authorities aware of their obligations to report it to the state and has encouraged victims to approach Legal Aid organizations. At the same time, however, protracting court processes may cause the community to ostracize victims or husbands to seek a divorce.

Legal Aid lawyers and paralegals have found more efficient ways of engagement. Users of Legal Aid organizations have had a high usage rate of mediation. Legal Aid lawyers and paralegals also suggested that they seek settlements that can peacefully reconcile parties. They assist clients to submit reconciliation letters to judges, which list conditions such as: disputants invite local authorities to a reconciliation ceremony where the perpetrator promises to change. Based on this, judges justify a suspended sentence or a fine, allowing the offender to return to his family. Lawyers and paralegals offer "counselling" services to clients through the case disposition process and monitor whether offenders adhere to their promises following suspended sentences. They also explain to community members the meaning of a suspended sentence.

As such, domestic violence cases are generally dealt with through reconciliation between disputants' families, a traditional dispute resolution method. As mentioned above, Legal Aid lawyers and paralegals, while embedding the involvement of courts in such a traditional method, recover the communal life of disputants, with an agreement of the perpetrator of avoiding recurrence of violence. At the same time, they build a monitoring system to secure the performance of perpetrators' promises. Women's dependent position must be considered in disposing of conflicts caused by domestic violence, which derive from such women's dependency. Contrarily, however, in view of relationships surrounding victims, it is not realistic in many cases to carry through with the relief of victims based on modern law, disregarding traditional dispute resolution methods as being irrational. Legal Aid lawyers intend to achieve reconciliation among family communities, repressing human rights violations against women to the maximum extent possible, through "practical hybrids" of traditional and formal dispute resolution methods.

In institutionalizing mediation, a dissemination strategy based on the traditional dispute resolution may be effective in allowing the system to take root among Timor-Lesteese people. However, while it is crucial to aim at the proper formation of an autonomous order between parties through mediation[11], it may not be realistic to attempt to carry it out immediately. In cases where there

[11] Kay Rala Xanana Gusmao, "On the occasion of the International Conference on Traditional Conflict Resolution & Traditional Justice in Timor-leste," *East Timor Law Journal*, 2012, http://easttimorlawjournal.blogspot.jp/2012/05/on-occasion-of-international-conference.html (accessed on August 18, 2016), also states the necessity of changing constituents in traditional dispute resolution methods.

exists possibilities for one party to suffer from undue disadvantages, deriving from deep-rooted traditional value-consciousness and customs, it is necessary to remove such disadvantages in the least frictional manner. The "practical hybrids" of mediation and courts, which I have discussed in this paper, may redress the disadvantageous situation for women in Timor-Lesteese Society.

Having said that, the practical hybrid of mediation and courts is simply one of the operational devices invented. Other practical approaches in the use of mediation may have been made at the site of dispute resolution. It may be necessary to explore such practical attempts, consider the functions of mediation in a comprehensive view of dispute resolution process, and institutionalize them[12]. Should consideration be given to mediation with such a viewpoint, it may be helpful to elaborate on, and make clear how the system can be used, not only by institutions specialized in the intermediation of formal and traditional dispute resolution systems, but also by disputants and their surrounding people[13]. In the first place, Nahe Biti aims to stabilize social relations surrounding parties, regardless of the existence of agreement among them. Understanding the situation of parties after the mediation procedure may offer important suggestions in considering how mediation should be.

V. CONCLUSION

"Law and Development" offers theoretical viewpoints to legal technical assistance activities. After the approach of transplanting modern law to developing countries failed and extinguished, "Law and Development" has rejuvenated by shifting its focus from "economic development" for market establishment, to "social development" aiming at poverty reduction. When dealing with issues of "social development," "major donor organizations have enlarged the scope of 'rule of law' to cover the poor, and conduct legal technical assistance under the concept of 'legal empowerment of the poor' (LEP)." This attempt can be characterized by the recognition of "customary law" (which was simply one of the objects to be reformed through judicial reforms) as "informal law/system,"

[12] Operational efforts may be worked out by avoiding legal disciplines. Care must be taken to the risk of making undue attempts out of legal monitoring. In fact, at *supra* 10 p.455 by Tom Kirk, Legal Aid lawyers mentioned in interviews that they would not have any involvement in the reconciliation ceremony or sign the reconciliation letter themselves. They were afraid that their involvement would lead to an agreement forced by lawyers and hinder autonomous dispute resolution by parties

[13] Although not directly related to the context of this paper, Shintaro Tatsumi, "*Ryakudatsu-kon – Timoru Minami Tetun Shakai ni okeru Bouryoku to Wakai ni Kansuru Ichikosatsu* – " (Marriage by Capture: A Study of Violence and Reconciliation in Southern Tetum Society), Bunkajinruigaku, Vol. 72, No. 1 (2007), pp. 44-67, considers a kidnapping case of a teenage girl occurred in the turmoil following the referendum for independence in East Timor. By showing the gap in discourses of the widely diffused Western modern humanitarianism and human rights movement, and of the victim's community members, Tatsumi makes clear "the process of easing the social tensions raised by the extraordinary violence in the community, or the understanding of reconciliation." When trying to solve cases through mediation, it may be necessary to understand with care and in detail the "reality" of the people in Timor-Lesteese society, through such anthropological approaches.

and an active incorporation thereof into development programs[14]. Nahe Biti, which serves as the foundation for the legislation of mediation law in Timor-Leste, may be useful resources for "legal empowerment of the poor" advocated in "Law and Development."

When I first met Mr. Nelinho Vital, Director-General of the National Directorate of Legal Advice and Legislation, Ministry of Justice of Timor-Leste, during the joint study program in Japan in 2012, I briefly explained Japan's facilitative mediation. Mr. Vital then asked me about any relations between this type of mediation and reconciliation. At that time, based on my understanding that reconciliation referred to the practice by the Commission for Reception, Truth and Reconciliation, I gave a simple answer that in recent years advocates of facilitative mediation had been discussing the method adopted by the Commission in association with mediation[15]. Subsequently I noticed that Mr. Vital's question came out of interest derived from Nahe Biti, the traditional dispute resolution system closely connected with the worldview of Timorese people. Should I have had a wider and deeper understanding of the Timorese world, I would have been able to hold discussions with Timorese people, which could be of some use for the "legal empowerment of the poor." I regret my lack of knowledge at that time.

[14] Nobuyuki Yasuda, *Kaihatsuhogaku no Atarashii Ugoki, Hinkonsha no Impawament (LEP) Gainen wo Chuushin ni* (A New Direction of the Law and Development Study: Focusing on the Concept of "Legal Empowerment of the Poor"), Seisaku Sozo Kenkyu No.4 (2011), pp.9.

[15] Carrie J. Menkel-Meadow, "Remembrance of Things Past?: The Relationship of Past to Future in Pursuing Justice in Mediation" *Cardozo Journal of Conflict Resolution* Vol. 5, 2004, pp.97-115.

LEGISLATIVE PROCESS IN MYANMAR

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I. INTRODUCTION

In Myanmar, on November 8, 2015, the second general election was held under the 2008 Constitution. The National League for Democracy (*NLD*) led by Ms. Aung San Suu Kyi won a landslide victory with 390 seats out of the total contested 491 seats in both the Upper and Lower Houses of Parliament. The then governing party, the Union Solidarity and Development Party (*USDP*) suffered a devastating defeat[2].

Following the election, the new Union Parliament was convened on February 1, 2016 to discuss the formation of a new government, including the selection of a new President. On March 30, 2016, a new administration led by the new President, H.E. Mr. Htin Kyaw, was inaugurated, with Ms. Aung San Suu Kyi assuming the positions of Minister of Foreign Affairs, Minister of the President's Office and the newly established position of State Counselor[3].

From April 2011 to January 2016, during the term of office of the former President, Mr. Thein Sein, the Union Parliament enacted 232 new laws[4] in an effort to support the nation's democratization and

[1] An attorney-at-law admitted in Japan who has been posted in Naypyidaw, the capital of Myanmar, since being dispatched as a long-term JICA expert in January 2014. He has engaged in activities, such as capacity-building for legislative-drafting and vetting as well as improving the training system of judges and prosecutors. The JICA Legal Cooperation Project organized a study trip to Japan in March 2015 to support the expedition of the legislative process in Myanmar. Officers invited from Myanmar, including a presidential legal advisor of the Office of the President and officers from the Union Attorney General's Office, Office of the Union Parliament and the Supreme Court of the Union, gave presentations on the legislative process of each institution to which they belonged. This paper is mainly based on the information provided at that time.

[2] In the House of Representatives (Lower House), just 323 seats were contested as the election was not held in seven constituencies. The NLD won 255 seats, leaving only 30 seats to the USDP. In the House of Nationalities (Upper House), the NLD obtained 135 seats out of 168 constituencies, with the USDP winning only 11 seats. You can find the result of the election at:
http://www.themimu.info/sites/themimu.info/files/documents/03-Sector_Map_Gov_IFES_Political_Party_Result_of_Pyithu_Hluttaw-Pie_MIMU1351v01_21Nov15_A3.pdf, and http://www.themimu.info/sites/themimu.info/files/documents/04-Sector_Map_Gov_IFES_Political_Party_Result_of_AmyothaHluttaw-Pie_MIMU1351v01_21Nov15_A3.pdf. The organization of the Union Parliament will be explained later in this paper.

[3] Since Ms. Aung San Suu Kyi's sons have foreign nationalities, she is not entitled to assume the presidency under Article 59 (f) of the Constitution.

[4] According to an officer of the Office of the Union Parliament.

transition to a market-oriented economy. The Parliament with multi-party system reconvened for the first time since 1963 when General Ne Win terminated it after staging a coup d'état. Since then, Parliament members and Parliament officers without experience in parliamentary proceedings have administered discussion and examination at the Parliament through trial and error[5]. It is crucial to develop the legislative process to be more effective and fair in order for the new Union Parliament to promote further political and economic reforms[6]. According to Parliament officers, the new Union Parliament would continue using the same administrative procedure as the former. However, there have been calls by Parliament staff to improve the deliberation process.

In Myanmar, many bills are drafted by relevant ministries or agencies. Due to the lack of legal experts posted within these ministries, Myanmar finds itself facing difficulties in the legislative-drafting process. Some government officers are aware of this problem.

It is widely believed that a reform of the legislative process will take place in Myanmar in the future. The NLD administration pledged to establish an effective and lean form of administration as one of its election promises[7]. In fact, it has reduced the number of ministries from 31 under the Thein Sein administration to 21. The NLD election promises include the enactment or revision of laws necessary for the benefit of the citizens, as well as the revision or abolition of laws detrimental to the "freedom and security that people should have by right"[8]. As such, it appears that legislative reform is unavoidable in order to meet all of these promises.

In this paper, I will describe the legislative process in Myanmar under the 2008 Constitution[9] and highlight the challenges in the process. As available information on the legislative practices of the present government is limited, I will discuss in this paper, unless otherwise stated, practices under the former administration of Mr. Thein Sein.

II. THE LEGISLATIVE PROCESS IN MYANMAR

A. Legislative Power and the Authority to Submit Bills

Myanmar has adopted the federal system with the legislative power vested in the Union Parliament

[5] See also International Crisis Group "Not a Rubber Stamp: Myanmar's Legislature in a Time of Transition" (13 December 2013).

[6] The revision of company law and insolvency law as well as the enactment of new laws on intellectual property are expected.

[7] According to the Authorized Translation of the National League for Democracy 2015 Election Manifesto (https://drive.google.com/a/jicalegalproject.com/file/d/0B-Tuf9DZaVm9ZmFLdm9wUjh1TzA/view)

[8] Ditto.

[9] The English translation of the Constitution was issued by the Ministry of Information of the Republic of the Union of Myanmar (September 2008).

(*Pyidaungsu Hluttaw*) and the local parliaments (Chapter IV of the Constitution). The Union Parliament's jurisdiction is broadly defined. It has the right to enact laws related to matters listed in Schedule One of the Constitution (96[10]): 1) Union defence and security; 2) foreign affairs; 3) finance and planning; 4) economy; 5) agriculture and livestock breeding; 6) energy, electricity, mining and forestry; 7) industry; 8) transport, communication and construction; 9) society; 10) management; and 11) justice. In this paper, I will discuss the legislative process at the Union-level only[11].

As mentioned earlier, the Union Parliament enacted 232 laws between April 2011 and January 2016. From these, 179 laws (77.1%) were submitted by the Union Government[12] and other government agencies, with the rest being submitted by Parliament members (including bills proposed by committees).

The Union-level organizations formed under the Constitution have the right to submit bills to the Union Parliament in relation to matters under their jurisdiction (100 (a))[13]. Union-level organizations consist of the Union Government, the House of the Union Parliament[14], the House of Representatives (*Pyithu Hluttaw*), the House of Nationalities (*Amyotha Hluttaw*), the Supreme Court of the Union (*SCU*), the Union Election Commission, the National Defense and Security Council, the Financial Commission, the Constitutional Tribunal of the Union, and the Union Civil Service Board[15]. The SCU plays an important role in advancing judicial reform as it has the responsibility to administer basic substantive and procedural laws in the civil and criminal fields,

[10] Unless otherwise stated, the numbers in parentheses in this paper refer to article numbers of the 2008 Constitution.

[11] The matters under the jurisdiction of the local assemblies are listed in Schedules Two and Three of the Constitution. However, they are not granted strong autonomy. See "Shin Kenpo no Gaiyo to Tokucho (Outline and Characteristics of the New Constitution)" by Kenji Ino, Institute of Developing Economies, Japan External Trade Organization (2010) in "Myanma Gunji Seiken no Yukue (Whereabouts of the Military Regime of Myanmar)" edited by Toshihiro Kudo. The Union Parliament has legislative power over all matters other than those vested to local parliaments by the Constitution (i.e. matters other than those enumerated in Schedules Two and Three) (98).

[12] The Union Government consists of the President, the Vice-Presidents, ministers of the Union and the Attorney General of the Union. It is also called "Cabinet" (200).

[13] Bills relating to national plans, annual budgets and taxation are to be submitted exclusively by the Union Government (100 (b)). Each parliament member also has the right to submit bills (138 (b), 158(b)). According to the Law Relating to Pyithu Hluttaw No.23/2012, Article 10 (a) and the Law Relating to Amyotha Hluttaw No.24/2012, Article 10 (a), each committee of both Houses also has the right to submit bills.

[14] The differences between the Union Parliament and the House of the Union Parliament are to be explained later.

[15] This information is based on the reference materials provided by the Union Attorney General's Office. Regarding Union-level organizations, it was once contested at the Constitutional Tribunal of the Union whether committees, commissions and organizations of each House were considered Union-level organizations. It was finally ruled that these organizations were not considered Union-level organizations (The President of the Union vs. The Speaker, The Pyidaungsu Hluttaw et al., Constitutional Tribunal Submission No.1/2012). Subsequently, the Union Parliament, being discontent with this judgment, followed the impeachment procedure of Constitutional Tribunal judges. All judges of the Tribunal subsequently resigned voluntarily. For details, see "Myanma ni okeru 'Ho no Shihai' – Jinken Hogo to Kenpo Saibansho ni Shouten wo Atete ('The Rule of Law" in Myanmar – With a focus on the Protection of Human Rights and the Constitutional Tribunal)" by Miwa Yamada in "Posuto Gunsei no Myanma – Kaikaku no Jitsuzo – (Myanmar in the Post-Military Regime – Real Picture of the Reform)" edited by Toshihiro Kudo, Institute of Developing Economies, Japan External Trade Organization (2015).

including the Contract Act, the Penal Code, the Civil and Criminal Procedure Codes, the Evidence Act, and the Insolvency Acts and to draft bills to amend them[16].

B. Legislative Drafting by the Union Government (Ministries with Jurisdiction) [17]

Before the inauguration of the new government in 2011, the Union Attorney General's Office (*UAGO*), not the relevant ministries, was in charge of drafting bills. However, as the 2008 Constitution came into force with the first session of the Union Parliament in 2011, the power to draft bills was transferred to the relevant ministries. Each ministry was granted discretion in deciding which department was in charge of drafting the bills. Regrettably, ministries are staffed with few legal experts, and officers without basic legal training are in charge of drafting laws[18]. For example, IP draft bills are under the jurisdiction of the Ministry of Science and Technology (currently the Ministry of Education). All legal draftsmen in the Ministry graduated with a science background (e.g. engineering) without a legal one. Even the Ministry of National Planning and Economic Development (currently known as the Ministry of Planning and Finance), which has jurisdiction over company law, did not have a draftsman with a legal background. Some ministries received assistance from overseas experts in order to draft bills[19] although there are cases where former UAGO officers with experience undertake the drafting work upon request by the relevant ministries.

In addition, at the bill-drafting stage by each ministry, there are almost no hearings held with stakeholders or no opinion-sharing sessions with other ministries. Bill drafting is commenced in a top-down manner. Research of facts for legislation, preparation of policy guidelines based on such research, and the collection of public comments on policy guidelines[20] are not sufficiently conducted.

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[16] The SCU is engaged in the drafting of laws, which are to be executed by the Court itself. Officers of the Law and Procedure Division of the SCU (who actually engage in bill-drafting) are summoned by each house of the Union Parliament to participate in the deliberation of bills under the jurisdiction of the SCU.

[17] The Union Government (mostly ministries with jurisdiction) is the main body of drafting bills. As I have already mentioned, the SCU also has the right to submit bills. According to SCU officers, the Law and Procedure Department of the SCU is in charge of drafting bills. Bills drafted by the SCU must be approved by the Judicial Conference before being submitted to the Union Parliament. These bills are to go through examination by the Union Attorney General's Office, the President Office and the Constitutional Tribunal, in principle. However, they are not necessarily examined by all of these organizations in practice. For example, the draft Arbitration Law was submitted to the Union Parliament before completion of legislative-vetting by the Union Attorney General's Office.

[18] More and more ministries are recruiting law graduates but the current levels are not sufficient.

[19] The extent of involvement in bill-making by officers in charge in each relevant ministry varies. In the case of the IP laws, officers of the Ministry of Science and Technology worked on drafting the bills by themselves with advice from the Japan Patent Office and the WIPO (World Intellectual Property Organization). There are also cases in which outside advisers are entrusted with the entire drafting work.

[20] There are cases where public comments are invited with the publication of bills in state-run newspapers at the stage of their submission to the Union Parliament. Even in these cases, however, public comments collected in this manner are not fully utilized.

C. Legislative Vetting by the UAGO

Bills drafted by the ministries with jurisdiction are forwarded to the UAGO for vetting. The UAGO is a government agency which provides legal advice, including legal-vetting, to the President, ministries, the Speakers of each House, and Union-level and other organizations (237 (a); 12(c) of the Attorney General of the Union Law). The Union Attorney General is also a member of the Union Government (200 (d)). Bills drafted by each ministry are vetted by the Legislative Vetting and Advising Department of the UAGO, commented upon, and forwarded back to each ministry with the approval of the Deputy Attorney General and the Union Attorney General.

Legislative-vetting is conducted from the following viewpoints[21]:

1) Whether the bill is consistent with the Constitution and existing laws;
2) Whether the content of the bill is consistent with national policies and the purpose of the bill;
3) Whether the bill is beneficial to the state and the protection of public interests;
4) Whether the bill is detrimental to the existence and security of the nation;
5) Whether the bill is detrimental to the safety of the assets of the people;
6) Whether the bill is detrimental to the integrity of the nation;
7) Whether the bill affects the customs of each ethnic group;
8) Whether the bill causes confusion to the jurisdictional matters of each ministry;
9) Whether the bill maintains sovereignty and is consistent with international treaties; and
10) Whether the bill contains important issues in relation to the subject matter.

In addition to these, the UAGO checks the formality of a bill. This includes whether the purposes of the legislation are provided, whether the effective date of the law is provided, whether there are any overlapping provisions, whether there are any grammatical mistakes, and whether the provisions are clear.

The efficiency of the legislative-vetting procedure is reduced by the inadequate number of qualified personnel and the lack of the digitization. Especially, due to the particularity of the Myanmar language, it is currently impossible to check the use of terms with computer software, which makes only paper-based vetting possible and legislative-vetting less efficient. Moreover, the relevant ministries only forward the cover letter and the bill without any explanatory materials to UAGO for its review. It is unclear whether the UAGO officers in charge of vetting the bills possess sufficient understanding of the purposes, contents and background information of the bills necessary for this function. For the examination of economic legislation, such as company law and intellectual property law, understanding of the laws which support the market system, such as contract law,

[21] According to materials provided from the UAGO.

property law or tort law, are indispensable. However, due to the suppression of legal training under decades of military rule, there are few officers equipped with the knowledge necessary for legal vetting[22].

Because the ministries have no legal obligations to accept the comments provided by the UAGO, each ministry can decide whether it will amend the bills according to these comments. In practice, however, bills are generally re-drafted based on the UAGO's comments. Especially, as for legal or formality matters, the UAGO requests their modifications in a straightforward fashion and the ministry usually accepts these requests. On the other hand, because each ministry has its own discretion on policy matters, the UAGO simply recommends re-consideration thereof in many cases.

D. Legislative Vetting by the Office of President and Approval by the Union Government

Upon completion of legislative-vetting by the UAGO, bills are subject to vetting by the Office of President and presidential legal advisors[23]. This is done from the perspective of consistency between the bills and the Constitution, existing laws and international law[24]. Subsequently bills are submitted from ministries (with modification if necessary) to the Cabinet meeting of the Union Government, and are submitted to the Union Parliament[25] upon approval.

E. Deliberation of Bills by the Union Parliament (Pyidaungsu Hluttaw)[26]

1. Organization of the Union Parliament

The legislative branch, the Union Parliament (*Pyidaungsu Hluttaw*), is composed of the House of Representatives and the House of Nationalities (74). In principle, for a law to be enacted, the bill needs to be passed by both Houses and signed by the President. One quarter of the seats in both Houses are allocated to military members appointed by the Defense Services' Commander-in-Chief, while the remaining three-fourths of the parliament members are elected by voters. The House of Representatives is composed of 330 members elected through the single-seat constituency system

[22] Regarding legal education, see the ILAC/CEELI Institute Report "Emerging Faces: Lawyers in Myanmar" (September 2014). With regards to the education system under military rule, see "Myanma Gunsei no Kyouiku Seisaku (Educational Politics under the Military Rule of Myanmar)" by Tomoko Masuda in "Myanma Seiji no Jitsuzo – Gunsei 23 Nen no Kozai to Shinseiken no Yukue (Reality of Myanmar Politics – Merits and Demerits of the 23-Year Military Rule and the Direction of the New Administration)" edited by Toshihiro Kudo, Institute of Developing Economies, Japan External Trade Organization (2012).

[23] There were three legal advisors under the former Thein Sein administration.

[24] Information based on reference materials provided from a presidential legal advisor.

[25] In practice, bills are forwarded from the Director-General of the Office of the Union Government to the Director-General of the Union Parliament.

[26] Information gained through an interview with the Office of the Union Parliament.

(with one seat accorded to each township[27]) and military appointees (maximum of 110)[28]. The House of Nationalities is composed of 168 members elected through the single-seat constituency system (with 12 seats accorded to each Region or State) and military appointees (maximum of 56).

In addition, the joint assembly, composed of the members of both Houses, discusses bills and takes votes on occasions. This joint assembly is also called the *Pyidaungsu Hluttaw* (e.g. 95 (b), 139 (c), 159 (c))[29]. One point should be made clear. The term "*Pyidaungsu Hluttaw*" is used to refer to the legislative branch of the Myanmar government as well as the joint assembly of both Houses of the Union Parliament. Hereinafter, the joint assembly shall be referred to as "the House of the Union Parliament," and Myanmar's legislative branch as a whole is referred to as "Union Parliament."

The term of members of both Houses is five years from the day of the first session of the House of Representatives (119, 151). The regular sessions of both Houses are convened at least once a year (126, 155).

2. Submission of bills to the Union Parliament and Designation of the House Deliberating the Bills First

As for bills submitted by the Union Government or Union-level organizations (i.e. public bills), the Speaker of the House of the Union Parliament decides which House will deliberate the bill first. There is no hierarchical relationship between the two Houses in the order of the deliberation of bills (101). As for the bills submitted by parliament members or House committees (i.e. private bills)[30], these bills must first be placed on the agenda before the House in which the member or committee belongs to for preliminary vetting. When there is an objection against the deliberation of private bills, deliberation may be continued only when the relevant plenary session gives an approval of commencing the deliberation of such draft.

Generally, both public bills and private bills must be submitted to the House of the Union Parliament no later than 30 days prior to the starting date of the assembly session. However, exceptions are allowed with special approval by the Speakers of both Houses. In practice, in the case of important bills, even if they are submitted in the middle of the assembly session, they may

[27] "Township" is one of the administrative divisions of Myanmar. The hierarchy of divisions, from top to bottom, is: Union, State or Region, District, and Township. As the population in each township varies greatly, the disparity in the weight of one vote is huge.

[28] On the occasion of the general election in November 2015, due to security concerns the election was not held in seven constituencies.

[29] For example, bills relating to national plans, budgets and taxation which are to be submitted by the Union Government shall be discussed and resolved at the House of Union Parliament (100 (b)).

[30] Under the new administration, a bill submitted by a House committee shall be considered as a bill submitted by a Union-level organization, that is, a public bill (which is not in accordance with the judgment of the Constitutional Tribunal of the Union as explained in footnote 15).

be subject to deliberation during the same session.

3. Deliberation of Bills by the Assembly

When a bill is forwarded to the first House for deliberation, the Bill Committee of the House always examines the bill first. The Bill Committee vets the bill from the viewpoints of[31]:

1) Whether it is compatible with the Constitution and existing laws as well as Myanmar's international obligations;
2) Whether it aligns with national priorities;
3) Whether it serves the interest of the nation and the people;
4) Whether it could pose a risk to national security;
5) Whether it is consistent with current realities; and
6) Whether its provisions can be implemented in practice.

The Bill Committee is one of the standing committees established within each House, according to sections 115(a) and 147(a) of the Constitution. Each committee is composed of one Chairman, one Secretary and 13 other members. For the deliberation of bills by the Bill Committee, not only committee members but also members from other relevant committees, government officers, Commissions (118, 150)[32], and relevant officials may join discussions with the consent of the Bill Committee. The Bill Committee deliberates bills, produces reports on proposed revisions of bills and reasons thereon and submits it to the plenary meeting of the first House. As it is difficult for the Bill Committee to examine all the bills by itself, in cases where many stakeholders are involved or at the request of the relevant committees, the Bill Committee may entrust these committees to examine the bills and draft reports thereon. However, even in these cases, at least one member of the Bill Committee shall participate in discussions conducted by the relevant committees. Reports drafted by the relevant committees must be approved by the Bill Committee before being submitted to the plenary session of the House.

Under the Constitution, a majority of votes of the Parliament members who are present and voting is required for a bill to be passed (129 (a), 155). However, voting is not conducted at the plenary session immediately after the report is submitted. The Speaker first asks members attending if they have any objections to the proposal of the Bill Committee. If no objection is raised, the bill with any modification by the Bill Committee's proposal is considered to have passed through the House

[31] See footnote 5 above.

[32] Commissions are meeting panels composed of not only parliament members but also the general public with relevant expertise and experience. For example, in the case of the Commission for Assessment of Legal Affairs and Special Issues, former UAGO officers or lawyers were members. Under the former administration this Commission was established at each House. However, as they often caused delays in proceedings due to conflict with one another, the current administration has established only one commission under the House of the Union Parliament.

with the votes of the majority of attending members. If there is any member against the proposal of the Bill Committee, the Committee is convened for further discussion together with the opposing member. There are cases where, as a result of re-discussion, the opposing member changes his or her opinion and votes for the Committee's proposal, or a compromise is reached between both parties to revise the original proposal of the Bill Committee. In these cases, the plenary session confirms whether a consensus has been formed among members. Upon its confirmation, the revised proposal passes through the House. In cases where no compromise has been reached, both the proposal of the Bill Committee and that of the opposing member are brought to vote at the plenary session[33].

Bills are passed in the same manner in the second House. Bills are examined by the Bill Committee (and also by relevant committees if necessary) and are deliberated and passed at the plenary session. The second House may pass, reject or pass upon amendment the bills passed through the first House. Upon resolution, the bills shall be forwarded back to the first House (139 (a), 159 (a)).

When a bill has been passed through both Houses, it is deemed to have been passed by the Union Parliament (95 (a)) and is subsequently forwarded to the President. When the second House has passed the revised proposal of a bill, it is sent back to the first House for re-voting (139 (b), 159 (b)). If the first House passed the revised proposal, it is deemed to have been passed by the Union Parliament (95 (a)) and is forwarded to the President. In cases where there is disagreement between both Houses concerning a bill, the House of the Union Parliament must be convened to approve and forward the bill to the President (95 (b), 139 (c), 159 (c)). Matters to be resolved in the House of the Union Parliament are to be determined by a majority of votes of attending members (86 (a)).

Reaching a consensus among members is considered to be extremely important to pass a bill. This can be seen when only one member is opposed to the proposal of the Bill Committee, the Committee is convened again. At the same time, it has been pointed out that the Bill Committees of both Houses are overloaded as they are required to deliberate every bill.

Currently there are over 1,100 officers in the Office of the Union Parliament. However, many of them are junior officers with little practical experience. It is undeniable that the office does not yet have a solid function in conducting research to support the legislative work of assembly members

[33] When counter-proposals have been submitted from multiple parliament members (proposal 1 and proposal 2), voting shall be conducted first between the Bill Committee's proposal and proposal 1. If the Committee's proposal has obtained a majority of votes, then another voting shall be held between the Committee's proposal and proposal 2. The proposal with more votes shall be the resolution of the House. In cases where proposal 1 has obtained a majority of votes in the first voting, another voting shall be held between the proposal 1 and proposal 2. Either proposal with a majority of votes shall be the decision of the House. A long period of time was required for such procedure to be well-established.

and for the smooth administration of assembly proceedings. Recently, efforts have been made to improve operations, such as forming a team of law graduates to improve the vetting function and inviting UAGO officers as instructors to hold study meetings on legislative-vetting[34].

4. Involvement of the President in the Legislative Process[35]

Bills approved or deemed to have been approved by the Union Parliament shall be forwarded to the President. Bills are enacted with his or her signature. The President may veto bills by forwarding them back to the House of the Union Parliament with comments attached. In cases where the President has not exercised a veto within 14 days after receiving a bill, it is enacted without his or her signature (105 (a) (c)). When a veto is exercised, the bill with the President's comments attached is returned to the House of the Union Parliament. Upon this, a Joint Bill Committee composed of the Bill Committees of both Houses meet to review the bill and produce a report on the review. Based on this report, the House of the Union Parliament deliberates the bill again and finally votes on proposal made by the Joint Bill Committee. The House of the Union Parliament may amend the bill according to the President's comments or approve the original bill without accepting these comments (106 (a)). The President may not exercise a veto on a bill forwarded back to him/her upon re-resolution by the House of the Union Parliament, and shall sign the bill within 7 days upon receipt to promulgate the law (106 (b)). Even if the President has not signed it, the bill shall become law when seven days has passed after receiving it. Enacted laws are promulgated through publication in the official gazette and come into effect on the day of promulgation unless otherwise provided by said law (107).

From the 1st term to the 10th term of the Union Parliament, there were 241 occasions in which the President used his veto and the House of the Union Parliament re-voted on bills with the President's comments attached, but there were only 163 occasions in which the bills passed reflecting the President's comments. Particularly in the case of bills regarding the authority of each House or bills in which political parties are deeply involved, there is a tendency to not accept the President's comments on such bills. This shows the strengthened autonomy of the Parliament. In the new Union Parliament, both Houses are controlled by a majority of NLD members, who won in the general election under the strong leadership of Ms. Aung San Suu Kyi. As the State Counselor, she is in a position of being able to influence not only the legislature, but also the executive branch[36]. Due to this, the legislative and executive branches would not be as frequently in serious conflicts as in the

[34] The third study trip to Japan in footnote 1 provided an opportunity to improve their operation.

[35] See "Minsei Ikan go no Myanma ni Okeru Atarashii Seiji, Daitoryo, Gikai, Kokugun (New Politics, President, Parliament and Defense Services in the Post-shift to Civilian Rule)" by Yoshihiro Nakanishi in "Posuto Gunsei no Myannma – Kaikaku no Jitsuzo – (Myanmar in the Post Military Rule – Real Picture of the Reform)" edited by Toshihiro Kudo, Institute of Developing Economies, Japan External Trade Organization (2015).

[36] See Myanmar Times dated April 1, 2016
http://www.mmtimes.com/index.php/national-news/nay-pyi-taw/19783-daw-suu-to-get-new-powers-under-draft-law.html

previous administration.

III. CONCLUSION

While the democratic process of legislation through parliament is being institutionalized, there are still many challenges in the process from legislative drafting to deliberation, leaving much to be improved. The crucial challenges to establish efficient legislative process are, as I mentioned before, the lack of adequate human resources, the unclear roles of institutions which review a bill from similar points of views, the lack of sufficient communication between those institutions and the heavy burden on the Bill Committees in the Union Parliament.

In addition to these, as Myanmar is in transition to a democratic country, the intention of the people should be reflected in the law and the legislative process requires transparency. However, as mentioned before, an opportunity for hearing from stakeholders and general public is rarely given.

The new administration is tackling these challenges. However, the most important thing is to develop the capacity of personnel involved in legislation. Rote learning may have been useful in strengthening the top-down military regime but is not conducive to cultivating human resources with the capacity of finding problems in Myanmar society and proposing solutions.

In general, in order to create a law, it is necessary to take the following steps:

1) Research relevant economic and social facts;
2) Examine and decide policies to solve problems identified through research; and
3) Draft bills based on the policies in 2) above.

To implement these steps, it is necessary to establish a bottom-up policy decision-making process. Personnel with problem-finding/solving capacities is indispensable for this purpose. However, Myanmar does not have enough time to train such personnel from the beginning, so priority should be given to further utilize the skills of middle-level government officers effectively[37]. This may also require changes in the mindset they have been accustomed to. This is the field in which external advisors should focus on. It is meaningless to simply argue in abstract terms that problem-finding and solving is important and efforts should be made for such. We should work together with relevant institutions in dealing with specific areas, and finding solutions to problems identified

[37] It may also be possible to focus on the strengthening of legislative capacity of parliament members, rather than the legislative-drafting capacity of ministries. However, it may be more urgent to improve the legislative process within the executive branch in order to more speedily carry out policies with more professional and technical knowledge within the branch.

through surveys.

Based on the plan above and as a part of JICA's project activities, we are currently committed to research and studies for reforming the insolvency law, together with the SCU. A working group, composed of middle-level officers and Japanese legal advisors, analyzes the current insolvency system in Myanmar, compares it with other countries' legal systems, and studies the guidebooks on insolvency systems issued by international donors. One of our plans is to (based on the results of such research) formulate policies on an insolvency law which is suited for the economic situation in Myanmar and to draft bills based on these policies. Relevant ministries, the Parliament, and the public are expected to provide input in forming policies. These activities will also contribute to the development of human resources with the capacity of problem-finding/solving. They will also provide an opportunity for improving systems relevant to the legislative process.

The fledgling administration of Myanmar should soon move towards the legislative process reform. We would like to further strengthen our commitment to the project activities in order to establish efficient and transplant legislative process.

OUTLINE OF THE CIVIL CODE 2015 OF VIETNAM

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I. INTRODUCTION

In Vietnam, a new Civil Code (hereinafter "the Civil Code 2015") was enacted on November 24, 2015[2]. The significance of the new code can be summed up in that general civil law has been created as the basic infrastructure for facilitating more free economic activities (transactions) between legal subjects in civil relations on an equal footing, with transactions safety measures.

Since the adoption of the Doi Moi (economic reform) policy in 1986, Vietnam has continuously and persistently advanced the introduction of a market economy (though with a prefix of "socialist-oriented"), along with the establishment of corresponding legal systems[3]. However, the conventional civil codes, including the current code, are considered to have been insufficient in responding to the demands of a market economy in several aspects. For example;

- The codes differentiated cases involving the state as a legal subject, from cases involving private individuals, thus prioritizing the state.
- The codes provided for "household" as an independent legal subject, in spite of its vague scope.
- A lack of consideration to the protection of *bona fide* third parties.

In light of the above, the Civil Code 2015, in addition to addressing the above issues to some extent, has drastically adopted modern provisions as represented by so-called "clauses" or *"Clausula rebus sic stantibus"* (principle of fundamental changes of circumstances). In this manner, the new code incorporates international private law provisions in line with global standards. It can be considered thus that the Civil Code 2015 has taken another further step towards the establishment of a private law system appropriate for a market-oriented economy and an age of globalization.

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[2] It is formally new legislation. However, such expressions as "revision of the Civil Code" or "revised Civil Code" are often used among individuals concerned as the legislation is considered to be a "complete revision" of the current code. To note, the Civil Code 2015 is the third-generation of civil code in Vietnam, following the Civil Code 1995 and Civil Code 2005.

[3] The second sentence of Art. 15 of the 1992 Constitution; Art. 51, para. 1 of the 2013 Constitution, etc.

In relation to Japanese assistance[4], and in spite of various challenges and complicities in the course of legislation, a great deal of proposals which had been continuously provided from Japanese experts (including the above-mentioned points), were in the end reflected in the new code (or at least ideas were adopted). From this viewpoint, Japanese assistance to date can be considered to have yielded substantial results[5].

This paper aims to report the outline of the Civil Code 2015 to readers inside and outside Japan. As it is beyond my ability here (partly due to time constraints) to refer to all aspects of the Civil Code 2015 with the 689 articles in total, this paper will mainly discuss the changes to the current code (enacted in 2005). Detailed analyses thereof will be left to Vietnamese law specialists and legal practitioners engaged in legal technical assistance. It is my hope that this paper can be of some use for future studies and examinations of the new civil code.

A temporary Japanese translation of the Civil Code 2015 (done by the JICA Project staff members, including myself) has already been posted to the page of "the Book of Vietnamese Six Major Laws" on the websites of JICA and the International Cooperation Department[6]. As the posted translation of the Code can be downloaded, you can directly refer to each article while reading this paper.

II. COMPOSITION OF THE CIVIL CODE 2015

The Civil Code 2015 consists of 689 articles in total, divided in the body into five parts and another part of enforcement provisions. Each part of the body is titled as follows:

Part One: General Provisions
Part Two: Ownership Rights and Other Property-Related Rights
Part Three: Obligations and Contracts
Part Four: Inheritance
Part Five: Civil Relations Involving Foreign Elements.

As you may assume, these titles may be re-phrased according to the Japanese statutory style as:

Part One: General Provisions
Part Two: Real Rights
Part Three: Claims

[4] Since the launch of Japan's first legal technical cooperation project in 1996, JICA has continuously extended assistance in the enactment (revision) of the Civil Code of Vietnam, with varied extents of engagement throughout the cooperation span.

[5] As mentioned in the parentheses, there were proposals which were, in spite of being accepted as ideas, reflected in the new code in uncomplete or ambiguous manners, or which were not adopted at all.

[6] https://www.jica.go.jp/project/vietnam/021/legal/index.html
http://www.moj.go.jp/housouken/houso_houkoku_vietnam.html (International Cooperation Department)

Part Four: Inheritance

Part Five: International Private Law

Comparing the above composition of the new code with that of the Civil Code 2005 (hereinafter "the current code"), the part on the transfer of land use rights (Part Five of the current code) and the part on intellectual property rights and technology transfer (Part Four of the current code) have been removed. The provisions in these parts are to be covered by special laws (the former in the Land Law and the latter in intellectual property laws and the Law on Technology Transfer)[7], underlining the characteristics of the Civil Code as general private law.

It is also noteworthy that Part Two provides for real rights under the title of "other property-related rights."[8] In fact, the Ministry of Justice, the agency in charge of drafting the new code, intended, from the initial stage of legislation, to introduce the concept of real rights (real rights system) in the Civil Code 2015. Consideration was even given to titling Part Two as "ownership and other real rights" ("real right" in Vietnamese is "vật quyền"). However, lawmakers and stakeholders strongly opposed the use of the term "real right."[9] It was even apprehended at one time that the introduction of the concept itself would be impossible due to various forms of confusion deriving from the use of this term. The Ministry of Justice, in the end, settled matters with the choice of the term "other property-related rights" instead of "real rights" (as says a proverb, "choosing substance over appearance")[10].

It is also significant that the title of Part Three was changed from that of the current code: "civil obligations and civil contracts" to "obligations and contracts," removing the word "civil." In Vietnam, prior to the enactment of the current Civil Code in 2005, civil laws and economic laws (commercial laws) were strictly distinguished and the Civil Code was not considered as being applicable to commercial transactions (it was not considered as general private law). Thus, the modifier "civil" was indispensable in referring to the nature of obligations and contracts under the Civil Code. At the time of the enactment of the current code in 2005, the Civil Code was positioned as general private law, but there was no change in the use of the modifier "civil." However, in the Civil Code 2015, the term "civil contract" disappeared and the modifier "civil" was removed, at least in the titles of parts (though such terms as "civil transactions" and "civil obligations" still remain). This shows proof of efforts by the Ministry of Justice in categorizing the civil code as general private law in the most

[7] As provisions on contracts of land use rights, four articles from Art. 500 through 503 are newly added to serve as a bridge between the Civil Code and the Land Law.

[8] In Vietnam, there is a tendency of considering titles of each part, chapter and article more important than the substance of provisions, and discussions can often continue hours over expressions of titles at workshops, etc.

[9] There are various opinions on the reasons for oppositions. It was explained that the Vietnamese felt emotional resistance against the term "vật quyền" as it was not originally a Vietnamese term and sounded as a translation from Chinese.

[10] After the enactment of the Civil Code 2015, the term "real rights" is openly used among stakeholders instead of the indirect: "other property-related rights."

comprehensible manner thought possible.

I would like to shift my focus from the basic composition and titles to the overview of the Civil Code 2015, primarily changes from the current code. Hereinafter the numbers of articles refer to those of the Civil Code 2015, unless otherwise stated.

III. CHARACTERISTICS OF THE NEW CIVIL CODE AND MAJOR CHANGES FROM THE CURRENT CODE[11]

A. Part One: General Provisions

1. Composition

Part One: "General Provisions" consists of 10 chapters and 157 articles. The title of each chapter is as follows:

Chapter I:	General provisions
Chapter II:	Establishment, exercise and protection of civil rights
Chapter III:	Natural persons
Chapter IV:	Juridical persons
Chapter V:	The Socialist Republic of Vietnam, central and local regulatory agencies in civil relations
Chapter VI:	Households, co-operative groups and other non-juridical persons in civil relations
Chapter VII:	Property
Chapter VIII:	Civil transactions
Chapter IX:	Representation
Chapter X:	Time limits and limitation periods

The chapter on property (Chapter XI) in Part Two in the current code was moved to Part One in the new code, which is proof of the drafters' awareness of the Pandekten system. In principle, however, no significant change was made in terms of statutory composition.

2. Clear Position of the Civil Code

It is clearly provided that the Civil Code is a general law that applies to civil relations (Art. 4, para. 1) ("in relations established on the basis of equality, freedom of will, independence of property and self-

[11] In order to understand the discussions below, it would be helpful to learn the substance of discussions at the time of the enactment of the current code (changes from the previous 1995 Civil Code). In this regard, the records of presentations delivered by H.E. Mr. Hoang The Lien, then Vice Minister of Justice of Vietnam, Professor Emeritus Akio Morishima of Nagoya University, and Professor Toyohiro Nomura of Gakushuin University (the titles are as of June 2006) published in ICD NEWS No. 27 (June 2006) (in Japanese), pp. 11 and onwards, will be useful.

responsibility" (Art. 1)).

The relationships between the code and special laws and international agreements are also provided (Art. 4, para. 2 through 4). Under these provisions, even special laws may not be against the basic principles of civil law prescribed in Article 3. In cases of provisions contrary to the above, provisions in the Civil Code shall apply preferentially.

In Vietnam, inconsistency among laws has often posed problems. In the legislative course of the new code as well, discussions were held on the best method for avoiding the risk of the spirit of the Civil Code being negatively overwritten by special laws to be enacted ex-post. In the end, it was decided to solve this problem by providing for the "basic principles of civil law[12]" in the Civil Code, invalidating provisions of special laws against such principles[13]. Regarding international agreements, however, it was set forth that their provisions shall prevail without reservation.

3. Diversified Sources of Law

In the absence of an agreement between parties or law provisions, practices shall apply (Art. 5, para. 2). If practices are unavailable, an analogy of law shall apply (Art. 6, para. 1). When an analogy of law is not applicable, "each basic principle of civil laws, judicial precedents, and the principle of fairness" shall apply (Art. 6, para. 2). The current code also contains similar provisions on the application of practices and the analogy of law (Art. 3 of the current code). In order to facilitate the operation of the code with more detailed provisions, the new code provides for the definition of "practices" (Art. 5, para. 1). In cases of so-called "gap in the law" where there exists no applicable law provisions, practices or analogies of law, it has been newly affirmed that "judicial precedents as well as the principle of fairness" can be the source of law. With these measures, and by providing that "the court may not refuse to solve civil cases on grounds of there being no applicable provisions" (Art. 14, para. 2), measures have been taken to prevent courts from refusing to accept cases on grounds of a "gap in the law."[14]

4. Classification of Legal Subjects

Legal subjects in the new code have been classified into just two types: natural and juridical persons (Art. 1). "Family households" and "cooperative groups" – which are recognized as legal subjects under the current code (Chapter V, Art. 106 and onwards), being sources of many problems – have

[12] It should be noted that basic principles applicable to civil law in general are provided for, by using the term "civil law" instead of "the Civil Code."

[13] The intent of lawmakers was as explained above. However, the Civil Code and other special laws should be on an equal footing in terms of law hierarchy. From this viewpoint, a new problem remains as to whether the effects of special laws can be denied by the provisions of the Civil Code (general law) (whether such understanding is appropriate).

[14] I heard that in many of these cases the courts traditionally refused to resolve cases in practice by rejecting the acceptance of cases or staying trials thereof.

lost their status as legal subjects and are dealt with as collective entities of individuals (Art. 101)[15].

Juridical persons are classified - according to the criteria on if they distribute profits to their members – into two types: commercial juridical persons (Art. 75) and non-commercial juridical persons (Art. 76)[16]. Regulatory agencies, people's armed units (military), and other special organizations (political organizations, socio-political organizations, etc.) are classified as non-commercial juridical persons (Art. 76)[17].

5. Abolition of the Preferential Treatment of the State in Civil Relations

It is clearly stated that every person, no matter whether natural or juridical persons, shall be equal and shall not be subject to unequal treatment for any reasons (Art. 3, para. 1). Based on this, the provisions in Article 10 of the current code: "The establishment and performance of civil rights and obligations must not infringe upon State (Nhà nước) interests, public interests and legitimate rights and interests of other persons" were amended as: "The establishment, exercise and termination of civil rights and/or obligations may not infringe national (quốc gia) interests, ethnic interests, public interests, lawful rights and interests of other persons" (Art. 3, para. 4). In this manner, the preferential treatment of national interests to the rights and obligations of private persons has been abolished. This amendment may seem to go unnoticed at first. These provisions differ in nuances; while the Vietnamese term "Nhà nước" refers to the existing and concrete government and administration, the term "quốc gia" refers to a more abstract concept of state. According to the draftsmen of the new code, "in civil relations the state and individuals are on an equal footing. In order to indicate that the rights and interests of the state (≒ government) shall no longer be given priority to the rights and interests of individuals, expressions were changed." As the embodiment thereof, while the current code does not allow an acquisition by prescription of properties under state ownership (Art. 247, para. 2), the Civil Code 2015 has removed said provisions (Art. 236), etc.

6. Increased Number of Types of Individuals with Limited Civil Act Capacities

In addition to provisions on minors (Art. 19 of the current code), persons having lost their civil act capacities (Art. 22 of the current code) and persons with restricted civil act capacities (Art. 23 of the current code), there are new provisions in place on new types of persons with restricted civil act capacities. They are called "persons with limited cognition or behavior control" (persons under

[15] Accordingly, a group of provisions on "cooperation contracts" are contained in Part Three, Chapter XVI "Common contracts," Section 8: "Cooperation Contract."

[16] Regarding the criteria of distinguishing commercial and non-commercial juridical persons, in the beginning the prevailing opinion was to distinguish based on the pursuit of profits. However, in the end an agreement was reached to distinguish based on whether profits were to be distributed to members.

[17] The new code does not include any provisions which directly states whether the state (the Socialist Republic of Viet Nam) is classified as a juridical person. However, Article 76 and Chapter V (Article 97 and onwards) infer that the state is considered as a juridical person, in the same manner as state agencies.

physical or spiritual conditions not to the extent of losing their civil act capacities but with insufficient capacities of recognizing and controlling their own acts)[18] (Art. 23).

7. Respect for the Intention of Individuals under Guardianship, Expansion of the Involvement of Courts

It has become possible for persons with full legal capacities to choose their guardians by their own will, in preparation for the time when they need to be under future guardianship (Art. 48). When it is necessary to select a guardian for a minor aged 6 years or older, such a minor's expectation should be taken into consideration (Art. 54, para. 1, second sentence). As above, a greater degree of respect is shown to the will of persons under guardianship. Furthermore, juridical persons are entitled to become guardians (Art. 50), through which nursing homes themselves can serve as guardians of their residents. In this manner, the scope of options in selecting guardians has been expanded.

Provisions on the involvement of courts in specific cases are also newly in place. For example, in cases where there exists disputes between guardians in terms of guardians, or appointment of guardians or guardianship supervisor, the court shall appoint the guardian (Art. 54, para. 1, second sentence) or the guardianship supervisor (Art. 51, para. 2, second sentence), respectively.

8. Arrangement of Provisions on Personal Rights

The number of provisions on personal rights was reduced from 28 under the current code to 15 in the new code (from Art. 25 through 39). In practice, however, only eight articles on the following rights were removed: the right to enjoy mutual care among family members (Art. 41 of the current code); the right to/not to recognize a father, mother or child (Art. 43 of the current code); the inviolable right to place of residence (Art. 46 of the current code); the right to freedom of belief and religion (Art. 47 of the current code); the right to freedom of movement, freedom of residence (Art. 48 of the current code); the right to work (Art. 49 of the current code); the right to freedom of business (Art. 50 of the current code); and the right to freedom of research, creation (Art. 51 of the current code). There are provisions for the contents of which have been expanded, including the right to change names or re-determine ethnicity (Art. 26 to 28) and newly added provisions (e.g. the right to change gender [Art. 37]), etc.

9. Arrangement of Concepts on Property

Concerning property, based on the definition that: "Property comprises objects, money, valuable papers and property rights" (Art. 105, para. 1), it is provided that: "Property includes immovable property and movable property. Immovable property and movable property may be existing property or

[18] Under the Japanese Civil Code, they are referred to as persons under curatorship or under assistance.

off-plan property" (Art. 105, para. 2). In Vietnam, there exists well-established commercial customs of finding proprietary nature in objects which are in the process of formation (e.g. buildings under construction), considering these as objects of transactions or offering them in security. To date, there have been various legal normative documents confirming customs in each individual field[19], but without legal grounds which directly corroborate the general legal nature or trading possibility of future-forming "property." In order to address this issue, the Civil Code 2015 explicitly provides for the proprietary nature of future-forming property (off-plan property), which marks a major difference from the current code. It is also newly provided that the right to use land is included in property rights (Art. 115).

It is also provided that: "Ownership and other rights to immovable property shall be registered in accordance with this Code and law on registration of property" (Art. 106, para. 1)[20], with such registrations being public (Art. 106, para. 3). Based on these provisions, the Ministry of Justice plans to enact a "Law on Property Registration" within a few years, broadly covering the registration of immovable property, movable property, securities and others. However, details including the timeframe, the possibility of successful completion of the plan as the Ministry anticipates, have not yet been decided.

10. Classification and Streamlining of Cases of Invalid Civil Transactions

The scope of valid civil transactions conducted by individuals with limited legal capacities, including minors, etc. has been expanded. Accordingly, for example, civil transactions made by minors less than 6 years of age for their daily needs (Art. 125, para. 2, item a), or those for simply arising rights or exempting from obligations (Art. 125, para. 2, item b) shall not be void.

Moreover, even acts which need to be established in writing or based on certain formalities (such as notarization), if two-thirds or more of obligations have already been fulfilled by ex-parte or both parties, the court may deem such transactions valid (Art. 129, para. 1 and 2)[21].

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[19] For example, the Law on Housing (65/2014/QH13), Decree on Security Transactions (163/2006/NĐ-CP, 11/2012/NĐ-CP), etc.

[20] However, the provisions do not set forth the results of non-registration of property-related rights (whether the creation/shift of rights cannot be recognized, whether property-related rights cannot take effect against a third party).

[21] The current code provides that the purchase and sale of a residential house shall be made in writing, with notarization (Art. 450). In reality, however, purchases and sales of houses with no documentation continue to exist. Moreover, recently there have been cases in which sellers assert the invalidity of sale contracts of houses on the grounds of non-compliance with required forms, by taking advantage of the rise of housing prices. In response thereto, discussions have been held for not allowing such unreasonable assertions, and for limiting the scope of invalidity of contracts on the grounds of non-compliance with formalities. These provisions have been introduced against this background. However, with regards to the designing of the system in detail, opinions were divided resulting in no agreements being reached. It ultimately appeared that national assembly members arbitrarily decided the requirement: "if two-thirds or more of obligations have already been fulfilled" and there are many stakeholders with doubt on the effectiveness of these provisions. Close attention should be paid to the future operation of these provisions.

More endeavors have been made to streamline the code in its entirety. Such endeavors include:

- The removal of the provisions (Art. 20, para. 2 of the current code) requiring no consent of representatives at law, in cases where persons between fifteen years of age and under eighteen years of age, with own property to ensure the performance of obligations, establish and perform civil transactions by themselves. These provisions have been criticized for contravening the purposes of the civil act capacity system;
- The starting date for the statute of limitations for requesting the court to declare the invalidity of civil transactions listed below was previously set on the date of the establishment of such civil transactions in a uniform manner:
  - conducted by persons with limited civil act capacities;
  - established due to mistakes, deception, intimidation and coercion;
  - conducted by persons at a time when they were incapable of being aware of, and controlling their acts; and
  - conducted without complying with prescribed formalities.

However, such dates for counting the statute of limitation have now been categorized and varied in a more flexible manner.

In this manner, the new code has been streamlined on the whole.

11. Improvement of Provisions to Protect *Bona Fide* Third Parties

There are cases where a property was registered through an invalid civil transaction, and another subsequent civil transaction was established through which the property was delivered to a *bona fide* third party, who entered into the transaction trusting the property's registration without negligence. In order to protect such *bona fide* third parties without negligence, provisions have been added (Art. 133, para. 2, first sentence). These provisions aim to increase the safety of transactions by protecting third parties who enter into transactions trusting the registration of relevant properties. However, there still remains room for questions on whether the existing registration system in Vietnam is sufficiently accurate to corroborate the trust from users. It will be urgently necessary to improve the accuracy of the registration system. As the subject of protection under these provisions is limited to cases where, as the words imply, "based on an invalid civil transaction, transacted property has been registered at a competent authority, and such property has already been transferred to a *bona fide* third party without negligence through another transaction." Thus, it should be noted that cases where:

- there exists no invalid transactions (acquisition from complete non-rights holders) in the first place; or
- persons have entered into transactions trusting the registration of subject property which does not need to be actually transferred thereto (e.g. receivers of mortgages),

may be out of the scope of protection.

In the same manner, and in order to improve the safety of transactions, provisions on apparent authority in cases of unauthorized representation or *ultra vires* representation (beyond the scope of representation) have been added (Art. 142, para. 1; Art. 143, para. 1). Under the current code, the effect of acts conducted by unauthorized representatives or *ultra vires* representatives can be attributed to principals only when:

- the principal has consented thereto in the case of unauthorized agencies (Art. 145, para. 1, first sentence of the current code); and
- the principal has given consent thereto or knew but did not oppose the act in the case of *ultra vires* representatives (Art. 146, para. 1, first sentence of the current code).

In the Civil Code 2015, the effect of such acts by apparent authority is attributed to principals when:

1) the principal has recognized (ratified) the transaction (Art. 142, para. 1, item a);
2) the principle, being aware of the unauthorized act, has not objected it within a reasonable period of time (Art. 142, para. 1, item b); or
3) due to the principle's intentional act or act with negligence, the other party did not know or was unable to know that the person who performed the transaction as a representative was unauthorized (Art. 142, para. 1, item c).

Among the above three cases, those in 3) are the most noteworthy, but attention should also be paid to the provisions on cases in 2). In these cases, the effect of an act by an unauthorized representative can be attributed to the principal unless the principal, within a reasonable period of time upon receipt of a demand from the other party (unauthorized representative), makes objections thereto. These provisions also draw a conclusion opposite to that of the current code[22].

12. Expansion of Representation System

Changes have been added to the new code for flexible operation of the representation system, including:

- It is expressly provided that juridical persons may serve as representatives (Art. 134, para. 1), and that juridical persons may have multiple legal representatives (Art. 137, para. 2)[23].
- Provisions on the apparent authority doctrine have been added to address cases of unauthorized

[22] The provisions that the effect of an act by an unauthorized representative (other party) shall be attributed to the principal (it shall be deemed that the principal has ratified the act) unless he/she answers to the demand of the other party may contravene the reasonable intention of the principal and will most probably force a harsh result on the principal. Japanese experts therefore suggested at various times the re-consideration of the appropriateness of potential results to be caused by these provisions. However, this advice was not reflected in the new code.

[23] In this regard, the new Civil Code (general law) follows the 2014 Law on Enterprises (special law) which has already provided for it (in Art. 13).

representation or *ultra vires* representation (see (11) above).

13. The Statute of Limitations

With regards to the statute of limitations, as in the current code, the following four types of statutes of limitations have been maintained:

- The statute of limitations for enjoying civil rights (acquisitive prescription) (Art. 150, para. 1);
- The statute of limitations for a release from civil obligations (extinctive prescription) (Art. 150, para. 2);
- The statute of limitations for initiating legal actions (Art. 150, para. 3); and
- The statute of limitations for requesting solutions of civil disputes (non-suit civil cases) (Art. 150, para. 4).

In the course of legislation, overlaps among: the statute of limitations for a release from civil obligations (which relates to effects under substantive laws); that for initiating legal actions and that for requesting solutions of non-suit civil cases (which relate to effects under procedural laws), were viewed as a problem. Under this situation, the prevailing opinion was to classify the types of statutes of limitations into only two types: those for enjoying civil rights and those for a release from civil obligations both under substantive laws. However, the abolition of the statute of limitations for initiating legal actions was strongly opposed by relevant parties, in particular the Supreme People's Court. Therefore, at the last stage of legislation, it was decided to keep the same structure of the current code.

However, not all the provisions are the same as those in the current code. Changes have been made, including: the court may apply provisions on the statute of limitation based solely on a request for its application from parties (invocation) (Art. 149, para. 2).

B. Part Two: Ownership Rights and Other Property-Related Rights

1. Composition

Part Two: "Ownership and Other Property-Related Rights" is composed of four chapters and 116 articles in total. The title of each chapter is as follows:

Chapter XI: General provisions
Chapter XII: Possession
Chapter XIII: Ownership rights
Chapter XIV: Other property-related rights.

Compared with the current code, Part Two has been significantly updated including:

- Chapter on property has moved to Part One.

- Provisions on ownership have been compiled in a single chapter.
- Chapters on possession and other property-related rights have been included.

2. Introduction of Other Property-Related Rights (Real Rights)

As mentioned in II above, the most significant change in the new code is that: (although the term "real right" was not adopted) the real right system has been introduced using the term: "ownership rights and other property-related rights." These property-related rights are divided into four types: 1) ownership rights; 2) the right to adjoining immovable property; 3) usufruct right (the right to enjoy use); and 4) surface rights (superficies rights) (Art. 158 and 159). The existence of rights to claims in realizing real property is also expressly provided (Art. 164 and 169).

The right to adjoining immovable property is defined as: "a right to be exercised on an immovable property to serve the exploitation of another immovable property under ownership of another person" (Art. 245). It is characteristic that this right covers those corresponding to both servitudes and rights pertaining to adjacent relationships under the Civil Code of Japan.

The Civil Code of Japan interprets adjacent relationships as the limit of ownership (constraints to ownership). The current Civil Code of Vietnam also provides on adjacent relationships in Chapter XVI: "Other provisions on ownership rights." The Civil Code 2015 interprets this relationship not as constraints to the ownership of servient land but as a type of statutory servitude arising in a dominant land. Accordingly, the new code classifies it, together with servitudes based on contracts, as "other property-related rights."

Usufruct right is defined as: "the right to use a property, under ownership of another entity, and enjoy its yield or income for a specific period of time" (Art. 257). This right is similar to "usufruit" in the French Civil Code or the usufruct in the former Civil Code of Japan.

At an early stage of legislation, discussions had been held on the introduction of usufruct right as a right to buildings for residence in order to protect the lives of individuals (assuming widows in principle) after the death of spouses. It appears that throughout the subsequent legislative process, this right has been generalized to allow use on broader occasions.

Surface right is "an entity's rights to the ground, water surface, space thereon and underground space, the right to use which belong to other entities" (Art. 267). Article 267 is very abstract in its tenor, and this right apparently does not aim to serve specific purposes. Considering the provisions of Article 271 which reads: "Each holder of surface rights has the right to exploit and use . . . for construction, planting or cultivation," surface rights in the Vietnamese Code may be a combination of superficies

rights and emphyteusis under the Japanese Civil Code.

These "other property-related rights" can hold direct and exclusive control over things. Therefore, provisions on the timing of establishment and change of rights, and methods of public notice may be extremely important. The Civil Code 2015 has a flaw of not containing clear general rules concerning the above-mentioned timing, etc. For reference, Article 161 in the general provisions of Part Two (Chapter XI) provides that: "The time of establishing ownership rights and other property-related rights shall be determined as prescribed in this Code and relevant laws; if there is no relevant regulations of law, the agreement of the parties shall prevail; if there is no relevant regulations of law or agreement of the parties, the time of establishing ownership rights and other property-related rights shall be the time when the property is transferred. The time when the property is transferred is the time when the obligee or his/her legal representative possesses the property." In this manner, this Article provides the time of establishment of rights according to statutory provisions, parties' agreements or the time of transfer, in this order. However, this does not clearly indicate the essential application relationships of statutory provisions and thus it will be difficult to understand (at the first glance of these provisions) which right is disposed of in which manner. In the following table, I have classified the criteria on which the new code bases each of the above-mentioned rights, setting aside "other relevant laws" and "agreement of parties." As the table includes question marks, quite a few points are not clear at first glance of the provisions.

Moreover, to begin with, not the Civil Code but special laws are preferentially applied to important immovables, such as [rights to use] land or buildings for residence (land law and residence law, respectively) – discussions on which provide practical benefits. It is hoped that the whole picture of the theory on real rights in Vietnam (including that of special laws) will be clarified, through more opportunities of discussions with Vietnamese legal draftsmen and civil law scholars.

Criteria of changes in real rights under the Civil Code (special laws and parties' agreements are not taken into consideration)

	Object	Time of Establishment	Time of Change
Ownership	Movables and immovables	Each time according to the provisions in Art. 222 and on, as per grounds (causes) for establishment of the ownership listed in each item of Art. 222. As to immovables, at the time of registration? (Art. 106, para. 1)	Unless there are special provisions in the Civil Code (e.g. Art. 458, para. 2 on gift contracts; Art. 234 and 614 on inheritance, etc.), at the time of transfer (Art. 106, para. 1, first sentence)
Rights to adjoining immovable property	Immovables	At the time of registration? (Art. 106, para. 1). Those provided by statutes may automatically arise according to natural topographical conditions? (Art. 246)	Change at the same time as the time of change of rights to immovables, objects of rights (Art. 247)?
Usufruct rights	Movables and immovables	At the time of transfer (Art. 259, para. 1). As for immovables, at the time of registration? (Art. 106, para. 1)	At the time of transfer? (Art. 259, para. 1). The existence of "not first usufructary" seems to be assumed (Art. 260, para. 1), but details of changes of rights are unclear.
Surface rights	Movables (Art. 107, para. 1, item a)	At the time of transfer (Art. 269). As for immovables, at the time of registration? (Art. 106, para. 1)	At the time of transfer? (Art. 271, para. 3)

3. Arrangement of Provisions on Possession

While the current code defines possession as a right (right to possession) (Art. 182 and onward in the current code), the Civil Code 2015 provides that possession is a factual concept (Art. 179 and onwards), and also provides for the right to possessory actions (Art. 185).

4. Arrangement of ownership forms

The current code divides the form of ownership into six types: 1) state ownership; 2) collective ownership; 3) private ownership; 4) common ownership; 5) ownership by political organizations and socio-political organizations; and 6) ownership by socio-politico-professional organizations, social organizations, and socio-professional organizations. The new code has streamlined these into three: 1) people's ownership; 2) private ownership; and 3) multiple ownership (common ownership).

C. Major Changes in Part Three: Obligations and Contracts

1. Composition

Part Three: "Obligations and Contracts" is composed of six chapters and 335 articles in total: The title of each chapter is as follows:

Chapter XV: General provisions

Chapter XVI: Common contracts
Chapter XVII: Promise of rewards and prize competitions
Chapter XVIII: Performance of acts without authorization
Chapter XIX: Obligations to return property due to unlawful possession or use of property or deriving of benefits from property
Chapter XX: Liability for compensation for non-contractual damages

No significant changes have been made in terms of composition, except for that:
- The provisions on the promise of reward, which was considered a type of common contracts under the current code, are dealt with independently in Chapter XVII;
- The types of common contracts have slightly altered.

2. Addition of New Security Measures

While the current code provides for seven types of measures to secure the performance of obligations: pledge, mortgage, deposit, security collateral, escrow account, guaranty and pledge of trust, in the new code, provisions on the title retention and lien on property were newly added (Art. 292, 331-334, 346-350).

In the course of legislation, there was an idea of compiling those of a security interest nature as real rights in Part Two, with the remaining security measures in Part Three. However, opinions were divided as to the classification and compilation of security measures. In addition, entangled discussions over the concept of "real rights" complicated matters. It appears that such a situation led to the compilation of all security measures in Chapter III, Part Three, under the title: "measures to secure the performance of obligations," as in the current code.

Nevertheless, with regards to certain security measures, these could be asserted against a third party from the moment of registration, keeping or possession, and their precedence against a third party is recognized, by providing that:
- Security measures shall take effect against a third party from the time of registration of such security measures or the secured party keeps or possesses the collateral (Art. 297, para. 1);
- When security measures take effect against a third party, the secured party is entitled to reclaim the collateral (Art. 297, para. 2).

Based thereon, it can be considered that in fact those security measures function as security interest.

With regards to "other property-related rights" (real rights), the concept of perfection is not applied. Thus, registration or transfer (keeping or possession) is considered to be the only requirement for the establishment and changes of other property-related rights, in principle. In comparison, registration

or transfer for security measures is considered as the requirement to take effect against third parties. It is interesting that in this manner, security measures and other property-related rights are theoretically distinguished.

Regarding the system design of these security measures, however, there still remain many unclear points. It appears unusual to me that the general security system (including pledge, mortgage, guaranty), and the system applied solely to contracts (deposit, escrow account – in particular, the latter is applied only to lease contracts) are provided in parallel in general provisions in Part Three. Setting aside this type of abstract theory of principles, I have several questions including:

- It is unclear how different the concepts of "keeping" and "possession" in Article 297 are;
- Regarding pledge and mortgage, it is provided that the time when contracts come into effect and the time when contracts can take effect against third parties are different (Art. 310 and 319); In comparison, in the cases of other security measures including the title retention with no such provisions (as those on pledge and mortgage), it is unclear how to define the time when contracts come into effect. (According to Article 298, paragraph 1, registration can be a requirement for effective security transactions only when there are statutory provisions to that effect. As the Civil Code does not fall under the category of "when there are statutory provisions to that effect," registration may not be the requirement for effective contracts for title retention, etc.) As mentioned in the part on other property-related rights, further detailed studies are anticipated to gain the entire picture of the legal system on security measures[24,25].

3. Stricter Civil Liabilities

The text of Article 308, paragraph 1 in Part Three, Chapter I: "General provisions", Section 3: "Civil

[24] As for security measures, the practice precedes the theory. Therefore, it will be necessary to research the actual situation of practice and operation of security measures after the implementation of the Civil Code 2015.

[25] Getting my talk out of the purpose of this paper, I will briefly explain the discussions held in the course of legislation. Regarding security measures, there were discussions on the acceptance of third-party mortgage in the new code. The current code provides, regarding the mortgage of property, for example, that "the mortgage of property means the use by a party (hereinafter referred to as the mortgagor) of his/her/its own property to secure the performance of a civil obligation toward the other party (hereinafter referred to as the mortgagee) without transferring such property to the mortgagee (Art. 342, para. 1, first sentence). In this manner, it is expressly provided that the property to be used as a mortgage must be owned by the mortgagor. However, as there exists no restrictions as to "the performance of whose civil obligations should be secured," it has been conventionally understood that it was accepted for the mortgagor to offer his/her its own property to secure the performance of others' civil obligations. Accordingly, in practice as well, mortgages of properties have been handled based on this understanding. However, at one stage during the legislative process of the Civil Code 2015, a phrase: "in order to secure the performance of one's own obligations" was included suddenly in the draft code. This caused confusion due to strong opposition from the business community, in particular from financial institutions and lawyers. The reason for such an attempt to limit the qualification of mortgagors is unknown. According to what was heard at that time, higher-ranking officers in the decision-making process had pointed out that securing the performance of others' obligations was not a mortgage but a guaranty. In the end, and as a result of subsequent discussions, the officers ratified the current practice and operation, as under the current code, without referring to "the performance of whose civil obligations should be secured". Considering that such an extremely important point at issue in both theory and practice - as to the right or wrong of third-party mortgages – was downplayed in such a manner, I must admit to glimpsing perils in the legislative process in Vietnam.

liability" of the current code provides, regarding the principle of fault liability in cases of default, that: "A person who does not perform or performs improperly a civil obligation must bear civil liability if he/she is at fault either intentionally or unintentionally." Article 604, paragraph 1 of the current code, which provides for tort liability, also refers to the principle of negligence liability by stating: "Those who intentionally or unintentionally infringe upon the life, health, . . . and thereby cause damage to others shall have to compensate." Additionally, paragraph 2 of said article provides that special laws shall separately provide for no-fault liability as necessary.

As the background to these provisions in the current code, the Civil Code 1995 of Vietnam (the previous code) was revised to the current code on suggestions from Japan. The Code 1995 provided, assuming negligence of perpetrators regarding not only default liability but also tort liability, that the perpetrators may not be exempt from liability unless no-fault is proven. Japanese experts advised that, as there are many types of torts, it should be the victim's burden to prove the negligence of the perpetrator regarding the torts, in principle. It was also advised that in cases where the burden of proof should definitely be imposed on the perpetrator, they should be provided by special laws[26].

However, in Article 364 of the Civil Code 2015, which corresponds to Article 308, paragraph 1 of the current code, the above-mentioned part: ". . . must bear civil liability if he/she is at fault either intentionally or unintentionally" was removed. Due to the removal of this part, through direct application of provisions of Article 351 on default liability, obligors who have committed default shall bear civil liability except that:

1) they have not properly performed obligations due to force majeure incidents; or
2) they have proven it was completely due to obligees' intention or negligence they were unable to perform obligations[27].

These provisions abandon the principle of negligence liability in default liability, and impose the burden of proof of exemptions on obligors.

The Civil Code 2015 is characterized by the adoption of the same statutory structure on tort liability (out-of-contract liability to compensate for damage), as that on default liability. In other words, the tortfeasor has the responsibility to compensate for damages; except that damages accrued were caused by:

1) a force majeure; or
2) the complete intention or negligence of the victim (Art. 584. Regarding tort liability, it is also provided that even if the tortfeasor was not negligent in any capacity, only when the damage

[26] See the record of presentation by Professor Nomura in ICD NEWS No.27 (June 2006), pp. 24 and 25, in supra note 11.
[27] These provisions are basically of the same structure as that of the Civil Code 1995 (See Art. 308 and 309 of the Civil Code 1995)

amount greatly exceeds the tortfeasor's economic means, the amount to compensate shall be reduced (Art. 585, para. 2)).

As such, the Civil Code 2015 does not basically accept exemptions of defaulting debtors or tortfeasors even if they are not negligent. Moreover, even in exceptional cases of exemptions, the burden of proof shall be imposed thereon. In this manner, the new code adopts a system of imposing extremely strict liability on defaulting debtors and (alleged) tortfeasors.

Imposition of such a strict liability thereon is attributable to the domestic situation in Vietnam. There has been an increase in the number of cases where, in particular when pursuing tort liabilities, victims have not been able to prove the intention or negligence of the other party and have eventually been forced to renounce damages. This situation thus required adressing[28].

This new system is clearly stricter than that of the 1995 Civil Code in which, even though the burden of proof was imposed on tortfeasors, the intention or negligence needed to be proven for the establishment of tort liability.

Individuals and companies doing businesses in Vietnam should thus pay great attention to these provisions[29]. The actual operation of this system by the courts must be awaited until the implementation of the Civil Code 2015. Continuous and close attention should be paid to the future operation of the Code, in particular to the method of pursuing tort liability

4. Provisions on Standard Form Contracts, General Transaction Conditions and the Principle of Changes in Circumstances

The Civil Code 2015 includes new provisions on the standard form of contracts (Art. 405) and general transaction conditions (Art. 406). It also expressly provides for the principle of changes in circumstances (amendment of a contract upon basic changes of circumstances) (Art. 420).

Regarding the standard form of contracts, the definition is: "a contract containing terms and conditions which are prepared by a party based on a standard form requiring the other party to reply within a reasonable period of time" (Art. 405, para. 1). The definition of general transaction conditions is "stable terms announced by a party to apply to the offeree" (Art. 406, para. 1). Both provisions govern the contract (adhesion contract) in a template (adhesive terms and conditions) with detailed

[28] According to the Vietnamese officers in charge of legislation.

[29] Japanese experts advised several times the principle of negligence liability being one of the fundamental principles of civil law, and therefore should be maintained; that it is not appropriate to apply - in the same manner in both cases of contractual liability and tort liability - the rule of not imposing the burden of proof of intention or negligence of defaulting debtors or tortfeasors, on creditors or victims; and that these matters should be addressed in special laws. Japanese advice was not reflected in the new code, however.

clauses. Although distinguishing is slightly difficult, their differences are that: the first type of contracts refers to cases where the contents of terms and conditions are directly proposed to the other party, and by granting a reasonable period of time for reply, it is deemed both parties have agreed on such terms and conditions; The latter deals with cases where terms and conditions are not directly proposed to the other party but are displayed at stores or posted on websites.

5. Change of Maximum Interest Rate in Loan Contracts

The maximum interest rate in loan contracts has been changed from "150 % of the basic interest rate announced by the State Bank" (Art. 476 of the current code) to "20% of the loaned amount per year" (Art. 468, para. 1).

6. Handling of Compensation for Damages Caused by Public Service Enforcers

Concerning damages caused by public service enforcers, the current code provides that: "agencies or organizations shall have to compensate for damages caused by public servants under their management while performing their public duties" (Art. 619, first sentence of the current code). However, as the relationship between these provisions and the subsequently enacted Law on State Compensation Liability was not made clear, an issue arose concerning whether claiming compensation was allowed according to the Civil Code, for damages beyond the scope covered by said Law on State Compensation Liability.

In view of this, the Civil Code 2015 provides that: "The State must compensate for damage caused by public service enforcers as prescribed in the Law on State Compensation Liability" (Art. 598). In this manner, the new code makes clear that damages caused by public service enforcers through their torts, shall in all cases be dealt with under the Law on State Compensation Liability[30].

D. Major Changes in Part Four: Inheritance

1. Composition

Part Four: "Inheritance" is composed of four chapters and 54 articles in total. Chapters XXI to XXIV are titled as follows with no structural changes from the current code:

Chapter XXI: General provisions
Chapter XXII: Inheritance under wills
Chapter XXIII: Inheritance at law
Chapter XXIV: Settlement and distribution of estates

[30] This change appears to result in the determinable narrowing of the scope of victims to be remedied. However, the Ministry of Justice is proposing to amend the Law on State Compensation Liability in force to allow expanding the scope. In this manner, the Ministry may be intending to find an acceptable balance.

2. Abolition of the Joint Testament System of Husband and Wife

Concerning common ownership by husband and wife (Art. 219 of the current code), the current code provides: "Husband and wife may make a joint testament to dispose of their common property" (Art. 663). However, this system poses such problems as the difficulty of amending or changing joint testaments once they are made. When a wife or husband wishes to amend, etc. their joint testament, consent must be obtained from the other (Art. 664, para. 2). Moreover, when divorcing, the handling of the joint testament is cumbersome. If one has passed away, the other can only amend or supplement the testament related to his/her own part of property (Art. 664, para. 2). Due to these points, a question had been posed on the rationality of the joint testament system of husband and wife in its entirety. This has led to the abolition of the system in the new code.

3. Statute of Limitations of Inheritance

Regarding the statute of limitations on inheritance (statute of limitations for initiating inheritance-related lawsuits) as provided in Article 645 of the current code, in the course of legislation of the Civil Code 2015, there was sharp disagreement between those for removing these provisions and those for maintaining them.

The "pro-removals" argued, as the grounds for their position, that:

1) Article 159, paragraph 3, item (a) of the 2004 Civil Procedure Code (which was revised in 2011) provides that the statute of limitations for initiating legal actions shall not apply to conflicts over property ownerships or conflicts over properties possessed and managed by others;
2) The setting of the statute of limitations can reduce the burden of courts, but may be harmful to the interests of the people;
3) As the court may render judgments based simply on the evidence to be produced by parties, burdens on court may not increase greatly even without statutes of limitations on initiating lawsuits.
4) If the statute of limitations is decided for initiating lawsuits (as in the current code), conflicts may continue on without resolution, even with the elapse of the statute of limitations; and others.

The "against-removals" showed (as grounds for its arguments): 1) consideration toward the burden on courts; and 2) anxiety toward drastic changes from the current code – eliminating the statute of limitations, etc.

Throughout the process of discussions, the "pro-removals" appeared to be prevailing. However, the conflict was settled in the end by agreeing that:

- the statute of limitations to request the division of estate (as to immovables) from 10 years (under the current code) to 30 years (no change as to movables); and

- upon elapse of the statute of limitations, the subject to whom properties in conflict pertain will be determined (Art. 623, para. 1).

E. Major Changes in Part Five: Civil Relations Involving Foreign Elements

1. Composition

Part Five: "Civil Relations Involving Foreign Elements" is composed of three chapters and 25 articles in total. The chapters are titled as follows:

Chapter XXV: General provisions
Chapter XXVI: The law applied to natural persons and juridical persons
Chapter XXVII: The law applied to property relations and personal relations

The structure of this part has been greatly updated from the current code (in which the corresponding part is not divided into chapters).

2. Provisions on the Freedom of Selection of Governing Law

The current code provides that foreign laws shall apply in cases where parties have so agreed upon in contracts, if such agreement is not contrary to the provisions of the Civil Code and other legal documents of the Socialist Republic of Vietnam (Art. 759, para. 3, second sentence). The Civil Code 2015 has greatly enlarged the scope for selecting governing laws (in particular on contractual relations) (Art. 664, para. 2; Art. 683, para. 1).

3. Provisions on the Concept of the Law of Most Closely Related Place

It is provided that, in cases where a governing law has not been fixed through agreement between parties, etc. the law of a most closely related place shall be the governing law (Art. 664, para. 3; Art. 672, para. 1&2; Art. 683, para. 1-3).

IV. CONCLUSION

I have discussed the outline of the Civil Code 2015, with a focus on changes from the current code. As is the case in Vietnam, it is unclear how newly incorporated contents will be instituted by judicial authorities (including courts) for their establishment in Vietnamese society. As I have mentioned several times, in studying the Civil Code of Vietnam, it is important to not only deepen one's understanding thereof by examining contents and purposes of its provisions but also, or more importantly, to continue focusing on its actual operation status.

Though this discussion is entirely insufficient in covering all the contents of the new Civil Code of

Vietnam, I would like to conclude by hoping it can be of some small use for readers in their future studies of the Civil Code 2015 of Vietnam.

THE NEW CIVIL CODE OF VIETNAM (2015) AND AGENDA FOR THE PROPERTY REGISTRATION SYSTEM

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I. INTRODUCTION

This paper discusses the property registration system in Vietnam, which will need to be put in place in line with the enactment and enforcement of the new Civil Code of Vietnam which was promulgated in November 2015[1] (hereinafter referred to as "Civil Code 2015", unless otherwise stated. The abbreviation of it for provisions quoted thereof shall be "VCC 2015"[2]).

The basic characteristics of the Civil Code 2015 lie in the establishment of general civil law as the basic institutional infrastructure necessary for making transactions between legal subjects (natural persons and legal persons) freer, and securing the safety of such transactions - an axis of economic activities[3]. The property registration system is the institutional infrastructure indispensable in realizing the security of transactions.

The Civil Code 2015 provides as follows regarding property, registration of property and property-related rights:

(i) Part I "General Provisions," Chapter VII "Property" in VCC 2015 defines property and provides for the property to be registered. According to these provisions, "property" comprises

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[1] The National Assembly of the Socialist Republic of Viet Nam, November 24, 2015 (Law No.: 91/2015/QH13).

[2] When quoting numbers of provisions in parentheses, "Article 1, Paragraph 1, First Sentence/Second Sentence, Text/Proviso" shall be abbreviated as "Art. 1 (1), 1st Sent. /2nd Sent., Tex/Pro."

[3] As for the general characteristics of Civil Code 2015, see Takeshi Matsumoto, Outline of the Civil Code 2015 of Vietnam, pp. 59. Further details will be discussed on other occasions. The following points can be raised as efforts made for improving the safety of transactions through the new Civil Code 2015: 1) Only natural and legal persons are considered to be legal subjects. The characteristics of households and associations which were recognized as legal subjects in the former Civil Code 2005, have been denied and they are considered as collective entities of individual legal subjects (2015 Art. 101 VCC 2015); 2) Contracts violating conditions pertaining to forms, including documentation or notarization, shall not be invalid immediately. If one or both parties have already fulfilled at least two thirds of obligations, the court may consider the transaction valid (Art. 129 (1) (2) VCC 2015); 3) In cases where property has been registered based on an invalid civil transaction, and a bona fide third party without negligence has entered into a transaction with the registered rights holder trusting the validity of the registration, the third party may obtain relevant rights (Art. 133 (2), 1st Sent. VCC 2015); 4) When an act has been performed by an unauthorized person, and the principal in spite of knowledge of the unauthorized act, has not raised any objection within a reasonable period of time (Art. 142 (1) b VCC 2015), or due to the principal's intention/negligence, the principal does not know or is unable to know that the other person is unauthorized or acts are beyond the scope of his/her representation authority (Art. 142c VCC 2015), the consequences of transactions shall belong to the principal (apparent authority).

"objects, money, valuable papers and property rights" (Art. 105 (1) VCC 2015). Moreover, "property includes both immovable property and movable property. Immovable property and movable property may be existing property or property to appear in the future" (Art. 105 (2) VCC 2015). Based on these, the "registration of property" is provided as follows (Art. 106 (1) to (3) VCC 2015):

i) Ownership and other rights to immovable property shall be registered in accordance with this Code and the law on registration of property.

ii) Ownership and other rights to movable property shall not be required to be registered, unless otherwise prescribed by law.

iii) The registration of property must be public.

Herein, it is provided that a) immovable property and b) movable property as far as the registration system of which is established under the property registration law shall be registered[4].

(ii) In Part I, Chapter VIII "Civil Transactions" it is provided that in cases where transacted property was "registered at a competent authority," even where the civil transaction as a basis of the registration was invalid, it shall be made possible for a third party who was not aware of the invalidity of the civil transaction without negligence to obtain relevant rights by the effect of law (Art. 133 (2) VCC 2015). The significance of this provision should be noted, because it protects the acquisition of the registered right which is an important benefit of the registration of property.

(iii) In Part Two "Ownership and Other Property Related Rights," Chapter XI "General Provisions," Section 1 provides for "rules for establishing and exercising ownership rights and other property-related rights." Then in Chapter XIII "Ownership," Section 3 "Creation and Termination of Ownership Rights," Sub-section 1 "Creation of Ownership Rights" provides for the establishment of ownership rights under agreements" (Art. 223 VCC 2015) and other related matters. Furthermore, Chapter XIV "Other Property-Related Rights" provides for the right to adjoining immovable property and the basis for it (Art. 245, 246 VCC 2015), the basis for establishing the right of usufruct (Art. 258 VCC 2015), and the basis for establishing the right of superficies, etc. These provisions require further consideration when examining what should be registered in the registration book: either (a) the property rights themselves; or (b) the process of changes (transactions) in property rights.

In any case, when establishing a law concerning the registration of property-related rights, its provisions must be consistent with the provisions of the Civil Code on the one hand, and with the registration practices on the other. I will discuss an ideal arrangement of the registration law, after

[4] Further examination will be necessary on whether these provisions necessarily mean compulsory registration.

examining provisions in the Civil Code 2015 concerning the properties and the property-related rights which shall be subject to registration.

II. PART TWO "OWNERSHIP RIGHTS AND OTHER PROPERTY RELATED RIGHTS" OF THE CIVIL CODE 2015, AND REGISTRATION

A. Property and Property-related Rights Which Can Be Subject to Registration

The Civil Code 2015 provides, in its Part Two, Section 1, rules for establishing and exercising ownership rights and other property-related rights. These provisions define, as property-related rights, 1) ownership rights (Art. 158 VCC 2015), as well as 2) rights to adjoining immovable property, 3) right of usufruct, and 4) right of superficies (Art. 159 (2) VCC 2015).

Ownership and other rights to immovable property shall be "registered in accordance with this Code and the law on registration of property" (Art. 106 (1) VCC 2015). This provision may be interpreted as imposing the obligation of registering these rights to immovable property. However, the existence of the obligation of registration is not clearly or directly provided[5], leaving room for interpretation.

At the same time, it is provided that ownership and other rights to movable property shall not be required to be registered, unless otherwise prescribed by the law on the registration of property (Art. 106 (2) VCC 2015).

B. Changes in Rights Which Can be Subject to Registration

1. Provisions in Part Two "Ownership Rights and Other Property Related Rights"

Regarding changes in rights, the Civil Code 2015 provides:

(i) in Part Two, Chapter XI "General Provisions," it is provided "The time of establishing ownership rights and other property-related rights shall be determined as prescribed in this Code and relevant laws; if there is no relevant regulations of law, the agreement of the parties shall prevail; if there is either relevant regulations of law or agreement of the parties, the time of establishing ownership rights and other property-related rights shall be the time when the property is delivered. The time when the property is delivered is the time when the obligee or his/her legal representative possesses the property" (Art. 161 (1) VCC 2015).

Moreover,

[5] It can be interpreted that registration is indirectly encouraged by denying the effect of the establishment of rights (registration as the necessary requirement for the effect of transformation of right: Art. 458 (2) VCC 2015) or granting no priority effect against a third party (registration as the additional requirement for asserting priority against a third party: Art. 297 (1) (2) VCC 2015) in case of no registration.

(ii) in Part Two, Chapter XIII "Ownership Rights," regarding the establishment of ownership rights based on a contract, it is provided that "A person to which property has been handed over through a contract of sale and purchase or by a gift, exchange or loan or another contract of transfer of ownership rights has the right to own such property as provided by law" (Art. 223 VCC 2015).

It is not simple or easy to interpret these provisions in an integrated manner in determining the time of changes in rights, including the time of transfer of ownership right. It may appear to be determined according to i) law provisions; ii) agreement of parties; and iii) the transfer of property in this order. However, as i) law provisions, to which the highest priority shall be given, are not necessarily clear, it is often not easy to make clear the time of changes in rights[6].

In addition, regarding other property-related rights, it is provided as follows with similar problems as the above being remaining:

(iii) The right to adjacent immovable property shall be established by law, agreement or will in accordance with natural terrain (Art. 246 VCC 2015).

(iv) The right of usufruct shall be established as prescribed by law, agreement or will (Art. 258 VCC 2015).

(v) The right of superficies shall be established as prescribed by law, agreement or will (Art. 268 VCC 2015).

These provisions in (iii) to (v) above cannot be considered to clearly set forth *the time* of establishment of these rights, either. It is interpreted that these rights shall be established at the time prescribed by law[7], or at the time which agreement or a will provides for that effect, but without clarity.

2. Provisions in Part Three "Obligations and Contracts

It should be noted that there exists separate provisions on the time of establishment of the above rights, according to the causes of establishment of ownership rights, in Part Three "Obligations and Contracts."

(i) Regarding the time of establishment of ownership rights according to the sale of property, it is provided that "the time when ownership rights with respect to property (rights) are transferred is the time when a purchaser receives documents evidencing the ownership rights with respect to the property (rights), or the time when the transfer of the ownership rights is registered if so provided by law" (Art. 450 (3) VCC 2015)[8]. However, it is not clear what provisions are

[6] See Matsumoto, op. cit. (footnote 3), pp. 71.

[7] As the substance of these legal provisions herein is not clear either, there exists similar problems as in the case of ownership rights ((i), (ii) above).

[8] It is necessary to confirm the treatment of cases where there is no receipt of documents or no registration concerning ownership rights to property.

referred to by the phrase "if so provided by law."

(ii) Concerning the establishment of ownership rights through a gift, it is provided that "A contract for a gift of movable property shall take effect when the recipient accepts the property, unless otherwise agreed" (Art. 458 (1) VCC 2015), and "Where the law requires the ownership right with respect to such movable property to be registered, the contract shall take effect from the time of registration" (Art. 458 (2) VCC 2015). Therefore, it is interpreted that the ownership right to movable property "on which registration is required by law" shall transfer by registration thereof.

Meanwhile, regarding a gift of immovable property, it is provided that "A gift of immovable property must be registered if the law requires registration of ownership" (Art. 459 (1) VCC 2015), and "a contract for a gift of immovable property shall take effect from the time of registration. In the case of immovable property for which no registration of ownership right is required, the gift contract shall take effect from the time when the property is delivered" (Art. 459 (2) VCC 2015). Thus, in cases of a gift of ownership right over immovable property for which registration is required, it is interpreted that the ownership right to which shall transfer through the registration of transfer.

(iii) Furthermore, "The transfer of land use right **shall have effect from the date of registration** under the provisions of the law on land" (Art. 503 VCC 2015. The bold font is an emphasis by the author). Concerning the transfer of land use right, it is construed that the principle of registration as the necessary requirement for the transfer of right is adopted.

3. Establishment of Security Rights

Regarding the time of establishment of security rights through their creation, it is provided as follows:

"Security shall **take effect against a third party** from the time of registration of such security or the secured party keeps or possesses the collateral" (Art. 297 (1) VCC 2015. The bold font is an emphasis by the author). Herein it is provided that registered security shall take "effect against a third party" from the time of registration[9]. Are these provisions meant to consider registration as an additional requirement for priority against a third party?

The above can also be confirmed in the particular sections on security rights: Contract on pledge of

[9] Article 298, paragraph 2 of the Civil Code 2015 also provides the effect against a third party from the time of registration. That is, "security shall be registered as agreed by the parties or provided by law" (Art. 298 (1) 1st Sent. VCC 2015), and "registration shall be the condition for a secured transaction to become valid only in cases prescribed by law" (Art. 298 (1) 2nd Sent. VCC 2015). "A registered security shall take effect against a third party from the time of registration" (Art. 298 (2) VCC 2015) and "the registration of security shall comply with regulations of law on registration of security" (Art. 298 (3) VCC 2015).

property shall "take effect from the time of concluding [the contract]" (unless otherwise agreed or prescribed by law) (Art. 310 (1) VCC 2015). However, "Pledge of property shall take effect against a third party from the time at which the pledgee keeps the pledged property," and "If immovable property is the subject of pledge as prescribed in law, the pledge on immovable property shall take effect against a third party from the time of registration" (Art. 310 (2) VCC 2015).

The contract on hypothec of property shall also "take effect from the time of concluding [the contract]" (unless otherwise agreed or prescribed by law) (Art. 319(1) VCC 2015), and "the hypothec of property shall take effect against a third party from the time of registration"(Art. 319 (2) VCC 2015).

The reservation of ownership shall "take effect against a third party from the time of registration" (Art. 331 (3) VCC 2015).

Reasons for requiring registration in particular when establishing these collateral rights to take effect against a third party are not made clear[10], and details thereof require further confirmation.

C. Registration and Transfer of Risk

Registration has an effect of determining the time of transfer of risk in a sale contract. That is, the risk in sale and purchase shall be transferred at the time of delivery and receipt of the property in principle (Art. 441 (1) VCC 2015). However, "where the law requires that ownership rights with respect to property which is the subject matter of a contract for sale and purchase be registered, the seller shall bear all risks until the completion of the registration procedures and the purchaser shall bear all risks from the completion of the registration procedures" unless otherwise agreed (Art. 441 (2) VCC 2015).

As mentioned above, it is relatively clearly provided that registration determines the time of transfer of risks.

III. AN IDEAL PROPERTY REGISTRATION SYSTEM

A. Scope of Coverage of Registration Law

Careful examination is required whether the scope of the law of registration should be limited to cover only immovable property and rights thereto, or it should also include the movable property to

[10] See Matsumoto, op. cit. (footnote 3), pp. 74.

be subject to registration.

B. Determination of Properties and Property Rights Subject to Registration

Regarding the registration of property, Article 106 of the Civil Code 2015 provides that 1) the ownership and other rights to immovable property shall be registered in accordance with the Civil Code and the law on registration of property (Art. 106 (1) VCC 2015); 2) the ownership and other rights to movable property shall be registered as long as it is required by law (Art. 106 (2) VCC 2015).

As explained earlier, it is necessary to make clear whether registration is obligatory under these provisions. Upon such clarification, it may be possible to make a list of rights subject to registration. For example, when the scope of the registration law is limited to immovable property and rights thereto, the registration of 1) the right to use land; 2) ownership of buildings; 3) rights to adjacent immovable property; 4) the right of usufruct; 5) the right of superficies; and 6) the right of lease may be required.

C. Relationships between Land and Buildings thereon

It should be clarified whether to consider land and buildings thereon as an integrated property or separate properties in light of the customary law of one's own country and actual transaction practices. When land and buildings thereon are considered separate properties, separate provisions on land registry and building registry shall be necessary respectively.

In this regard, full consideration should be given to current immovable property transaction and registration practices. Article 107 of the Civil Code 2015 provides that "immovable property shall be composed of a) land; b) houses and constructions attached to land; c) other property attached to land, houses and constructions; and d) other property as prescribed by law (Art. 107 (1) VCC 2015). However, it is not provided whether land and houses/constructions are separate properties or an integrated property with land.

If land and buildings are an integrated property, when transferring ownership thereof through sale, or in creating hypothec or pledge, land and buildings thereon shall be dealt with as one property. However, in cases where a right of superficies is established on land and based on which a structure (e.g. a condominium, etc.) has been built thereon, i) the right of superficies plus the ownership of the structure, and ii) the right to use land, shall be different properties. This is due to the ownership of a structure being accompanied by the right of superficies as the title to the land. It is not against the principle that land and buildings are integrated property. However, in cases of constructing a structure with no title on other's land, if the land and structure are an integrated property, the

structure becomes integrated with the land, and the land owner thus may himself/herself remove the structure[11].

In comparison with the above, if land and buildings are considered separate properties, when transferring ownerships thereof through sale or establishing hypothec or pledge thereon, it is possible to sell, establish hypothec or pledge only land or building thereon. In this case, provisions thereof will be necessary in the registration law as well.

In cases where a structure has been constructed without title on other's land, as the structure is not integrated into the land, the land owner may not remove it by himself/herself but must claim the structure's owner for the removal of the building and the vacation of the land, based on his/her right to use the land.

To make the registration of immovable property accurate, it is necessary to obtain and renew information on land and buildings. In this regard, the question as to the extent that surveys of land cadastral and building cadastral can be conducted accurately becomes important[12].

D. Register Book System

1. General Examination

With regards to the compilation of property registry, it is necessary to examine, in light of the traditional concept of ownership and transfer of ownership of one's own country, as well as an analysis of comparative law, whether to adopt the compilation-per-property system or the compilation-per-transaction system, or combining both. As the premise thereof, it is necessary to make clear whether matters to be entered in the registry are only the changes in rights themselves as a result of any causes thereof, or they include not only the changes in rights but also the causes for those changes in rights.

2. Examination of Particulars

It is necessary to decide how to enter properties and each right thereto to be registered in the registry. For example, registration forms must be provided on individual properties and rights, including 1) the right to use land; 2) ownership of buildings; 3) rights to adjoining property; 4) the right of usufruct; 5) the right of superficies; 6) the right of lease of property, etc. (See B. above).

Among the above, in the case of rights to adjoining property in 3) above, it is necessary to examine:

[11] Many European countries, including France, Germany, etc. have succeeded the Roman-law tradition which have adopted the principle that land and buildings thereon are integrated property ("Superficies solo cedit").

[12] As for land, accurate measurement and renewal of information of land are necessary so that the land boundary on registry and the ownership boundary coincide to the maximum extent possible.

- the method of its registration including how to register information on such rights in the registry of adjacent properties;
- the necessity of an additional registration of such information in the registry of any property which can be benefitted by the registered right to adjacent property.

E. Registration Application Procedure

It is necessary to provide information on by whom and how registration can be done. In this regard, registration upon application by parties or registration by entrusted government offices may be specified.

In the case of registration upon application, provisions are necessary on who and how to register; whether joint application or application by a single applicant should be allowed; what documents or information are required for submission, in particular, in order to secure the authenticity of applications for registration.

Article 323 of the Civil Code 2015 provides, as a right of a person who holds hypothec, "to conduct the registration of hypothec as prescribed by law" (Art. 323 (4) VCC 2015). Based on this, property registration law needs to set forth the hypothec registration procedure: whether only the person who holds hypothec should apply for the registration, and what types of documents or information are required for submission. It is also necessary to confirm current transaction and registration practices, whether there exist problems therein, if any.

F. Effect of Registration

Article 133, paragraph 2 of the Civil Code 2015 provides; "In cases where a civil transaction is invalid but the transacted property is registered to a competent authority and such property has already been transferred to a bona fide and not negligent third party through another transaction which is established based on that registration, such transaction shall remain valid."

Regarding this provision, it should be confirmed:

- whether the "property" referred to in the above provision includes "immovable property"; and if so,
- whether the registration of immovable property is granted a public reliance effect;
- with regards to all properties registered, whether movable or immovable, whether the above provision aims to grant a public reliance effect to such registrations of properties; and if so,
- the necessity and appropriateness of such a public reliance effect.

Whether or not to grant a public reliance effect to registration needs to be carefully decided, in consideration that whether it is institutionally corroborated so as to secure the authenticity of

registration. How strong is the social demand for granting a public reliance effect to registration must also be considered.

G. Publication of Registration

The Civil Code 2015 provides that the registration of property, whether immovable or movable, must be open to public (Art. 106 (3) VCC 2015). Based on this, it is necessary to determine the publication methods, requirements, fees, possibility of making copies, etc. in the law of registration law, an ordinance for its enforcement, etc.

IV. CONCLUSION

It appears that many items need to be dealt with in the registration law, even when dealing with only immovable property. In consideration of the necessity of transaction practices according to the types of properties, rights and transactions, it will be necessary to examine the scope of coverage of registration law, properties, rights thereto and transactions to be registered, structure of registry, registration procedure and effects, publication methods of registration, etc. in more details.

Finally, it should be noted that the registration law must be arranged to conform to the substantive provisions of the Civil Code 2015, which define properties and provide when and how property rights are transferred or established under what requirements. Further analyses of the concerned provisions of the Civil Code 2015 must be promoted, and, if necessary, the interpretation of those provisions may be required in consideration of the current practices of property transactions.

OUTLINE OF THE CIVIL PROCEDURE CODE 2015 OF VIETNAM

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I. INTRODUCTION

Since the enactment of the Constitution 2013, the National Assembly of Vietnam has amended and enacted a multitude of legislation each year in adapting its legal system to the new Constitution. In particular, the 10th Session of the XIII Term (Period: October 20 – November 27, 2015) passed five amended basic codes: Penal Code, Criminal Procedure Code, Civil Code, Civil Procedure Code and the Administrative Procedure Code, which drew attention to the judicial community of Vietnam.

This paper discusses the outline of the revised Civil Procedure Code (hereinafter referred to as "new CPC." Article numbers refer to those of the new CPC unless otherwise stated).

Though the new CPC came into effect on July 1, 2016, it may be difficult to give detailed explanations thereof at this time, as examinations on how to operate the new code still continue at courts. This paper thus reports its outline, with a focus on changes from the previous code. Detailed analyses thereof will be undertaken by scholars and legal professionals specialized in Vietnamese law.

A provisional translation of the new code into Japanese has been made by the International Cooperation Department (ICD). Due to space constraints, Japanese translation of the new CPC in its entirety cannot be published here. The Japanese translation is available online at the websites of JICA and the ICD[1].

II. OUTLINE OF THE NEW CIVIL PROCEDURE CODE

The new CPC was submitted to the National Assembly during the 9th session of the XIII Term which opened on May 20, 2015. Through deliberations at the assembly, the new code was adopted on

[1] https://www.jica.go.jp/project/vietnam/021/legal/index.html
http://www.moj.go.jp/housouken/houso_houkoku_vietnam.html

November 25 of the same year during the 10th session[2].

The new CPC is composed of 10 parts and 42 chapters with a total of 517 articles. In comparison with the 2004 Civil Procedure Code (hereinafter referred to as the "prior CPC" or "prior code." It was once amended according to Law No. 65/2011/QH12, passed on March 29, 2011), the number of articles has increased by approximately 100.

No major changes have been added to the statutory composition in general to drastically change the civil procedure or non-contentious case system. The composition of the prior code has remained unchanged except for Part IV: "Resolution of Civil Lawsuits According to Simplified Procedures," which has been newly established in the new code (which is to be discussed later).

III. MAJOR CHANGES IN THE NEW CODE

A. Improvement of the Adversarial Principle

"The adversarial principle" is expressly provided for in the Constitution 2013 as a principle guaranteed in trials by the People's Courts (Art. 103, para. 5). The prior CPC included provisions thereof as assurances of the right to oral argument through amendment in 2011 (Art. 23a of the prior CPC). In comparison, the new CPC, while succeeding and improving said provisions of the prior CPC under the Constitution 2013 (Art. 24, para. 1), provides for parties' rights to collect and submit evidence and relevant materials to courts, and obligations to notify the other party of submitted materials and evidence, and to express opinions on evidence, etc. (Art. 24, para. 2 and 3).

Other noteworthy changes made in line with the above principle are as follows:

- Section 3: "Oral argument in court sessions" has been added as an independent section, organizing provisions of the prior CPC. It provides for the procedure for the parties' expression of opinions, questioning and argument about evidence, etc. (Art. 247 and onwards);
- It is expressly provided that on the date of court sessions, not only arguments or presentation of evidence about facts, but also statements of opinions about evidence and applicable law provisions are conducted (Art. 247, para.1); and
- Article 222 of the prior CPC was revised to conduct questioning by involved parties, other procedure participants, judges and procurators in this order (Art. 249).

[2] According to the legislative procedure of the National Assembly of Vietnam, legislation is passed through deliberations over two sessions. More specifically, legislation is passed at the second session, after deliberations held during the first session.

B. Norms to be Applied by Courts in Case Disposition and Powers for Uniform Application of Law

1. Criteria concerning Statutory Provisions to be Applied

In order to address the situation in which courts refuse to settle cases on grounds of no currently existing applicable laws, the new CPC provides that courts must not refuse to settle civil cases or non-contentious cases for a lack of current applicable law provisions for such cases (Art. 4, para. 2). If no current law provisions are applicable, courts shall resolve such cases by applying customs, law provisions applicable to same matters, basic rules of civil law, precedents and the justice in this order (Art. 43-45). In these cases, the attendance of procurators is required (Art. 21, para. 2).

As explained above, the new CPC provides for settlement standards to be applied by courts, so as to avoid refusals of settlement of civil cases in practice for reasons of "gaps in the law." However, it is a simple assumption that front-line judges may question on: the basic principles; how precedents should be used; how to properly interpret fairness and equality - the basic axioms of the justice, etc. Considering these matters as a type of legal "interpretation" under Vietnamese law, discussions should be arranged on the courts' right to interpret law and its scope as well[3].

2. Introduction of Legal Precedent System

In October 2015, the Supreme People's Court (SPC) issued a "Resolution on the Selection, Publication and Application of Court Precedents" (03/2015/NQ-HDTP), to begin the Vietnamese original "precedent system." According to said resolution, from among decisions made through cassation procedures by the SPC and High-Level People's Courts, and judgements and decisions by the SPC, High People's Courts and lower courts, those appropriate to be examined and applied in court trials shall be selected and published as precedents[4]. The usage of court precedents under the CPC are as explained in (1) above.

In relation to the precedent system, the new CPC provides that judgments and decisions of each court shall be published on the website (Art. 269, para. 3 on those of first-instance courts; Art. 315, para. 2 on appellate judgements/decisions; Art. 350, para. 2 on cassation review decisions; Art. 370, para. 4

[3] Under the Constitution, the right to interpret the Constitution, the law, and decree-laws of the Standing Committee of the National Assembly is granted to the Standing Committee of the National Assembly (Art. 74, para. 2). Accordingly, it is understood that courts are not granted the right to interpret law in Vietnam. It can be considered, however, that the selection criteria of precedents require judgments/decisions indicate a certain level of interpretation. In practice as well, it may be difficult to apply law provisions without any interpretation thereof. Therefore, actual application of laws may involve interpretation. It should be noted, however, that it is unclear whether the Vietnamese term of interpretation: "giải thích" implies more than a simple explanation of objective meanings and contents of words. A further detailed examination will be necessary on the interpretation of Vietnamese law from academic viewpoints as well.

[4] As of August 2015, six precedents have been selected and posted on the website of the SPC and published in the "Court Magazine," etc.

on decisions of civil matters[5]).

3. Disposition in Case of Discovery of Legal Normative Documents Requiring Alterations, etc.

In cases where, during the course of civil lawsuit's resolution, a judge finds a legislative document related to the resolution of the civil lawsuit denoting contrariness against the Constitution, law or resolutions of the National Assembly, ordinances or resolutions of the Standing Committee of the National Assembly or legislative documents of superior regulatory agencies, the judge shall make a report to that effect to the chief judge of the court being in charge of the case. Upon receipt of such a report, the chief judge shall report the case in writing to request the SPC Chief Justice recommend a competent agency to consider amendment, supplement or annulment of the legislative document in question (Art. 221, para. 1). If the case has already been forwarded for trial or during cassation/retrial procedures, such procedures shall be suspended (Art. 221, para 2; Art. 214, para. 1 (e)). Agencies receiving a recommendation from the SPC shall consider it and dispose of the case. In cases where no written response has been made by the competent agency within one month from the day on which the recommendation by the SPC Chief Justice was received, legal normative documents with higher-level effect shall be applied for case resolution (Art. 221, para. 3).

Along with the precedent system, the above system may possibly be aiming to realize a uniform application of law. Even with an ex-post amendment of legislative documents denoting contrariness against, or inconsistency with law, an issue may naturally arise as to whether even legislative documents to be applied for the disposition of cases are retroactively amended back to the time when the legal act in question was committed. Attention should be paid to the future operation of the new code, as well as to the significance and theoretical issues of this system.

C. Introduction of Case Dispositions through Simplified Procedures

1. Simplified Procedures (Court Procedures by a Single Judge)

In Vietnam, the participation of people's jurors in first-instance trials has been mandatory since before the CPC revision. Accordingly, trials have been conducted by a panel composed of one judge and two jurors, even in cases with no factual disputes. Such trials have been criticized as being unnecessarily prolonged with an attendant rise in costs.

Due to the above, and since prior to the enactment of the Constitution 2013, discussions had been held on the necessity of introducing a new trial procedure to realize a speedy and efficient case

[5] Even if sample trial cases are published on websites, unless they go through the selection procedure of "precedents," they shall not be regarded as "precedents" to be the standard for case resolution. In this sense, the publication of sample trial cases may be part of the efforts for information disclosure by courts. It may also be expected that such information disclosure will be useful for outside individuals to choose and recommend sample trial cases as "precedent," from among those published.

disposition by courts. In the JICA Technical Assistance Project for Legal and Judicial System Reform, Phase 2, which was implemented until March 31, 2015 (hereinafter "former project") as well, information was provided to this effect through local seminars with short-term experts from Japan.

The Constitution 2013 provides for an exceptional situation allowing trials through "simplified procedures" by a single judge, while maintaining the participation of people's jurors in principle (Art. 103, para. 1 and 3). In line with this, the "simplified procedures" has been introduced through the recent revision of the CPC. It should be noted, however, that opinions had been divided from the legislative-drafting stage throughout the deliberation stage at the National Assembly, regarding conditions for the application of "simplified procedures" for case disposition, courts with jurisdiction thereof, etc. Various opinions were presented concerning the conditions that cases should meet to be subject to the simplified procedures, including: subject values or the category of cases. It was ultimately decided that cases with clear factual relationships, where the court does not need to collect evidence (Art. 317, para. 1), and where involved parties can easily be summoned, etc. are to be subject to the simplified procedures (Art. 317, para. 1 and 2).

The SPC will soon provide detailed guidelines on the requirements for the application of the simplified procedures. Should the judgment on qualitative standards (e.g. the existence of disputes between parties, clearness of evidence, etc.) be left to courts, defendants will likely try to challenge the plaintiff's case so as to avoid case disposition through the simplified procedures. Such a system design may not be stable enough to make the system useful for simple and expeditious case dispositions. Moreover, the addresses of parties identified (Art. 317, para. 1, item b) is also required for application of the simplified procedures. Under this condition, even cases with clear evidence on the existence of rights (but without an identified address of the defendant) will be considered to be out of the scope of application of the simplified procedures. As such, the application scope of the simplified procedures will be limited considerably. Further examination will be necessary on the system operation in the future.

2. Introduction of Procedures for Recognition of Successful Out-of-Court Mediation Results

As another simplified procedure of case disposition, I would like to discuss the procedures for recognition of successful out-of-court mediation results (Art. 416 and onwards).

It had been discussed whether successful out-of-court mediation results could be considered to be the title of obligation, but the decision thereon was deferred at the time of the previous revision of the

Civil Procedure Code in 2011[6]. Upon revision of the new CPC, successful out-of-court mediation results under law regulations on mediation shall be enforceable according to law regulations on enforcement of civil judgments through the recognition procedure by courts (Art. 419, para. 9). The recognition procedure of out-of-court mediation results is provided as a type of procedures on non-suit civil matters.

D. Arrangement of Provisions on Jurisdiction (in line with the 2014 Law on Organization of People's Courts)

In Vietnam, the Law on Organization of People's Courts (62/2014/QH13) was enacted in 2014 to reform the court organization. Specifically, the Appellate Court, which had belonged to the SPC, became independent as the High-level People's Court[7] in three cities (Hanoi, Danang, Ho Chi Minh). Furthermore, the Family and Juvenile Tribunal was established as the sixth specialized tribunal[8]. Provisions in the new CPC have been organized in line with this new court organization.

The High-level People's Court shall have jurisdiction over: 1) cassation procedures against legally effective judgments/decisions of the Provincial-level People's Courts or District-level People's Courts (Art. 337, para. 1; Art. 354, para. 2); and 2) appeal procedures against judgements/decisions of the first-instance Provincial-level People's Courts (Art. 29, para. 1 of the Law on Organization of People's Courts). Accordingly, it is provided that the SPC shall have jurisdiction over cassation procedures of legally effective judgments/decisions of the High-level People's Courts (Art. 337, para. 2). Moreover, the High-level People's Courts shall conduct cassation of trials by People's Courts within their territorial jurisdiction (Art. 18). In other words, part of the jurisdiction of the SPC (and its Appellate Court) under the prior code shall be transferred to the High-level People's Courts. This will allow the SPC to concentrate on its duty of realizing the strict and uniform application of law nationwide.

Moreover, the District-level People's Courts shall have jurisdiction over cases of marriage, family, etc., except for those involving foreign elements, or cases of approval or enforcement of foreign judgments (Art. 35, para. 1 (a); para. 2 (b); and para. 3). The Family and Juvenile Tribunal of the Provincial-level People's Courts shall have jurisdiction over: 1) marriage- and family-related first-

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[6] See Shusaku Tatara, *Betonamu no Gurasuruutsu Wakai ni kansuru Kanrenhouki* (Related Laws concerning Grassroots Conciliation), ICD NEWS No.53, 2012 (in Japanese). The Ordinance on the Organization and Activities of Reconciliation at the Grassroots (which is discussed in Tatara's paper) was upgraded to a law (Law on Grassroots Conciliation, 35/2013/QH13), which took effect on January 1, 2014.

[7] It is occasionally translated "Superior Court" in English.

[8] Regarding the outline of the new Law on Organization of People's Courts, see *Betonamu Shin-Saibansho-ho, Kensatsuin-ho, Kigyo-ho, Toshi-ho oyobi Minjihanketsu-shikkou-ho no Gaiyo* (The Outline of the new Law on Organization of People's Courts, Law on Organization of People's Procuracies, Law on Enterprises, Law on Investment and the Law on Enforcement of Civil Judgments), ICD NEWS No.63, pp. 175-193 (in Japanese), at http://www.moj.go.jp/content/001150471.pdf.

instance cases which do not fall under the jurisdiction of the District-level People's Courts; and 2) appellate procedures against judgments/decisions in marriage and family-related first-instance cases at the District-level People's Courts (Art. 37, para. 1, (a) and (b); Art. 38, para. 2)[9].

E. Arrangement of Rules on Cassation Procedures

Some amendments have been added to the provisions on cassation procedures.

Regarding the requirements for the application of cassation procedures, no amendments have been made to the existing three types of requirements: 1) When conclusions in judgments/decisions are incompatible with objective factual relations; 2) There are serious violations against procedures; and 3) There are mistakes in the application of law (Art. 283 of the prior CPC; Art. 326, para. 1 of the new CPC). Concerning all these three requirements, the conditions of causing damage to legitimate rights and interests of involved parties, and of infringing upon national and public benefits (only on the third requirements above) have been added (Art. 326, para. 1).

There may arise questions that in many cases which fall under the requirements in 1) and 3) above, the legitimate rights and interests of parties may also be infringed on. It appears that by imposing further conditions on the infringement of rights for the application of cassation procedures, attempts have been made, to focus resources on cases which truly require reliefs.

Moreover, it is newly provided that only the SPC Chief Justice and Prosecutor General of the Supreme People's Procuracy, Chief Judges of the High-level People's Courts and Chief Prosecutors of the High-level People's Procuracy shall be entitled to apply for cassation procedures, disqualifying the Chief Judges of the Provincial-level People's Courts (Art. 331). In cases where Chief Judges of the Provincial-level People's Courts find grounds for conducting cassation procedures against any judgements/decisions, recommendations shall be filed to the Chief Judges of the High-level People's Courts or the SPC Chief Justice to commence cassation procedures (Art. 327, para. 3).

Under the prior CPC, the cassation review panels had only the following options (Art. 297 of the prior code):

1) To uphold judgments or decisions of the original court;
2) To annul judgments or decisions of the original court, and uphold judgments or decisions of the first-instance court;
3) To annul judgments or decisions and remand cases for retrial; and
4) To annul judgments or decisions and terminate the resolution of cases.

[9] There is only one Family and Juvenile Tribunal established within the Ho Chi Minh City People's Court as of August 2016.

According to the new CPC, in addition to the above, the cassation review panel may modify parts or the whole of judgments or decisions of the original court (Art. 343, para. 5). This may be a countermeasure against criticism that, even in cases where, in view of the result of the cassation review, parties could have reached an agreement, judgments or decisions were annulled for retrial. Such a procedure proved cumbersome. In response to such criticism, it has been allowed to annul judgments or decisions and make the panel's own judgment/decision.

IV. CONCLUSION

I have discussed the outline of the new CPC with a focus on major changes from the previous code. Throughout the enactment of the prior code in 2004 and revision in 2011, continued efforts have been made to improve parties' procedural rights, while maintaining the leading position of courts. The rights of parties and respect for the will of parties have often been referred to by participants in seminars and other project activities. At the same time, it appears that judges at the forefront have yet to shed the need to steer trial proceedings, not parties. Due to this, it may still take some time for the new CPC to become ingrained in Vietnam. Further studies and improvements are expected to be made as necessary in anticipation of various problems arising from the operation of the new code.

A large part of the new CPC owes to the efforts made through the former JICA Project. Such efforts include examinations of the results from local seminars and study trips to Japan, which were organized on a list of themes requested by the SPC, as well as joint efforts with other donors. I would like to take this opportunity to deliver this report and express my sincere appreciation to the Study Group for Improvement of Court Practices, ICD of the Research and Training Institute of the Ministry of Justice, the Supreme Court, and all those who have extended their kind support.

I am fully aware that this paper is in no way sufficient to act as commentary on the new CPC. It would be my sincere pleasure if it could though be of some help for scholars specialized in Vietnamese law, legal practitioners, and all those who are concerned, in understanding the new Vietnamese law.

COMMENCEMENT OF A NEW PROJECT IN INDONESIA - PROJECT ON INTELLECTUAL PROPERTY RIGHTS PROTECTION AND LEGAL CONSISTENCY FOR IMPROVING BUSINESS ENVIRONMENT -

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JICA Long-Term Expert in Indonesia

I. INTRODUCTION

Indonesia is an extremely important country for Japan, both in terms of security and economy. The "Basic Policies on Legal Technical Assistance[1]" of the Japanese government (revised in May 2013) considers Indonesia as a country of highest priority. Moreover, Country Assistance Policy for Indonesia[2] (April 2012) places emphasis on achieving further economic growth, through assistance in the improvement of business and investment environment and professional human resource development.

Japan's legal technical cooperation with Indonesia came into full swing in 2002. Since then, such activities as study trips to Japan within the framework of the Japan International Cooperation Agency (JICA), and local surveys and discussions by the Research and Training Institute (RTI) of the Ministry of Justice (MOJ), have been conducted intermittently. Through these occasions, Japan continued to build cooperative relationships with relevant officials of the Supreme Court and the Ministry of Law and Human Rights (MLHR) of Indonesia[3]. In particular in cooperation with the Supreme Court of Indonesia, the "JICA Project on Improvement of Mediation System" was implemented from April 2007 to March 2009. Even after the completion of this project, a friendly cooperative relationship has continued among stakeholders in Indonesia and Japan. For example, a private entity was established voluntarily by Japanese and Indonesian legal professionals (including those involved in the former project). Moreover, the MOJ has continued to organize study trips to Japan, joint studies, etc. within

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[1] http://www.moj.go.jp/content/000115321.pdf. It is deemed that "legal technical assistance" refers to support or cooperation in all legal disciplines by several entities including government (ministries, agencies, etc.), universities, private companies, etc. in a broad sense. In this paper, however, it refers to assistance and cooperation by the Ministry of Justice of Japan, in principle.

[2] http://www.id.emb-japan.go.jp/oda/en/policy.pdf. This assistance policy considers legal technical assistance as one of the points of attention, stating that: "governance such as legal predictability and stability is important for promoting the improvement of the business and investment environment."

[3] The Ministry of Law and Human Rights has jurisdiction over immigration, correction, protection of human rights, etc. It is also in charge of drafting laws under its jurisdiction (civil laws, criminal laws, intellectual property laws, etc.) as well as examining consistency of bills drafted by other ministries. It has combined functions of those of the Ministry of Justice, Patent Office and the Cabinet Legislation Bureau of Japan.

its original framework.

In line with the above-mentioned government policies, etc. and in response to a request from Indonesia, a new JICA project on Intellectual Property Rights Protection and Legal Consistency for Improving Business Environment (hereinafter "new project") was launched in December 2015. It is an advanced version of a former JICA project[4] conducted by the Japan Patent Office to improve the examination work of intellectual property rights (IPRs). The new project aims to strengthen the IPR protection system, and establish procedures to improve consistency in drafting and examining business laws. Currently four JICA long-term experts including myself are posted in Indonesia to promote cooperation on a daily basis[5]. As mentioned above, it took six years for the MOJ to be involved in a JICA project again since the end of the former project. In this paper I will briefly review the background to legal technical cooperation with Indonesia, and discuss the outline of the new project.

II. HISTORY OF LEGAL TECHNICAL COOPERATION WITH INDONESIA

A. Dawning Stage

Legal technical cooperation with Indonesia dates back to 1998. In the middle of the 1990s, the need for judicial system reform was already a topic of debate within Indonesia. The Asian economic crisis, which was triggered by the monetary crisis in Thailand, began to infect Indonesia. Coupled with the collapse of the Suharto administration in 1998, which had continued for approximately three decades, the judicial system reform (including the Constitution) became one of the critical national challenges, with efforts for this purpose being accelerated.

In line with the above movement, and in response to requests from Indonesia, legal cooperation was conducted on economic-related laws such as bankruptcy law, mortgage law, alternative dispute resolutions, etc. With the participation of judges from the Supreme Court, prosecutors, officers of the MLHR, a training course was held in Japan. In 2000, a study group on the competition law of Indonesia was organized by the Japan External Trade Organization (JETRO), etc.

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[4] The Japan Patent Office has provided support to Indonesia through the JICA framework in the field of industrial rights since 1994. The most recent was the Project for Strengthening Intellectual Property Rights Protection from April 2011 to April 2015.

[5] In December 2015, Mr. Yoshihiro Nagahashi of the Japan Patent Office, and in February 2016, Mr. Hiromitsu Magira (originally a judge) and myself (originally a prosecutor) of the MOJ were dispatched as JICA long-term experts to the Directorate General of Intellectual Property of the MLHR, to the Supreme Court and to the Directorate General of Legislation of the MLHR, respectively. In addition, Ms. Yasuyo Honda, with a rich experience as a JICA long-term expert in Latin America, etc, was posted in Indonesia as a project coordinator.

B. Early Stage

Subsequently, as mentioned above, Japan began full-scale cooperation with Indonesia in 2002. Since that time, study trips and joint studies have been held annually by JICA and the MOJ (despite differences in their frameworks), inviting judicial and legal officers from Indonesia. In parallel thereto, JICA and the RTI have intermittently conducted local surveys.

During this stage, comparative joint studies were held in Japan on the judicial systems of both countries and ADR, with the participation of judges of the Supreme Court, prosecutors of the Attorney General's Office, officers of the Directorate General of Legislation (DGL) and the Directorate General of Intellectual Property (DGIP) of the MLHR, and lawyers. Furthermore, the following invitations were carried out in cooperation with the Ministry of Foreign Affairs and JICA:

- Honorable Chief Justice Bagir Manan of the Supreme Court (at the time) in 2003;
- Professor Hikmahanto Juwana of the Faculty of Law of the University of Indonesia (at the time) in 2002 and 2005.

In this manner, an increase in opportunities of study trips, joint studies, etc. made it possible to hold continuous dialogue with Indonesian stakeholders[6]. Through exchange of opinions on the occasion of a series of training seminars, joint studies, discussions in Indonesia and Japan, themes of cooperation were narrowed down[7].

C. Project on Improvement of Mediation System

Through repeated dialogue, the Supreme Court of Indonesia showed strong interest in the resolution of a large volume of backlogged cases at the court of last instance. As one of the solutions to this issue, Indonesia hoped for a further proactive use of the existing mediation system. In response to this interest, legal technical cooperation with Indonesia was developed into the JICA Project on Improvement of Mediation System.

This project worked with the Supreme Court of Indonesia as the assistance target organization, with the aim of improving the court-annexed mediation system, by:

1) revising Supreme Court regulations;
2) improving the system necessary to train mediators; and
3) broadly disseminating the court-annexed mediation system.

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[6] In 2003, a full-scale survey in the judicial field was also begun through dispatch of an attorney-at-law, Mr. Tsutomu Hiraishi, as a JICA planning researcher.

[7] Candidate themes were: ensuring independence, transparency and efficiency of judiciary, rationalization of the appeal system to solve the increase of backlogged cases, establishment of the mediation system, formulation of anti-corruption policies, improvement in case management, etc.

As an input from Japan, Ms. Tamaki Kakuda, an attorney-at-law, was dispatched to Indonesia as a JICA long-term expert. As part of local efforts, a working group was formed, composed of judges of the Supreme Court, district courts, lawyers, law professors, and representatives of private training centers of mediators (accredited by the Supreme Court of Indonesia). Concurrently, in Japan an advisory group was established to support project activities, with academic experts including then Professor Yoshiro Kusano of Gakushuin University (a former judge) and legal professionals.

Under the above scheme, activities of various methods combined were advanced, including local working group activities, study trips to Japan, local seminars by advisory group members, etc. As a result, great results were achieved as follows:

1) In July 2008, a revised Supreme Court regulation (PERMA No.1, 2008[8]) was implemented to actively use the court-annexed mediation system;
2) From August 2008 to February 2009, in line with the court-annexed mediation system under the revised regulation, training courses for trainers of mediators were organized; and
3) Dissemination seminars on the mediation system were held several times by courts.

D. Until the Commencement of the New Project

Through the Project on Improvement of Mediation System, the Supreme Court of Indonesia found a deepening trust toward Japan, and developed a strong interest, not only in the mediation field but also in the Japanese judicial system in general. Thus, despite the end of said project in 2009, the Supreme Court hoped to continue cooperation with Japan in promoting the judicial system reform. In response to such expectations, the MOJ continuously developed various cooperation activities, within its own framework, as follow-up measures of the former project and further contributed to efforts being made in Indonesia. The MOJ's original activities included:

- Holding seminars and joint studies annually in Japan, inviting judicial officers from Indonesia, on themes selected according to requests from Indonesia;
- Holding local seminars to introduce Japan's mediation system, through cooperation between ICD professors and former project advisory group members, including Professor Yoshiro Kusano of Gakushuin University and Professor Kazuto Inaba of Chukyo University, etc.

The following is a list of the MOJ's original cooperation activities in and after 2010:
In 2010:

[8] The revised regulation reflected the Japanese system, including: 1) judgments rendered in cases which did not go through the mediation procedure are invalid; 2) litigation parties have the right to select mediators (from among judges [including judges of the court in charge of the case], attorneys-at-law, law scholars or non-lawyers); 3) The period granted for mediation is 40 days in principle, which can be extended for not more than 14 days; 4) Even if mediation results unsuccessful, the judge in charge of litigation may try settlement at any stage until the pronunciation of sentence. This regulation was further revised through PERMA No.1, 2016.

- Invitation of the Chief Director of the Department of Civil Affairs and others of the Supreme Court to Japan to discuss future cooperation;
- Invitation of the Chief of the Training Center[9] of the Supreme Court and others to Japan for a comparative joint study of the legal training system in Indonesia and Japan;
- Invitation of the Deputy Chief Justice of the Supreme Court to Japan for studies of IP laws;
- A local survey, etc. by ICD professors

In 2011:

- The first joint study for capacity-development of Indonesian judges (on the Japanese legal training system, etc.) in Japan
- A local survey, etc. by ICD professors

In 2012:

- The second joint study for capacity-development of Indonesian judges (on judicial training, proceedings of non-contentious cases) in Japan
- A local survey, etc. by ICD professors

In 2013:

- Discussions between the Director-General of the Research and Training Institute (RTI) of the MOJ and relevant organizations in Indonesia
- A local survey, etc. by ICD professors

In 2014:

- The third joint study for capacity-development of Indonesian judges (on IP, civil provisional remedies, civil execution, etc.) in Japan
- Joint study with the Secretary and others of the Supreme Court (on small claims) in Japan
- A local survey, etc. by ICD professors

In 2015:

- The fourth joint study for capacity-development of Indonesian judges (on small claims), organization of a symposium (on IP litigations and the actual situation of court practices in Indonesia)
- A local survey, etc. by ICD professors.

III. NEW PROJECT

A. Formation of a New Project

In parallel with the above-mentioned seminars and joint studies, and in response to requests from Indonesia, the MOJ held discussions with related organizations in Japan and Indonesia on the occasion

[9] It corresponds to the Legal Training and Research Institute of the Supreme Court of Japan, and administers training of judges, etc.

of local surveys, etc., in cooperation with JICA. The purpose of which was to understand needs in Indonesia to form a new project. During this course of events, it was found that the interest of the Supreme Court of Indonesia focused on IP field, as well as a strong demand for Japanese cooperation from the DGL of the MLHR. Accordingly, in October 2014, another local survey was conducted for terminal evaluation of the afore-mentioned JICA Project for Strengthening IP Rights Protection (see footnote 4), as well as to hold discussions with relevant organizations for the formation of a new project. Through these preparations, in February 2015, the Japanese government officially decided to develop a new JICA legal cooperation project for Indonesia, centering on intellectual property, to work with three implementing agencies: the Supreme Court, the DGIP and DGL of the MLHR.

Subsequently, preparations were made for the conclusion of a Record of Discussions (R/D[10]) for the new project, including a detailed planning survey to decide details with each implementing agency. In July and August 2015, an R/D for the "Project on Intellectual Property Rights Protection and Legal Consistency for Improving Business Environment" was concluded between JICA and the Supreme Court of Indonesia, and with the MLHR, respectively[11]. In December 2015, the project was finally initiated[12].

B. Outline of the Project

The outline of the new project is as follows:

[Period] December 2015 – December 2020 (five years)

[Implementing organizations] Supreme Court of Indonesia, DGIP and DGL of the MLHR

[Overall goal] Legal consistency and law enforcement procedures of business laws including IP laws will be improved.

[Project purpose] The system for improving legal consistency and IPR protection will be strengthened.

[Long-term experts] 4 experts (a prosecutor, a judge, an officer from the Japan Patent Office, a coordinator)

[Cooperative organizations in Japan] Ministry of Justice, Supreme Court, Patent Office, an advisory group

The new project aims to strengthen the IP protection system in Indonesia, as well as establishing procedures to improve consistency in drafting and examining IP laws.

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[10] In implementing technical cooperation between Japan and other countries, based on a treaty or any other international agreements concluded by Japan and relevant other governments, a document is signed and exchanged between the implementing agencies of both countries, where matters of agreement are recorded, including detailed conditions of the implementation of technical cooperation.

[11] The implementing organizations of the new project are the Supreme Court of Indonesia, the DGIP and DGL of the MLHR. As the latter two belong to the same Ministry, one (1) R/D was concluded with each of the Supreme Court and the MLHR.

[12] Under the R/D, the beginning date of the new project was set on the "date of dispatch of the first long-term expert." Due to procedures in Indonesia, Mr. Nagahashi of the Japan Patent Office was first posted in Indonesia as a JICA long-term expert on December 21, 2015. The new project was thus commenced on this date.

Strengthening the IP protection system means to increase predictability in:

- the IP acquisition process through the capacity-building of IP examiners, and by further improving the facility for users in obtaining IP-related information. Progress has been seen in this area through cooperation with the Japan Patent Office;

It also means to increase predictability in:

- the disposition of IP cases through the capacity-building of judges in charge of IP litigations.

In this manner, the new project seeks to strengthen the IP protection system not only during the IP administrative procedure but also during the court procedure for conflict disposition.

The establishment of laws with secured consistency may reduce arbitrariness in the operation of laws, leading to increased predictability in any aspects of administration and justice. From this viewpoint and for improving legal consistency, it is aimed, by focusing on IP laws, to establish a framework and measures which will be useful for legal drafters and examiners in legislative drafting and examination with improved consistency. By achieving these project purposes, a "looking-beyond" long-term goal is to increase legal consistency of business laws, including IP laws, leading to an improvement in the operation and enforcement procedures of such laws.

To realize these goals, the following activities are planned:

- For the Supreme Court of Indonesia: formulation of training curricula for judges in charge of IP cases, creation of teaching materials to be used in such training;
- For the DGIP, revision of examination standards, capacity-building of IP examiners of higher ranks, etc.;
- For the DGL, preparation of reference materials for securing legal consistency, organization of training courses using such materials, etc.; and
- For the DGIP and DGL, formulation of subordinate laws of the recently revised copyright law, to-be-enacted patent law or trademark law.

These activities will be developed by working groups composed of officers in charge of IP practices, being combined with training courses in Japan, local seminars, etc. As experiences in cooperation with Japan, cooperation methods, etc. differ in each implementing agency, details of activity development methods will be decided and customized according to the situation in each agency.

Regarding the support scheme in Japan, in the new project as well an advisory group has been formed, composed of legal professionals, law scholars, etc. These will cooperate in the project by providing advanced and professional knowledge in each field of their specialties, through such opportunities as:

- participation in discussions with local working groups and long-term experts;

- serving as lecturers in training seminars in Japan and local seminars;

As mentioned above, in addition to Mr. Nagahashi, who was first posted in Indonesia, Mr. Magira, Ms. Honda and myself assumed positions as long-term experts in February 2016, completing the local cooperation scheme of four JICA experts.

Each of the three implementing organizations has offered work space for the long-term experts. However, due to constraints in the use of these offices and for the need to secure space for information-sharing among long-term experts, an outside common office was set up. At present, Mr. Nagahashi and Ms. Honda use the office in the DGIP of the MLHR, Mr. Magira, the common office, and myself, the office in the DGL of the MLHR as our bases. In each office a local staff officer works together with the long-term expert. It is anticipated to review and finalize the ideal personnel allocation in each implementing agency through future activities.

IV. CONCLUSION

On May 4, 2016, then Minister of Justice Mitsuhide Iwaki of Japan visited Indonesia and held close dialogue with Honorable Chief Justice Muhammad Hatta Ali of the Supreme Court and H.E. Minister Yasonna Laoly of Law and Human Rights. They discussed bilateral cooperative relationships in the legal and judicial fields, and confirmed further strengthening of the already existing relationships between Indonesia and Japan. During the Minister's stay in Indonesia, a commemorative ceremony for the above purpose was held inviting related officers and individuals in the legal and judicial fields from both countries, including said Minister and Chief Justice. Details of the ceremony will be reported on other occasions.

I would like to underscore that the new project has been founded on the bilateral relationship of trust and cooperation, which has been built through long-term steady exchanges of many stakeholders in the judicial field.

The new project seeks to further reinforce the conventional cooperation with Indonesia in the IP field from the legal and judicial perspectives. This means encouraging relevant organizations in Indonesia to more proactively create points of interface, eliminating existing barriers. This applies just as much to Japanese relevant institutions. It may seem an exaggeration but this type of framework is not only the first trial in light of the history of Japan's legal technical cooperation, but also a new and challenging trial for all involved in this new endeavor.

The new project has just begun. We will press ahead each activity step-by-step through trial and error. It may not be too much to say that everything has to be moved forward in an experimental manner. I would like to conclude by requesting your kind understanding and continued support of our new project.

CURRENT TREND OF JAPAN'S BASIC POLICIES FOR LEGAL TECHNICAL ASSISTANCE

Hiroyuki ITO
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I. INTRODUCTION

In this issue of ICD NEWS, we are introducing our activities in relation to each partner country on pp. 115 and onwards.

The International Cooperation Department (ICD) has published its departmental journal: ICD NEWS, in Japanese, bi-monthly since 2002 and quarterly since 2006. The English edition has been published annually since 2009, for sharing information and enhancing cooperative relationships with overseas donors and other stakeholders. Our activity reports contained in this issue aim to meet the above objective. From these reports readers will notice that one of the characteristics of Japanese legal technical assistance is to provide assistance which matches the real situation of each country. Our project designs and activities vary thusly from country to country.

At the same time, as an organization of the Ministry of Justice of Japan, the ICD has implemented its activities in line with "Basic Polices on Legal Technical Assistance" approved by the government of Japan.

In 2009, the Council of Overseas Economic Cooperation established within the Cabinet approved the first "Basic Policy of Assistance for Legal and Judicial System Development." It was revised in 2013, upon consultation among several ministries related to legal technical assistance. Other government annual policies, including "Basic Policy on Economic and Fiscal Management and Reform (Honebuto no Hoshin - the Big Boned Policy)," have frequently quoted the promotion of providing legal technical assistance.

In this regard, it can be stated that legal technical assistance has attracted an increasing degree of attention in Japan in recent years. However, since its commencement by the Ministry of Justice (with

Vietnam) in 1994, gaining publicity thereof has been a lengthy process. In fact, when I first joined the ICD in 2010, a very small portion of the population had knowledge thereof. Since that time, within only a half-decade, legal technical assistance has seen its profile elevated and today even the Prime Minister of Japan has quoted legal technical assistance as a significant method in enforcing the policies of the government of Japan.

Japanese legal technical assistance aims to establish the rule of law and good governance in each recipient country. To this end, Japan supports each developing country in its self-efforts for the benefit of its nation and citizens. Needless to say, development and stability of assisted countries may lead to peace, safety and prosperity in the surrounding regions and in the end, in the global community.

Recently, however, changes have been seen in the trend of Japanese legal technical assistance. A new goal of improving the trade and investment environment for Japanese enterprises in recipient countries has been added as another objective of assistance. This is clearly manifested in the Basic Policies, and ongoing assistance projects are designed so as to achieve this goal.

Against this background, this paper will discuss the recent trend in the Basic Policies on Legal Technical Assistance of Japan.

II. TREND OF BASIC POLICIES

A. Basic Policies on Legal Technical Assistance (Revised)[1]

1. Basic Concept

In 2009, the "Basic Policy of Assistance for Legal and Judicial System Development" was established by the Council of Overseas Economic Cooperation[2]. It was the first policy of this kind manifested by the government.

Since then, in response to changes in the economic and other environments surrounding Japan and Asia, the Basic Policy was revised in May 2013, in consultation among ministries related to legal technical assistance, including the Ministry of Foreign Affairs, Ministry of Justice, Cabinet Office, etc. As the basic tenet of the policy, it is stated: "Legal technical assistance, which provides legislative assistance or support for improving legal institutions in developing countries around

[1] URL:http://www.moj.go.jp/content/000115321.pdf

[2] The council was established within the Cabinet by a Cabinet decision in 2006. The council was chaired by the Prime Minister, consisting of the Chief Cabinet Secretary, Minister for Foreign Affairs and other related Ministers. The Justice Minister also attended the council meeting when dealing with legal matters.

the world, contributes to their self-help efforts toward good governance and building of integral foundations to attain sustainable growth. Japan has continuously emphasized the importance of the "rule of law" and appealed for the need to see it strengthened. Therefore, legal technical assistance is an effective tool for Japan to maintain its honorable position in the international community, and needs to be developed in a strategic manner." This concept is shared in both original and revised basic policies, and in line therewith, the new policy sets forth objectives for providing legal technical assistance as below:

(i) Establishing the rule of law in developing countries through sharing universal values, including freedom, democracy, basic human rights, etc.;
(ii) Improving the environment for sustainable growth and assuring compliance of global rules;
(iii) Sharing Japan's experience and systems, strengthening their economic ties with Japan, and establishing a platform for regional cooperation and integration;
(iv) Improving the trade and investment environment, which is beneficial for Japanese enterprises in expanding their businesses overseas, and assisting in the introduction of environmental and safety regulations; and
(v) Enhancing the effectiveness of Japanese economic cooperation, and contributing to developing countries in achieving international development goals, through enhancement of governance.

2. Changes in Basic Policies on Legal Technical Assistance in 2009 and 2013

a. Additional objectives

One of the primary differences between the original basic policies formulated in 2009 and those revised in 2013 is the addition of objectives (iv) and (v) above. In particular, attention should be paid to (iv).

Along with social and economic globalization, the number of Japanese enterprises expanding businesses overseas has been on the rise. On June 14, 2013, the Cabinet decided upon the Japan Revitalization Strategy, subtitled "Japan is Back." It proposed proactive economic growth strategies, including strong support for the globalization of Japanese companies. Many Japanese enterprises with businesses in developing countries or expanding businesses in those countries often face legal issues. As a solution thereto, the above-mentioned new government strategy emphasizes the importance of legal technical assistance for improving the business and investment environment for Japanese companies in developing countries.

As a matter of course, legal technical assistance is not meant to benefit solely Japan. In fact, the promotion of foreign investment is given high priority in developing countries as a means to achieve sustainable economic growth. Our direction is to build a win-win relationship between Japan and recipient countries. This is based on the belief that, as a provider of Japanese official

development assistance, we owe accountability for our activities to the Japanese people.

b. Priority countries and areas

Another major difference is priority countries in the Basic Policy have been changed. In the initial basic policies in 2009, focus was placed on seven countries: Vietnam, Cambodia, Laos, Indonesia, Mongolia, Uzbekistan and China. In contrast, the revised policies state that the selection of target countries and areas should be decided in accordance with needs in not only developing countries but also in the Japanese economic community. Following this policy, Myanmar and Bangladesh have been newly added as priority countries and China has been removed. At present, focus is placed on the eight countries mentioned above.

Upon establishment of a civilian government in Myanmar in 2011, Japan began a new JICA (Japan International Cooperation Agency) project for improving Myanmar's legal system in 2013. In this project, assistance has been provided in the field of legislative-drafting and human resource development, working primarily with the Union Attorney General's Office and the Supreme Court of the Union of Myanmar.

A new initiative was also launched with Bangladesh in 2016. Through local surveys on the law and legal systems in Bangladesh, the ICD organized a joint-study in Japan, inviting officers from the Ministry of Law, Justice and Parliamentary Affairs of Bangladesh and other relevant agencies.

Our assistance is not limited to the priority countries mentioned above. Regarding China and other countries or regions, the revised Basic Policies set forth: "With regard to China, legal cooperation will be continued for promoting the smooth operation of Japanese businesses and for establishing robust governance based on the rule of law in China." It also states: "For the purpose of promoting democracy, establishment of the rule of law, peace-building, improvement of investment environment, cooperation between the public and private sectors, demands for assistance in other Asian countries including Nepal and Timor-Leste, and in African countries will also be considered in accordance with their needs and necessities."

B. The Development Cooperation Charter[3]

As our legal technical assistance activities constitute part of Official Development Assistance (ODA), our activities must also be in line with Japan's ODA Charter. Japan's ODA commemorated the 60th anniversary in 2015, and its ODA Charter (established in 1992 and revised in 2003) was amended in February 2015 as a new Cabinet decision titled "the Development Cooperation

[3] URL:http://www.mofa.go.jp/files/000067701.pdf

Charter." This new charter expressly sets forth the development cooperation policy of Japan, in line with the diversification and complication of global challenges. It lists the following three points as priority issues:

(i) "Quality growth" and poverty eradication through such growth;
(ii) Sharing universal values and realizing a peaceful and secure society;
(iii) Building a sustainable and resilient international community through efforts to address global challenges.

Establishing comprehensive and effective legal and judicial systems is related to each of the above three issues. In particular, in the context of the second issue, the new charter states: "The establishment of the rule of law, the realization of good governance, the promotion and consolidation of democratization, and respect for basic human rights including women's rights constitute the basis for effective, efficient and stable economic and social activities, and thereby support social and economic development. They also hold the key to realizing an equitable and inclusive society including reducing disparities. Japan will thus provide the necessary assistance in such areas as: development of legal and judicial systems that involves the development of positive law and the training of legal and judicial experts."

C. Other Cabinet decisions

As I mentioned in the introduction above, the Prime Minister of Japan, Mr. Shinzo Abe, expressed the importance of legal technical assistance at the Standing Committee on Budget on February 3, 2016. It was an epoch-making comment. He mentioned: "The implementation of legal technical assistance toward foreign countries is an important measure to establish the rule of law in the global community. It not only contributes to the sustainable growth of partner countries but also leads to the improvement of the security and investment environment for Japan. Japan has thus implemented assistance in various forms, including that in the drafting of laws and the capacity-building of legal professionals, primarily in Asian countries. All this has been undertaken based on the Development Cooperation Charter, Strategy Relating Infrastructure Export, and others."

To exemplify the above comments of Prime Minister, since a few years ago, a significant number of annual basic policies or strategies approved by the Cabinet or other government councils have referred to the promotion of legal technical assistance as part of attempts to improve the overseas business environment. In 2016, such a statement was included in "the Basic Policy on Economic and Fiscal Management and Reform (Honebuto no Hoshin - the Big-Boned Policy) 2016[4]," "Japan

[4] URL:http://www5.cao.go.jp/keizai-shimon/kaigi/cabinet/2016/2016_basicpolicies_en.pdf

Revitalization Strategy 2016[5],” “Intellectual Property Strategic Program 2016[6]” and “the Strategy for Infrastructure System Export.”

These statements are not limited in the domestic scene. Japan has underlined its strategy of promoting legal technical assistance in the international arena as well. As an example thereof, in the Seventh Mekong-Japan Summit Meeting held on July 4, 2015, the “New Tokyo Strategy 2015 for Mekong-Japan Cooperation[7]” was adopted, including a statement: “The Mekong region countries highly valued the role of Japan in the development of legal and judicial systems of the Mekong region, such as the development of positive laws (including economic and business law) and the capacity development of legal professionals.” In adopting this strategy, Japan and Mekong region countries (Cambodia, Laos, Myanmar, Thailand and Vietnam) agreed to continue to work on reinforcing the rule of law in the Mekong region.

III. REFLECTION OF POLICIES IN LEGAL TECHNICAL COOPERATION PROJECTS

A JICA Legal Technical Cooperation Project commenced approximately 20 years ago in response to a request from the government of Vietnam. Since that time, Japan’s legal technical assistance has expanded to other countries: Cambodia, Laos, Indonesia, Myanmar, Nepal, and others. Assistance has been provided to countries in transition to market economies or post-conflict countries, with a focus on drafting basic laws or capacity development. Despite significant achievements gained in the recipient countries, which have been made possible through efforts of, and cooperation with, these countries, there is still room for improvement in the legal and judicial fields.

Each technical cooperation project is designed upon agreement between the government of Japan and the government of the partner country, through needs surveys and dialogue. In recent years, however, when designing new or continuing projects, it appears that consideration is being given more than ever to the interest of Japan or Japanese enterprises.

For your reference, I will present one sample case. A new JICA technical cooperation project began with Indonesia in December 2015, titled: “The project on intellectual property rights protection and legal consistency for improving business environment[8].”

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[5] URL:http://www.kantei.go.jp/jp/singi/keizaisaisei/pdf/2016_hombun1_e.pdf
[6] URL:http://www.kantei.go.jp/jp/singi/titeki2/kettei/chizaikeikaku20160509_e.pdf
[7] URL:http://www.mofa.go.jp/s_sa/sea1/page1e_000044.html
[8] For details on this project, see Kosuke YOKOMAKU, Commencement of a New Project in Indonesia – Project on Intellectual Property Rights Protection and Legal Consistency for Improving Business Environment, on pp. 99.

Indonesia, a country with the fourth largest population in the world, has seen a great economic growth recently, attracting many Japanese companies to its market. However, once beginning businesses in Indonesia, these companies are often at odds in the face of unclear statutory provisions or a lack of regulations in implementing laws. The protection of intellectual property rights is also an important factor for inviting foreign investment. To help avoid these business risks and a possible negative impact to the economic growth in Indonesia, the above project has been initiated together with the Ministry of Law and Human Rights and the Supreme Court of Indonesia.

The project for Indonesia aims to improve the business environment not only for Japanese enterprises. Both domestic and international investors and companies will benefit from improved business environment in Indonesia through this project. As part of activities to achieve this goal, the project works on the capacity-building of judges and government officers.

In terms of legal consistency, not only the project in Indonesia but also the project currently ongoing in Vietnam seeks to improve legal consistency through institutional capacity-development[9].

IV. CONCLUSION

As mentioned above, various national policies have referred to the importance of legal technical assistance. This serves as the rationale for pushing our legal cooperation activities forward. Emphasizing the improvement of the business environment is crucial in providing assistance, and the realization of a visible outcome will be required in the near future.

Looking at the reality in recipient countries, however, we see many challenges remaining before building the rule of law. In this regard, establishing fundamental legal and judicial systems, along with human resource development – our primary and traditional activities – will be critical in overcoming such problems from the long-term point of view.

To the above end, and in light of the needs in each recipient country and in consideration of national basic policies and strategies, we must continually pursue better approaches for more effective and efficient legal development of partner countries.

[9] More information is available at http://www.moj.go.jp/content/001179311.pdf

VIETNAM

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International Cooperation Department

I. OUTLINE

1. The Ministry of Justice (MOJ) of Japan, in cooperation with JICA, has provided legal technical assistance to Vietnam since 1996, including assistance in drafting basic laws, human resource development in the legal field, etc. At present, the JICA Project for Harmonized, Practical Legislation and Uniform Application of Law Targeting Year 2010 is continuing on a five-year plan starting in April 2015.

   This project aims at the institutional capacity-development of legal/judicial institutions in accordance with the revised Constitution of Vietnam and state judicial reform strategies. The ultimate goal of which is to rectify and minimize inconsistency among laws, and to realize proper understanding of, and a uniform operation and application of laws. The project works with the Office of Government (OOG), a new counterpart organization, in addition to the conventional ones: the Ministry of Justice (MOJ), Supreme People's Court (SPC), Supreme People's Procuracy (SPP) and the Vietnam Bar Federation (VBF). The OOG is in charge of legislative examination together with the MOJ.

2. As mentioned above, the project aims at the capacity-development of the MOJ and the OOG for legislative examination, in order to minimize and rectify legal inconsistency, as well as to realize a proper understanding of, and uniform operation and application of laws[1].

   Currently in Vietnam, efforts are being made for the establishment and improvement of basic laws, in line with the purport of the new Constitution enacted in 2013. In said project, assistance has been provided toward the enactment and revision of basic laws in the civil and criminal fields. Furthermore, in addition to JICA project activities, the MOJ has provided and shared (within its original framework) Japanese knowledge and experience in the revision of the Penal Code. As a result of these efforts, several basic laws including the Civil Code, Code of Civil Procedure, Code of Criminal Procedure and the Penal Code were enacted and revised by the National Assembly in 2015.

3. At present, five JICA long-term experts: three prosecutors (two of whom were ICD professors and another originally a judge), one attorney-at-law and one project coordinator, are posted in Vietnam.

II. ICD ACTIVITIES IN FY2016

1. Participation in JICA survey team

   In April 2016, a Joint Coordination Committee meeting was held in Hanoi with the participation of an ICD professor and others. In addition, in November 2016 and February 2017, prior to the enactment of property registration law being projected by the MOJ of Vietnam, a local survey was conducted with the participation of ICD professors. The survey was necessary to research the actual status of registration of immovable property, interview relevant organizations, etc.

2. Study trips to Japan

   a. OOG

      In July 2016, a training seminar was held in Japan targeting OOG officers, etc. In this seminar, lectures on the following topics as well as discussions with ICD professors were conducted:

      - Legislative-examination system for maintaining consistency among laws, which are directly related to the OOG;

[1] ICD NEWS 2016 (in English) contains feature articles on the details of the new project.

- Coordination with relevant organizations during the legislative enactment process;
- Strengthening the OOG's leadership.

b. MOJ

In September 2016, a study trip to Japan was conducted inviting MOJ officers, etc. As mentioned above, for future enactment of property registration law, this study trip aimed to inject Japanese knowledge and experience concerning property registration, etc. The curriculum included lectures by Japan's MOJ officers, a former Director of the Legal Affairs Bureau and law professors, as well as observation visits to registration agencies, etc.

c. SPC

In November 2016, a study trip to Japan for SPC officers was organized.

In Vietnam, an agency in charge of special treatment of minors (which is equivalent to the family court in Japan) began operation in April 2016. Accordingly, lectures by former judges, etc. and visits to relevant agencies, were carried out to provide information and knowledge on the family court and the treatment of minors in Japan.

3. Local seminar

A local seminar was conducted, with the participation of ICD professors, for SPC officers, etc. in December 2016, and for officers of the MOJ and the Ministry of Natural Resources and Environment, etc. in February 2017, respectively.

III. FUTURE PLANS

Current project activities will be continued in cooperation with the aforementioned five counterpart organizations. The ICD will continue to extend full support thereto.

In line with the national strategy of Vietnam which considers the year 2020 as the target year to complete legal/judicial reform, the current project is scheduled to finish in March 2020. It is thus necessary, in addition to activities under the current plan, to examine how to construct and maintain relationships with Vietnam in the legal and judicial fields after the completion of the current project.

CAMBODIA

Jun UCHIYAMA
Professor and Government Attorney
International Cooperation Department

I. OUTLINE

In Cambodia, the Japan International Cooperation Agency (JICA) has implemented the Legal and Judicial Development Project (Phase 4) (hereinafter referred to as "the Project"), for five years from April 2012 to March 2017. Thus, fiscal year (FY) 2016 falls into the last year of the project.

The project works together with four organizations in Cambodia: Ministry of Justice (MOJ), Royal Academy for Judicial Profession (RAJP), Bar Association of the Kingdom of Cambodia (BAKC) and the Royal University of Law and Economics (RULE).

The overall purpose of the project is the capacity-development of legal professionals, officials, etc. for proper implementation of the Civil Code and the Code of Civil Procedure, as well as the wide dissemination of the two codes.

Accordingly, four working groups (WG) were formed by the above four organizations respectively tasked with holding study meetings, seminars and other activities to principally discuss and learn the theories and practices of the two codes.

The International Cooperation Department (ICD) has supported the implementation of the project by holding seminars in Japan, by dispatching its professors to Cambodia and through other activities.

In FY2016, four JICA long-term experts (one ICD professor [originally prosecutor], two lawyers and one project coordinator) were posted in Cambodia to engage in the project and support WGs activities on a daily basis. In September 2016, one of the two lawyers finished his term of office, and was replaced by another ICD professor, who was posted as a short-term expert for four months.

II. MAIN ACTIVITIES

1. Dispatch of experts

   The ICD dispatched two prosecutors to Cambodia, one as a long-term expert and another on a short-term basis.

2. Participation in the JICA Survey Team

   ICD professors and officers participated in the following JICA teams.
   - The Project Terminal Evaluation Team in August 2016.
   - Detailed Planning Survey Team for the next project in September 2016.
   - Joint Coordination Committee (JCC) in January 2017.

3. Giving lectures in seminars in Cambodia

   ICD professors gave lecturers in the following seminars held in Phnom Penh.
   - Seminar on the cure of complaint, prohibition of overlapping suits, etc. in August 2016.
   - Seminar on retrial, invalidity and rescission of contracts, etc. in January 2017.
   - Seminar on compulsory execution, preservative relief, etc. in February 2017.

4. Study trip to Japan

   The ICD held the ninth study trip of the Project in October 2016.

   The main contents of the study were:
   - Drafting and reviewing judgments (suits for damages based on torts related to traffic accidents)
   - Courtesy visits to, and exchange of opinions at, the Bar Association of Tochigi Prefecture, Supreme Court, Center of Compulsory Execution in the Tokyo District Court and others.

III. PROSPECTS TOWARDS FY2017

The current project will finish at the end of March 2017 and the next project ("Legal and Judicial Development Project [Phase 5]") will commence in April 2017, to establish the foundation for proper operation of the Civil Code and the Code of Civil Procedure.

The following activities are scheduled for the next project:

- Drafting sample formats of court documents, including complaint, reply, judgment, etc.
- Drafting laws and regulations related to the above two codes, including law on land registration.
- Disclosure of civil judgments and decisions.

The project will work, not only with the Ministry of Justice of Cambodia, the traditional counterpart, but also legal professionals (judges, lawyers), as well as other ministries and agencies including the Ministry of Land Management, Urban Planning and Construction (MLMUPC) and others.

LAOS

Atsushi ITO
Professor and Government Attorney
International Cooperation Department

I. OUTLINE

1. In Laos, following the JICA Project for Human Resource Development in the Legal Sector (Phase 1) (hereinafter referred to as "Phase 1"), which was implemented over the course of four years between July 2010 and July 2014, Phase 2 of the same project (hereinafter "Phase 2") is currently ongoing under a four-year plan.

   Based on the results obtained through the first phase, Phase 2 continues to work with four implementing organizations: Ministry of Justice of Laos, People's Supreme Court, Office of the Supreme People's Prosecutor and the National University of Laos, with the aim to:
   - improve legislative-drafting and legislative-operation/enforcement capacity;
   - improve legal education, training of legal professionals and continuous training in legal

practice; as well as to

- help promote law dissemination and understanding of law.

2. In Phase 2, as well as in Phase 1, four sub-working groups (SWG) have been formed, being composed of officers from the above-mentioned four organizations, to engage in the following activities:
   1) SWG on civil code: To draft systematically organized civil code, in consideration of the actual status of economy in Laos and international standards, as well as to prepare reference materials, etc. for the uniform operation of the code;
   2) SWG on civil and economic law: To prepare reference materials, etc. (so-called "Q&A book") on civil and economic laws (law on economic dispute resolution, labor law, etc.);
   3) SWG on criminal law: To prepare reference materials, etc. ("Q&A book") on the investigation stage in relation to criminal law (penal code, criminal procedure code, law on juvenile case procedures, etc.); and
   4) SWG for education/training improvement: to draft curricula and teaching materials, and improve teaching methods, etc. for the National Institute of Justice.

   In addition to these activities in 1) to 4) above, it is anticipated to use reference materials created through such activities, in improving legal practices and legislative revisions, as well as for legal education and training at the four organizations. At the same time, it is aimed to use these materials in disseminating legal knowledge and promoting understanding of law among government officers and citizens.

II. ACTIVITIES IN FY2016

1. Japanese personnel posted for local activities
   Currently four JICA long-term experts (one prosecutor [ICD professor], two attorneys-at-law, and one coordinator) are engaged in local project activities. At one time five long-term experts (one additional attorney-at-law) were posted in Laos.

2. Activities

1) Dispatch of a JICA survey team
   In May and November 2016, the fourth and fifth Joint Coordination Committee meetings were held, with the participation of several ICD professors.

2) Study trips to Japan

The following study trips were held in Japan by the ICD.

- In the study trip for SWG on civil and economic law in October 2016, discussions were held, in particular, on an economic dispute resolution law currently being drafted, and on a Q&A book on labor law.
- In the study trip on criminal law in November 2016, discussions were held, focusing particularly on the Q&A book on the investigation stage currently being drafted.
- In the study trip on education/training improvement in February 2017, the curriculum included discussions on the creation and use of mock records to be used as teaching materials at the National Institute of Justice, a mock trial, etc.

3) Local seminars

In December 2016, a local seminar will be held for the SWG on education/training improvement in Laos with the participation of an ICD professor.

4) Joint study

In March 2017, a joint study is being conducted in Japan, in cooperation between the ICD and the SWG on civil code, to study the Draft New Civil Code of Laos and relevant laws.

III. FUTURE PLAN

As Phase 2 of the JICA project continues, the same types of activities as in FY2016 will be conducted.

Our assistance activities have been given high marks in Laos, with friendly cooperative relationships with the four implementing organizations. It is our hope to maintain and develop such harmonious relationships to further improve our activities, by finely tuning the contents of study trips, etc. to local needs.

MYANMAR

Kazunori NOSE

Professor and Government Attorney

International Cooperation Department

I. OUTLINE

1. In November 2013, the JICA "Project for Capacity Development of Legal, Judicial and Relevant Sectors in Myanmar" began with the Supreme Court of the Union (hereinafter "SC") and the Union Attorney General's Office (hereinafter "UAGO") as target institutions. The project aims to promote the rule of law, democracy and sustainable economic growth in Myanmar, through the institutional and personnel capacity-building necessary for the establishment and operation of laws. Such laws and legal operation shall match the social and economic situation in Myanmar, as well as international standards.

2. The project consists of two pillars: 1) strengthening the capacity to address urgent legislative challenges facing Myanmar; and 2) building the foundation for human resource development of judges and prosecutors belonging to the target institutions.

3. The initial project period was for three years. However, in March 2016, an agreement was reached with both target agencies to extend the period from three to five years, until the end of May 2018.

Myanmar is still in the process of democratization and the nation's needs may change in the future. The project thus does not limit the area of cooperation to be able to address any legal areas.

4. In the fiscal year 2016, cooperation has been extended in relation to the trial proceedings of intellectual property (IP) cases, insolvency law and the mediation system. Below is a list of ICD's activities for Myanmar in FY2016 in a chronological order.

II. MAIN ACTIVITIES

1. Local seminar on the IP trial system (in May)
   A local seminar was held on the IP trial system, targeting SC officers, etc. IP advisory group members and attorneys of the Japan Federation of Bar Associations were invited to Myanmar to give lectures.

2. Study trip to Japan (in June)
   A study trip to Japan was organized on insolvency law, with the participation of officers from the two targeting agencies, as well as members of the Assembly of the Union (one from the Upper House and the Lower House each).

3. Local seminar on the mediation system (in July)
   According to the action plan included in the Judiciary Strategic Plan formulated by the SC, the feasibility of civil mediation was to be examined and researched. In this regard, a local seminar was conducted to discuss what cooperation could be expected from Japan.

4. Local seminar on IP trial system (in August)
   Discussions were held on the arrangement of points-at-issue of the IP trial system and creation of summary paper thereof, as well as the composition of a textbook for newly-appointed judges.

5. Local seminar on insolvency law (in November)
   A local seminar was held on basic issues of the Insolvency Law for officers of the SC. A law professor invited from Japan gave lectures.

6. Study trip to Japan (in November)
   A study trip was organized on mediation, inviting not only officers of the two targeting

institutions but also Union Assembly members (one from the Upper and Lower Houses each) as well as officers from the Ministry of Labour, Immigration and Population.

7. Local seminar on the IP trial system (in February 2017)
   On the basis of the two local seminars held in May and August 2016, discussions were held on the composition of a textbook on, and arrangement of points-at-issue in, the IP trial system.

8. Study trip to Japan (in February 2017)
   On the basis of the study trip held in June 2016, more detailed drafting work was conducted on the Insolvency Law.

9. Joint Coordination Committee (JCC) meeting (in March 2017)
   A JCC meeting is being held to discuss an activity plan for FY2017.

III. PROSPECTS TOWARDS FY2017

The same types of activities as those conducted in FY2016 are being planned for FY2017, as the current project phase will continue. In addition, cooperation in the field of contract examination is scheduled, as well as promoting coordination with other international donors.

INDONESIA

Masanori ISHIDA

Professor and Government Attorney

International Cooperation Department

I. OUTLINE

1. The International Cooperation Department (ICD) has provided legal technical assistance to Indonesia in various forms since 2002. In the new JICA Project on Intellectual Property Rights Protection and Legal Consistency for Improving Business Environment (hereinafter "the project") as well , which has been ongoing since December 2015, the ICD extends full support, together with the Japan Patent Office.

   The project works on a five-year plan with three implementing institutions in Indonesia: the Supreme Court (SC), Directorate General of Legislation (DGL) and the Directorate General of Intellectual Property (DGIP) of the Ministry of Law and Human Rights. The ultimate goal of the project is to establish a system to maintain the legal consistency of intellectual property (IP) laws, as well as to strengthen the IP protection system.

2. A working group has been formed by the SC and DGL each, composed of officers of these institutions. The working groups are engaged in the revision of training materials for judges in charge of IP cases, revision of Law No.12, 2011, which provides for legislative procedures, etc.

II. ACTIVITIES IN FY2016

1. Local cooperation personnel

   Four JICA long-term experts: two public prosecutors (one of whom was originally a judge), an officer from the Japan Patent Office, and one coordinator, have been posted in Indonesia.

2. Activities

a. Joint studies and study trips to Japan

   The ICD organized a joint study in Japan inviting DGL executive officers in May 2016. Moreover, JICA study trips to Japan were organized in July of the same year for officers of the SC, DGL and DGIP, in October 2016 for officers of the SC and DGL, and in February 2017 for officers of the DGL. The participants learnt the legislative process in Japan, as well as the local autonomy system, etc.

b. Participation in the JICA Survey Team, etc.

   The ICD also conducted other activities as follows:

   - Held a discussion with DGL executive officers in June 2016;
   - Participated in an international symposium organized by the DGL and others;
   - Visited Indonesia as part of the JICA Survey Team to participate in the first Joint Coordination Committee meeting, local seminar, etc.

III. FUTURE PLANS

The project is a five-year plan, and therefore the same types of activities as those of this fiscal year are planned for FY2017.

As it has been a short period of time since the commencement of the new project, detailed contents of activities are still to be revealed. The ICD hopes to develop activities which accommodate needs of Indonesia, by maintaining close relationships with relevant authorities in the country.

NEPAL

Kei HIROTA

Professor and Government Attorney

International Cooperation Department

I. HISTORY AND OUTLINE OF LEGAL TECHNICAL ASSISTANCE TO NEPAL

1. In Nepal, after a decade-long civil war, the monarchy was abolished in May 2008, declaring a transition to the federal democratic republic system. Thereafter, in parallel to the constitution-enactment process by the Constituent Assembly, efforts have been made for the modernization of legal systems through a drastic legal reform. Such efforts included dividing and re-compiling of the "Mulki Ain" (a basic code which covers four legal areas of civil substance law, civil procedural law, criminal substance law and criminal procedural law), which has been and is still effective since enactment in the 19th century.

2. In Nepal, issues of delays in litigation proceedings and "non-punishment" (criminals remain at large without being properly punished) have eroded the population's trust in justice, posing a great challenge in improving case management. In addition, there are high expectations for the use of judicial mediation for improving the dispute-resolution capacity of courts. However, an insufficient understanding of the system and a lack of capacity of mediators have been barriers in promoting the use of judicial mediation.

3. In light of the above, the government of Nepal requested assistance from Japan for strengthening the capacity of case disposition and management, and dispute-resolution capacity of courts through promotion of the use of judicial mediation. In response to this, the Japan International Cooperation Agency (JICA) implemented a "Project for Strengthening the Capacity of Court for Expeditious and Reliable Dispute Settlement" on a plan of three years and seven months beginning in September 2013.

4. Said project has the following objectives:
   - to improve the case management system and its operation, and thereby to improve the capacity of judges and court officials for case management;
   - to promote proper dispute resolution through mediation, and improve the capacity of courts for expeditious and trustworthy dispute settlement.

   The above will be achieved through:
   - creation of improvement methods of the civil/criminal case management system;
   - creation of teaching materials, etc. for introduction and dissemination of the above:
   - creation of teaching materials, etc. which are necessary in promoting dispute resolution through judicial mediation.

II. ICD ACTIVITIES IN FY2016

1. Local assistance structure

   Three JICA long-term experts (two attorneys-at-law and one coordinator) have been posted in Nepal.

2. Details of activities

a. Participation in a JICA Survey Team

   In September 2016, a project final evaluation survey was conducted by JICA, in which an ICD professor also participated.

b. Study trips to Japan

   The ICD cooperated in the organization of study trips to Japan in July and December 2016. In each trip, the ICD provided information on Japan's case management system including the arrangement procedure of points-at-issue and evidence in civil/criminal proceedings, mediation system, etc.

3. Local survey

   From December 14 – 21, 2016, an ICD professor and two professors from UNAFEI (United

Nations Asia and Far East Institute for the Prevention of Crime and the Treatment of Offenders) visited Nepal to become familiar with the actual situation of, and challenges in, court practices in Nepal. To this end, a survey was conducted on:

- the efforts being made for the simplification of charging sheets; and
- the issues of the analysis, evaluation, etc. of evidence, which constitute part of the causes of delays in litigation proceedings in Nepal.

III. FUTURE PLANS

Though the project currently in progress is scheduled to finish in March 2017, its period will be extended as necessary to achieve hoped-for results.

TIMOR-LESTE

Hiromichi ONISHI
Professor
International Cooperation Department

I. OUTLINE

1. The Democratic Republic of Timor-Leste (hereinafter "Timor-Leste"), the first new sovereign state in the 21st century, after official independence in 2002, has advanced nation-building with assistance from various countries and international organizations. Currently, based on the "Justice Sector Strategic Plan for Timor-Leste 2011-2030," it is undertaking the development of legal/judicial systems, capacity-building of legal professionals, etc.

   Due to a lack of a foundation for institution-building, human resources, information, experience, etc., the country finds itself compelled to rely on assistance from donor countries and organizations in a large part of such endeavors. Such assistance includes support in legislative work by foreign advisors, human resource development of legal professionals through lectures by foreign experts, establishment of litigation procedures, etc.

2. Japan has provided legal technical assistance to Timor-Leste since 2009 within the framework of the Japan International Cooperation Agency (JICA) and the original initiative of the International Cooperation Department (ICD) of the Research and Training Institute, Ministry

of Justice (MOJ). Targeting executive officers of the National Directorate of Legal Advice and Legislation of the MOJ of Timor-Leste etc., Japan aims to improve the legislative-drafting capacity through support in drafting individual laws, in accordance with priorities of, and requests from Timor-Leste. To date, Japanese assistance has dealt with the Law of Extradition, Drug Crime Control Law, Juvenile Justice Law, Mediation Law, etc. As a result, steady results have been achieved:

- A portion of the laws covered by Japanese assistance have been enacted;
- The MOJ has gained basic knowledge of legislative procedures, applying it in drafting individual laws.

II. ACTIVITIES IN FY2016

1. Local survey

   In August 2016, the director and officers of the ICD visited Timor-Leste to:

   1) conduct a local survey in preparation for a joint study of legal systems in Japan, as well as for a local seminar to be held thereafter (see 2. and 3. below).
   2) hold discussions with relevant agencies concerning future cooperation activities.

2. Joint study of legal systems

   From February to March 2017, high-ranking officers of the MOJ visited Japan to hold a joint study of legal systems, with a focus on the Civil Registration Law, Civil Code in relation to marriage and family law, etc.

3. Local seminar and local survey

   In March 2017, ICD professors and an officer will visit Timor-Leste to conduct a seminar on the laws for which assistance has been provided to date, etc. as well as a local survey and discussions with relevant organizations on future activities.

III. FUTURE PLANS

Whether the rule of law takes roots in Timor-Leste may depend on the future development of the nation. Furthermore, it is urgently required to draft and develop basic laws, which are necessary for the establishment of the rule of law, including laws in relation to dispute resolution, civil registration, immovable property, etc. The MOJ of Timor-Leste is thus currently examining the formulation of these laws. At this stage, an effective and strategic legal technical assistance may

contribute to the establishment of the rule of law in Timor-Leste.

We hope to continue to proactively promote assistance to Timor-Leste, with a focus on basic and important laws, in order to improve its legislative-drafting capacity.

KOREA

Hiromichi ONISHI

Professor

International Cooperation Department

I. OUTLINE OF JUDICIAL COOPERATION ACTIVITIES WITH KOREA

1. The Republic of Korea (hereinafter "Korea") has maintained a close relationship and exchanges with Japan since ancient times, with a legal system similar to Japan's. Against this background, comparative studies of legal systems in both countries may mutually contribute to the development of legal systems and improvement of legal practices. It is also important to build and maintain a bilateral cooperative relationship in the judicial field as well.

   The International Cooperation Department (ICD) of the Research and Training Institute of the Ministry of Justice of Japan, as a part of judicial cooperation activities with Korea, has organized a Japan-Korea Partnership Joint Study with the Training Institute for Court Officials of the Supreme Court of Korea since 1999. This joint study has been co-hosted by the International Civil and Commercial Law Centre Foundation (ICCLC), a public utility foundation.

2. The Japan-Korea Partnership Joint Study aims to help develop legal systems and improve legal practices in both countries, as well as cultivate bilateral partnership, using knowledge

deepened through comparative joint studies. These joint studies are attended by legal officers from both countries to mutually examine problems in civil-law systems and practices.

Participants are composed of Japanese officials from the Ministry of Justice, legal affairs bureaus and courts, as well as Korean court officers. Two sessions are held annually: one in each country. Participants mutually visit each other's country to research and study (through lectures, observation visits, studies of legal practices, etc.) the immovable registration system, commercial registration system, family registration system, deposit system and civil execution system (studies of the family registration system and deposit system are conducted every other year). Study results are compiled and published in book form as reference materials.

3. In the fiscal year 2016, the 17th partnership program was organized in which the Japan session was held in June, and the Korea session in October. Active studies and exchange of opinions were conducted by participants from both countries, concerning institutional and practical issues in the immovable registration system, commercial registration system, family registration system and civil execution system.

II. ACTIVITIES IN FY2016

1. Japan Session

a. Lectures

Lectures were given on the civil execution system and immovable registration system of Japan under the titles: "The civil execution system and recent problems in practice surrounding the civil execution system in Japan" and "The 150-year history of the immovable registration system."

b. Observation visits

The participants paid visits to the Supreme Court, Tokyo District Court and the Saitama District Legal Affairs Bureau, to receive explanations on the outline of their duties and observe the facilities.

c. Studies of legal practices and presentations thereon

Each of the five Korean participants conducted studies through questions to their Japanese partners, etc. and made presentations, on the themes:

- "Registration of the right of lease,"
- "Registration of preservation of ownership of unregistered land,"
- "Study of the birth registration system in cases of 'unknown mother,'"
- "Possibility of proceeding with auctions of undivided store (open-area store)," and;

- "Study of provisional registration of trade names."

2. Korea Session

a. Lectures

Lectures were given on the family-relations registration system of Korean citizens living abroad, and residents' registration system under the titles: "The status quo and prospects of the family-relations registration office for Korean nationals abroad," and "the residents' registration system in Korea."

b. Observation visits

The participants paid visits to the Supreme Court, Seoul Central District Court, the Family Relations Registration Office for Korean Nationals Abroad of the Supreme Court and the IT Center in Bundang-gu, to receive explanations on the outline of their duties and observe the facilities.

c. Studies of legal practices and general presentations thereon

Each of the five Japanese participants conducted studies through questions to their Korean partners, and made presentations, on the themes:

- "Consideration on how to make the immovable registration system trustworthy by citizens – solution of problems in cases of unknown owners and improvement of information";
- "Land which owner is difficult to be located – with a focus on the status quo of land with unregistered inheritance thereof and measures to promote registration of inherited land";
- "Measures to secure authenticity of entries in family registrations – with a focus on personal identification at the time of registration to establish personal status, and examination on the substance of registration";
- "Consideration on the securement of the authenticity, and simplification and expedition of commercial registration"; and
- "Improvement of the effectiveness of the debtors' assets disclosure system."

III. FUTURE PLANS

Maintaining cooperative relationships in the judicial field between Japan and Korea is important for the development and strengthening of bilateral relationships. As such, it has been meaningful for the judicial institutions in both countries to have conducted partnership joint studies as much as 17 times.

We will make efforts to improve the contents of joint studies and further develop the partnership program to make it more meaningful.

At the same time, it is our sincere hope to strengthen the already existing judicial cooperative relationship between our two countries, in addition to this partnership program.