Chapter 4 Competition

4.1 Current Situation of Affairs Concerning Competition Laws and Policies

(1) Summary of competition laws and policies

While countries do not always agree on the purpose of competition law, their competition laws can be broadly classified as having either an economic or an uneconomic approach.[25] The economic approach aims only to maximize the efficiency of the economy and does not consider such sociopolitical standards as fairness and equality. The uneconomic approach, while it considers the economic values, emphasizes values reflecting the culture, history, systems, etc., of each country. Competition laws formulated using the uneconomic approach thus support multiple values. The purpose of Japan's Antimonopoly Act is defined as "to promote free and fair competition" (Article 1), which is an economic approach.[26] Which approach is taken, the purpose of competition law and policy clearly includes the essence of promoting market competition and thereby enhancing economic efficiency. In this sense, it can be said that establishing a framework for competition law and policy is tantamount to establishing an infrastructure to strengthen the competitiveness of domestic industries.

Although there is considerable variation in the forms of business that countries restrict by their competition laws, advanced countries today generally consider the following three business forms as major ones that should be controlled by competition law.

1) Restrictive business practices

Restrictive business practices refer to arrangements among enterprises that are intended to curb competition. They are of two types: horizontal arrangements among competing enterprises, and vertical arrangements among upstream and downstream enterprises such as a materials vendor, a manufacturer, and a retailer. Horizontal arrangements include price fixing, quantitative allocations, and market sharing agreements. Bid rigging is also included. Vertical arrangements include re-sale price maintaining agreements, agreements on exclusive distribution by geographic area or customer, exclusive dealing agreements, etc.

2) Monopolization or abuse of dominance

Monopolization or abuse of dominance refers to unfair competition by enterprises that have a monopolistic or dominant share in a market. It includes price discrimination, exclusive dealing agreements, and compulsion or refusal to deal.

3) Concentrations and mergers

Concentrations and mergers are consolidations of in-house sections between competing enterprises or the mergers of competing enterprises. These acts are subject to

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[25] World Bank/OECD, *A Framework for the Design and Implementation of Competition Law and Policy*, 1998, p.2.

[26] Shigekazu Imamura, *Introduction to Antimonopoly Law (Dokusen-kinshi-ho Nyumon)* (Fourth Edition), Yuhikaku, 1993. There is also a prevailing view that sees the ultimate purpose of the law in a statement in a later paragraph in its Article 1, "to promote the democratic and wholesome development of the national economy as well as to ensure the interests of consumers in general." (Hiroshi Iyori, "Chapter 1: What is the Antimonopoly Law? (Dokusen-kinshi-ho to wa Nanika)," in Hiroshi Iyori and Jotaro Yabe eds., *Theory and Practical Affairs of the Antimonopoly Law (Dokusen-kinshi-ho no Riron to Jitsumu)*, Seirin-shoin, 2000.) It appears that these arguments about the purpose of the Antimonopoly Law have been influenced by the relationship between industrial policy and competition policy in postwar Japan. For a history of Japan's Antimonopoly Law, see Shin Kisugi, "Chapter 2: Historical Overview of Japan's Competition Policy (Nihon no Kyoso-seisaku no Rekishiteki Gaikan) (1)" and "Chapter 3: Historical Overview of Japan's Competition Policy (2), in Akira Goto and Kotaro Suzumura eds., *Japan's Industrial Policy (Nihon no Sangyo-seisaku)*, Tokyo-daigaku-shuppankai, 1999.

control by law when such consolidations and mergers result in larger market share, thus reducing competition.

In addition, separate from their systems of competition law, major advanced countries usually use another law to restrict unfair competition, which is also part of their competition policy.[27] Unfair competition, which impedes fair competition among enterprises, includes infringement on trademark rights and slander and slur against competitors. It does not refer to an act to limit, reduce, or eliminate competition that is subject to competition law. However, the competition law and the law on unfair competition work together to ensure a competitive environment[28] and therefore the latter should also be considered part of competition policy.[29] In fact, there are some Asian countries whose competition laws cover unfair competition as well. Also, a study by APEC[30] on competition law and model competition laws by the World Bank / OECD[31] and UNCTAD[32] accept that the restriction of unfair competition is a part of competition law. Moreover, in China and some other countries that have no competition laws but do have laws against unfair competition, controlling unfair competition is a primary part of their competition policy.

Traditionally, competition laws and policies exclusively targeted domestic enterprises and markets. Only the United States actively applied the Antitrust Law outside its territory from the 1950s into 1960s because it has followed the effect doctrine as far as jurisdiction of the Antitrust Law is concerned after the appellate court ruling on the Alcore case in 1945. In those days, however, the Department of Justice in the U.S. primarily investigated cases like international cartels, in which foreign enterprises performed acts of anti-competition that affected the U.S. market. In this respect, it can be said that the aim of the extraterritorial enforcement of the Antitrust Law was to promote competition within the U.S.[33] In addition, since other countries lagged behind the U.S. in establishing competition laws, the U.S. authorities could be seen as exerting their control over unfair competition outside its borders, which is today controlled by the country in which the illegal enterprise operates. In fact, in the 1970s, as other advanced countries established competition laws and developed their enforcement capabilities, the U.S. increasingly reduced its extraterritorial enforcement of the Antitrust Law.[34] From this perspective, the purpose of competition law and policy until the mid 1980s was basically to promote domestic competition.

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[27] In Japan, unfair competition is regulated by the Unfair Competition Prevention Law.

[28] The complementary relationship between Japan's Antimonopoly Law and Unfair Competition Prevention Law is described in Tetsu Negishi, "Chapter 5: Antimonopoly Act and Unfair Competition Prevention Law (Dokusen-kinshi-ho to Fuseikyoso-boushi-ho)" in Akira Kaneko, Akira Negishi, and Tokutaro Sato eds., Fairness Kenkyukai, *Enterprises and Fairness - Principle of Structure and Competition (Kigyo to Feanesu – Kosei to Kyoso no Genri)*, Sinzansha, 2000.

[29] Protection of trademark rights, regulations on false and misleading advertising, etc., help enterprises to establish their brands and thereby enhance their competitive edge. Thus, these can be included in part of competition policy.

[30] APEC. *Study on Competition Laws for Developing Countries*. 1999

[31] See Footnote 25. p.147. Please note, however, that it says countries could address the issue of unfair competition in their general consumer protection laws instead of their competition laws.

[32] UNCTAD. *Model Law on Competition: Draft commentaries to possible elements for articles of a model law or laws*. 2000. p.30. Please note, however, that it says the present trend in counries adopting competition legislation seems to be the adoption of two separate laws, that is, competition law and consumer protection law.

[33] Masahiro Murakami, "Chapter 1: International Coordination of Competition Law (Kyoso-ho no Kokusaiteki-chosei)," in Kazumasa Iwata and Mitsuhiro Fukao eds., *International Coordination of Economic System (Keizai-seido no Kokusaiteki-chosei)*, Nihon Keizai Shimbunsha, 1995.

[34] Akinori Uesugi, "Chapter 8: International Corporate Activities and Antimonopoly Law (Kokusaiteki-na Kigyo-katsudo to Dokusen-kinshi-ho)," in Hiroshi Iyori and Jotaro Yabe eds., *Theory and Practical Affairs of the Antimonopoly Law (Dokusen-kinshi-ho no Riron to Jitsumu)*, Seirin-shoin, 2000.

(2) International trends in competition laws and policies

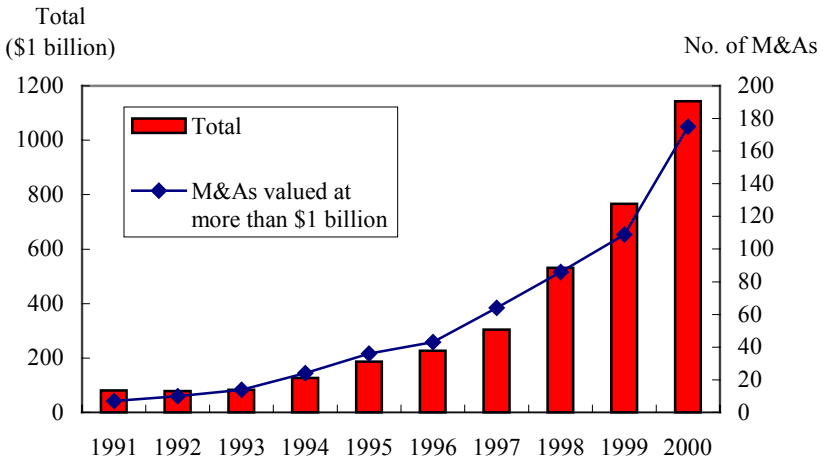
1) Changing Situation

In the 1980s, with the advance of deregulation in the business and investment sectors, countries became ever more interdependent in their economic activities and enterprises expanded their overseas activities. This trend brought the countries' attention to the international aspects of competition law that provided equal competition opportunities to enterprises operating overseas. The U.S., for example, in the late 1980s, refocused its attention on the persistent failure of its trading partners to improve market accessibility, which led to intensified discussions on the exterritorial enforcement of the Antitrust Law. Furthermore, the 1990s saw the spread of the global market economy, further expanding the overseas activities of enterprises and creating opportunities for anti-competition that was beyond the ability of each country to control. This has increasingly enhanced the need for global cooperation.

For instance, international cartels, which involve more than one country, consequently have a serious impact on the trade activities of the countries involved and hamper competition in their markets. However, cartels are formed by multiple enterprises, which makes it difficult to collect evidence of illegal acts. For this and other reasons the authorities in each affected country may find it difficult to deal with these illegal acts by themselves.

Moreover, the world began to see a growing number of aggressive international mergers and acquisitions and business tie-ups aimed at acquiring a strong business base in various countries and regions (Fig. 4-1). These international M&As and other activities go through a process of authorization in more than one country, which makes the authorization procedures complex. Different countries may also make different decisions due to the difficulty of acquiring evidence or other necessary information from the other countries.

These circumstances led countries to realize the limits of their ability to handle anti-competition individually, and the world grew to understand the importance of establishing competition laws and having appropriate authorities collaborate worldwide on matters regarding competition.



Sources: 2000 and 2001 versions of "World Investment Report," UNCTAD

Fig. 4-1 Trends in cross-border M&As

2) International trends in establishing legal infrastructure

The EC Competition Law established rules for business activities in the gigantic EC market in the 1980s. This, accompanied with the development of the U.S. Antitrust Law, furthered recognition of the importance of competition law among advanced countries. In the 1990s, the major advanced countries began coordinating their competition laws through bilateral cooperation agreements, etc. Such bilateral cooperation agreements also included the establishment of collaborative systems, such as positive comity, notification, consultation, and cooperation in enforcement, for efficiently solving cases having jurisdictions spanning more than one country.[35] In recent years, there have been≈ some cases that the authorities of the countries concerned jointly investigated[36]

The advanced countries now fully recognize the importance of competition law and policy, so the World Bank and the IMF have begun advising developing countries to formulate competition law and policy. The World Bank helps them to enact and revise laws regulating competition, and to establish a competition authority, paying attention to the likelihood of obstructions by the governments to market access, acts by state-owned enterprises and conglomerates that restrict competition, and anti-competitive behaviors by multinational enterprises. The World Bank worked with the OECD in 1998 to compile a paper on a framework for competition law and policy.[37] As a conditionality of its loans, the IMF also requires its recipient countries to establish competition laws and policies in order to eliminate state-backed monopolies and cartels and crony capitalism. These moves gained momentum after the Asian crisis, when countries realized that the lack of a competitive environment had helped to create inefficient markets and worsened their economic situations.

Since the GATT, predecessor to the WTO, targeted trade barriers by the governments of its signatories, there are no WTO agreements that directly address the restraint of private competition.[38] With the further advance of free trade, however, there was growing recognition that anti-competitive activities by private enterprises have a negative impact, contrary to the benefits that free trade brings about. This brought to the WTO's attention the need to prevent such activities. This led to the set up of the "Working Group on Trade and Competition Policy" by the WTO in 1997, where the members discuss whether or not to apply the WTO's basic principles, such as the equal treatment of foreign and domestic enterprises, transparency, and "most favored nation" status, to the area of competition policy. They also studied the modality of international cooperation, technical assistance for building capacity in developing countries, and other matters. However, they have not yet decided to establish a multilateral framework for legal provisions in the area of competition.

(3) Implications for developing countries

As the above trends spread worldwide, developing countries are beginning to recognize the need to introduce laws and policies to regulate competition.

Introducing such laws and policies in developing countries can strengthen the competitiveness of their industries through (a) ensured market efficiency by promoting a

[35] Masahiro Murakami, "Bilateral Agreement and International Enforcement System concerning Competition Law," in The Japan Association of International Economic Law, *Annual Report No.9: Issues in International Assistance and Cooperation (Kokusai-kyojo no Shomondai)*, Horitsu Bunkasha, 2000.

[36] For example, the U.S. Department of Justice and the EC Committee jointly investigated the Microsoft case.

[37] World Bank/OECD, Ibid., 1998.

[38] The current WTO agreements can be applied to cases where a country's products cannot be sold in foreign markets due to the discriminatory application of competition policy by governments in foreign countries against products from outside their borders. Sadao Nagaoka, "Chapter 11: Globalization and Competition Policy" (Edited by Akira Goto and Kotaro Suzumura "Japan's Competition Policy"/Tokyo Daigaku Shuppan 1999)

competitive environment and eliminating unfair competition, and (b) promoting domestic brands by protecting trademark rights, eliminating false labeling/markings, and other measures. However, due to the priority given to the policy of protecting and fostering domestic businesses, some developing countries have no competition laws or policies, even though they have laws to regulate unfair competition. Some countries have established such laws and policies but need to improve their capacity to enforce them.

Normally, however, developing countries that do not have competition laws or the capacity to enforce them tend to be damaged the most by cross-border anti-competition in this global economy because multilateral enterprises tend to form cartels and commit other anti-competitive activities in those countries. Against this backdrop, developing countries are beginning to understand that, in a global economy, the principles of competition, rather than protectionism, will strengthen their domestic businesses. In particular, countries in Southeast Asia have learned the lesson of the economic crisis in late 1990s and are increasingly aware of the importance of market functions.

In light of the above, developing countries should establish legal infrastructures for competition in order to deal with anti-competitive activities committed by multilateral and other enterprises, and to protect and foster their industries without resorting to protective measures in the new international environment. There is also a growing need for international cooperation among the appropriate authorities.

4.2 Current Situation and Problems in Asian Countries

(1) Establishing legal infrastructures for competition, and issues

The first boom in introducing competition laws in Asia lasted from the late 1960s to the 1970s, when developing countries attempted to tighten their control over multinational enterprises and local conglomerates. This effort was aimed not at promoting competition but at regulating unfair benefits that these enterprises and conglomerates obtained under the favor of price controls and other government interventions.

Later, experiencing high economic growth in the 1980s and the growth of the global economy in the 1990s, the ASEAN members were made increasingly aware of the need for laws regulating competition. This was helped also by active efforts by various world bodies including the UNCTAD, World Bank, and the OECD. After suffering from the 1997 Asian crisis, Thailand and Indonesia both enacted comprehensive laws regulating competition in 1999. Behind this movement was the recognition among international organizations that the lack of a competitive environment, due to the dominance of state-run enterprises and conglomerates, had helped to trigger the Asian crisis and that modern competition laws would be one means of helping the affected nations to overcome their economic plights.

[BOX 4-1] Competition Law in Thailand

The "Price Fixing and Anti-monopoly Act", enacted in 1979, is considered to be Thailand's first legal system to control competition. Consisting of two parts—price controls and the prohibition of monopolies—this act was intended to control prices while preventing dominant companies from profiting unfairly from the price controls. However, it was paradoxical to attempt to curb the ill effects of price controls by a law that regulated competition without regulating price controls directly. In fact, during the 20 years in which the law was in effect, the government applied it to only a few cartels.

In the period of rapid economic growth and deregulation following the late 1980s, the government of Thailand recognized the limitations of regulations based mainly on price controls, and in the 1990s, started formulating market-oriented laws to regulate competition. These efforts were accelerated by the Asian crisis and led to enactment of the "Business Competition Law" in March 1999. This comprehensive law covers the full range of major restrictions, including restrictive business practices, abuse of a predominant position in the market, and business amalgamations. To enforce the new law, a new committee on business competition was set up and empowered to make decisions on a wide range of matters, e.g., the criteria for market dominance or the range of business amalgamations that were permitted. However, the committee is under supervision of the Department of Commerce in charge of formulating an industrial policy for the country, and this has raised concerns about the department's influence over the committee. It is thus necessary to provide detailed regulations for the law's enforcement to ensure more transparency, which is underway at the present time.

Source: Noboru Honjo, "Chapter 1: Shift to Market Economy and Competition Law in Asia" in Masayuki Kobayashi ed., *Shift to Market Economy and Social Law in Asian Countries (Ajia-shokoku no Shijo-keizai-ka to Shakai-ho)*, The Institute of Developing Economies, 2000.

[BOX 4-2] Competition Law in Indonesia

Before 1999, Indonesia had in place a variety of laws and regulations to promote competition. However these laws and regulations were not fully enforced and the government's repeated interventions distorted the market, which resulted in rampant acts of unfair competition. When the Asian crisis struck, as a conditionality for assistance, the IMF demanded that a competition law be enacted to prevent these activities. This led in 1999 to the enactment of the "Law Concerning Prohibition of Monopolistic Practices and Unfair Business Competition".

As a comprehensive competition law, this law provides a complete set of major restrictive rules. Before the bill was passed, however, there was an intense conflict between the Parliament, which was pursuing an ideal, and the Department of Commerce, which sought to protect the interests of the economic sector. As a result, the law has assumed a very peculiar nature. First, although in advanced countries any core cartel in itself is illegal, the Indonesian law restricts only a cartel's abusive activities except price cartels and boycotts that are per se illegal. Conversely, in advanced countries, a vertical restrictive business that is not a core cartel is not restricted so long as it has no abusive activities, while Indonesia prohibits such acts. Second, the Indonesian law has been strongly influenced by Continental European Law and its provisions are very strict and idealistic. At the same time, the Indonesian competition law allows a broad range of exemptions and exceptions and grants the enforcement authorities very great latitude in applying their powers. Under these circumstances, it is hoped that establishing detailed rules for its enforcement will prevent the law from being arbitrarily applied.

Source: Kaneko, ibid., 2002.

The two comprehensive competition laws described above have had an impact on neighboring countries. Some countries have been moved to consider adopting their own comprehensive competition laws (Table 4-1). China and Vietnam, which are currently

negotiating to enter the WTO, are earnestly studying such laws. During the Asian crisis, the Malaysian government started to follow an economic policy of state control, but now a working committee is reviewing a draft of a competition law.[39] In the Philippines also, there is a growing call for competition laws, and the government has launched a study, including a review of existing codes governing competition, with the assistance of the advanced countries and international bodies.

The contents and methods of Asian competition-related laws differ from those in the competition laws of the advanced countries. For instance, the conditions of illegality in the area of competition may differ among Asian countries. As mentioned above, in advanced countries core cartels are inherently illegal but the Indonesian competition law only restricts the abusive acts of cartels with the exception of price cartels and boycotts. In the Philippines, the Price Act of 1991 specified cartels as illegal as far as the necessities of life are concerned, though some specialists view the act as simply the government's attempt to create an effective price control system. In China, some administrative agencies engage in profit-making activities, and in this unique context—a market economy-oriented socialist country—the "Law Countering Unfair Competition" prohibits administrative agencies from forming monopolies or restricting competition from private businesses. This concept of preventing abuse by administrative agencies is also embodied in the draft of a comprehensive competition law now under study.

[39] http://www.apec-iap.org/document/MAS_2001_IAP.htm

Table 4.1Competition Laws in Asia

	Laws relating to competition	Prohibited practices				Authorities
		Restrictive business practices	Monopolies or abuse of market dominance	Concentrations of business and mergers	Illegal (unfair) competition (note 1)	
Thailand	Business Competition Law (1999)	○	○	○	(○)	Business Competition Committee
Indonesia	Law Concerning Prohibition of Monopolistic Practices and Unfair Business Competition (1999)	○	○	○	(○)	Business Competition Supervisory Committee
Malaysia	Communications and Multimedia Act (1998)	△ (communications and multi-media sector only)	△ (communications and multi-media sector only)		(○)	Communications and Multimedia Commission
	<Trade Practices (Fair Competition) Bill (draft) (1996)>	<○>	<○>	<○>	<○>	<Trade Practices Commission>
Philippines	An Act to Prohibit Monopolies and Combinations in Restraint of Trade (1925) (note 2) Price Act (1991)	○	○	○	△ (prohibits price controls only for necessities)	Department of Justice
China	Law for Countering Unfair Competition (1993) Price Law (1998)				○	State Administration on Industry and Commerce, State Development Planning Commission, etc.
	Anti-trust Law (draft) (2000)	<○>	<○>	<○>		<An anti-trust agency will be founded>
Vietnam	<Competition Law (draft) (2001)>	<○>	<○>	<○>	<○>	

Notes: 1. Items marked by (○) are separately covered by the Consumer Protection Act.
2. Clauses providing substantive regulations were transferred to Article 186 of the Revised Penal Code in 1957 and those that only establish procedures still remain.

[BOX 4-3] Competition Law in Malaysia

Based on a 1992 report on competition policy, the Malaysian government started work on a Draft of Trade Practices Bill, but no comprehensive law regulating competition has been formulated thus far. In the wake of the Asian crisis, Malaysia took a different course from Thailand and Indonesia. The government rejected the deregulation-based economic structural reforms recommended by the IMF and other international bodies and instead, tightened its grip on the unique state control-oriented economy.

The Consumer Protection Act enacted in 1999 contains provisions to restrict false labeling/markings and unfair trade. However, it basically aims to protect consumers and thus differs from competition law, which is primarily intended to encourage competition among enterprises. The 1965 Companies Act includes Article 179, which regulates takeovers and mergers. This act, however, focuses on the disclosure of information and other matters, basically from the viewpoint of protecting the gains of general investors, and thus differs greatly from the concept of promoting competition.

The only law in Malaysia with provisions to promote competition today is the Communications and Multimedia Act that was enacted in 1998. The act has a complete set of regulations covering the entire communications and information sector in the country. These regulations are designed to nurture the domestic communications and multimedia industry. Unlike previous restrictive laws, the act actively endorses transparency and clarity and promotes competition and deregulation by means of an extensive ban on the restraint of competition and the abuse of a dominant position in the market. Further, the Communications and Multimedia Commission that was set up under the act was given a wide range of powers to use at its discretion, including the authority to determine the legality of business activities, set guidelines, and halt illegal activities. Thus, it can be said that Malaysia has a set of restrictions similar in function to a competition law, at least insofar as the communications and multimedia sector is concerned.

Source: ASEAN Competition Law Project (Coordinator: Nobuyuki Yasuda) in Graduate School of International Development, Nagoya University, *Competition Law and Policy in ASEAN*. Fair Trade Institute (Kosei Torihiki Kyokai), 2000.

[BOX 4-4] Laws regulating competition in China

In its ongoing movement toward a market economy, China in 1993 enacted the "Law for Countering Unfair Competition", which focuses on preventing unfair competition. As regards monopolies and cartels that are normally regulated by a competition law, however, it only prohibits competition-impeding activities and bid rigging by monopolistic public enterprises. There are no provisions for restricting business amalgamations to prevent concentrations of economic powers. On the other hand, unlike laws in advanced countries, the law prohibits public officials from controlling competition through abuse of their administrative powers. In China, some administrative agencies can act as a dominant enterprise and they tend to restrict competition by using their administrative powers to protect their own interests. This situation, which is unique to a socialist market economy, appears to be behind the inclusion of the above restriction in the law.

As mentioned above, since there is no major law with regard to competition, the issue of a law regulating competition was addressed as one facet of China's institutional infrastructure improvements in its negotiations for accession to the WTO. The government published a draft of an anti-trust law in 2000 and is currently working toward its enactment.

Source: Honjo, ibid., 2000.

(2) Application of legal systems for competition, and issues

Although the Asian countries are gradually establishing fully comprehensive competition laws, these laws are not often enforced. For example, Philippine authorities have applied

the monopoly prohibition provision included in its criminal law to only a few companies.[40] Thailand began enforcing its competition law three years ago but the Business Competition Committee has issued decisions in only two cases, while another two cases were settled before the Committee could issue a decision.[41] These situations may be due to the problems of the law enforcement systems, which include understaffed competition authorities, and the need to improve their capability to handle investigations and examinations.[42]

Furthermore, the absence of independent supervisory agencies is often cited as a problem in enforcing competition laws in Asian countries. For example, in the Philippines, the power to control cartels under the Price Act is held not by an independent body but by an office in charge of consumer protection in the Department of Commerce and Industries. Thailand and Indonesia, which have comprehensive competition laws, have independent supervisory agencies. However, Thailand's Business Competition Committee is affiliated with the Department of Internal Trade, which is responsible for industrial policy. Indonesia's Business Competition Supervisory Committee adopts a council system; its members are subject to the President's power to appoint and dismiss them, and they are responsible to the President. It is sometimes pointed out that these conditions make it possible for administrative powers to exert influence on these committees.

Moreover, the lack of guidelines for enforcing the law has made it difficult for authorities to apply it in an appropriate manner. Independent law enforcement authorities and clear guidelines are also necessary to prevent situations in which authorities are forced to apply the law in ways that benefit particular industries or interest groups.

[BOX 4-5] Competition Law in the Philippines

Upon the 1925 enactment of its competition law entitled "An Act to Prohibit Monopolies and Combinations in Restraint of Trade," which was modeled on the U.S. Sherman Act, the Philippines became the first Asian country with a codified set of rules governing competition. The law forbids business practices that restrict competition, as well as prohibits monopolies and business amalgamations. Since 1930, substantive regulations have been transferred into Article 186 of the Revised Penal Code, which is entitled "Monopolies and combinations in restraint of trade." Article 186 is considered to function as a comprehensive competition law because it provides a complete set of rules, and because in 1962 the Department of Justice decided to quote rulings by the U.S. courts under the Sherman Act in the application of Article 186 to cover the lack of Philippine court cases on monopolies and combinations. Yet, in reality it has been applied to very few cases to date. First, unlike a general economics law, the illegal acts defined in the law are considered crimes under the Revised Penal Code and therefore rigorous proof is demanded for guilt. Second, an independent supervisory body has not been established for the law.[43] Finally, the spread of nationalism across the nation after its independence from the U.S., which has caused the Philippines to pursue state-controlled economic development, appears to have affected the situation.

However, globalization gained further momentum in the 1990's, so the Philippine government launched a deregulation policy of privatizing national enterprises. At the same time, there was movement towards developing a policy for competition. One result was the Price Act enacted in 1991. It is intended to control prices and accordingly is the opposite of competition law, yet Article 5 of the Price Act specifies stockpiling, excessive profit-making and cartels as illegal price controls, albeit only in regard to the necessities of life, and the Internal Trade and Consumer Protection Bureau of the Department of Commerce and Industries is given the power to control cartels. Furthermore, from the 1990s onward, a number of bills concerning competition were sent

[40] ASEAN Competition Law Project, ibid., 2000.
[41] http://www.dit.go.th/english/kangkhun/image/kang_en.gif
[42] Honjo, ibid., 2001.
[43] Abad, Anthoney, R.A. *Recommendation for Philippine Anti-Trust Policy and Regulation*, PASCAN, 2000.

to the Parliament. Clearly, there is growing recognition of the need for a competition law.
Source: ASEAN Competition Law Project, ibid., 2000.

[BOX 4-6] Competition Law in Vietnam

Since the launch of the Doi Moi Policy in 1986, Vietnam has been pursuing the introduction of a market economy. In the 1990s, these efforts shifted to full-scale reforms, such as reforming state-run enterprises, accepting private enterprises, and easing government regulations, which led the market to the center of economic activities. At the same time, numerous cases of abuse increasingly took place. This drew the government's attention to the importance of ensuring fairness, and in the late 1990s, the government began emphasizing the need to establish laws to regulate competition.

Currently in Vietnam, there is no law to control disturbances of competition among enterprises. At best, deceptive advertisement is defined as a crime by the Vietnamese criminal law enacted in 1989. This was because the concept of "competition" had a negative image in the socialist regime, but due to the background described above, the government added the establishment of a competition law to the 1999 legislation plan and has been working to enact it with assistance from the UNDP and other bodies. The first draft, dated March 2001, shows that it is a comprehensive bill containing a full range of major rules for regulating competition. However, many matters have to be determined, including, for example, the supervisory body (currently three models have been proposed for this body). Thus, further discussions on the details are needed.

Source: ASEAN Competition Law Project, ibid., 2000.

4.3 Current Situation of Assistance by Japan

Based on the recognition that developing countries need to develop infrastructure and policies for free and fair markets in order to achieve sound economic growth, the JICA and the Fair Trade Commission of Japan are working closely with each other to help these countries develop laws and policies governing competition.

The help includes, for instance, country-by-country or regional training programs for the authorities who will enforce the competition laws, as well as sending specialists to improve understanding of the importance of competition, build capacity, and help to develop legal infrastructure relating to competition and design policy. (To date, specialists have been sent to Thailand, Indonesia, and Malaysia).

[BOX 4-7] PFP Competition Policy Seminar

On Japan's initiative, this seminar was held as part of the Partners for Progress (PFP) Program agreed upon at the 1995 APEC conference as a scheme to facilitate economic and technical cooperation. The JICA and the Department of Internal Trade of Thailand jointly held annual seminars from 1996 through 2000. The seminar for FY2000 was attended by all APEC members but Canada.

Lectures in the seminar included a review of the competition policies of the participant countries, the roles of competition laws and policies, the economic and legal aspects of implementing such policies, etc. Throughout the series of seminars, the participants increased their knowledge of cartels, monopolies, mergers, etc., through group discussions. The seminar received a very high evaluation from the participants, and a new training program to succeed the PFP has been already launched.

4.4 Assistance by Other Donors

Table 4.2 is a result of the analysis on the views held by various international bodies and donors concerning the current situation of competition laws and policies in the recipient countries and on a future approach for establishing competition-related infrastructures. Table 4.3 is a list of assistance projects implemented by major donors in Asia.

Table 4.2 Views of international donors on competition laws and policies in developing countries

	Understanding of the situations in developing countries	Objectives of competition law and policy	Measures to be taken
World Bank	The factors below have obstructed competition in domestic markets: (1) Government restrictions on market access and withdrawals - Restrictions on establishing enterprises - Excessive procedures for new business - Excessive withdrawal costs, such as restricting lay-offs, etc. (2) Private barriers and natural barriers - Monopolies, cartels, and vertical business arrangements - Natural monopolies	(1) Promote a competitive environment (2) Prohibit anti-competitive acts	(1) Establish or revise competition laws (2) Set up authorities to enforce competition laws (3) Ease regulations (4) Open up the domestic market
IMF	A lack of a competitive environment resulting from collusion among a government, financial institutions, and companies, and other acts, has harmed market principles, helping to form an inefficient market.	(1) Prohibit state-backed monopolies and cartels (2) Prohibit crony capitalism (3) Promote a competitive environment	(1) Privatize state-run enterprises (2) Establish or strengthen competition laws (3) Introduce a competitive bidding system
WTO	(1) A sudden increase of acts of unfair competition has marred not only foreign trade and economic development but also multilateral trade. (2) The absence of competition laws and policies has undermined the effects of deregulation of trade, investment, and other regulations. (3) Monopolies have hindered important elements of the new market (market access, innovation, and dynamism).	(1) Prohibit anti-competitive acts (2) Permanently establish the fruits of reforms (3) Revitalize the market	(1) Strengthen competition policy (2) Introduce or improve competition laws (3) Work out multilateral framework for competition laws
UNCTAD	The success of developing countries in participating in the world economy hinges on the ability to ensure access to technologies, human and economic resources, and access to export market, or, in other words, the ability to counter anti-competition practices by dominant businesses and abuses of their positions. It is therefore necessary to work out a multilateral, rather than national, framework with regard to competition policy.	Prohibit anti-competitive practices and abuses of dominant positions	(1) Work out multilateral framework for competition law (2) Develop abilities relating to competition law and policy (3) Establish intellectual property rights
APEC	Competition policy is vital in carrying out trade and investment policies. Particularly, in a rapidly advancing global economy, a lack of consistency among competition, trade, and investment policies has hindered the economic development of countries.	Promote a competitive environment for the economy	(1) Establish competition laws (2) Deregulation (3) Privatization
ADB	(1) Anti-competitive practices have prevented structural changes, helping to form an industrial structure with high concentrations of money, transactions, etc. in large companies (2) Restrictions on competition have led to high operating cost structures, helped by limited options, inadequate innovation, inefficiency, etc.	Improve the efficiency and competitiveness of industries	(1) Deregulation and liberalization (2) Reform corporate structures (3) Privatize state-run enterprises (4) Improve the commercial environment
USAID	Inappropriate competition law, regional monopolies, etc., have hindered entry into international trade, thereby harming the interests of consumers.	Establish a legal and institutional framework to enable competition to work in the market	(1) Formulate competition policies (2) Introduce modern competition laws (3) Bolster the capacity of the appropriate authorities

Source: Timothy Lane, Atish Ghosh, Javier Hamann, Steven Phillips, Marianne Schlze-Ghattas and Tsidi Tsikata, *IMF-Supported Programs in Indonesia, Korea, and Thailand: A Preliminary Assessment*, 1999.; APEC(1995)、UNCTAD, *The Role of Competition Policy for Development in Globalizing World Markets: Papers presented at the pre-UNCTAD X Seminar*, 1999; USAID, *United States Government Initiatives To Build Trade Related Capacity in Developing and Transition Countries,* 2001; World Bank, *World Development Report 2002: Building Institutions for Markets*, Oxford University Press, 2001; WTO, *Report of the Working Group on the Interaction between Trade and Competition Policy to the General Council*, 2000.

Table 4.3 Assistance by major donors in five Asian countries

	Thailand	Indonesia	Malaysia	Philippines	China
Competition law	• Assist in formulating enforcement regulations for competition laws (World Bank) • Assist in drawing up guidelines for enforcing competition laws (World Bank)	• Promote the formulation of competition laws by setting conditionalities (IMF and World Bank)	• Hold workshops on competition bills (UNCTAD)	• Technical assistance in introducing modern competition laws (World Bank) • Assist in working out a framework for a comprehensive competition policy (AusAID)	
Capacity of authorities to implement policies	• Provide programs to enhance the capacity needed to carry out a competition policy (World Bank) • Assist in preparing operation manuals (World Bank) • Provide programs to develop capability for carrying out a competition policy (AusAID and ACCC) • Hold training seminars relating to competition (UNCTAD)	• Provide programs to enhance the capacity needed to carry out a competition policy (World Bank) • Assist in improving the ability to carry out a competition policy (USAID) • Assist in simplifying the framework for competition policy (ADB) • Assist in developing the capability for reviewing and abolishing industrial regulations (ADB)		• Assist in improving capability to carry out a competition policy (USAID) • Propose competition policies on power generation and power retail sale (ADB) • Make proposals concerning the review of competition policies for the energy sector (ADB) • Technical assistance toward setting up appropriate authorities (USAID)	• Hold seminars on railway reforms and competition (OECD)
Others	• Intellectual property system development project (GTZ)	• Technical assistance in establishing a competitive bidding system (World Bank)			

Sources: World Bank, *Philippines: Country Assistance Strategy Report*, 1998; Ibid., *INDONEWSIA: Country Assistance Strategy – Progress Report*, 1999; Ibid., *The Country Development Partnership for Competitiveness*, 2001; ASEAN Competition Law Project (2000), ADB's homepage

From these tables, the following conclusions can be drawn.

1) Donors consider that laws and policies governing competition either are not in place or are inadequate in developing countries, thereby hindering the efficiency or fairness of competition. They understand that it is important to establish competition laws and policies in order to promote the competitive environment needed for economic development.
2) International organs in charge of commerce and trade, such as the WTO, UNCTAD, and APEC, insist on the need for a multilateral framework for competition policy to match the growing global economy. In contrast, the World Bank, ADB, and other development-assisting financial institutions seem to focus on traditional forms of assistance, such as promoting a competitive environment in each developing country by introducing and improving laws and policies regulating competition. In fact, the latter's assistance seems to mainly target two points: (i) introducing or improving modern competition laws, and (ii) building the capacity of the authorities empowered to enforce those laws. On the other hand, APEC, which conducts studies on competition law[44] and works jointly with Japan to provide local authorities with training programs on competition policy, aims to help the whole region to have a better understanding of competition law and policy with a view to building an international framework for competition in the future. The WTO, which offers capacity building, including technical assistance[45], will also likely commit themselves to further efforts to establish the international framework for competition.
3) Furthermore, the assistance programs that the donors delivered vary according to the level of improvements of competition law and policy in the recipient countries. The two countries that have only recently established competition laws, Thailand and Indonesia, are largely given assistance in formulating detailed rules, preparing guidelines for their enforcement, and building capacity in their competition authorities. The Philippines, with no modern competition law as yet, are being given assistance in formulating one. Also in Malaysia, donors continue their steady cooperation, including sending specialists, with the aim of preparing a draft of a competition law.

4.5 Issues and Future Direction in Assistance

(1) Issues in assistance

As described up to this point, the development of legal systems governing competition varies in the developing countries of Asia at present, but there is no doubt that they are all moving toward introducing a modern competition law. Thailand and Indonesia have established comprehensive competition laws and are currently working out detailed rules for their enforcement. China and Vietnam are in the middle of preparing drafts of comprehensive competition laws. Malaysia has also begun to review its draft of a competition law. The Philippines have just undertaken a study on the introduction of a competition law. On the other hand, these countries seem to have very different views on the details of competition law and policy, including the scope of restrictions, approaches to restriction methods, characterization of competition authorities, and enforcement systems.

One of the reasons for the above situation is that the introduction of a modern competition law and policy needs the active involvement of the government. In many developing countries, introducing a competition law and policy is closely related to the industrial policies they employed and will likely lead to changes in existing systems. There

[44] APEC, ibid., 1999.
[45] WTO Working Paper, WT/WGTCP/W/168, 2001.

is the possibility, therefore, that the movement toward a more competitive environment will fail to win full support from some related parties. For this reason, the government must be firmly committed to introducing a competition law and policy. Furthermore, the government should ensure transparency after its introduction in order to prevent arbitrary enforcement by particular powers.

With the above points in mind, donors should deliver the assistance that satisfies the needs of each country in the future. Specifically, the following points need to be considered first.

1) Understanding of competition law and policy

There is a growing common understanding that competition policy is the foundation of an efficient market system and that a legal system to ensure sound competition is a precondition for making the market mechanism work. However some developing countries are concerned that introducing competition law and policy will benefit foreign investors while adversely affecting domestic businesses, at least in the short term. This concern appears to come from their incorrect understanding of competition law and policy or the lack of concrete examples of the benefits they can gain from them.

2) Relation between competition and industrial policy

As a result of their industrial policies, many developing countries are implementing policies to restrict competition. Restricting imports to protect domestic industries and granting monopoly rights to multinational enterprises to attract their investment are good examples of this. In fact, there is a view that domestic industries should be fostered by means of industrial policy, depending on the economic development phase of the country, even though it curbs competition to some extent. Thus, each developing country has its own point of view on the relation between competition and industrial policy. Whatever point of view a developing country has, there is no doubt that it is necessary for the country to achieve its economic development by coordinating both a competition policy and an industrial policy in accordance with its development phase.

3) Influence of cultural and social elements

Naturally, the economic systems of countries differ from one another, influenced by historical conditions and environments, even between countries endowed with similar natural resources. This is true of competition law and policy. For instance, regulations to control the abuse of administrative powers are unique to China and this can be understood from its social and economic conditions: the country is in transition from a planned economy to a market economy and administrative officials still have great influence over the economy. From this point of view, in delivering technical assistance with regard to competition policy, the harmonization approach that focuses on convergence with an ideal and standardized system is not necessarily appropriate.[46] It is more important to pay attention to the cultural and social backgrounds of each country.

4) Competition policy by sector

Liberalizing trade and investment and easing domestic regulations will undoubtedly have a tremendous impact on local businesses and will promote competition among them. Some can argue that small regions and countries such as Hong Kong and Singapore[47] do not need competition laws if a competitive environment is created in the markets through

[46] "Introduction: International Adjustment of Economic Systems," Kazumasa Iwata, and "International Adjustment of Economic Systems" compiled by Kazumasa Iwata and Mitsuhiro Fukao, Ninon Keizai Shimbunsha, 1995.

liberalization and deregulation. Even such small regions and countries that have liberalized or deregulated markets, however, may also have some sectors where liberalization and deregulations cannot easily promote competition. These sectors include government procurement sectors, public benefit sectors, and, in the case of countries experiencing a shift from socialism to capitalism, state-monopoly enterprises that are the legacies of history. Hong Kong and Singapore are introducing competition-related regulations on a sector-by-sector basis.[47] Particularly in public utilities sectors, including electricity, gas, and communications, despite deregulation efforts, any dominant company, even in advanced countries, can prevent the country from enjoying the benefits of liberalization. In such cases, it is necessary to ban monopolies and abuse by companies holding a dominant position in the market. This may be also true in developing countries, and it may be necessary to apply competition policies only to those sectors if introducing a competition law and policy for the whole nation is not possible. This is the case with the Malaysian multimedia sector. How a competition policy is introduced is up to the individual country.

(2) Future approaches to assistance

Based on the above view, Japan's future approach to assistance for the competition sector can be described by the three viewpoints below:

1) Assistance concerning the introduction and implementation of competition law and policy

Before providing assistance for implementing competition law and policy, it is important to discuss and study how to place a competition policy in the context of the industrial policies and development strategies in each country, rather than trying to build a common view on how to implement them in every country. Based on such discussions and studies, the countries concerned may select certain methods, such as receiving assistance in areas that are likely to be acceptable to local businesses as judged from cases of assistance previously provided to other countries. Strategic introduction of a competition policy to selected sectors may be also among the available options.

In addition, guaranteeing the independence of the appropriate authorities and establishing clear implementation standards are important for ensuring and enhancing transparency during the implementation of a competition law. It is very effective to extend assistance to ensure them. At the same time, enforcing a competition law requires considerable human resources to handle investigations and examinations. From this angle, it is also necessary to build the capacity of relevant government agencies.

2) Assistance to match each country's needs

Since each country has a different understanding of the importance of competition law and policy, and industrial policies differ from government to government, each country is at a different stage in establishing a competition law and policy. Consequently, assistance should be appropriate for the stages and needs of each country. For instance, the concept of prohibiting unfair competition has already become established in many developing countries and so, even for countries yet to reach a consensus on the introduction of a competition law, it is relatively easy to win understanding from their industries for a process of gradually shifting from introducing an unfair competition prevention law to introducing a competition law. This approach may be an option for developing countries. Staged delivery of assistance such as this can take the following forms.

[47] Singapore is studying the introduction of a comprehensive competition law.

1) Countries with no competition law
   i) Advocacy activities relating to competition law and policy, and capacity building for legal infrastructure development
   ii) Assist in establishing legal systems and formulating a policy in fields that are outside of competition law but related to a competition policy and likely to win consensus among the domestic parties concerned (e.g., indication of transactions, unfair competition prevention law)
   iii) In the case of countries considering the introduction of a competition law, assist in investigating and studying its relation to current industrial policies, and offer policy proposals

2) Countries with competition-related regulations but without a comprehensive legal system regarding competition
   i) Assist in investigating and studying the relation between a competition policy and an industrial policy, and offer policy proposals
   ii) Promote better understanding on the shortcomings of an existing competition law, and assist in capacity-building for legal infrastructure development
   iii) Assist in capacity-building to overcome problems during implementation, including improving the ability of the responsible authorities to handle investigations and examinations

3) Countries taking concrete actions to introduce a comprehensive competition law
   i) Assist in formulating a competition law, enforcement regulations, and guidelines
   ii) Assist in establishing responsible authorities, including building capacity to handle investigations and examinations
   iii) Assist in capacity-building for international cooperation, such as the signing of monopoly prevention agreements

4) Countries with a comprehensive competition law already in place
   i) Assist in formulating enforcement regulations and guidelines for the law
   ii) Assist in capacity-building to overcome problems faced in implementation, including improving the ability of the responsible authorities to handle investigations and examinations
   iii) Assist in capacity-building for international cooperation, such as the signing of monopoly prevention agreements

In addition to the above, it may be helpful to study how Japan achieved its gradual introduction of a competition law and then transfer the knowledge obtained from the studies to developing countries.

3) Assistance for international cooperation

In international cooperation, attention should be paid to the current situations of countries regarding their legal infrastructures in the competition sector, the likelihood of consensus in the local industry, and their social and cultural backgrounds. Considering these factors, it seems appropriate at this time to proceed with international cooperation according to the situation in each country. For this purpose, it may be important to carry out advocacy activities and assist in capacity-building.

In order to work out the specifics of international cooperation, it is necessary to build consensus among the countries through seminars and workshops.

Chapter 5 Conclusion

5.1 Importance of Building Institution to Strengthen Industrial Competitiveness

As economic globalization advances, international rules are being developed for industrial activities, and the industrial sectors of each country are increasingly expected to operate according to these rules. The World Trade Organization (WTO) is formulating rules on trade and conducting active discussions on regional economic integration. The scope of the discussion concerning such rules is broadening to include not only trade but also investment, competition, and other areas of industrial activity. It is no longer possible to ignore these trends and still achieve industrial development. Under these circumstances, in addition to improving the capabilities of individual companies, it is important to build an institution that will be able to influence industrial activity overall. Therefore, as developing countries pursue industrial development in the midst of globalization, from the standpoint of improving their industrial competitiveness, it is essential for them to actively participate in the formulation of the new rules that are being established, to develop domestic systems that are consistent with these rules, and to administer them properly.

5.2 Role of ODA in Institutional Development in Developing Countries

The following are the two main roles to be played by ODA in the area of institutional development in developing countries.

[1] Role of supporting economic development in developing countries in a new economic environment

First, to help developing countries avoid being left behind in the rapid current of globalization, ODA must play the role of supporting adaptation to the new framework that is being developed, as well as economic development within that framework. In the past, Japan's assistance for industrial promotion in developing countries was mainly focused on problem resolution, improvement, and reinforcement within companies (improving management resources). However, there are limits to the improvement of industrial competitiveness based on such individual instances of technological transfer. As stated above, the institution in developing countries needs to adapt to the rapidly changing economic environment, and industries need to become competitive within that framework. It is important to provide support in this regard. Support in the area of institutional development is expected to play a very important role in the economic development of developing countries amid future changes in the worldwide environment.

[2] Role of promoting improvement in the global and regional economic environment and institutional coordination

Second, toward the development of a suitable global and regional economic environment with regard to industry, ODA must play the role of promoting the formulation of rules that are harmonious for all related countries, including developing countries. In promoting future economic development, it is effective to establish rules that are appropriate for all related parties in order to stimulate trade and investment while improving the competitiveness of domestic industries, as envisioned by the WTO and East Asian countries with regard to future economic consolidation. Japanese industry, which has grown through trade and investment with other countries, will also need to develop an appropriate economic environment through economic consolidation with surrounding regions and the WTO.

Meanwhile, many developing countries take a cautious attitude with regard to the formulation of new rules because of concerns about the impact these rules will have on

protecting and fostering domestic industries, and this has the effect of slowing the progress of international institutional coordination and rule formulation. This has led to a high level of awareness at the WTO, APEC, etc. concerning the importance of educating developing countries on the significance of international rule-making, including consideration for developing countries in rule formulation, and actively cooperating in capacity building. When developing countries are given support in order to properly enjoy the benefits of the new frameworks and to proactively participate in rule making, this can be expected to contribute not only to development in developing countries, but also to the maintenance and development of frameworks for harmonious regional and international economic development. In particular, support for the region of East Asia, where efforts are being made to build deeper economic ties in the future, is effective not only in terms of conventional aid to developing countries but also for the sake of joint institutional infrastructure development by Japan and Asian countries, with the aim of building equal economic partnerships. It is important to actively implement support for institutional infrastructure development based on these considerations.

5.3 Basic Approach to Institutional Development

In this paper, we have discussed systems related to improving industrial competitiveness that have the primary aims of reducing transaction costs and developing a competitive business environment. The main focus in the area of reducing transaction costs is to identify inappropriate regulations, institutions, and systems that obstruct smooth industrial activities, and to make the necessary improvements. The main issues in this area are facilitating smoother trading and investment and introducing policies for competition. In the area of developing a competitive business environment, the main focus is on systems to strengthen competitive pressures in order to bring out the potential capabilities of industries. The issues in this area include policies for competition, trade liberalization, and liberalization of investment. The WTO, FTA, and other organizations are formulating rules concerning each type of system, and since these are important areas in which developing countries are expected to conform to the rules, there is a high level of need for assistance.

In general, few developing countries raise any objection to institutional development for the sake of reducing transaction costs, and assistance in this area can be considered with a positive attitude. However, developing countries respond variously to the idea of institutional development that includes the goal of developing a competitive business environment, based on the industrial policies each country has adopted in order to foster domestic industries. Therefore, it is necessary to consider the content of support on a case-by-case basis, according to each developing country's needs and stage of development.

The areas of institutional development and implementation must be considered separately with regard to support for improving these kinds of institutions. Concerning the development of institution, it is important to provide assistance from the standpoint of introducing and improving appropriate institutions after considering the content of institution that is best suited to each developing country, while also considering international coordination. And concerning the implementation of these institutions, the necessary perspectives include the question of how to improve the effectiveness of the institutions that have been introduced, as well as how to administer and implement them. It has been noted that in many developing countries, problems arise with regard to execution after the institutions have been introduced. In other words, merely introducing a new institution through cooperation for institutional development is not sufficient to resolve the actual problems that exist. Ultimately, continuous support is needed in the area of implementation and administration so that the institutional infrastructure can function properly. In support for institutional infrastructure development, it is essential to proceed with cooperation

according to gradual processes, based on the two areas described above.

5.4 Directions for Support in Institutional Development

(1) Trade

Efforts are being made to liberalize and facilitate international trade, with the goal of promoting and expanding trade. With regard to trade liberalization, efforts to reduce tariffs and remove nontariff barriers are being made by the WTO and under free trade agreements (FTA). Developing countries often take a negative attitude toward radical trade liberalization in order to protect and nurture their domestic industries. However, it is difficult for any country to achieve economic development while going against the tide of international trade liberalization, and these countries need to participate appropriately in the relevant institutions and enjoy the benefits of participation.

Cooperation with regard to trade liberalization must offer support for the development of strategies on how to strengthen domestic industries in the framework of rules formulated with regard to free trade systems, as well as support to ensure conformity with those systems within the developing country for the sake of rule implementation. Based on the response of the developing country to trade liberalization, the main endeavors are education and knowledge transfer on trends in trade liberalization and how to deal with those trends, cooperation in policy proposal, and cooperation for capacity building in areas such as reviewing legislative systems for the fulfillment of agreements and improving administrative capabilities for agreement fulfillment.

The WTO, APEC, and other organizations are discussing the formulation of international rules as a way to increase the efficiency of trade-related activities and improve industrial competitiveness, since smoother trade means lower trading costs. Cooperation in this area is highly significant, considering the future participation of developing countries in rule formulation and the need for effective implementation after the rules have been formulated. The area of facilitating smoother trade involves few conflicts with domestic industrial policies, and developing countries take a positive attitude toward this area, so this is a field in which active assistance can be provided. Cooperation with regard to facilitating smoother trade must be conducted by stages according to the country's situation.

[1] Obtaining knowledge and promoting basic understanding with regard to facilitating smoother trade

In facilitating smoother trade, it is important first of all to ensure that the authorities and other parties related to trade procedures have a thorough understanding of the importance of facilitating smoother trade as well as the approach to be taken. It is effective to transfer knowledge concerning trends in international debate on trade facilitation, as well as advanced experience and methods, and to provide support for efforts toward improvement. Also, to promote coordination and joint efforts among various organizations, it is effective to gather interested persons in working groups and workshops, providing support for consensus building.

[2] Analyzing the issues from a comprehensive standpoint

In efforts to facilitate smoother trade, it is important to analyze the trade-related procedures from a comprehensive standpoint and clarify the kinds of issues that exist. In the past, most support in this area has been aimed at cooperation with regard to individual procedures in areas such as customs, port, and quarantine procedures. It has been noted that in order to improve overall efficiency in this area of support, it is necessary to

identify the areas where bottlenecks actually exist, taking the standpoint of linking and coordinating the various types of procedures. Therefore, there is recognition of the importance of analyzing the overall procedures before beginning any specific improvements, and it is effective to provide cooperation for this kind of surveying and analysis. A survey of the time required to pass through customs, measuring the time required in each of the trade-related procedures, clarifies the issues in a quantitative manner by measuring procedural time requirements. Since these survey results can be used as a benchmark in evaluating improvements, cooperation in this area is effective.

[3] Specific support to facilitate smoother trade procedures

Most support with regard to specific efforts is focused on capacity building for the introduction and improvement of effective institutional infrastructure. The primary form of assistance is knowledge transfer concerning the introduction and implementation of institutional infrastructure for efficient procedures and coordination with international trends. In efforts for improvement in business operations, one central form of support aims to facilitate smoother procedures through computerization and the establishment of relevant systems. This is effective not only in increasing speed, but also in improving transparency, preventing corruption, and linking and coordinating the various procedures.

(2) Investment

While investment has the advantage of improving industrial competitiveness through the transfer of funds, technology, and management expertise, it also exposes domestic industries to severe competition from foreign businesses. Therefore, countries may either provide preferential treatment for investment or take steps to restrict investment, depending on their situations. The WTO is working on the preparation of international rules on investment-related institutions, and many countries have signed bilateral investment agreements. Meanwhile, each country has its own attitudes regarding the development of investment rules in relation to the protection and fostering of its own domestic industries, and some developing countries take a negative stance toward the development of international rules. However, the inadequacy or lack of domestic institutional infrastructure related to investment has often hindered the promotion of investment in developing countries, and cooperation in the area of institutional infrastructure development related to investment is highly significant with regard to the realization of an appropriate investment environment in developing countries. Therefore, the fundamental stance for cooperation in this area is as follows, based on trends in international rule-making, and centered on support for an appropriate response to those trends and the improvement of investment-related systems in a manner that is suited to the situation of the developing country.

[1] Consensus formation and capacity building with regard to the formulation of investment rules

The study of rule making for investment-related systems has just begun. First, it is necessary to coordinate the views of each nation concerning investment rule formulation and to obtain a deeper mutual understanding while building an appropriate investment environment. It is effective to provide cooperation for the holding of forums to exchange views and build a consensus, and it is important to provide cooperation for capacity building, including a better understanding of international trends and the transfer of knowledge related to implementation.

[2] Analyzing the impact of new investment-related systems and suggesting directions for improvement

The establishment of new investment-related systems is expected to have an important impact on domestic industries in developing countries, and this is a factor causing developing countries to take a negative stance toward institutional development. An effective form of support in this regard is to analyze the impact that the introduction of new systems in the area of investment would exert on industries, provide information on case studies in other countries to support policy determination in developing countries, and indicate gradual processes for institutional infrastructure development.

[3] Introducing and improving investment-related systems

In the development and operation of specific investment-related systems, in addition to institutional infrastructure development, it is effective to make improvements such as confirming whether the new institution is consistent with the existing legal infrastructure, increasing transparency, and so on. It is also effective to provide cooperation on a medium- to long-term cycle, as needed, for reviewing and revising the systems according to the state of operations after the new legal infrastructure has been in place for some period of time, in order to support appropriate operation in addition to providing support at the time of system introduction. Finally, it is essential to introduce systems that will allow the independent development of laws by the developing countries.

(3) Competition

The functions of competition laws and competition policies are to prohibit acts such as restrictive business practices, monopolies, and anti-competitive business concentrations or consolidations and to promote market competition, thereby building a foundation for higher economic efficiency and stronger industrial competitiveness. It is also effective to develop laws and policies on competition that clamp down on anti-competitive acts by multinational corporations that have gained dominance in the domestic markets of developing countries. There is some discussion on building an international framework with regard to competition laws and policies as well. However, major differences exist among developing countries with regard to their institutional infrastructures relating to competition. Some countries have not yet passed any competition law; other countries have a partial legal infrastructure in this area; and still others have a comprehensive legal infrastructure in place. Therefore, it is important for support in the area of competition to include consideration for the diversity of developing nations and the gradual nature of change. Cooperation in this area should be based on the following considerations.

[1] Obtaining knowledge and promoting basic understanding with regard to policies on competition

First, based on the inadequate understanding of some related parties in developing countries with regard to competition laws and policies, it is important to provide support for promoting a better understanding of the concept of competition policy. The conventional mode of cooperation by providing training and dispatching experts will continue to be effective in this area.

[2] Suggesting directions for the introduction and development of competition laws and policies

Since the introduction of competition laws and policies is related to policies which protect and nurture the domestic industries of developing countries, it is effective to identify the position of a country's competition policy within the country's industrial

development strategy and offer suggestions in this regard, indicating the processes for institutional infrastructure development. Based on Japan's experience, it is considered effective to provide research-based proposals to developing countries concerning ways to gradually develop competition-related institutional infrastructure.

[3] Support for gradual institutional infrastructure development

In supporting the development of specific legal infrastructure, it is important to take a gradual approach to infrastructure development and implementation, according to each country's situation in this area. Based on the country's state of industrial evolution and other factors, this should progress from areas in which it is relatively easy to build a consensus (such as consumer affairs administration and laws against unfair competition) to the introduction of systems limited to certain industries, and ultimately the adoption of a comprehensive competition law.

Chapter 3 Schedule of direct investment reception policies and systems in Asia

		Indonesia	Thailand	Malaysia	The Philippines	China	Vietnam
Investment promotion organization	Organization to promote investment	Investment Coordinating Board (BKPM)	BOI (Thai Board of Investment)	Malaysian Industrial Development Authority (MIDA), Multimedia Development Corporation (MDC), and Foreign Investment Committee (FIC)	BOI (Board of Investment), Philippine Economic Zone Authority (PEZA), Clark Development Corporation (CDC), Subic Bay Metropolitan Authority (SBMA), etc.	Government: Ministry of Foreign Trade and Economic Cooperation Organization: China Council for the Promotion of International Trade	Ministry of Trade and Vietnam Chamber of Commerce and Industry
Restrictions on foreign investment	Sectors restricted or banned	[1] Sectors banned to private investment, both domestic and foreign; [2] sectors banned to foreign investment; [3] sectors open to foreign investors at set investment ratios or other conditions: Presidential Ordinances No. 96 dated July 20, 2000 and No. 118 dated August 16, 2000	Forty-three sectors are banned or restricted at three levels.	Investment at a 25-percent or lower ratio is conditionally allowed in public sectors (railway, electricity, water, telecommunications, broadcasting, etc.)	As stated in the list of negatives.	Sectors that are banned or restricted are specified in the "List for Guidance on Foreign Investment in Industries" (enforced and revised in April 1, 2002). An investment prohibition list (from September 1999) was issued with the aim of preventing overlapping investment in industrial and commercial sectors.	Conditions are set for each project, such as [1] it must be a joint venture or project cooperation contract; [2] an export quota is imposed; and [3] domestic materials must be developed. Four sectors are specified as banned.
	Foreign investment ratio	Foreign investors are allowed to provide up to 95% of capital for joint ventures. If they desire whole ownership of their business, they are required to assign part of the stock to local individual(s) or corporation(s) directly or through the securities market within 15 years of the start of operation.	Although the entry of foreign capital is not restricted in principle, a foreign enterprises restriction law restricts foreign enterprises with 50% or more ownership in 43 specified sectors. Of BOI-promoted sectors, here is no limit on investment ratio in the case of the manufacturing sector.	Limits are placed on 1) the manufacturing sector, 2) the non-manufacturing sector, and 3) projects involving non-reproducible resources.	There is no upper ceiling on the foreign investment ratio except in sectors specified in the list of negatives (100-percent foreign capital is allowed).	A minimum of 25%.	No statutory maximum is set in principle. The lowest requirement is 30% (or 20% with the approval of the government, 20%).
	Land ownership by foreign enterprises	Land ownership is limited to Indonesian nationals. Foreign enterprises are allowed to operate on particular lots after obtaining particular rights other than land rights.	In principle, foreigners (including foreign corporations) are not allowed to acquire land. However, BOI-promoted or Industrial Estate Authority of Thailand (IEAT)-certified enterprises are allowed to own land. For residential purposes, foreigners can obtain land if investing 40 million bahts or more and after a lapse of three or more years of the investment period.	Prices are controlled for individual properties worth 250,000 ringgits or more. However foreign enterprises are allowed to acquire even undeveloped property and also purchase property whether it is for residency, retail, factory or office purposes. Making an application with the FIC is required for property with a selling price of over 20 million ringgits.	Land ownership by foreign enterprises is not permitted.	The state owns all land and foreign enterprises are not allowed to own land. However the right to use land can be granted to foreign enterprises.	Normally, foreign enterprises are allowed to own land for 50 years. Rents under land-use rights can be obtained by multiplying unit prices, which are set by the Ministry of Finance, by factors calculated according to the development state of the surrounding infrastructure. Prices are set for each sector.

		Indonesia	Thailand	Malaysia	The Philippines	China	Vietnam
	Capital	A minimum amount of capital is not established since the feasibility of a project is determined at the time of application. However, the amount is set for some sectors and so, an inquiry must be made to the Investment Coordination Agency. 1996 BKPM Director Decision No. 21.	A statutory minimum amount of capital is set for each sector by ministry ordinances. Capital of 3 million bahts or more is required for sectors subject to the Foreign Project Law and 2 million bahts or more for sectors not restricted.	The minimum amount of authorized capital is 100 thousand ringgits and the minimum paid capital is 2 ringgits. The paid capital can be freely set within the range of the authorized capital.	Corporations are required to issue stock equivalent to or greater than 25% of their authorized capital and pay a minimum of 25% of it. The paid capital must be 5,000 pesos or more.	Reduction in the registered capital amount is authorized by strict examination.	In principle, the statutory capital of joint ventures and wholly-owned foreign enterprises must be below 30% of the overall investment capital.
	Others	None	The government previously set local procurement ratios for automobiles, motorcycles, diesel engines for agricultural use, milk, and other goods, but abolished such ratios for automobiles, as required by the WTO Agreement on TRIMs.	Other restrictions include domestic sourcing requirements and production license requirements by the Industrial Coordination Act (ICA). Regulations concerning property acquisition are eased.	Automobile manufacturers have an obligation to acquire particular amounts of foreign currency and satisfy government-set local procurement ratios.	Investment ratio restriction, regional restriction, and foreign currency control.	Domestic sourcing ratio: for motorcycles, 5-10% in the second year of investment and 60% in the fifth to sixth years; for electronics appliances, 20% in the second year; for automobiles, 5% in the fifth year and 30% in the tenth year.
Encourages foreign investment	Encourages certain industries and business categories	The “Tax Holiday” system was revised in Presidential Ordinance No. 7 dated January 14, 1999, but it was abolished as agreed upon with the IMF in January 2000.	126 sectors (as of January 2002).	A wide range of sectors encourages foreign investment from manufacturing to agriculture, tourism, high-tech industry, and research and development. Among others, high-tech and R&D sectors have been offered greater favorable measures recently.	Sectors listed in the Investment Priorities Plan (IPP), export business, BOT projects, etc.	Encouraged sectors are specified in the “List for Guidance on Foreign Investment in Industries” (enforced and revised in April 1, 2002). Further, for the West China Great Development plan, the government issued the “List of Foreign Enterprises Investment Priority Industries for Mid and West China” (June 2000) with sectors open to foreign investment specified for each of 20 provinces and cities in the areas.	Encouraged fields specified in a foreign investment law including parts manufacturing and export-oriented manufacturing.
	Favorable measures	Favorable measures are available for particular areas (enterprises located in the east area of Indonesia known as KTI, the economic integration development area known as KAPET, and those in bonded areas.) There are also moves to set up free trade zones (FTZ) across the country, starting at Saban Island (the Special Region of Aceh).	Corporate tax reduction, machinery and materials import tax exemption, etc. Benefits vary with location of enterprise. Industries of special importance are granted maximum benefits in terms of corporate tax and machinery import tax, regardless of their location. However the overall tax exemption is below 100% of the investment amount of enterprises with the exception of projects judged important by the BOI.	Privileges for importing materials and capital goods; tax breaks; general favorable measures for manufacturers; favorable measures for high-tech industries; and incentive measures for the Multimedia Super Corridor (MSC) project.	Foreign investors are granted corporate tax exemption or other benefits by bodies charged with attracting investment, etc.	Corporate tax, tax exemption from facilities, operating tax, tariff, value-added tax, technological development cost, Mid and West China area, borrowing from banks.	Corporate tax benefits are offered at three levels, depending on investment contents.

		Indonesia	Thailand	Malaysia	The Philippines	China	Vietnam
Tax system	Corporate tax	Corporate tax rates are 10% when the annual taxable income is 50 million rupiahs or lower; 15% when between 50 million and 100 million rupiahs; and 30% when above 100 million rupiahs. The withholding tax rate for dividends, royalties, and interests is 20%.	Tax rate is 30% of net income. Foundations and organizations are required to pay taxes at rates between 2-10%, depending on their activities. Foreign operators are required to assess their annual taxable incomes and pay an amount equivalent to half of the assessed amount within 60 days after six months into their business year. Then, they are required to file an income tax return and pay tax amounts as required, within 150 days of their settlement days.	The corporate tax rate was reduced to 28% in the 1998 taxable year and the personal income tax rate became a maximum of 28% in the 2002 taxable year (progressive tax rate).	The corporate tax rate is a maximum of 32%.	The basic corporate tax rate for foreign enterprises is 33% (state tax: 30% and local tax: 3%), reduced tax rate, taxation at the source, and taxation of representative offices.	The standard tax rate is 25% (see the "tax incentives" for tax incentives).
	Bilateral tax treaties	Signed. (The withholding tax rate is 10%.)	Signed. (The withholding tax rate is 15% for dividends between parent and child companies; 20% for general dividends; 10% and 20% for interest; and 15% for usage charges.)	Signed. (The withholding tax rate is 5% for dividends between parent and child companies; 15% for general dividends; 10% for interest; and 10% for royalties.)	Signed with Japan and many other countries.	The Japan-China Tax Treaty defines real estate income, the provision of services, etc. (The withholding tax rate is 10% for dividends between parent and child companies; 10% for general dividends; 10% for interest; and 10% for use charges.)	Signed
	Other taxes	Income tax rates are 5% when the annual taxable income is 25 million rupiahs or lower; 10% when between 25 million and 50 million rupiahs; 15% when between 50 million and 100 million rupiahs; 25% when between 100 million and 200 million rupiahs; and 35% when above 200 million rupiahs. The value added tax rate is 10% and the luxury sales tax rate is 10-75%.	Aside from corporate tax, there are a value added tax (which is currently 7% but will drop to 10% on October 1, 2002), a specified business tax (0.11-3.4%), a withholding tax on overseas remittances, a personal income tax (progressive taxation ranging between 0 and 37%), a special tax (oil revenue tax [commodity tax, land and building tax, and land development tax], a document stamp tax, etc.), etc.	Sales tax (5-15%, depending on the item), commodity tax, service tax (5%), and document stamp tax.	Value added tax, percentage tax (a kind of sales tax), commodity tax, local tax, etc.	Personal income tax, value-added tax on imports, operating tax, and consumption tax	Profit remittance tax (at three levels of 3, 5, and 7% depending on investment amounts), value added tax, personal income tax, etc.
Restrictions on employment of foreigners, residency permits, and employment of locals	Restrictions on employment of foreigners	Employment of foreigners is regulated under three established categories. Enterprises exporting 65% or more of their products are exempted form employment regulations, and have the freedom to employ foreigners.	Foreigners are banned from employment in 39 sectors. Normally, in order to obtain a work permit for a foreigner, enterprises are required to pay 2 million bahts or more of their capital per permit.	The government has a policy of ensuring that every sector has Malays employed. However foreign enterprises are allowed to hire foreigners for specified "key posts" and in fields (for positions requiring professional knowledge or capability) short of competent personnel.	Foreigners must obtain a work permit from the Department of Labor and Employment.	Employment of foreigners is controlled under the "Regulations on Alien Employment in China" (May 1996). In order to hire foreign employees, business owners need to complete relevant procedures including obtaining certificates for employment, etc., from local authorities in charge of labor administration.	Foreigners working at foreign enterprises or their representative offices must obtain a work permit (with an exception of directors, representatives of those offices, etc.)

		Indonesia	Thailand	Malaysia	The Philippines	China	Vietnam
	Residency permit	Improvements have been made year by year in such formalities as issuing visas and work permits and in handling renewal applications. Personnel sought by local authorities in charge of exports are treated expeditiously.	In order to enter the country for working purposes and apply for a work permit, foreigners are required to apply for a non-immigrant visa (Immigration Act Alien Employment Act). It grants a 90-day-long stay permit upon entry. The stay period can be extended after obtaining a work permit. BOI-encouraged enterprises can obtain the permit relatively easily.	A working visa is required even for a short stay when it is for working purposes. Depending on the periods and purposes, the following are required: employment pass, temporary working pass, and professional pass.	Various types of visas are available, including temporary entry visa, employment visa, and multiple-entry special visa, according to purpose and conditions.	For entry, visas need to be obtained from a Chinese overseas mission. After entry, foreigners need to obtain a stay visa according to the stay period, etc. They also need to obtain a certificate for alien residency from the public security authorities.	Foreigners wishing to stay for over one year can obtain a stay permit for up to three years from the Public Security Authority of the People's Committee and then they are exempted from a visa during the effective period of the permit (there is no enforcement regulation for it, however).
	Obligation to employ locals	Articles 11 and 12 of the Foreign Investment Law define foreign employment and provide for the obligation to give opportunities in education and training to employed locals.	Judgements are made under different standards by the Immigration Bureau handling visas and the Ministry of Labor and Social Welfare dealing with work permits. The Bureau requires the employment of four Thais per foreigner while the Ministry demands seven locals per foreigner (in principle) (at the end of February 1999). The latest information needs to be obtained when making an application.	1955 Employment Act, 1951 Employees Provident Fund Act, 1969 Employees' Social Security Act, 1994 Occupational Safety and Health Act, and 1952 Workmen's Compensation Act. Foreign operators are requested to hire locals so that the ethnic composition of their employees reflects that of the nation. They have to submit training and promotion plans.	N.A.	Foreign operators can freely hire employees with cooperation from local labor personnel authorities.	Employing locals takes precedence. The minimum wages are 626,000 dong per month in Hanoi and Ho Chi Minh Cities.
Fundraising system in invested countries		General foreign enterprises that do not satisfy particular conditions are not allowed to take out loans from state banks.	No restrictions.	Foreign enterprises can borrow up to 10 million ringgits from any and all domestic sources on condition that they acquire a 55% or higher credit line from a financial institution founded in Malaysia.	Funds can be raised by issuing securities and borrowing from domestic institutions.	Generally foreign enterprises raise funds from overseas, but it is also possible to obtain foreign currency loans from the Bank of China. Product manufacturers and high-tech enterprises are entitled to borrow money on a priority basis. All other banks designated by the People's Bank of China can lend money in RMB to foreign enterprises.	Foreign enterprises can make a loan on their land use right from domestic financial institutions including foreign banks.
Foreign exchange control and foreign currency exchange system		Foreign exchange activities are freely allowed in principle. No upper ceiling is set on the remittance of dividends, profits, etc. under foreign exchange control laws.	The laws specify no currency for receipts or payments, or for settlements. When acquiring foreign currencies through exports, etc., the enterprises must convert them into baht or transfer them to their foreign currency bank account within seven days of the acquisition (foreign currency concentration obligation).	There is no limit on the remittance of profits by foreign enterprises if they show the necessary documents to the banks handling the remittance. Non-residents are prohibited from exchanging foreign currency for an amount equivalent to the principal of the profits in ringgit on sale of assets such as securities.	Sending assets to one's own country, etc., requires registration with a central bank in advance.	As per the "Foreign Exchange Control Ordinance."	Foreign enterprises can open accounts for local or foreign currency with local banks, joint venture banks, and foreign-affiliated banks in Vietnam. They can open accounts with banks outside Vietnam with a central bank's permission.

		Indonesia	Thailand	Malaysia	The Philippines	China	Vietnam
Systems related to technology patents, and the granting of industrial and intellectual property rights		Patents are protected for 20 years from the date of reception of the application. Trademark rights can be renewed on a ten-year basis.	[1] Copyright Law [2] Trademark Law [3] Patent Law	Protection of industrial property rights (Patent Law amended in 1995). Patents are protected for 20 years from the date of issuance. Trademark rights can be regularly renewed and are available for continuous use (1976 Trademark Law and 1983 Regulations for the Trademark Law). No limit on the protection period of trademarks. Computer programs, etc. are protected for 50 years (1987 Copyright Law).	Intellectual Property Right Law (the Philippines Constitutions No. 8293). The effective period is 20 years from the date of application.	China is a member of the Paris Convention for the Protection of Industrial Property and has signed the Agreement on TRIPS. Investment in kind by intellectual property rights is allowed. Introducing technologies from overseas is now liberalized, in principle.	The protection periods of intellectual property rights are 20 years of the date of application for patents, five years for design use rights (renewable two times at a five-year interval), and 10 years for trademark rights (renewable on a ten-year basis with no limit). The period for technological transfer contracts is short: seven years of the effective date, in principle.
Procedures for establishing foreign enterprises, and required documents		Required procedures are to [1] obtain an approval notice for investment, [2] register incorporation, [3] obtain a certificate for employing foreigners, [4] obtain a permit for importing capital goods, [5] obtain permits for location, [6] obtain permits for construction, and [7] obtain permits for construction and commercial operation.	Required procedures are to [1] apply for approval to a trade name, [2] register basic articles of incorporation, [3] hold a general incorporation meeting, [4] register incorporation (final registration), and [5] register for taxation. Required documents include applications for registration, ancillary articles of incorporation, list of shareholders, and minutes of the general incorporation meeting. Registration fees are required as well.	Register incorporation within three months after obtaining approval for a company name. Submit articles of incorporation, Forms 48A and 6, along with the registration fee, prescribed according to the authorized capital, to the Registry of Companies (ROC). Hold the first board of directors and submit Forms 24, 44, and 49 to the ROC within a month of incorporation.	In order to establish a corporation, prospective foreign operators are required to register the corporation with the Securities Exchange Committee (SEC). This requires submission of the required documents, including basic and ancillary articles of incorporation.	Procedures are prescribed for each of the three investment forms of joint venture, co-ownership, and whole ownership.	In order to set up corporations, prospective foreign operators are required to obtain a certificate for investment. For this, they need to [1] register or [2] apply for it. For [1], the certificate will be issued within 15 days and for [2], within 30 or 45 days.

Source: Prepared using JETRO overseas data file (JETRO-FILE).