

Chapter 7

ENERGY, ENVIRONMENT, LABOR AND ELECTRONIC COMMERCE

Energy

Background of the Rules

The WTO, with the liberalization of international trade as a basic principle, prohibits exclusion without exception from not only mineral resources such as copper, nickel and rare earths, etc., but also energy resources such as natural gas, crude oil, and coal, etc.; it is an organization that aims to secure adequate distribution of energy and mineral resources by ensuring free trade. As Japan does not have an abundance of natural resources, establishing a secure supply of energy and mineral resources is one of its most important issues. In order to satisfy these requests within the scope of WTO's discipline, Japan makes efforts to reinforce the stable supply of energy and mineral resources in its EPA/FTAs.

Japan's efforts through EPAs/FTAs

Japan's relationship with Indonesia, Brunei, and Australia are particularly significant in the matter of energy and mineral resources. As a result, separate chapters are dedicated to the subject in EPAs with these countries (all the EPAs entered into force). With these EPAs, Japan is facilitating its efforts to further strengthen its ties in this sector with these countries.

1. Indonesia

Indonesia is Japan's major supplier of crude oil and coal as well as liquefied natural gas (LNG). In the Japan-Indonesia EPA signed in August 2007 Chapter 8 covers energy and mineral resources. This chapter aims to strengthen and stabilize the supplies of energy and mineral resources through promoting investment and trade in these areas. Energy and mineral resources are strategically important for sustainable economic growth in both Indonesia and Japan. Therefore, the transparency of government policies needs to improve, political dialogue enhanced, and cooperation promoted, based on the rules provided below:

(a) Definitions (Article 97, Annex11)

Mineral resources, such as copper and nickel, in addition to energy resources, such as natural gas, crude oil, and coal, shall be subject to this chapter.

(b) Promotion and Facilitation of Investment (Article 98, Annex12)

Each party shall cooperate in promoting and facilitating investments through ways such as discussing, exchanging information and supporting investment promotion activities.

(c) Import and Export Restrictions (Article 99)

Each party shall have obligations to provide relevant information as early as possible, etc. when import and export restrictions are introduced.

(d) Export Licensing Procedures and Administrations (Article 100)

Each party shall have obligations, including providing relevant information concerning the administration of the restrictions, etc., when export licensing procedures are adopted or maintained.

(e) Energy and Mineral Resource Regulatory Measures (Article 101)

Each party shall have such obligations to ensure its regulatory bodies to avoid disruption of existing contractual relationship in application of the regulatory measure, and to notify the other party as soon as possible in adaptation of any new regulatory measure etc.

(f) Environmental Aspects (Article 102)

Each party confirms the importance of avoiding or minimizing harmful environmental impacts and shall have such obligations to take account of environmental considerations etc.

(g) Community Development (Article 103)

Each party welcomes any contribution by investors to community development.

(h) Cooperation (Article 104)

Each party shall cooperate in the three areas including policy development, capacity building and technology transfer in Indonesia.

(i) Sub-Committee on Energy and Mineral Resources (Article 105)

Parties shall establish a subcommittee as a place to exchanging information, reviewing, etc. In this committee, parties shall discuss energy security, and the development of an open and competitive market, etc.

2. Brunei

Brunei is a major producer of liquefied natural gas (LNG), and one of Japan's top suppliers of LNG. The Japan-Brunei EPA signed in June 2007 was the first of Japan's EPAs/FTAs to include a chapter concerning energy. It encourages the maintenance and strengthening of a stable and mutually beneficial relationship for both countries by introducing rules on regulatory measures, conducting cooperation and establishing a framework of dialogue as specified below:

(a) Basic Principle (Article 89)

Both parties recognize the importance of strengthening stable and mutually beneficial relationship in the energy sector.

(b) Definitions (Article 90)

Natural gas and crude oil shall be subject to this Chapter.

(c) Import and Export Restrictions (Article 91)

Each party shall have such obligations to give due consideration to contractual relationships in application of the import / export restrictions, and to give written notice, and hold consultation, upon the request, when import / export restrictions are introduced.

(d) Energy Regulatory Measures (Article 92)

Each party shall have such obligations to seek to ensure its regulatory bodies minimize adverse effects upon contractual relationships in application of the regulatory measures, and to give written notice, and hold consultation, upon the request, when import / export restrictions are introduced etc.

(e) Environmental Aspect (Article 93)

Each party shall endeavour to minimize, in an economically efficient manner, harmful environmental impacts of all activities related to energy.

(f) Cooperation (Article 94)

Each party shall cooperate in the areas including policy development, human resource development and technological development, for strengthening stable and mutually beneficial relationship in the energy sector.

(g) Sub-Committee on Energy (Article 95)

Parties shall establish a subcommittee as a place to exchanging information, reviewing, etc.

3. Australia

Australia is a major supplier of iron ore, coal and natural gas for Japan. The Japan-Australia EPA, signed in July 2014, contains Chapter 8 on Energy and Mineral Resources. In consideration of the importance of the energy and mineral resources sector for both countries, this Chapter provides that the parties shall endeavour to take reasonable measures for a stable supply of these resources and not to introduce export prohibition/restriction measures under the WTO agreements (GATT Articles XI:2(a) and XX(g)). Furthermore, it also provides that when a Party adopts or maintains export licensing procedures or introduces new energy and mineral resource regulatory measures, implementation shall be undertaken in a transparent and predictable manner and the Party shall hold consultations on request of the other Party.

More concretely, the following rules are provided.

(a) Basic Principle (Article 8.1)

The Parties recognise the importance of strengthening their stable and mutually beneficial relationship in the energy and mineral resources sector.

(b) Definitions (Article 8.2)

The energy and mineral resources sector shall be subject to this Chapter.

(c) Stable Supply of Energy and Mineral Resources (Article 8.3)

If a severe and sustained disruption to supply of an energy and mineral resource good or threat thereof arises, a Party may request consultations with the other Party, etc.

(d) Export Restrictions (Article 8.4)

Each Party shall endeavour not to introduce or maintain any prohibitions or restrictions on the exportation or sale for export of any energy and mineral resource goods. Where a Party intends to adopt an export prohibition or restriction, the Party shall seek to limit such prohibition or restriction to the extent necessary, provide notice in writing, and on request provide the other Party with a reasonable opportunity for consultation, etc.

(e) Export Licensing Procedures and Administrations (Article 8.5)

If a Party adopts or maintains export licensing procedures with respect to an energy and mineral resource good, the implementation shall be undertaken in a transparent and predictable manner, etc.

(f) Energy and Mineral Resource Regulatory Measures (Article 8.6)

In cases where a Party adopts any new energy and mineral resource regulatory measure, the Party shall ensure transparency of the measure in the energy and mineral resources sector, including notifying the other Party of such measure prior to the implementation of such measure, etc. and the Party shall, on request of the other Party, hold consultations with the other Party, etc.

(g) Cooperation (Article 8.7)

The Parties shall promote cooperation for strengthening stable and mutually beneficial relationships in the energy and mineral resources sector.

(h) Sub-Committee on Energy and Mineral Resources (Article 8.8)

The Parties hereby establish a Sub-Committee on Energy and Mineral Resources for reviewing and monitoring the implementation and operation of this Chapter and exchanging information, etc.

4. Canada

Canada is one of the world's major exporters of natural resources such as energy, metals, and minerals. Coal, fuels, minerals (iron ore, copper ore) account for approximately 30% of the import volume from Canada to Japan.

In "3.15 Other (Energy, minerals and foods)" of the "joint study report related to the potentials of Japan-Canada EPA", both countries agreed that special consideration should be given in the EPA for the Japan-Canada trade relationships in these fields.

Official negotiations for the Japan-Canada EPA commenced in November 2012.

Participation in International Energy Decisions

1. Energy Charter Treaty (ECT)

The ECT, which has been in force since 1998, promotes market-oriented reform and enterprise activities in the area of energy in the post Soviet and East European countries.

The ECT was signed by Japan in 1995 and became effective in 2002. It provides for free trade and transit of energy materials and products, as well as for protection of investments in the area of energy.

First, the ECT states that its provisions shall apply to trade in energy materials and products while any contracting party is not a party to GATT and related instruments (Article 29). The clause's objective is to facilitate the soft landing of Russia and post-Soviet and Eastern Europe countries that were not members of the WTO at the time the Treaty became effective into the GATT/WTO regime; thus, it serves as a transitional measure. The energy materials and products are defined in ANNEX EM, and include items such as uranium ore, coal, coal gas, tar, petroleum, refined petroleum, natural gas, bitumen, asphalt, electrical energy, fuel wood, and charcoal.

Second, the ECT provides that, with respect to the freedom of transit of energy materials and products, each contracting party shall not discriminate or unreasonably restrict transit based on the origin, destination or ownership of such energy materials and products. Transit is defined in Item 10 of Article 7, and basically covers transit of oil or natural gas via pipelines, or transit of electricity via electric transmission facilities running through three or more regions (countries).

The ECT also provides that: each contracting party shall work to promote competition (Article 6); each contracting party shall agree to promote access to and transfer of energy technology (Article 8); each contracting party shall strive to minimize harmful environmental impacts occurring within or outside its area, and strive to stimulate public awareness and cooperation (Article 19); measures for dispute settlement (Part V); and provisional application for contracting parties (Article 45).

As of January 2014, the ECT has been signed by 47 countries and states, and one international institution. In February 2015, Jordan announced that it would become a member of the Convention. Russia and Australia have signed, but not yet ratified. There are also several countries who choose to remain as observers (US, Canada, China, Korea, Saudi Arabia, etc. For more details, refer to www.encharter.org). (The ECT also addresses issues related to energy other than those mentioned above. Please refer to Section III, Chapter 5 Investment).

In addition, there have been efforts, mainly led by the EU, to promote the ECT as an international legal framework in the energy sector, and a ministerial meeting on the ECT is scheduled to be held in May 2015.

Overview of Legal Disciplines

As examples of internationally recognized rules on minerals and resources, the provisions of NAFTA are discussed below. NAFTA provides in Chapter 6 (Energy and Basic Petrochemicals) as follows:

(a) Principles (Article 601)

This article confirms: respect for the Constitutions of the member nations; desirability of strengthening the important role of trade in energy and basic petrochemical goods in the free trade area; and the importance of having viable and internationally competitive energy and petrochemical sectors to further the individual national interests of the member nations.

(b) Definitions (Article 602)

Terms such as uranium ore, coal, coke, tar, naphtha, oil, bitumen oil, cogas, petroleum coke, a uranium compound, oxidation heavy hydrogen, ethane, and butane are classified under the Harmonized System using codes of 4 to 6 digits.

Annex 602.3 prescribes reservations and special provisions including the following: each party shall allow its state enterprises to negotiate performance clauses in their service contracts; the Mexican State reserves to itself strategic activities such as exploration and exploitation of crude oil and natural gas; and an enterprise of another party may acquire, establish, or operate an electricity generating facility for independent power production in Mexico.

(c) Import and Export Restrictions (Article 603)

This article incorporates the provisions of the GATT with respect to import and export restrictions. In particular, minimum and maximum export price restrictions are prohibited, and other parties to NAFTA can resort to negotiation in circumstances where a party adopts or maintains a restriction on import or export of an energy or basic petrochemical good in connection with a non-party. In addition, provisions to the same effect are included in Chapter 3 on Trade in Goods (Article 309).

(d) Export Taxes (Article 604)

The article provides that no party may adopt or maintain any duty, tax or other charge on the export of any energy or basic petrochemical good to the territory of another Party, unless such duty, tax or charge is adopted or maintained on exports of any such good to the territory of all other parties; and any such good when destined for domestic consumption. In addition, Chapter 3 on Trade in Goods includes provisions to the same effect (Article 314; with basic foods such as eggs, salt and flour in Mexico excluded under Annex 314).

(e) Other Export Measures (Article 605)

The article provides that a party may adopt or maintain a restriction otherwise justified under Articles XI:2(a) or XX(g), (i) or (j) of GATT with respect to the export of an energy or basic petrochemical good to the territory of another party, only if:

- i) the restriction does not reduce the proportion of the total export shipments of the specific energy or basic petrochemical good made available to that other party relative to the total supply of that good of the party maintaining the restriction as compared to the proportion prevailing in the most recent 36-month period for which data is available prior to the imposition of the measure;
- ii) the party does not impose a higher price for exports of an energy or basic petrochemical good to the other party than the price charged for such good when consumed domestically; and
- iii) the restriction does not require the disruption of normal channels of supply to that other party or normal proportions among specific energy or basic petrochemical goods supplied to that other party, such as, for example, between crude oil and refined products and among different categories of crude oil and of refined products.

The clauses are applicable only to the bilateral relationship of the United States and Canada, and thus are not applicable to Mexico (Annex 605). Article 315, which is applied to goods in general, also includes provisions to the same effect, with Mexico being exempt (Annex 315).

(f) Energy Regulatory Measures (Article 606)

This article states that each party shall strive to ensure that in the application of any energy regulatory measure, energy regulatory bodies within its territory will avoid disruption of contractual relationships to the maximum extent practicable.

Environment

Background of the Rules

Today, an increasing number of EPAs/FTAs include provisions concerning environmental issues. This seems to reflect the recent growing awareness of environmental issues in each country. From an economic point of view, one main reason for this (as in the case of NAFTA) is the desire to respond to the concern that a failure of the counterparty country to comply with environmental (and labor) regulations may bring disadvantages to domestic industries, resulting in a race to the bottom for environmental regulations. This concern seems to strongly influence numerous investment agreements that include provisions confirming that it is inappropriate to invite investment (or encourage trade) by relaxing domestic environmental laws.

A second important reason for this trend is the view that when discrepancies exist between enterprises of counterparties to EPAs/FTAs with respect to compliance with environmental regulations, leveling off such discrepancies will improve and promote even-handed competition. Some multinational enterprises implement the world's highest level of environmental awareness regardless of the level required by environmental regulations of the countries in which they operate. In such cases, enhancing the level of the host countries' environmental regulations will serve to create better conditions for even-handed competition. The same situation may prevail in countries where the level of environmental regulations is high but enforcement is insufficient. When local enterprises do not fully comply with environmental regulations but foreign enterprises do comply (based on respect for compliance or corporate social responsibility), obtaining sufficient enforcement of environmental regulations is needed to bring about even-handed competitive conditions.

Against the background mentioned above, in submitting requests to EPA/FTA partner countries with regard to the development and enforcement of environmental regulations, it is conceivable that there might be requests for cooperation from the EPA/FTA partner country in question, for example, concerning technical assistance. In general, since it is often the case that countries with technologies and experience to solve environmental problems no longer have serious environmental problems, and in contrast, those with serious environmental problems do not yet have such technologies and experiences, bilateral cooperation between these countries will lead to global harmony. It is thus important that Japan play an active role and contribute to environmental protection on a global scale, maximizing the experience and technologies that it has cultivated in the past and reducing the damage it might cause to the global environment. Furthermore, raising such cooperative measures from a bilateral ad-hoc level to an EPA/FTA level will further advance Japan's role in this area.

Overview of Legal Disciplines

The FTA/EPAs entered into by Japan so far do not include independent chapters on the environment in these agreements; however, Japan is involved in initiatives for the environment. Common content in these initiatives are provisions that investment should not be encouraged by relaxing environmental measures -Investment Chapter), cooperation in the field of the environment - Cooperation Chapter), and environmental regulations that a country considers necessary in relation to mutual recognition cannot be prevented - Mutual Recognition Chapter). In addition to the following, environment-related provisions are also discussed in the agreements at present under negotiation.

1. Japan-Singapore EPA

As a provision relating to environmental protection, the chapter on Mutual Recognition (Chapter 6) states, as a general exception to the chapter, that nothing in this chapter shall be construed to limit the authority of a party to take environmental measures it considers appropriate pursuant to a mutual recognition policy (Article 54). Article 31 of the Implementation Agreement expressly provides that the environment is a cooperative area of science technology.

2. Japan-Mexico EPA

The chapter on Investment (Chapter 7) includes provisions stating as follows: (i) a measure that requires an investment to use a technology to meet generally applicable health, safety or environmental requirements shall not be construed to be inconsistent with the restriction on imposing or enforcing certain requirements on the other party (Article 65 1(f)); (ii) it is inappropriate to encourage investment by relaxing environmental measures (Article 74); and (iii) in investor-to-state investment arbitration, a tribunal may appoint one or more experts in the field of environmental matters to report to it in writing on any factual issue concerning matters of their expertise (Article 90).

The chapter on Cooperation (Chapter 14) includes a provision that contracting parties should cooperate on issues of environment. Such cooperation includes information exchange, improvement of skills, and promotion of trade of environmental goods/services.

Furthermore, the chapter on enforcement and implementation of the EPA (Chapter 16), provides that a public comment procedure shall not be required in an emergency case of protecting the environment (Article 161).

3. Japan-Malaysia EPA

This EPA includes only two environment-related provisions: (i) the chapter on Investment (Chapter 17) includes the provision that investments should not be invited by relaxing environmental measures (Article 90); and (ii) the chapter on Cooperation (Chapter 12) includes the provision that expressly states the environment is an area of cooperation (Article 140 (g)).

4. Japan-Philippines EPA

The chapter on Trade in Goods (Chapter 2) includes a provision on bilateral cooperation for the utilization of appropriate mechanisms in conformance with the importing party's environmental standards (Article 27).

The chapter on Cooperation (Chapter 14) expressly identifies energy and environment as areas of cooperation (Article 144(d)). Furthermore, the chapter on Mutual Recognition (Chapter 6) includes the provision, as a general exception to the chapter, that nothing in this chapter shall be construed to limit the authority of a party to take measures it considers appropriate for protecting the environment (Article 66), and the chapter on Investment (Chapter 8) includes the provision that it is not appropriate to encourage investment by relaxing environmental measures (Article 102). The foreign affairs ministers exchanged letters, and in accordance with the Basel Convention, it was confirmed that hazardous wastes specified and prohibited by domestic laws of both countries will not be exported from Japan to the Philippines, and that related articles in the Japan-Philippines Economic Partnership Agreement will not hinder the adoption and implementation of such measures under existing and future laws, regulations and rules of either country.

5. Japan-Chile EPA

The preamble of this EPA states that economic development, social development and environmental protection are interdependent and mutually reinforcing pillars of sustainable development. The strategic economic partnership can play an important role in promoting sustainable development.

Also, the chapter on Investment (Chapter 8) includes the provision that it is inappropriate to encourage investment by relaxing environmental measures (Article 87). In addition, when the agreement was signed, each party adopted the political declaration on the environment, confirming their intention continue to pursue high level environmental protection, to promote public awareness, and to encourage and facilitate cooperative activities in the field of environment such as promotion of projects under Clean Development Mechanism (CDM).

6. Japan-Thailand EPA

The chapter on Mutual Recognition (Chapter 6) includes the provision, as a general exception to the chapter, that nothing in this chapter shall be construed to limit the authority of a party to take measures it considers appropriate for protecting the environment (Article 68).

The chapter on Investment (Chapter 8) includes the provision that investment shall not be facilitated by relaxing environmental controls (Article 111). In addition, the chapter on Cooperation (Chapter 13) stipulates the environment as the field of cooperation (Article 153 (f)), and the political declaration, which was made when the agreement was signed, stipulates the promotion of cooperation in the areas of science and technology, energy and the environment.

Chapter 10 of the Implementing Agreements on Cooperation provides details regarding environmental cooperation, and says that the parties shall establish a sub-committee on cooperation in the fields of science and technology, energy and the environment. Also the parties exchange the documents between the foreign minister which reconfirms the rights and obligations regarding hazardous waste under the Basel Convention and states that the import/export of hazardous waste will be strictly regulated in compliance with the Basel Convention. It also provides that measures for the import/export of hazardous waste – notwithstanding the tariff elimination – can be applied in compliance with the Basel Convention, and that the parties will cooperate for environmental protection.

7. Japan-Brunei EPA

In the preamble, it is recognized that economic development, social development and environmental protection are independent and mutually reinforcing components of sustainable development and that the economic partnership can play an important role in promoting sustainable development.

Also, the chapter on Investment (Chapter 5) includes the statement that it is inappropriate to encourage investment by relaxing environmental measures (Article 71). The chapter on Energy (Chapter 7) includes the provisions that each Party shall endeavour to minimize harmful environmental impacts of all activities related to energy in its Area, and take into account environmental considerations throughout the process of formulation and implementation of its policy on energy. It also encourages favourable considerations for transfer and dissemination of technologies that contribute to the protection of environment, consistent with the adequate and effective protection of intellectual property rights, and promotes public awareness of environmental impacts of activities related to energy and of the scope for and the costs associated with the prevention or abatement of such impacts. (Article 93). In addition, the chapter on Cooperation (Chapter 9) stipulates the environment as the field of cooperation (Article 102 (h)).

8. Japan-Indonesia EPA

The chapter on Investment (Chapter 5) includes the statement that it is inappropriate to encourage investment by relaxing environmental measures (Article 74). The chapter on Mineral Resources and Energy (Chapter 8) includes the provisions that each party confirms the importance of avoiding or minimizing harmful environmental impacts of all activities related to energy and mineral resources in its area, and shall take into account environmental considerations, in accordance with its laws and regulations, throughout the process of formulation and implementation of its policy on energy and mineral resources. Also, it shall encourage favourable conditions for the transfer and dissemination of technologies that contribute to the protection of environment, consistent with the adequate and effective protection of intellectual property rights, and promote public awareness of environmental impacts of activities related to energy and mineral resources and of the scope for and the costs associated with the prevention or abatement of such impacts (Article 102).

The chapter on Cooperation (Chapter 13) stipulates the environment as a field of cooperation (Article 134 (i)). Chapter 7 of the Implementing Agreements also includes a provision of the scope and system of cooperation in the field of the environment.

9. Japan –ASEAN Comprehensive EPA

The chapter on Goods (Chapter 2) prescribes that none of the provisions in this chapter shall be construed to prevent a Party which is a party to the Basel Convention or any other relevant international agreement from adopting or enforcing any measure relating to hazardous wastes or hazardous substances based on its laws and regulations, in accordance with such international agreements (Article 16). Moreover, the chapter on Standards, Technical Regulations and Conformity Assessment Procedures (Chapter 5) stipulates, as a general exception to the chapter, that none of the provisions in the chapter shall restrict the right of a Party to prepare, adopt and apply standards and technical regulations, to the extent necessary in order to conserve the environment (Article 44), while the chapter on Economic Cooperation (Chapter 8) clearly specifies that the environment is a field for cooperation (Article 53 (k)).

10. Japan –Viet Nam EPA

The chapter on Technical Regulations, Standards, and Conformity Assessment Procedures (Chapter 6) stipulates, as a general exception to the chapter, that it shall not impede a Party from implementing the environmental regulations that it believes to be appropriate (Article 51). The chapter on Cooperation (Chapter 12) clearly specifies that the environment is a field for cooperation, while Chapter 10, which is the Implementing Agreement, prescribes the scope and forms of cooperation in the environmental field.

11. Japan – Switzerland EPA

The chapter on General Provisions (Chapter 1) states that the Parties shall promote trade in environmental products and environment-related services, in order to disseminate products and technologies that support the achievement of goals focused on environmental protection and development (Article 9). The chapter on Investment (Chapter 9) stipulates that it is inappropriate to ease health, safety or environment regulations in order to encourage investment (Article 101).

12. Japan – India EPA

By Japan's request, the chapter on General Provisions (Chapter 1) has an independent article stating that both signatory countries will work on environmental protection (Article 8). In the chapter on Investment (Chapter 8), it stipulates that it is inappropriate to relax environmental measures to encourage investment (Article 99). The chapter on Cooperation (Chapter 13) clearly states that the fields of cooperation shall include the environment (Article 129). Its scope and form may be set forth in the Implementing Agreement.

13. Japan – Peru EPA

In the preamble, the parties commit to implement this Agreement in a manner consistent with environmental protection and conservation. The chapter on Government Procurement stipulates that each Party may prepare, adopt, or apply technical specifications to protect the environment. Furthermore, in the chapter on Cooperation (Chapter 14), it is clearly stated that the fields of cooperation shall include the environment (Article 200). In the Implementing Agreement, Chapter 3 Article 25 specifies the areas and forms of cooperation.

Additionally, on the occasion of signing the agreement, the Joint Statement on Trade and Environment was released, reaffirming the importance of, and the parties' commitments to, the Convention on Biological Diversity and the United Nations Framework Convention on Climate Change.

14. Japan-Australia EPA

The chapter on Investment (Chapter 14) stipulates, as a general exception to the chapter, that “measures necessary to protect human, animal or plant life or health” include environmental measures necessary to protect human, animal or plant life or health. In addition, the chapter on Government Procurement (Chapter 17) stipulates that a Party may prepare, adopt, or apply technical specifications to promote the conservation of natural resources or protect the environment.

15. Japan-Mongolia EPA

The chapter on Investment (Chapter 10) stipulates that the Parties shall refrain from encouraging investment by relaxing their respective health and safety standards. In addition, in the chapter on Cooperation (Chapter 15), it is clearly stated that the fields of cooperation shall include the environment (Article 15.1). In the Implementing Agreement, Article 5.10 specifies the areas and forms of cooperation in the environment sector.

16. Energy Charter Treaty (“ECT”)

The Energy Charter Treaty, which is not an FTA but an international agreement regulating transfer of energy resources and investment protection, provides that contracting parties shall strive to minimize in an economically efficient manner harmful environmental impacts. The contracting parties agree to the Polluter Pays Principle (the polluter should, in principle, bear the cost of pollution). The ECT further provides that: contracting parties (or the parties involved) shall take into account environmental considerations throughout the formulation and implementation of their energy policies; promote market-oriented price formation and fuller reflection of environmental costs and benefits throughout the Energy Cycle; have particular regard for cooperation in the field of international environmental standards, improving energy efficiency for developing and using renewable energy sources; promote public awareness of the environmental impacts of energy systems; and promote transparent assessment at an early stage (Article 19, Item 1).

The ECT provides that, at the request of one or more contracting parties, disputes concerning the application or interpretation of provisions therein shall, to the extent that arrangements for the consideration of such disputes do not exist in other appropriate international fora, be reviewed by the Charter Conference with the aim of finding a solution (Article 19, Item 2).

Provisions on the Environment in EPAs/FTAs signed by other countries

Some countries have signed EPAs/FTAs that take a more active and positive approach toward environmental protection.

1. United States

Many trade agreements signed by the United States include independent chapters on the environment. The agreements in particular with Singapore, Chile, Australia, Bahrain and Morocco set forth an organizational framework promoting cooperation on environmental issues and monitoring the compliance of domestic environmental rules and regulations.

For example, the North American Agreement on Environmental Cooperation between the government of Canada, the government of the United Mexican States and the government of the United States, *inter alia*, that: (i) each party shall periodically prepare and make publicly available reports on the state of the environment (Article 2); (ii) each party shall ensure that its laws and regulations provide for high levels of environmental protection and shall strive to continue to improve those laws and regulations (Article 3); (iii) each party shall ensure that its laws, regulations, procedures and administrative rulings of general application respecting any matter covered by this Agreement are promptly published or otherwise made available (Article 4); and (iv) each party shall effectively enforce its environmental laws and regulations through appropriate governmental action (Article 5).

A Commission for Environmental Cooperation which is comprised of a Council, a Secretariat and a Joint Advisory Committee was established (Article 8). The Council shall prepare an annual report of the Commission in accordance with instructions (Article 12) as well as preparing a report in its own initiative (Article 13), and a factual report based on information furnished by non-governmental organizations or individuals demonstrating negligence by effective enforcement of environmental rules and regulations. Such reports shall be made publicly available upon the Council's decision (Article 15).

This agreement further provides that any contracting party may request consultations with any other party regarding whether there has been a persistent pattern of failure by that other party to effectively enforce its environmental law (Article 22). If the matter has not been resolved, the Council shall convene an arbitral panel to consider the matter where the alleged persistent pattern of failure by the party complained against to effectively enforce its environmental law relates to a situation involving workplaces, firms, companies or sectors that produce goods or provide services (Article 24). Moreover, agreements concluded in recent years, such as those between the United States and Singapore, the United States and Chile, the United States and Australia, the United States and Bahrain, the United States and Morocco, and the United States and the Republic of Korea, have set forth organizational frameworks for promoting cooperation relating to environmental problems and monitoring the enforcement of domestic environment legislation.

2. EU

Regional trade agreements signed by EU member states set the principles and scope of environmental cooperation as a cross-sectoral theme for promoting and ensuring sustainable development based on the principle of environmental integration provided for in Article 11 of the Treaty on the Functioning of the EU and the provisions on foreign policy provided for in Article 21.2 of the EU Treaty.

For example, the EU-Chile Association Agreement includes a provision that the intent of environmental cooperation is to encourage conservation and improvement of the environment, prevent contamination and degradation of natural resources and ecosystems, and encourage rational use of the ecosystem in the interest of sustainable development. The agreement further provides that the following are particularly significant: the relationship

between poverty and the environment; the environmental impact of economic activities; environmental problems and land-use management; projects to reinforce Chile's environmental structure and policies; exchanges of information, technology and experience in areas including environmental standards and models, training and education; environmental education and training to involve citizens more; and technical assistance and joint regional research programs (Article 28). The EU-Korea EPA and the EU-Canada Comprehensive Economic and Trade Agreement (CETA) include provisions that pursue high levels of environmental protection, compliance with the multinational environmental agreements, trade and investment promotion in environmental goods and services, enforcement of environmental law, prohibition of relaxing environmental regulations, cooperation in the environmental field, consultation, and referring disputes to a panel of experts.

3. Other Countries

Canada has signed agreements with Chile and Costa Rica following the NAFTA model. The Trans-Pacific SEP (an EPA among Brunei, Chile, Singapore and New Zealand) includes the Environmental Cooperation Agreement among the parties to the Trans-Pacific Economic Partnership Agreement (as an annex). In addition, the MERCOSUR includes the provision that each party will cooperate in the implementation of international environmental agreements to which they are parties (Article 5).

Labor

Background of the Rules

Cases of including labor-related provisions in EPAs/FTAs are also increasing in number. The same economic background as environmental issues is considered to have led to growing awareness of labor issues among countries. That is, first, domestic industries complying with labor regulations in the counterparty country may suffer a disadvantage in terms of their competitiveness and result in a battle of labor regulation relaxation (“race to the bottom”). In responding to such a concern, many EPAs/FTAs include provisions confirming that it is inappropriate to invite investment (or encourage trade) by relaxing domestic labor regulations. Second, as in the field of environmental issues, there are cases in which an EPA/FTA includes provisions that aim to improve and promote even-handed competition through leveling off discrepancies with respect to compliance with labor regulations where discrepancies with respect to compliance with labor regulations exist among different enterprises in an EPA/FTA partner country. In particular, when local enterprises do not fully comply with labor regulations but foreign enterprises do comply (based on respect for compliance or corporate social responsibility), securing sufficient enforcement of labor regulations will bring about fair competition environments.

As described above, environmental and labor issues share similar economic background. EPAs/FTAs of the United States and the EU refer to these issues as “Trade and Sustainable Development” and treat them in a single chapter, with special procedures (particularly on procedures such as dispute settlement) that differ from those used in other areas (see “Labor issues in FTAs of other countries”).

Overview of Legal Disciplines

Due to interest in the above-mentioned issues, including provisions confirming that it is inappropriate to invite investment by relaxing domestic labor laws and provisions requiring the promotion of labor protection in EPAs/FTAs are increasing. As described in the next section, “Labor issues in FTAs of other countries”, FTAs concluded by the United States and the EU, in particular, include provisions requiring the protection and enhancement of labor rights.

The labor-related provisions of the individual EPAs concluded by Japan are described below. These labor-related provisions are mainly provided in the chapters on Investment, Trade in Services and Government Procurement. Of the EPAs concluded by Japan to date, provisions confirming that it is inappropriate to invite investment by relaxing domestic labor laws are included in the Japan-Philippines EPA, the Japan-Switzerland EPA, and the Japan-Mongolia EPA. Other labor-related provisions include provisions requiring parties to ensure that the EPA rules do not prohibit the application of labor-related measures of the respective countries such as prison labor, provisions requiring them not to apply the provisions of the chapter on Trade in Services to measures affecting natural persons seeking access to the employment market of a country or measures regarding employment on a permanent basis, and provisions requiring parties not to limit total employment in the services sector, etc.

(1) Japan-Singapore EPA

The chapter on Trade in Goods includes the provision that nothing in that chapter shall be construed to prevent the adoption or enforcement of measures relating to the products of prison labor, subject to the requirement that such measures are not applied in a manner that would constitute a means of arbitrary or unjustifiable discrimination against the other party (Article 19, Paragraph 1 (e)). In addition, the chapter on Investment includes the provision that nothing in that chapter shall be construed to prevent the adoption or enforcement of measures relating to prison labor (Article 83, Paragraph 1(d)).

(2) Japan-Mexico EPA

The chapter on Services includes a provision that the aforementioned chapter shall not apply to measures affecting natural persons seeking access to the employment market of a country, or measures regarding employment on a permanent basis (Article 97, Paragraph 2 (h)). The chapter on Entry and Temporary Stay of Nationals for Business Purposes stipulates that the chapter reflect the necessity of protecting the labor force and permanent employment in both countries (Article 113, Paragraph 1), and the chapter shall not be applied to measures that affect those who try to participate in the employment market, or that pertain to permanent employment (Article 114, Paragraph 2).

The chapter on Government Procurement includes the provision that nothing herein prevents taking measures relating to goods or services of prison labor (Article 126, Paragraph 2(d)). Moreover, the chapter on Cooperation refers to exchange of information related to best practices on technical and vocational education and training, including labor policy, as an area for developing cooperation (Article 143 (a)).

(3) Japan Malaysia EPA

The chapter on Trade in Services stipulates that it shall not apply to measures affecting natural persons seeking access to the employment market of a country, or measures regarding employment on a permanent basis (Article 94, Paragraph 2(d)).

(4) Japan-Philippines EPA

The chapter on Investment includes provisions concerning investment and labor. These provisions provides that it is inappropriate to encourage investment by weakening or reducing the protections afforded in domestic labor laws, and that each party shall strive to ensure that it does not take measures that weakens or reduces adherence to the internationally recognized labor rights such as: the right of association, the right to organize and bargain collectively, labor protections for children and young people, acceptable conditions of work with respect to minimum wages, hours of work, and occupational safety and health (Article 103). The same article also provides that if a party considers that the other party has offered such an encouragement, it may request consultations with the other party.

(5) Japan-Chile EPA

The chapters on Services and Financial Services include provisions that these chapters shall not apply to measures affecting natural persons seeking access to the employment

market of a country, or measures regarding employment on a permanent basis (Article 106, Paragraph 2 (f), Article 117, Paragraph 4 (d)). Furthermore, the chapter that prescribes Entry and Temporary Stay of Nationals for Business Purposes, includes the provisions that this chapter reflect the necessity of protecting the labor force and permanent employment in both countries (Article 129, Paragraph 1) and is not applied to measures affecting those who are seeking access to the employment market, or measures that pertain to permanent employment (Article 130, Paragraph 2). The chapter on Government Procurement includes the provision that nothing herein prevents taking measures relating to goods or services of prison labor (Article 151 (d)).

(6) Japan-Thailand EPA

The chapter on Services includes the provision that this chapter shall not apply to measures affecting natural persons seeking access to the employment market of a country, or measures regarding employment on a permanent basis (Article 72, Paragraph 2 (e)), and that the total number of employees in a specific service shall not be limited in the sectors where market-access commitments are undertaken (Article 74, Paragraph 2 (d)). Moreover, the chapter on the Movement of Natural Persons includes the provision that this chapter shall not apply to measures affecting natural persons seeking access to the employment market of a country, or measures regarding employment on a permanent basis (Article 115, Paragraph 2).

(7) Japan-Brunei EPA

The chapter on Services includes the provision that this chapter shall not apply to measures affecting natural persons seeking access to the employment market of a country, or measures regarding employment on a permanent basis (Article 73, Paragraph 2 (d)), and that the total number of employees in a specific service shall not be limited in the sectors where market-access commitments are undertaken (Article 75, Paragraph 2 (d)).

(8) Japan-Indonesia EPA

The chapter on Services includes the provision that this chapter shall not apply to measures affecting natural persons seeking access to the employment market of a country, or measures regarding employment on a permanent basis (Article 76, Paragraph 2 (e)), and that the total number of employees in a specific service shall not be limited in the sectors where market-access commitments are undertaken (Article 78, Paragraph 2 (d)). In addition, the chapter on the Movement of Natural Persons includes the provision that this chapter shall not apply to measures affecting natural persons seeking access to the employment market of a country, or measures regarding employment on a permanent basis (Article 92, Paragraph 2).

(9) Japan – Viet Nam EPA

The chapter on Services stipulates that, adhering to the basic principle of GATS, it does not treat the provision of labor – that is to say, natural persons seeking to enter the employment market – as a service, so the provisions of the chapter on Services do not apply to measures that have an impact on such natural persons and measures relating to nationality, residence or employment on a permanent basis (Article 57, Paragraph 2 (d)). Moreover, in fields in which a commitment has been made regarding the obligation of market access in relation to trade in services, it is stipulated that the total number of those employed in a specific service field must not be restricted (Article 59, Paragraph 2 (d)). Furthermore, the

chapter on the Movement of Natural Persons also prescribes that its provisions on the movement of natural persons do not apply to measures that have an impact on natural persons seeking access to the employment market and measures relating to nationality, residence or employment on a permanent basis (Article 74, Paragraph 2).

(10) Japan – Switzerland EPA

The chapter on Investment stipulates that it is inappropriate to relax domestic labor standards in order to encourage investment. The chapter on Services stipulates that, adhering to the basic principle of GATS, it does not treat the provision of labor – that is to say, natural persons seeking to enter the employment market – as a service, so the provisions of the chapter on Services do not apply to measures that have an impact on such natural persons and measures relating to nationality, residence or employment on a permanent basis (Article 50, Paragraph 2). Moreover, in fields in which the obligation of market access in relation to trade in services has not been withheld, it is stipulated that the total number of those employed in a specific service field must not be restricted (Article 46, Paragraph 2 (d)). Furthermore, the chapter on the Movement of Natural Persons also prescribes that its provisions on the movement of natural persons do not apply to measures that have an impact on natural persons seeking access to the employment market and measures relating to nationality, residence or employment on a permanent basis (Article 62, Paragraph 2); it also sets forth the principle that the chapter on the Movement of Natural Persons reflects the necessity of protecting the domestic workforce and permanent employment in each signatory country (Article 63, Paragraph 1).

(11) Japan – India EPA

The Chapter on Services specifies that the Chapter shall not apply to measures affecting natural persons seeking access to the employment market of a Party, or measures regarding employment on a permanent basis (Article 57, Paragraph 2(c)). The Chapter on The Movement of Natural Persons also specifies that the Chapter shall not apply to measures affecting natural persons of a Party seeking access to the employment market of the other Party, nor shall it apply to measures regarding nationality or citizenship, or residence or employment on a permanent basis (Article 74, Paragraph 2).

(12) Japan – Peru EPA

The Chapter on Services specifies that it shall not impose any obligation on a Party with respect to a national of the other Party seeking access to its employment market, or employed on a permanent basis in that Party and shall not confer any right on that national with respect to that access or employment (Article 104, Paragraph 4). Additionally, Article 106(d) of the same chapter stipulates that Neither Party shall maintain or adopt limitations in the form of numerical quotas on the total number of natural persons that may be employed in a particular service sector or that a service supplier may employ and who are necessary for, and directly related to, the supply of a specific service.

The Chapter on Entry and Temporary Stay of Nationals for Business Purposes specifies that the chapter reflects the need to protect the domestic labor force and permanent employment in either Party (Article 133, Paragraph 1), and the Chapter shall not apply to measures regarding employment on a permanent basis (Article 134, Paragraph 2). Additionally, the Chapter on Government Procurement specifies that nothing in the Chapter shall be construed to prevent a Party from

imposing measures relating to goods or services of prison labor (Article 161, Paragraph 2).

(13) Japan-Australia EPA

The Chapter on Trade in Services stipulates that it shall not apply to measures affecting natural persons of a Party seeking access to the employment market of the other Party, or measures regarding nationality or citizenship, or residence or employment on a permanent basis (Article 9.1, Paragraph 2 (d)). Article 9.3, Paragraph 1 (d) of the Chapter on Trade in Services stipulates that a Party shall not adopt or maintain measures that are defined as limitations on the total number of natural persons who may be employed in a particular service sector or that a service supplier may employ and who are necessary for, and directly related to, the supply of a specific service.

The Chapter on Movement of Natural Persons stipulates that the Chapter shall not apply to measures affecting natural persons of a Party seeking access to the employment market of the other Party, nor to measures regarding nationality or citizenship, or residence or employment on a permanent basis (Article 12.1, Paragraph 2). The Chapter on Government Procurement stipulates that nothing in the Chapter shall be construed to prevent a Party from imposing, enforcing or maintaining measures relating to goods or services of handicapped persons, of philanthropic or not-for-profit institutions or of prison labour (Article 17.20, Paragraph 2 (d)).

(14) Japan-Mongolia EPA

The Chapter on Investment stipulates that the Parties shall refrain from encouraging investment by lowering their labor standards (Article 10.17). The Chapter on Trade in Services stipulates that it shall not apply to measures affecting natural persons of a Party seeking access to the employment market of the other Party, or measures regarding nationality or citizenship, or residence or employment on a permanent basis (Article 7.1, Paragraph 2 (f)), and that a Party shall not maintain or adopt measures that are defined as limitations on the total number of natural persons who may be employed in a particular service sector or that a service supplier may employ and who are necessary for, and directly related to, the supply of a specific service (Article 7.5, Paragraph 2 (d)).

In addition, the Chapter on Movement of Natural Persons stipulates that the Chapter shall not apply to measures affecting natural persons of a Party seeking access to the employment market of the other Party, nor shall it apply to measures regarding nationality or citizenship, or residence or employment on a permanent basis (Article 8.2, Paragraph 2).

Labor issues in FTAs of other countries

1. United States

(1) NAFTA

While main text of NAFTA does not include provisions concerning labor policies, its preamble states that the agreement aims to create new employment opportunities, to improve working conditions and living standards, and to protect, enhance and enforce basic workers' rights.

(2) North American Agreement on Labor Cooperation of NAFTA

In August 1993, the trilateral North American Agreement on Labor Cooperation, which was to complement NAFTA in the area of labor protection, was concluded between the United States, Canada and Mexico. The agreement became effective in January 1994, simultaneously with NAFTA. The conclusion of the complementary agreement was in response to the opposition to NAFTA, expressed by groups such as the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO), due to concerns that NAFTA would promote shifting of factories to Mexico (whose labor conditions, including wages, were considered to be less stringent than those of the US), and thereby worsen the already tough US employment conditions. An outline of the provisions related to labor issues (principal items) of this agreement is as follows:

(a) Promotion of Labor Principles

The three countries -- the United States, Canada and Mexico -- promote, in accordance with their respective domestic laws: i) freedom of association; ii) right to collective bargaining; iii) right to strike; iv) prohibition of forced labor; v) labor protection for children and young persons; vi) minimum employment standards; vii) elimination of employment discrimination; viii) equal pay for women and men; ix) prevention of occupational injuries and illnesses; x) compensation for occupational injuries and illness; and xi) protection of migrant workers.

(b) General Obligations Prescribed by the Agreement

The agreement sets forth the general obligations of the parties to, inter alia: i) improve working conditions and living standards; ii) promote effective enforcement by each party of its labor laws; iii) cooperate and coordinate to promote the principles of the agreement; and iv) encourage publication and exchange of information to enhance the mutual understanding of the statutes, institutions and legal frameworks governing labor in each country.

(c) Establishment of Commission for Labor Cooperation

Pursuant to the agreement, the Commission for Labor Cooperation is to be established, which shall consist of the Ministerial Council, the Secretariat and the National Administrative Offices (NAO). The Ministerial Council oversees the implementation of the agreement and directs the work and activities of the Secretariat. The Secretariat is to be established as a permanent body and give technical assistance to the Ministerial Council as well as prepare and submit periodic reports thereto. The NAO is to be established in each member state, and serve as a point of contact and provides information.

(d) Dispute Settlement Mechanism

1) When a dispute arises concerning the issue such as occupational safety and health, child labor and minimum wage, the NAO will exchange related information, followed by convening of the Ministerial Council upon the request of at least one member state, and the Evaluation Committee of Experts (ECE) will then resolve the dispute. The ECE will conduct research concerning the respective issues, prepare a report thereon and submit it to the Ministerial Council. In cases where the issue is of a structural nature and cannot be resolved in the Ministerial Council, an arbitration panel comprised of experts will be established upon the request of at least two member states.

2) When the arbitration panel determines, after the examination of a case, that the state complained against failed to effectively enforce labor standards or regulations, such state should within 60 days adopt and agree to an action plan to solve the problem. If agreement is not reached within the prescribed period, the panel may evaluate the action plan or present a counter plan within another 60 days.

3) In order to ensure implementation of the action plan, the arbitration panel may be convened as necessary and impose a monetary contribution on a state complained against that does not implement the action plan. If the panel determines that such state has not made the required monetary contribution and continues to refrain from implementing the action plan, the panel may suspend the payment of benefits under NAFTA within a certain amount (maximum of USD 20,000,000) with regard to the United States and Mexico, or file a suit in a federal court of Canada to implement the payment and action plan with regard to Canada.

(3) Other FTAs concluded by U.S.

The US-Jordan FTA provides in Article 6 that the parties thereto reaffirm their obligations as members of the International Labor Organization (“ILO”), and that the parties shall strive to ensure protection by domestic law of internationally recognized labor rights such as such as the right of association; the right to organize and bargain collectively; prohibition on the use of any form of forced or compulsory labor; a minimum wage for the employment of children; and acceptable of labor conditions with respect to minimum wages and hours of work, etc. (Paragraph 1). The parties also recognize that it is inappropriate to encourage trade by relaxing domestic labor laws. Accordingly, each party shall strive to ensure that it does not waive or otherwise derogate from, or offer to waive or otherwise derogate from, such laws as an encouragement for trade with the other party (Paragraph 2). Moreover, each party shall strive to ensure that its laws provide for labor standards consistent with internationally recognized labor rights (Paragraph 3), and each party shall not fail to effectively enforce its labor laws (Paragraph 4(a)) or to recognize that each party retains the right to exercise discretion with respect to making decisions regarding the allocation of resources (Paragraph 4(b)). The Joint Committee shall consider any cooperation opportunity (Paragraph 5).

Other FTAs signed by the U.S. include similar provisions on labor (e.g., U.S.-Singapore, U.S.-Panama, U.S.-Bahrain, U.S.-Australia, U.S.-Chile, and CAFTA-DR). In the recently concluded US-Korea FTA (entered into force in March 2012), labor-related provisions are provided for in Chapter 19. They include provisions reaffirming the party’s obligations as members of the ILO (Article 19.1 and Article 19.2, Paragraph 1), and compliance with the provisions requiring no relaxation of labor regulations in a manner affecting trade or investment between the Parties (Article 19.2, Paragraph 2), and the provisions on labor cooperation mechanism (Annex 19-A), etc.

2. EU

The FTAs by the EU deal with labor issues within the framework for cooperation. For example, the EC-Chile Association Agreement (in force since 2003) recognizes the importance of social development along with economic development, and gives priority to the creation of employment and respect for fundamental social rights, notably by promoting the

relevant conventions of the ILO covering such issues as the freedom of association, the right to collective bargaining and non-discrimination, the abolition of forced and child labor, and equal treatment between men and women (Article 44, Paragraph 1).; In addition, the Agreement lists priority measures aimed at: reduction of poverty and the fight against social exclusion; promoting the role of women in the economic and social development process; developing and modernizing labor relations, working conditions, social welfare and employment security; promoting vocational training and development of human resources; and promoting projects and programs which generate opportunities for the creation of employment within micro-, small- and medium-sized enterprises (Paragraph 4).

The EU-Egypt Association Agreement (in force since 2004) also reaffirms the importance of the fair treatment of workers legally residing and employed in the territory of the contracting party, and upon the request of a counter party, each party agrees to initiate talks related to working conditions (Article 62). The agreement further provides that the parties thereto shall conduct regular dialogue on social matters, and that this dialogue shall be used to find ways to achieve progress in the field of movement of workers and equal treatment and social integration of the nationals legally residing in the territories of their host countries (Article 63). Subsequently, as a general rule on external actions, universality and indivisibility of human rights and fundamental freedoms are explicitly provided for in Article 21 of the Treaty on The European Union via the Treaty of Lisbon that entered into effect on December 1, 2009.

The recently concluded FTA with the Republic of Korea (which entered into force in July 2011) includes a chapter on environment and labor as "Trade and Sustainable Development (Article 13)". It includes provisions reaffirming their obligations as members of the ILO (Article 13.4, Paragraph 3), on the establishment of a Domestic Advisory Group(s) (Article 13.12, Paragraphs 4 and 5), on the establishment of a Civil Society Forum (Article 13.13), and on independent dispute settlement mechanisms (Articles 13.14, 13.15, and 13.16), etc. Although not yet signed, an independent chapter on labor is expected to be provided in the FTA with Canada (CETA).

Electronic Commerce

1. Overview of the Rules

Since the Declaration on Global Electronic Commerce was adopted at the second WTO Ministerial Conference in May 1998, discussions have been held as to which legal regulatory framework electronic commerce within the WTO, OECD, UNCITRAL and APEC applies to e-commerce. Although discussions about these international frameworks have not reached conclusions, establishment of effective legal control within EPAs/FTAs has progressed since the chapter on electronic commerce was included in the Australia-Singapore FTA (signed in February 2003).

Regarding the legal control on electronic commerce, the "concept of electronic commerce", "classification of digital contents", and "custom duties" have been discussed (Figure III-7-1).

(1) The Definitions and Outline of Electronic Commerce

The concept of electronic commerce is either not defined or used in individual terms

and definitions in existing international agreements (refer to Figure III-7-2). In the "chapter on electronic commerce" in EPAs/FTAs, "electronic commerce" is not defined, but characteristics that constitute electronic commerce are set out as follows.

a) Technological neutrality

Although electronic commerce and traditional commerce have differences in methods and technology, other elements are neutral.

- i) We can see this concept applied to, for example, the method to declare the commercial intention (paper-based document or E-mail), the method to supply services across the border (postal mail, fax, telephone or E-mail) and the method to deliver the intangible products including software (trade in tangible medium like CD/DVD or communication with electromagnetic wave for broadcasting or Internet).

b) Economic growth and opportunity

This is a concept that seeks to grasp the true nature of electronic commerce, based on the principle that there should be a proper awareness of the advantages of multiple international transactions specific to electronic commerce and that internationally consistent initiatives aimed at the maintenance and further development of these advantages should be promoted in order to maintain this trend and aim for further growth.

c) Environment of trust and confidence

This is a concept that seeks to grasp the essence of electronic commerce, focusing on the risks, such as increased opportunities for fraud or the leakage of information, based on the principle that there should be a proper awareness of the nature of such risks and that internationally consistent initiatives should be promoted in order to avoid or reduce such risks.

(2) The Classification of Digital Contents

When the digital contents are purchased, the applicable WTO rules are found in either GATT, GATS or TRIPS depending on whether the issue that arises out of marketing digital contents is the purchase price of goods, payment for a service, or royalty for intellectual property rights, respectively. Among countries that have concluded EPAs/FTAs including "chapters on electronic commerce", the United States, Australia and Japan have continued to take neutral positions with regard to classification trends. These countries maintain their neutral stance in discussions within the WTO and this is frequently cited in the chapters on electronic commerce in the form of an annotation.

(3) Not imposing Customs Duties

Custom Duties are-- not imposed on software that is downloaded from another country from websites through the Internet. One of the reasons is that electronic transmissions cannot be captured by modern technology and so imposition of customs duties is not possible; it is also internationally agreed at present that customs duties should not be imposed on electronic transmissions.

Since the second WTO Ministerial Conference (May 1998), the Moratorium on Customs Duties (to maintain the current practice of not imposing custom duties on electronic transmissions) has been maintained. At the ninth Ministerial Conference (December 2013), it was decided to maintain the moratorium until the next Conference. With regard to bilateral EPAs/FTAs, the non-imposition of custom duties is stipulated as a permanent legal obligation in the chapter on electronic commerce of the FTAs concluded by the United States and Australia.

The modalities for custom duties on carrier media including software were discussed at the GATT Committee on Customs Valuation before the creation of the WTO. The Committee¹ decided that "If the software is transmittable through a wired channel or a satellite, there are no issues of custom duties"; this is a circumstance to be considered for custom valuation of software.

If electronic transmissions can be technologically captured in the future, the Moratorium on Customs Duties will end and some WTO member countries may start imposing customs duties on electronic transmissions. The objective of having a provision on electronic commerce within bilateral FTAs is to prepare for these risks.

Nevertheless, even for an electronic transmission from a contracting country to an FTA, it is difficult to determine whether or not the source of the transmission was the contracting country. In other words, a policy of a non-imposition of custom duties that is restricted between two contracting countries is likely to be impossible.

So, it is possible to understand that the objective of this discipline is, through the increase of EPAs/FTAs with this discipline, to actually establish 'non-imposition community' which can remain even when electronic transmissions can be captured.

2. Discussions Within Major International Organizations

(1) WTO

After the United States submitted to the General Council of the WTO in February 1998 a document proposing that customs duties not be imposed on electronic transmission, the Ministerial Declaration on Global Electronic Commerce was adopted at the 2nd WTO Ministerial Conference, which was held in Geneva in May 1998. In this declaration, as well as deciding to formulate an action plan for considering all issues concerning trade relating to electronic commerce, the basic principle of the non-imposition of tariffs on electronic commerce was agreed. From the very outset, discussions within the WTO concerning electronic commerce have primarily taken place from the viewpoint of existing trade frameworks (services, goods, intellectual property and development), but outside the WTO, although deliberations from a cross-cutting perspective in particular have been viewed as important, discussions have not really progressed. What was explicitly stated at the Hong Kong Ministerial Conference in December 2005 was that, ultimately, the non-imposition of tariffs and the classification of digital content would be the main focus. In the Ministry of Economy, Trade and Industry proposal published in June 2001, Japan has summed up the importance of establishing "the basis of an international framework concerning e-commerce that will benefit both developed and developing countries" and the importance of "continuing to implement legitimate policies that reflect in a well-balanced fashion the interests of both consumers and businesses" as the concept of "eQuality", and has submitted proposals for issues that should be tackled by the WTO and frameworks for studying them.

(Refer to Section II, Chapter 12, "Column: E-Commerce-Main Points of Discussion" and 2. 2) for the discussions in the WTO.)

(2) OECD

¹ Concerning customs valuation on transportation media containing software, the valuation method of targeting only the transportation medium excluding the cost and price of software was regarded to be consistent with Article VII of GATT(Customs Valuation) in the decision of the Committee on Customs Valuation adopted at the Tokyo Round in 1984 (VAL/8) and the discussions (VAL/M/10). This valuation method has been referred to in WTO Decision VI in relation to the interpretation of the agreement to implement Article VII of GATT.

The OECD guidelines have been incorporated into EPAs/FTAs. The OECD Action Plan for Electronic Commerce was adopted in the OECD Ministerial Conference on Electronic Commerce (October 1998). It contains the four principles mentioned below.

a) Building trust with users and consumers

The main activities that are derived from this principle are consumer protection, privacy protection, and information security and authentication. In particular, with regard to consumer protection, the OECD Guidelines for Consumer Protection in the Context of Electronic Commerce was published (1999). This document sets forth eight principles: “transparent, effective consumer protection”; “fair sales, advertising and marketing behavior”; “online information disclosure”; “verification processes”; “payment”; “conflict resolution and redress”; “privacy protection”; and “education and publicity”. In addition to the aforementioned eight basic principles, the OECD is recommending and proposing the implementation of guidelines and global cooperation. In particular, in 2003, the OECD Guidelines for Protecting Consumers from Fraudulent and Deceptive Commercial Practice Across Borders were established, giving more concrete form to part of the aforementioned principle of “fair sales, advertising and marketing behavior”.

At the same time, the OECD Guidelines Governing the Protection of Privacy and Transborder Flows of Personal Data, which was enacted in September 1980, is the cornerstone of privacy protection, and, through their implementation, the OECD is promoting activities such as the technological verification of improved privacy protection and increased user awareness. The Guidelines were revised in 2013.

Finally, with regard to information security and authentication, the OECD Guidelines on Security of Information Systems were formulated in 1992, while in 1997, the Guidelines on Cryptography Policy were enacted. The former were revised in 2002 as the Guideline for the Security of Information Systems and Networks.

b) Setting the basic rules for digital markets

As a result of the Turku Conference, which was held in 1997, conditions concerning the basic framework for the taxation of electronic commerce were enacted at the OECD Ministerial Conference on Electronic Commerce (October 1998). The basic principles of the tax system proposed that the principles of neutrality, efficiency, clarity and certainty, effectiveness and fairness, and flexibility are necessary. The tax system framework for implementing these principles specifies that the elements covered are services for taxpayers, tax administration (administration of information about individual taxpayers and authentication of taxpayers), the collection of taxes, consumption tax, and cooperation with the international tax system.

In December 2000, the OECD submitted a report with an analysis of a table showing each country’s GATS commitments from the particular perspective of the provision of online services.

c) Strengthening information infrastructure for electronic commerce

With regard to access to and use of information infrastructure, consideration has primarily been given to market trends and policy implications with regard to communications technology, such as approaches to network service prices, telecommunications regulations and interconnectivity between businesses. In particular, with regard to the relationship with electronic commerce, a report entitled Local Access Pricing and E-Commerce was published in 2000, which appealed for an awareness of the “international digital divide” brought about by differences in the degree to which international networks have become pervasive.

With regard to Internet management and the domain names system (DNS), a report

providing statistical information to the Working Group on Internet Governance was submitted in May 2005, which was formed under the auspices of the United Nations.

d) Maximizing the benefits brought about by electronic commerce

The main activities arising from this principle relate to the impact on the economy and society, electronic government, small and medium-sized enterprises, education and skills, remote area development and information and communications technology, cooperation in development, and global participation. In order to develop highly consistent international statistics, the OECD has published various reports that scrutinize various private sector surveys, while proposing a definition of electronic commerce and various relevant indicators.

(3) UNCITRAL

A model law related to electronic commerce and electronic signature has been adopted in United Nations Commission on International Trade Law (UNCITRAL), which was established in 1966 as a committee under the direct control of the United Nations General Assembly.

a) Model Law on Electronic Commerce

This was adopted by UNCITRAL in 1996, and was adopted as an international resolution of the General Assembly in January 1997. Its objective is to provide a model law which can apply to use of electronic means, instead of paper-based means, for communication and information storage.

The main relevant provisions include “the legal weight, effectiveness or enforceability of information must not be denied on the grounds that it takes the form of a data message (Article 5)”, and “in relation to the completion of contracts, as long as there is no particular agreement between the parties, it is possible to display applications and consent to applications by means of data messages (Article 11)”. (This model law was revised in 1998.)

b) Model Law on Electronic Signature

Based on Article 7 of the Model Law on Electronic Commerce, concerning electronic signature, this model law was adopted by UNCITRAL in 2001, reflecting the latest technological developments relating to electronic signatures. This model law specified the establishment of standards relating to technological reliability in order to certify the equivalence of electronic signatures with written signatures, and the guaranteeing of technological neutrality to ensure that no legal advantage is given to a particular technological product used for electronic signatures.

(4) APEC

The Leader’s Declaration as “A Vision for the 21st Century” (1997) and the “Blueprint for Action on Electronic Commerce (1998)” recognized the large potential and importance of electronic commerce. In 1999, the ECSG (Electronic Commerce Steering Group) was established as an APEC Senior Officials’ Special Task Force. Data privacy and paperless trade have been discussed and a model of electronic commerce chapter has been formulated for EPA/FTAs.

a) Data privacy

With the aim of promoting consistent information privacy protection measures in APEC member countries, in order to prevent flows of information relating to trade between member countries being hindered unnecessarily, the APEC Privacy Framework was adopted at the APEC Leaders’ Summit held in November 2005. This framework itself acknowledges that it is fundamentally consistent with the 1980 OECD Guidelines, with new provisions to prevent tangible harms to individuals. Furthermore, based on the Framework, the development of the

Cross-border Privacy Rules (CBPRs) proceeded as a rule for organizations handling personal information across borders.

Based on the APEC Data Privacy Pathfinder adopted in 2007 by both the APEC Ministers' Meeting and the APEC Leaders' Summit, the Pathfinder project, which began in 2008, involves discussions aimed at the formulation of documents such as self-assessment guidelines for businesses and the Cross-border Privacy Enforcement Agreement (CPEA).

The CBPR was organized at the summit held in November 2011 and in the Leader's Declaration.

b) Paperless trade

Based on the Strategies and Actions Toward a Cross-border Paperless Trading Environment approved at the sixteenth APEC Ministerial Meeting (November 2004), work that will facilitate the electronic transmission of trade-related information (electronic certificate of origin, electronic invoice, electronic documents and electronic trade financing) within the APEC region by 2020 is underway.

3. Chapter on Electronic Commerce in EPAs/FTAs

The chapter discusses the scope, non-imposition of customs duties and non-discriminatory treatment of digital products, electronic signature and certification, and consumer protection.

(1) Scope

a) Technological neutrality in services provided electronically

Based on the principle of technological neutrality, the regulations concerning trade in services should be neutral about the technical methods to provide the service. With regard to electronic commerce, this provision confirms that regulation of trade in services shall be equally applicable to services provided electronically and non-electronically.

b) Clearly stipulating items exempt from the application of the regulation

Sensitive items can exempt either from the whole chapter on electronic commerce or from individual regulations. Such exemptions may include domestic taxation, subsidies and government procurement, broadcasting and audiovisual services, general exceptions and exceptional measures relating to security in GATT and GATS, and measures concerning regulatory inconsistencies in investment services (so-called "non-conforming" measures).

(2) Provisions concerning consistency with other regulations

Adjustments are made in the form of "do not apply to the extent of inconsistency with..." when other chapters, such as chapters of trade in goods, trade in services, investment and intellectual property rights, are applicable.

(3) Non-discriminatory treatment of digital products

The classification of digital content in the WTO has become deadlocked, however, the EPAs/FTAs define digital content as "digital products" and set forth the details of national treatment and most-favored-nation treatment in relation to such products.

a) The definition of digital products

Digital products were defined in the US-Singapore FTA as "computer programs, text, video, images, sound recordings and other products that are digitally encoded". This definition is applied in most of the EPAs/FTAs defining digital products.

However, some definitions say "regardless of whether they are fixed on a carrier medium or transmitted electronically", and others say "not including ones that are fixed on a carrier medium".

b) National treatment

This is the stipulation that there will be no discrimination between domestic and foreign with regard to the country of origin or nationality of the manufacturer, etc. of digital products; this is the same concept as the national treatment concept in trade in goods and services.

c) Most-favored-nation treatment

This is the same concept as the most-favored-nation treatment concept in trade in goods and services, and stipulates that there will be no discrimination against non-signatory countries with regard to the country of origin or nationality of the manufacturer, etc. of digital products.

(4) Customs

The moratorium on the imposition of customs duties has continued since the 2nd WTO Ministerial Meeting in 1998, right up to the present day; this is given substance in bilateral agreements as a permanent regulation that is legally binding.

However, with regard to the fine points of the provision, there are two models: the United States model, which states that "apart from domestic taxes, tariffs, fees or other levies" shall not be imposed "in relation to the export or import of digital products"; and the Australian model, which adopts the WTO moratorium wording and states that "the Parties shall maintain the current practice of not imposing custom duties on electronic transmissions between the Parties".

With regard to the former, the United States definition of "digital products" includes "content fixed on a carrier medium" which means that there is a legal obligation not to impose customs duties on software and visual images exported as such or imported as trade in goods in the form of CDs and DVDs.

(5) Prohibition on requirement concerning the location of computing facilities

For businesses providing so-called cloud computing services, requirements to locate their servers and data centers in that country can be a disrupting factor for the optimal global deployment of their facilities. In addition, companies using these services and seeking overseas business development with global service providers as partners must bear unnecessary costs if they are required to use domestic servers from the overseas sites. This provision prohibits, in principle, contracting parties from making such requirements. In consideration of the electronic commerce market that has been rapidly developing and expanding in recent years and the needs for creating new rules, this provision was provided for the first time among EPAs concluded by Japan in the Japan-Mongolia EPA (in the chapter on Electronic Commerce)

In the case of handling information that relates to security, etc., ., the Japan-Mongolia EPA provides that measures requiring computing facilities to be located within the country may be allowed if they are necessary to achieve a legitimate public policy objective.

(6) Source Code

In the past, measures requiring access to the source code of the software embedded in devices had been adopted/discussed in China and India. There have been requests by other countries at the WTO to review these measures.

While protectionist policies were observed in some countries, such regulations may possibly be implemented by some country in the future under domestic industry promotion policies and other economic policies, etc. This situation can be a potential concern for ICT device manufacturers, service providers, and investors in the area. In order to prevent such requirements from being made, source code provisions require the government not to request transfer and disclosure of source code as a condition for import or sale of software or devices with embedded software. As with the provision of “(5) Prohibition on requirement concerning the location of computing facilities”, this provision was included for the first time among the EPAs concluded by Japan in the Japan-Mongolia EPA (in the chapter on Electronic Commerce).

The Japan-Mongolia EPA provides for exceptions stipulating that software subject to this provision does not include software used for critical infrastructure.

(7) Domestic regulations

This provision clearly stipulates the basic principle of industry-led development of electronic commerce and minimization of regulatory burdens, and adopts wording similar to the UNCITRAL model law on electronic commerce, the APEC model measures, and clauses on national regulations in GATS Article VI.

(8) Electronic signatures and authentication services

In general, this provision includes the pursuit of interoperability with regard to electronic certificates that use Public Key Infrastructure (PKI), mutual recognition between signatories of electronic certificates, particularly those issued by governments in relation to administrative services, guarantee of equivalence between conventional signature and electronic signature, assurance of technological neutrality on the choice of means of signature, and the prevention of legislation that hinders the opportunity for a party to an agreement to testify in court regarding the compliance of electronic commerce with the law. Korea

Bilateral discussions on interoperability and mutual recognition tend to be difficult when the two countries have different definitions of electronic signature under their own domestic laws.

(9) Paperless trade administration

These regulations stipulate that trade administration documents, from certificates of origin to documents for customs, quarantine, and entry, should be in a form that can be used publicly in an electronic format, and that governments should accept trade administration documents submitted electronically as being legally equivalent to those submitted as paper documents.

In some cases, these provisions are set forth as a legal obligation which does not apply where there are requirements under existing domestic or international laws, or cases in which computerization would actually decrease the efficiency of trade administration.

(10) Online consumer protection

This provision reflects the principle regarding the adoption and maintenance by each country of measures relating to consumer protection set out in the 1999 OECD Guidelines for Consumer Protection in the Context of Electronic Commerce. Some agreements also advocate cooperation between consumer protection groups, and contain measures against unsolicited E-mail and protection of privacy.

With regard to privacy, the two main documents are the 2005 APEC Privacy Framework

and its forerunner, the 1980 OECD Guidelines Governing the Protection of Privacy and Transborder Flows of Personal Data; the main provisions in bilateral agreements advocate the necessity of protection and give consideration to international standards.

(11) Private sector participation

This was originally formulated as a separate clause by Australia after summarizing the section that incorporated into bilateral agreements the principle that industry should take the initiative, which is contained in the Domestic Regulatory Framework in the APEC model measures.

In the Japan-Switzerland EPA, the provision advocating self-regulation by the private sector that was summarized as “cooperation” in the APEC model measures is contained in this clause.

(12) Cooperation

This provision relates to the promotion of electronic commerce by small and medium-sized enterprises, the sharing of information concerning advanced technologies and business practices, and active participation in discussions in international forums that are incorporated into the APEC Blueprint for Action on Electronic Commerce.

4. Details of Specific Provisions in Bilateral Agreements (see Figure III-7-3)

(1) Australia – Singapore FTA (signed February 2003, entered into force July 2003)

Chapter 14 of this agreement is the chapter on electronic commerce, and is composed of the Preamble, Purposes and Definitions (Article 1), Transparency (Article 2), Customs Duties (Article 3), Domestic Regulatory Frameworks (Article 4), Electronic Authentication and Electronic Signatures (Article 5), Online Consumer Protection (Article 6), Online Personal Data Protection (Article 7), Paperless Trading (Article 8), Exceptions (Article 9) and Non-Application of Dispute Settlement Provisions (Article 10). The definition of “customs duties” in this chapter says, with regard to electronic transmission between Parties, “while the maintenance of the practice of non-imposition of customs duties is set forth as a legal obligation, “customs duties” has the same meaning as defined in Trade in Goods.”

There are no special provisions on coordination with other chapters, but the clause concerning exceptions stipulates that the general and security exceptions in the chapter concerning trade in services apply to this chapter as well.

In this chapter, it is stipulated that dispute settlement provisions do not apply to the sections on domestic regulatory frameworks, electronic authentication and electronic signatures, online consumer protection, and online personal data protection.

(2) United States - Singapore FTA (signed May 2003, entered into force January 2004)

Chapter 14 of this agreement is the chapter on electronic commerce, and is composed of clauses entitled General (Article 14.1), Electronic Supply of Services (Article 14.2), Digital Products (Article 14.3) and Definitions (Article 14.4).

“Electronic” is defined as “using electronic means”. With regard to relations with other chapters, the chapter on financial services includes a provision stipulating that the disciplines in the Electronic Commerce Chapter do not apply to prudential measures. Moreover, general exceptions in the chapter entitled General and Final Provisions (Article 21.1 Paragraph 2) prescribe that the GATS clause on general exceptions (Article XIV) is applicable to the provisions of the chapter on electronic commerce as well. In addition, there is a footnote concerning the adoption of the GATS exception clause in regard to electronic

commerce, stating that, “This is without prejudice to the classification of digital products as a good or a service”.

With regard to exemption from the regulation concerning non-discriminatory treatment of digital products Article 14.3 Paragraph 5 states that these regulations do not apply to any non-conforming measure described in the chapters on cross-border trade in services, finance and investment (so-called reservation measures). Moreover, with particular regard to broadcasting services, it specifies that the whole of Article 14.3 (non-application of customs duties and non-discriminatory treatment of digital products) does not apply.

The regulations on non-discriminatory treatment of digital products are set forth as national treatment and most-favored nation treatment. The definition of digital products is given as products “that are digitally encoded, regardless of whether they are fixed on a carrier medium or transmitted electronically”.

The provision on customs duties stipulates that “apart from domestic taxes, tariffs, fees or other levies” shall not be imposed “in relation to the export or import of digital products”. The provision stipulates that only digital products that are electronically transmitted are subject to the permanent non-imposition of customs duties. On the other hand, it also stipulates that “each Party shall determine the customs value of an imported carrier medium bearing a digital product according to the cost or value of the carrier medium alone, without regard to the cost or value of the digital product stored on the carrier medium.”

(3) United States - Chile FTA (signed June 2003, entered into force January 2004)

Chapter 15 of the agreement is the chapter on electronic commerce, and the chapter consists of General Provisions (Article 15.1), Electronic Supply of Services (Article 15.2), Customs Duties on Digital Products (Article 15.3), Non-Discrimination for Digital Products (Article 15.4), Cooperation (Article 15.5) and Definitions (Article 15.6). The maintenance of cross-border information flow was newly included in the article on cooperation.

The definition of “digital product” differs greatly from that in the United States – Singapore FTA, and content fixed on a carrier medium is excluded from the definition. At the same time, in the definition, there is a footnote distancing it from the handling of classification methodology in domestic law and in WTO discussions. The provision of non-imposition of customs duties stipulates that they are not imposed on digital product of the other Party.” There are no provisions on charges other than customs duties. In addition, domestic taxes are not subject to the regulation, as in the case of the United States – Singapore FTA.

With regard to cooperation, the content is identical to that of the APEC model measure which covers such matters as support for the resolution of issues faced by small and medium-sized enterprises, the sharing of information and experience in the field of advanced technology, such as cyber-security, the maintenance of cross-border information flows, the recommendation of self-regulation by the private sector, and cooperative discussions in various international institutions.

(4) United States – Australia FTA (signed May 2004, entered into force January 2005)

Chapter 16 of this agreement is the chapter concerning electronic commerce and it consists of sections entitled General (Article 16.1), Electronic Supply of Services (Article 16.2), Customs Duties (Article 16.3), Non-Discriminatory Treatment of Digital Products (Article 16.4), Authentication and Digital Certificates (Article 16.5), Online Consumer Protection (Article 16.6), Paperless Trade Administration (Article 16.7) and Definitions (Article 16.8).

With regard to non-discriminatory treatment of digital products, the regulations do not apply to non-conforming measures set forth in the chapters on cross-border trade in services,

financial services and investment (so-called reservation measures); nor do they apply to subsidies or services supplied in the exercise of governmental authority. Moreover, this article states that it does not apply to broadcasting and audio-visual services in particular. In terms of substantive content, the section on national treatment and most-favored-nation treatment has the same provisions as the United States – Singapore FTA.

While the definition of digital product contains the footnote “The definition of digital products should not be understood to reflect a Party’s view on whether trade in digital products through electronic transmission should be categorized as trade in services or trade in goods.”, there is also a footnote stating that “digital products can be a component of a good, be used in the supply of a service, or exist separately”.

The provisions on non-imposition of tariffs stipulate that “apart from domestic taxes, tariffs, fees or other levies” shall not be imposed “in relation to the export or import of digital products”. Where this FTA differs from the United States – Singapore FTA is in that, with regard to non-imposition of customs duties, it does not distinguish between content “transmitted electronically” and that “fixed on a carrier medium”, thereby committing the parties to the non-imposition of tariffs on all digital products equally. The definition of tariffs subject to the non-imposition obligation is prescribed in the chapter on general provisions; it states that this applies not only to the chapter on trade in goods, but also to the chapter on electronic commerce, and as well as excluding domestic taxes from the scope of customs duties, it stipulates that customs duties are imposed on goods.

With regard to authentication and digital certificates, the content is more or less the same as the Australia – Singapore FTA. However, the focus is not electronic signatures, but rather digital certificates, which are generally used outside of electronic signatures as well, so the scope covered by these provisions is broader than in the case of the Australia – Singapore FTA.

With regard to online consumer protection, the principle adopted from the 1999 OECD Guidelines for Consumer Protection in the Context of Electronic Commerce (guaranteeing the transparency and effectiveness of consumer protection measures) is stipulated here.

The provisions on paperless trade are similar to those in the Australia-Singapore FTA and are equivalent to the contents of the APEC model measures.

(5) India – Singapore Comprehensive Economic Cooperation Agreement (signed June 2005, entered into force August 2005)

Chapter 10 of this agreement is the chapter on electronic commerce, and this chapter consists of sections entitled General (Article 10.1), Definitions (Article 10.2), Electronic Supply of Services (Article 10.3), Digital Products (Article 10.4), Exceptions (Article 10.5) and Transparency (Article 10.6). The substantive content is more or less the same as in the case of the United States – Singapore FTA, but it differs in terms of adoption of the GATS provision for transparency and absence of the provisions for the most-favored nation treatment for digital product.

With regard to where exceptions are within the disciplines affecting digital products, the general exceptions and security exceptions apply to measures that do not conform to and the chapter on and broadcasting services other chapters (reservations).

(6) Korea – United States FTA (signed June 2007, has not yet entered into force)

Chapter 15 of this agreement is the chapter on electronic commerce, and this chapter consists of sections entitled General (Article 15.1), Electronic Supply of Services (Article 15.2), Digital Products (Article 15.3), Electronic Authentication and Electronic Signatures (Article 15.4), Online Consumer Protection (Article 15.5), Paperless Trading (Article 15.6), Principles on Access to and Use of the Internet for Electronic Commerce (Article 15.7),

Cross-border Information Flows (Article 15.8) and Definitions (Article 15.9). With regard to the non-discriminatory treatment of digital products, the biggest difference from the United States – Australia FTA is that the context of “bilateral trade” is emphasized, particularly in relation to the provision concerning national treatment.

Digital products that are “fixed on carrier media and originate in a Party” and digital products that are “transmitted electronically” are not subject to customs duties. The United States - Korea FTA is positioned between the United States-Australia FTA which covers all digital products and the United States-Singapore FTA which only covers electronically transmitted digital products.

With regard to online consumer protection, in addition to guaranteeing transparency and effectiveness regarding consumer protection measures as in the United States-Peru FTA, “the recognition of importance in cooperation between national consumer protection agencies on activities related to cross-border electronic commerce in order to enhance consumer welfare” and “cooperation between enforcement authorities to respond to fraudulent and deceptive commercial practices in electronic commerce” were stipulated.

“Principles that ensure consumers' reasonable access to the Internet for electronic commerce” and “cross-border information flow” are not included in the United States-Australia FTA.

(7) Japan – Switzerland EPA (signed February 2009, entered into force September 2009)

Chapter 8 of this agreement is the chapter on electronic commerce and this chapter consists of sections entitled Scope (Article 70), General Principles (Article 71), Definitions (Article 72), Non-Discriminatory Treatment of Digital Products (Article 73), Non-Discriminatory Treatment of Services (Article 74), Market Access (Article 75), Customs Duties (Article 76), Domestic Regulation (Article 77), Electronic Signatures and Certification Services (Article 78), Paperless Trade Administration (Article 79), Protection of Online Consumers (Article 80), Private Sector Participation (Article 81), Cooperation (Article 82) and Exceptions (Article 83).

Digital products are defined as “computer programs, texts, plans, designs, video, images, sound recordings or any combinations thereof”. In addition, as in the case of the United States–Chile FTA, digital products fixed on a carrier medium are not included in this definition, with an annotation stating that the provision in the chapter on trade in goods applies to digital products that are fixed on carrier media.

With regard to national treatment, it is structurally the same as the national treatment provision in GATT and GATS, stipulating that each Party shall “not adopt measures that accord less favourable treatment to digital products of the other Party than it accords to its own like digital products.”

With regard to most-favored-nation treatment, there is a provision concerning the introduction and maintenance of measures, which stipulates that each party shall “not adopt or maintain measures that accord less favourable treatment to digital products of the other Party than it accords to like digital products of a non-Party.”

Moreover, it also stipulates that: “in implementing orders on non-discriminatory treatment, each Party shall ensure to transparently, objectively, rationally and fairly determine whether the origin of the digital product is one Party, the other Party or a Third Party”; “Each Party shall, upon request by the other Party, explain how it determines the origin of a digital product in implementing its obligations”; “The Parties shall cooperate in international organizations and forums to foster the development of criteria determining the origin of a

digital product”; and “this clause will be revised after five years of effected date unless both countries agree otherwise.”

With regard to custom duties, it confirms the WTO moratorium and stipulates that establishing legal obligations should only be done within the WTO framework. Due to the stipulation of exceptions in the chapter on electronic commerce, domestic taxes are exempted from the scope of the non-imposition of customs tariffs, as in other bilateral agreements.

The same principle regarding domestic regulation is set forth as in the clause on national regulations in GATS (Article VI of GATS), which states that “the operation of measures relating to electronic commerce should be undertaken transparently, objectively, rationally and fairly, and they must not impose an unnecessarily heavy burden.”

The provisions regarding electronic signatures and certification services added an exception clause similar to the one in the Korea – United States FTA, stating that the requirement to meet a particular standard should “serve a legitimate policy objective and be substantially related to achieving that objective”. Furthermore, it stipulates that the principle of technological neutrality shall be applied electronic signatures used in “communications that have significant relevance to those transactions”, because of the possibility that they may be used as part of the transaction.

With regard to paperless trade administration, a provision concerning cooperation in international forums similar to the provision in the United States-Australia FTA and the United States-Korea FTA was added.

As far as online consumer protection is concerned, in addition to the principle of “guaranteeing the transparency and effectiveness of the adoption and maintenance of consumer protection measures”, a provision regarding the protection of privacy was added.

Refer to “3. Chapter on Electronic Commerce in the EPA/FTA” above for other details.

(8) Korea – EU FTA (signed October 2010, entered into force July 2011)

There is no independent chapter; it is structured as a part of Trade in Services of Chapter 7 Trade in Services, Establishment and Electronic Commerce. Section F of Chapter 7, entitled “Electronic Commerce”, only contains two articles. This is an unusual structure for an EPA/FTA that stipulates rules related to electronic commerce; it may have been formulated in concert with EU’s stance that “all discussions related to electronic commerce can be covered by trade in services disciplines. Therefore, the concept of digital product is not necessary.” In light of Korea’s position in the United States-Korea FTA, a footnote stating that “The inclusion of the provisions on electronic commerce in this Chapter is made without prejudice to Korea’s position on whether deliveries by electronic means should be categorised as trade in services or goods” was added to the clause on non-imposition of customs duties.

Article 7.48 contains the objective for establishment, compliance with international data protection standards, and non-imposition of customs duties on electronic distribution. The EU’s stance on data protection is apparent in the provision stating, “Electronic commerce must be developed in accordance with international data protection standards.”

Article 7.49 stipulates intergovernmental dialogues for cooperation. Electronic signature, obligations of service providers, spam mail countermeasures, consumer protection, and document digitization are covered, and the exchange of information regarding the legislative and its management is prescribed.

(9) Japan-Australia EPA (signed July 2014, entered into force January 2015)

Chapter 13 of this agreement is the chapter on electronic commerce. It consists of sections entitled Basic Principles (Article 13.1), Definitions (Article 13.2), Customs Duties (Article 13.3), Non-Discriminatory Treatment of Digital Products (Article 13.4), Domestic Regulation (Article 13.5), Electronic Signature (Article 13.6), Consumer Protection (Article 13.7), Personal Data Protection (Article 13.8), Paperless Trade Administration (Article 13.9), and Cooperation (Article 13.10).

In Article 13.2 on Definitions, digital products are defined as “such products as computer programmes, text, video, images and sound recordings, or any combinations thereof, that are digitally encoded, electronically transmitted, and produced for commercial sale or distribution” and does not include “those that are fixed on a carrier medium”. Without prejudice to the classification of digital products in the WTO, this chapter provides Notes stating that “digital products do not include “digitised representations of financial instruments, including money” and “Nothing in this Chapter shall be considered as affecting the views of either Party on whether trade in digital products through electronic transmission is categorised as trade in services or trade in goods”.

The Non-Discriminatory Treatment of Digital Products clause provides that neither Party may accord less favourable treatment to some digital products than it accords to other like digital products (Article 13.4, Paragraphs 1 and 2), which are not included in the previous EPAs.

The EPA provides that neither Party may accord less favourable treatment to: (1) digital products (a) “created, produced, published, stored, transmitted, contracted for, commissioned, or first made available on commercial terms in the Area of the other Party than it accords to like digital products created, produced, published, stored, transmitted, contracted for, commissioned, or first made available on commercial terms in a non- Party”, and (b) those “whose author, performer, producer, developer, or distributor is a person of the other Party than it accords to like digital products whose author, performer, producer, developer, or distributor is a person of a non-Party”, and (2) that neither Party may accord less favourable treatment to some digital products than it accords to other like digital products on the basis that “the digital products receiving less favourable treatment are created, produced, published, stored, transmitted, contracted for, commissioned, or first made available on commercial terms in the Area of the other Party”.

Recognising the Parties’ objective of promoting bilateral trade, this chapter includes a Note providing that “some digital products” subject to non-discriminatory treatment refers “solely to those digital products created, produced, published, contracted for, or commissioned in the Area of the other Party, or digital products of which the author, performer, producer, or developer is a person of the other Party”.

In addition, the EPA provides that with regard to customs duties each Party shall “maintain its practice of not imposing customs duties on electronic transmissions between the Parties” (making permanent the WTO moratorium). The EPA also includes provisions that encourage the use of electronic signatures based on internationally accepted standards (Article 13.6, Paragraph 3), provisions requiring a party to take into account international standards or methods made under the auspices of international organizations (Article 16.9, Paragraph 3), and provisions on cooperation in the enforcement of laws against fraudulent and deceptive commercial practices in electronic commerce (Article 13.10, Paragraph 5).

(10) Japan-Mongolia EPA (signed February 2015)

Chapter 9 of this Agreement covers electronic commerce. It consists of sections entitled General Provisions (Article 9.1), Definitions (Article 9.2), Customs Duties (Article

9.3), Non-Discriminatory Treatment of Digital Products (Article 9.4), Electronic Signature (Article 9.5), Consumer Protection (Article 9.6), Unsolicited Commercial E-mail (Article 9.7), Paperless Trade Administration (Article 9.8), Domestic Regulation (Article 9.9), Prohibition on Requirement concerning the Location of Computing Facilities (Article 9.10), Source Code (Article 9.11), Cooperation (Article 9.12), and Sub-Committee on Electronic Commerce (Article 9.13).

In Article 9.2 on Definitions, digital products are defined as “computer programs, text, video, images, sound recordings and other products, that are digitally encoded” regardless of whether they are fixed on a carrier medium or transmitted electronically. In the EPAs that Japan concluded with Switzerland and Australia, digital products are defined not to include “those that are fixed on a carrier medium”, but the Japan-Mongolia EPA provides that the provisions of this chapter also apply to those that are fixed on a carrier medium.

As with the Japan-Switzerland EPA, the Non-Discriminatory Treatment of Digital Products clause of this EPA invokes the GATS provisions and provides that “Neither Party shall adopt or maintain measures that accord less favorable treatment to digital products of the other Party than it accords to its own like digital products”.

With regard to most-favored-nation treatment, the EPA imposes obligations on both adoption and maintenance of measures, by providing that “Neither Party shall adopt or maintain measures that accord less favorable treatment to digital products of the other Party than it accords to like digital products of a non-Party”.

In addition, for the first time in EPAs concluded by Japan, this EPA includes a Prohibition on Requirement concerning the Location of Computing Facilities, which generally prohibits the Parties from requiring locating computing facilities in their countries, and a “Source Code” clause, requiring the government not to request transfer and disclosure of source code as a condition for import or sale of software or devices with embedded software.

Reference: EU-Korea Cultural Cooperation Protocol

A protocol was attached to the EU-Korea FTA. In order to effectuate the protocol, ratification by all EU member states as well as EU ratification procedures, and ratification of the Convention on Cultural Diversity by Korea is required.

The objectives of this protocol are to recognize the economic and social importance of cultural industries in both countries; reinforce the capacities and independence of the cultural industries of both countries in order to promote economic, trade and cultural cooperation; promote local content; protect cultural diversity; protect cultural heritage; and secure cultural identities.

The content deals mainly with cultural cooperation, specifying the discussion and promotion of the possibility of treating co-produced audio-visual work the same as domestic work in the market.

It is especially worthy of notice that cooperation in the broadcasting field is described in the "Other audiovisual cooperation". More specifically, in order to cooperate in the area of broadcasting "with an aim to promote cultural exchange through promoting exchange of information and views on broadcasting policy and regulatory framework between competent authorities", "cooperation and exchange between the broadcasting industries" and the "exchange of audio-visual works" are encouraged. It also states that both countries shall "endeavour to facilitate the use of international and regional standards in order to ensure compatibility and interoperability of audio-visual technologies, thereby contributing to

strengthening cultural exchanges."

The promotion of "rental and leasing of the technical material and equipment necessary to create and record audio-visual works" and "the digitalization of audio-visual archives" are also included.

The liberalization of market entry in the audio-visual field is not mentioned in this protocol. As the provisions of "Other audio-visual cooperation" are obligations to use best efforts, effectiveness may be limited; however, the advertising effect of producing EU audio-visual work in Korea is predicted to be large.

Reference: Co-production Agreement

There is an agreement to establish rules for co-production between contracting countries, covering the contents of films, videos and television programs. The agreement stipulates that a contracting country should accord treatment equivalent to domestic work or similar preferential treatment to work that is co-produced with the other contracting country, and establishes the conditions for co-produced work.

The "Convention on the Protection and Promotion of the Diversity of Cultural Expressions" (Convention on Cultural Diversity), approved at the UNESCO conference in December 2005, promotes the conclusion of the Co-production Agreement among the ratifying countries. Countries that ratify the Convention on Cultural Diversity and place emphasis on its philosophy tend to exclude preferential treatments provided in the Co-production Agreement from national treatment and most-favored nation treatment within the liberalization commitments of trade in service, in order for such preferential treatment not to be shared equally with other EPAs/FTAs.

In the chapter on electronic commerce, sensitivity towards clauses related to audio-visual contents that are supplies via networks and obligations to liberalize them have been revealed which has generated discrepancies between contents exporting countries such as the United States.

Japan was in favor of adopting the Convention on Cultural Diversity but has not ratified it. The only Co-production Agreement in which Japan participates is the "COMMON STATEMENT OF POLICY ON FILM, TELEVISION AND VIDEO CO-PRODUCTION BETWEEN JAPAN AND CANADA" concluded with Canada (signed on July 20, 1994).

Column: Trade Principles for Information and Communication Technology Services

The principles provide the ideas obtained through the generalization of the commitment stipulated in the chapters on electronic commerce and telecommunication services of the EPAs/FTAs. The contents agreed upon are not legally binding, but aim to spread the principles to third-party countries through international trade negotiations. The United States and the EU agreed to the trade principles in 2011, and Japan and the United States agreed in 2012.

The first Trade Principles for ICT Services was the "United States-EU Trade Principles for Information and Communication Technology Services" (announced on April 4, 2011), which was agreed to by USTR and the European Commission. The principles support the global development of ICT networks and services in cooperation with other countries, and aim to enable competition in trade of the other country with service providers on equal grounds.

The Japan-United States Trade Principles for ICT Services (announced on January 27, 2012) was developed in the framework of the United States-Japan Economic Harmonization

Initiative. The objective is to ensure transparency of regulations, share views on promoting trade in ICT services, and jointly disseminate the contents to other countries. Two items were added to the United States-EU principles; there are twelve all together.

When the contents of both principles are compared (refer to Figure III-7-4), the ten common items are almost the same. However, the stance of placing importance on cultural diversity is reflected strongly in the preamble of the United States-EU principles, which state that public funds and subsidies for the enhancement of cultural diversity is an exception to the principles.

In developing the Trade Principles for ICT Services and EPAs/FTAs (the chapter on electronic commerce), conflicts between policies regarding protection of personal information and privacy applied by each country, and "cross-border information flows" and "local infrastructure and local presence" are expected to arise.

The idea of ensuring free information flow across borders is not compatible with the policy of securing the privacy level of a country by restricting the flow of personal information to nations with insufficient personal information protection measures. Similarly, to comply with measures that prohibit local infrastructure and presence requirements will complicate the adoption of a privacy protection policy that requires the establishment of a data center within the country for overseas service providers that handle personal information in order to prevent personal information of its own people from being sent to another country.

Although the Trade Principles for ICT Services excludes policies and legislation for privacy protection in the preamble, it is not made clear how that is balanced with the items expressed in the principles. Opinions on the optimum balance differ significantly between Europe, where privacy protection by regulations is emphasized, and the United States, where the protection of personal information is entrusted in voluntary propositions and market principles. The difference in opinion is clearly expressed in the proposed EU data protection regulation issued in 2012 and the "Consumer Privacy Bill of Rights" related to privacy put forward by the United States in the same year. This implies a new bipolar confrontation in future trade negotiations.

Figure III-7-1 The Lineage of Major International Initiatives Relating to Electronic Commerce

	WTO	OECD	UNCITRAL	APEC	Bilateral Agreements (Date of Signature)
1980		OECD Guide lines Governing the Protection of Transborder Flows of Personal data			
1992		OECD Guidelines on Security of Information Systems			
1997		Guidelines on Cryptography Policy	Model Law on Electronic Commerce		
1998	Ministerial Declaration on Global Electronic Commerce	Electronic Commerce Taxation Framework Conditions, OECD Action Plan for Electronic Commerce		APEC Blueprint for Action on Electronic Commerce	
1999	Report to United Nations General Assembly	OECD Guidelines for Consumer Protection in the Context of Electronic Commerce		Electronic Commerce Steering Group	
2000		Local Access Pricing and E-Commerce, Round Table Discussions on Electronic Commerce			
2001			Model Law on Electronic Signature		
2002		Guidelines for the Security of Information Systems and Networks			
2003		OECD Guidelines for Protecting Consumers from Fraudulent and Deceptive Commercial Practice Across Borders			Australia-Singapore FTA US-Singapore FTA US-Chile FTA
2004	Extension of the moratorium on the non- imposition of customs duties			Guidelines on Techniques for Issuing Certificates That Can be Provided for Use in Electronic Commerce Throughout the APEC Region	US-Australia FTA Australia-Thailand FTA
2005	Extension of the moratorium on the non- imposition of customs duties		United Nations Convention on the Use of Electronic Communications in International Contracts	APEC Privacy Framework	Thailand-New Zealand Closer Economic Partnership Agreement India-Singapore Comprehensive Economic Cooperation Agreement Korea-Singapore FTA
2006					US-Peru FTA US-Colombia FTA
2007				APEC Data Privacy Pathfinder, agreement on APEC Trade Facilitation Model Measures Concerning Electronic Commerce Chapters of FTAs	Korea-US FTA
2008					Australia-Chile FTA
2009	Extension of the moratorium on the non- imposition of customs				Japan-Switzerland EPA

	duties				
2010				APEC Cross-border Privacy Enforcement Arrangement (CPEA)	Korea-EU FTA
2011	Extension of the moratorium on the non-imposition of customs duties			APEC Cross-border Privacy Rules System (CBPR)	
2010 2011	Extension of the moratorium on the non-imposition of tariffs			APEC Cross-border Privacy Enforcement Arrangement (CPEA) APEC Cross-border Privacy Rules System (CBPR)	Korea - EU FTA
2012 2013	Extension of the moratorium on the non-imposition of customs duties	OECD Guidelines Governing the Protection of Transborder Flows of Personal Data revised			Australia-Malaysia FTA

Figure III-7-2 Various Definitions of “Electronic Commerce”

From the WTO Electronic Commerce Action Plan adopted in September 1998.	(Paragraph 1.3 Sentence 1) Exclusively for the purposes of the work programme, and without prejudice to its outcome, the term “electronic commerce” is understood to mean the production, distribution, marketing, sale or delivery of goods and services by electronic means.
From the UNCITRAL Model Law on Electronic Commerce adopted by United Nations General Assembly resolution in January 1997.	(Preamble, Paragraph 2) Noting that an increasing number of transactions in international trade are carried out by means of electronic data interchange and other means of communication, commonly referred to as “electronic commerce”, which involve the use of alternatives to paper-based methods of communication and storage of information
From <i>Measuring Electronic Commerce</i> , a document published by the OECD in January 1997	Electronic commerce refers generally to all forms of transactions relating to commercial activities, including both organizations and individuals, that are based upon the processing and transmission of digitized data, including text, sound and visual images.
Based on the definition in the Summary Record of the 2001 meeting [DSTI/ICCP/IIS (2001) M], a document published by the OECD in 2001	An electronic transaction is the sale or purchase of goods or services, whether between businesses, households, individuals, governments, and other public or private organizations, conducted over computer-mediated networks. The goods and services are ordered over those networks, but the payment and the ultimate delivery of the good or service may be conducted on or off-line.
From the definition of Internet transaction in the Summary Record of the 2001 meeting [DSTI/ICCP/IIS (2001) M], a document published by the OECD in 2001	An Internet transaction is the sale or purchase of goods or services, whether between businesses, households, individuals, governments, and other public or private organizations, conducted over the Internet. The goods and services are ordered over the Internet, but the payment and the ultimate delivery of the good or service may be conducted on or off-line.
2009 Integration of broad and narrow OECD definitions	An e-commerce transaction is the sale or purchase of goods or services, conducted over computer networks by methods specifically designed for the purpose of receiving or placing of orders. The goods or services are ordered by those methods, but the payment and the ultimate delivery of the goods or services do not have to be conducted online. An e-commerce transaction can be between enterprises, households, individuals, governments, and other public or private organizations.

Figure III-7-3 Specific content prescribed in bilateral agreements

	Australia- Singapore FTA	USA - Singapore FTA	USA - Chile FTA	USA - Australia FTA
	Signed February 2003 Effective July 2003	Signed May 2003 Effective January 2004	Signed June 2003 Effective January 2004	Signed May 2004 Effective January 2005
① Scope	<ul style="list-style-type: none"> ○ “Affirmation of conformity to the WTO regulation” (Preamble) ○ Objectives and general definition (Article 1) ○ Exceptions (Article 9) ○ Non-application of dispute settlement provisions (Article 10) 	<ul style="list-style-type: none"> ○ General (Article 14.1) ○ Electronic supply of services (Article 14.2) ○ Definitions (Article 14.4) ○ GATS general exclusions applicable (General and final provisions, Article 21.1 Paragraph 2) ○ Financial prudential measures excluded from scope of chapter on electronic commerce (Finance chapter Article 10.10 Paragraphs 1 & 2) 	<ul style="list-style-type: none"> ○ General provisions (Article 15.1) - Excludes related provisions, exceptions and non-conforming measures in the Agreement or Annex ○ Electronic supply of services (Article 15.2) ○ Definitions (Article 15.6) ○ GATS general exclusions applicable (Exceptions chapter Article 23.1 Paragraph 2) ○ Financial prudential measures excluded from scope of chapter on electronic commerce (Finance chapter Article 12.10 Paragraphs 1 & 2) 	<ul style="list-style-type: none"> ○ General (Article 16.1) ○ Electronic supply of services (Article 16.2) ○ Definitions (Article 16.8) ○ GATS general exclusions applicable (General and final provisions, Article 22.1 Paragraph 2) ○ Financial prudential measures excluded from scope of chapter on electronic commerce (Finance chapter Article 13.10 Paragraphs 1 & 2)
② Provisions on consistency with other regulations				<ul style="list-style-type: none"> ○ Adjustment between non-discriminatory treatment of digital products (Article 17) and Intellectual property rights chapter (Article 16.4 Paragraph 3 (c))
③ Non-discriminatory treatment of digital products (NT = National Treatment) (MFN = Most-Favored-Nation treatment)		<ul style="list-style-type: none"> ○ Digital products (Article 14.3 Paragraphs 3 & 4) - NT and MFN provisions including both carrier media and electronic transmissions - Broadcasting services excluded from the scope of application - Consistency measures set forth in the chapters on cross-border services, finance and investment are also excluded from the scope of application of the chapter on electronic commerce 	<ul style="list-style-type: none"> ○ Non-discriminatory treatment of digital products - NT and MFN provisions regarding electronic transmissions only - Current non-conforming measures can be maintained for up to one year after the effective date of the Agreement (Only measures described in the Annex can be maintained after that) 	<ul style="list-style-type: none"> ○ Non-discriminatory treatment of digital products (Article 16.4) - NT and MFN provisions including both carrier media and electronic transmissions - Audio-visual and broadcasting services excluded from the scope of application - Consistency measures set forth in the chapters on services and investment are also excluded from the scope of application of the chapter on electronic commerce - Subsidies and administration services are also excluded
④ Customs duties	<ul style="list-style-type: none"> ○ Perpetual obligation not to impose customs duties on bilateral "electronic transmissions" (Article 3) 	<ul style="list-style-type: none"> ○ Non-discriminatory treatment of digital products (Article 14.3 Paragraph 1 & 2) - Perpetual obligation not to impose customs duties on bilateral "electronic transmissions" - Obligation to maintain custom procedures on digital products on carrier media 	<ul style="list-style-type: none"> ○ Customs duties on digital products (Article 15.3) - Perpetual obligation not to impose customs duties on bilateral "electronic transmissions" 	<ul style="list-style-type: none"> ○ Customs duties (Article 16.3) - Perpetual obligation not to impose customs duties on bilateral "electronic transmissions"
⑤ Domestic regulations	<ul style="list-style-type: none"> ○ Domestic regulatory frameworks (Article 4) 			<ul style="list-style-type: none"> ○
⑥ Electronic signatures and authentication services	<ul style="list-style-type: none"> ○ Electronic authentication and electronic signatures (Article 5) 			<ul style="list-style-type: none"> ○ Authentication and digital certificates (Article 16.5)

	Australia- Singapore FTA	USA - Singapore FTA	USA - Chile FTA	USA - Australia FTA
	Signed February 2003 Effective July 2003	Signed May 2003 Effective January 2004	Signed June 2003 Effective January 2004	Signed May 2004 Effective January 2005
⑦ Paperless trade administration	<input type="radio"/> Paperless trade (Article 8)			<input type="radio"/> Paperless trade administration (Article 16.7)
⑧ Online consumer protection	<input type="radio"/> Online Consumer protection (Article 6) <input type="radio"/> Online personal data protection (Article 7)			<input type="radio"/> Protection of online consumers (Article 16.6) - Invokes provisions from the OECD “Guidelines for protection consumers regarding electronic commerce”
⑨ Private sector participation	<input type="radio"/> Domestic Regulatory Frameworks (Article 4)			
⑩ Cooperation			<input type="radio"/> Cooperation (Article 15.5)	
☑ Cross-border information flow			<input type="radio"/> Cooperation (Article 15.5 paragraph (c)) - Cooperation in maintaining cross-border information flow of the APEC model measures	
☑ Unsolicited mail				
Other	<input type="radio"/> Transparency (Article 2)			

	Australia - Thailand FTA Signed July 2004 Effective January 2005	Thailand - New Zealand CEPA Signed April 2005 Effective July 2005	India - Singapore CECA Signed June 2005 Effective August 2005	Korea - USA FTA Signed June 2007 Not yet effective	Japan - Switzerland EPA Signed February 2009 Not yet effective
① Scope	<ul style="list-style-type: none"> ○ Objectives and definitions (Article 1101) ○ Non-application of dispute settlement provisions (Article 1109) 	<ul style="list-style-type: none"> ○ Objectives and definitions (Article 10.1) ○ Non-application of dispute settlement provisions (Article 10.8) 	<ul style="list-style-type: none"> ○ General provisions (Article 10.1) ○ Electronic supply of services (Article 10.3) ○ Definitions (Article 10.2) ○ Exceptions (Article 10.5) <ul style="list-style-type: none"> - Government procurement is excluded - General exceptions and security apply - Non-conforming measures in other chapters are excluded - Broadcasting services excluded from the scope of application 	<ul style="list-style-type: none"> ○ General (Article 15.1) ○ Electronic supply of services (Article 15.2) ○ Definitions (Article 9) ○ GATS general exclusions applicable (Exceptions chapter Article 22.1 Paragraph 2) ○ Financial prudential measures excluded from scope of chapter on electronic commerce (Finance chapter Article 13.10 Paragraphs 1 & 2) 	<ul style="list-style-type: none"> ○ Scope (Article 70) ○ General principles (Article 71) ○ Definitions (Article 72) ○ Exceptions (Article 83) <ul style="list-style-type: none"> - GATS/GATT general exclusions and security exclusions cited - Subsidies, government services and special tax measures are also excluded
② Provisions on consistency with other regulations					<ul style="list-style-type: none"> ○ Provision regarding coordination with the chapters on trade in goods, trade in services, investment and intellectual property (General principles (Article 71, Paragraph 3))
③ Non-discriminatory treatment of digital products (NT = National Treatment) (MFN = Most-Favored-Nation treatment)			<ul style="list-style-type: none"> ○ Digital products (Article 10.4 Paragraphs 3 & 4) <ul style="list-style-type: none"> - NT provisions including both carrier media and electronic transmissions - Broadcasting services excluded from the scope of application - Consistency measures set forth in the chapters on cross-border services, finance and investment are also excluded from the scope of application of the chapter on electronic commerce 	<ul style="list-style-type: none"> ○ Digital products (Article 15.3 Paragraphs 2 & 3) <ul style="list-style-type: none"> - NT and MFN provisions including both carrier media and electronic transmissions (in particular, NT emphasizes the application to bilateral trade) - Broadcasting services excluded from the scope of application - Consistency measures set forth in the chapters on cross-border services, finance and investment are also excluded from the scope of application of the chapter on electronic commerce - Subsidies and government services are also excluded 	<ul style="list-style-type: none"> ○ Non-discriminatory treatment of digital products (Article 73) <ul style="list-style-type: none"> - NT and MFN provisions regarding electronic transmissions only (however, for NT it is a "best effort" provision) - Consistency measures set forth in the chapters on services and investment are also excluded from the scope of application of the chapter on electronic commerce - Sets forth provisions and principles on determining the nationality of digital products and also establishes an obligation to explain - Stipulation that consultations are to take place 5 years after the agreement becomes effective

	Australia - Thailand FTA Signed July 2004 Effective January 2005	Thailand - New Zealand CEPA Signed April 2005 Effective July 2005	India - Singapore CECA Signed June 2005 Effective August 2005	Korea - USA FTA Signed June 2007 Not yet effective	Japan - Switzerland EPA Signed February 2009 Not yet effective
④ Customs duties	○ Perpetual obligation not to impose customs duties on bilateral "electronic transmissions" (Article 1102)	○ Perpetual obligation not to impose customs duties on bilateral "electronic transmissions" (Article 10.2)	○ Digital products (Article 10 Paragraphs 1 & 2) - Perpetual obligation not to impose customs duties on bilateral "electronic transmissions" - Obligation to maintain customs procedures on digital products on carrier media	○ Non-discriminatory treatment of digital products (Article 15.3 Paragraph 1) - Perpetual obligation not to impose customs duties on bilateral "electronic transmissions" or digital products on carrier media - There is a consultation provision concerning differences in outlook relating to the operation of the regulations	○ Provision affirming the WTO moratorium on the imposition of customs duties (Article 76)
⑤ Domestic regulations	○ Domestic Regulatory Frameworks (Article 1103)	○ Domestic Regulatory Frameworks (Article 10.3)			○ Domestic regulation (Article 77) - Partially invokes the principles of Article VI of GATS (domestic regulations)
⑥ Electronic signatures and authentication on services	○ Electronic authentication and digital certificates (Article 1104)			○ Electronic authentication and electronic certificates (Article 15.4) - There is an additional provision regarding the principle of technological neutrality in relation to electronic signatures - There is an exception relating to "legitimate governmental objectives"	○ Electronic signatures and certification services (Article 78) - There is an exception relating to specified transactions stipulated in domestic laws - There is an exception relating to "legitimate governmental objectives"
⑦ Paperless trade administration	○ Paperless trading (Article 1107)	○ Paperless trading (Article 10.6)		○ Paperless trading (Article 15.6)	○ Paperless trade administration (Article 79)

	Australia - Thailand FTA	Thailand - New Zealand CEPA	India - Singapore CETA	Korea - USA FTA	Japan - Switzerland EPA
	Signed July 2004 Effective January 2005	Signed April 2005 Effective July 2005	Signed June 2005 Effective August 2005	Signed June 2007 Not yet effective	Signed February 2009 Not yet effective
⑧ Online consumer protection	<input type="radio"/> Online consumer protection (Article 1105) <input type="radio"/> Online personal data protection (Article 1106)	<input type="radio"/> Online consumer protection (Article 10.4) <input type="radio"/> Online personal data protection (Article 10.5)		<input type="radio"/> Online consumer protection (Article 15.5) - Adopts the principles of the OECD Guidelines for Consumer Protection in the Context of Electronic Commerce - Provision on cooperation between governmental authorities in both countries (law enforcement authorities and national consumer protection agencies, in relation to fraud, etc.) (Article 15.8) - Provision on the protection of personal data (incorporates the principles of the APEC Privacy Framework)	<input type="radio"/> Protection of online consumers (Article 80) - Also includes provisions on the principles of the protection of privacy
⑨ Private sector participation	<input type="radio"/> Domestic Regulatory Frameworks (Article 1103)	<input type="radio"/> Domestic Regulatory Frameworks (Article 10.3)			<input type="radio"/> Private sector participation (Article 81)
⑩ Cooperation	<input type="radio"/> Cooperation (Article 1108)	<input type="radio"/> Cooperation (Article 10.7)			<input type="radio"/> Cooperation (Article 82)
㉑ Cross-border information flow				<input type="radio"/> Cross-border information flow (Article 15.8) - Provisions related to personal information protection (invokes provisions from the APEC Privacy framework)	
㉒ Unsolicited mail					<input type="radio"/> Cooperation (Article 82.2 Paragraph (b)) <input type="radio"/> Consumer/data protection (Electronic transmission service Annex Article 9.1 Paragraph (a))

	Australia - Thailand FTA	Thailand - New Zealand CEPA	India - Singapore CECA	Korea - USA FTA	Japan - Switzerland EPA
	Signed July 2004 Effective January 2005	Signed April 2005 Effective July 2005	Signed June 2005 Effective August 2005	Signed June 2007 Not yet effective	Signed February 2009 Not yet effective
Other			○ Transparency (Article 10.6)	○ "Principle of access to and use of the internet for electronic commerce" (Article 15.7)	○ Non-discriminatory treatment of services (Article 74) - Consistency measures set forth in the chapters on services and investment are excluded from the scope of application of the chapter on electronic commerce ○ Market access (Article 75) - Consistency measures set forth in the chapters on services and investment are excluded from the scope of application of the chapter on electronic commerce

	ASEAN - Australia-New Zealand FTA	Korea - EU FTA	Australia Malaysia FTA	Japan-Australia EPA	Japan-Mongolia EPA
	Signed February 2009 Effective January 2010	Signed October 2010 Effective July 2011	Signed May 2012 Effective January 2013	Signed July 2014 Effective January 2015	Signed February 27
① Scope	<ul style="list-style-type: none"> ○ Objective (Article 1) ○ Definitions (Article 2) 	<ul style="list-style-type: none"> ○ General (Article 7.48 Paragraph 1) ○ Exclusion of audio-visual services - Cross-border service trade section Article 7.4 Paragraph 1 and Establishment section Article 7.10) - Audio-visual services are stipulated in the EU-Korea Protocol on Cultural Cooperation 	<ul style="list-style-type: none"> ○ Objective (Article 15.1) ○ Electronic supply of services (Article 15.2) ○ Definitions (Article 15.3) 	<ul style="list-style-type: none"> ○ Basic principles (Article 13.1) ○ Definitions (Article 13.2) 	<ul style="list-style-type: none"> ○ General provisions (Article 9.1) ○ Definitions (Article 9.2)
② Provisions on consistency with other regulations	<ul style="list-style-type: none"> ○ Non-Application of Chapter 17 (Consultations and Dispute Settlement) (Article 10) 				<ul style="list-style-type: none"> ○ Provision regarding coordination with the chapters on trade in goods, trade in services, and intellectual property (Article 9.1 General provisions)
③ Non-discriminatory treatment of digital products (NT = National Treatment) (MFN = Most-Favored-Nation treatment)				<ul style="list-style-type: none"> ○ Non-discriminatory treatment of digital products (Article 13.4) ○ NT and MFN provisions regarding electronic transmissions only ○ Provision regarding coordination with non-conforming measures, properties, government procurement, subsidies, and services supplied in the exercise of governmental authority in the chapters on investment and trade in services 	<ul style="list-style-type: none"> ○ Non-Discriminatory Treatment of Digital Products (Article 9.4) ○ NT and MFN provisions including digital products fixed on a carrier medium ○ Government procurement, subsidies provided by a Party or a state enterprise (including grants, government-supported loans, guarantees and insurance), and measures listed in the Schedules of Specific Commitments and List of Most-Favored-Nation Treatment Exemptions of the trade in services chapter and in the Reservations of the investment chapter are excluded from the scope of application of the chapter on electronic commerce

	ASEAN - Australia-New Zealand FTA	Korea - EU FTA	Australia - Malaysia FTA	Japan-Australia EPA	Japan-Mongolia EPA
	Signed February 2009 Effective January 2010	Signed October 2010 Effective July 2011	Signed May 2012 Effective January 2013	Signed July 2014 Effective January 2015	Signed February 27
④ Customs duties		○ Objective and principles (Article 7.48 Paragraph 3) - Non-imposition of customs duties on electronic transmissions. Footnote “The inclusion of the provisions on electronic commerce in this Chapter is made without prejudice to Korea’s position on whether deliveries by electronic means should be categorised as trade in services or goods.”	○ Customs duties (Article 15.4)	○ Customs duties (Article 13.3) Perpetual obligation not to impose customs duties on bilateral “electronic transmissions”	○ Customs duties (Article 9.3) Perpetual obligation not to impose customs duties on bilateral “electronic transmissions”
⑤ Domestic regulations	○ Domestic regulatory frameworks (Article 3)		○ Domestic regulatory frameworks (Article 15.5)	○ Domestic regulation (Article 13.5)	○ Domestic regulation (Article 9.9)
⑥ Electronic signatures and authentication services	○ Electronic authentication and digital certificates (Article 5)	○ Cooperation on regulatory issues (Article 7.49 Paragraph 1(a))	○ Electronic authentication and digital certificates (Article 15.6)	○ Electronic signature (Article 13.6)	○ Electronic signature (Article 9.5)
⑦ Paperless trade administration	○ Paperless trading (Article 8) ○ Cooperation on electric commerce (Article 9 Paragraph (a))	○ Cooperation on regulatory issues (Article 7.49 Paragraph 1(e))	○ Paperless trading (Article 15.9)	○ Paperless trade administration (Article 13.9)	○ Paperless trade administration (Article 9.8)
⑧ Online consumer protection	○ Online Consumer protection (Article 6) ○ Online personal data protection (Article 7) ○ Cooperation on electric commerce (Article 9 Paragraph (c))	○ Objective and principles (Article 7.48 Paragraph 2) - Development of electronic commerce in line with international standards of data protection	○ Online Consumer protection (Article 15.7) ○ Online personal data protection (Article 15.8)	○ Consumer protection (Article 13.7) ○ Personal data protection (Article 13.8)	○ Consumer protection (Article 9.6)
⑨ Private sector participation	○ Cooperation on electric commerce (Article 9 Paragraph (g))			○ Cooperation (Article 13.10)	○ Cooperation (Article 9.12)
⑩ Cooperation	○ Cooperation on electric commerce (Article 9)	○ Cooperation on regulatory issues (Article 7.49)			
㉔ Cross-border information flow					
㉔ Unsolicited mail	○ Cooperation on electric commerce (Article 9 Paragraph (c))	○ Cooperation on regulatory issues (Article 7.49 Paragraph 1 (c)(d)) - Measures on unsolicited electronic commercial communications and consumer protection	○ Unsolicited commercial electronic messages (Article 15.10)		

	ASEAN - Australia-New Zealand FTA	Korea - EU FTA	Australia Malaysia FTA	Japan-Australia EPA	Japan-Mongolia EPA
	Signed February 2009 Effective January 2010	Signed October 2010 Effective July 2011	Signed May 2012 Effective January 2013	Signed July 2014 Effective January 2015	Signed February 27
Other	○ Transparency (Article 3)	○ Cooperation on regulatory issues (Article 7.49 Paragraph 1 (b)) - Liability of intermediary service providers with respect to the transmission or storage of information			○ Sub-Committee on Electronic Commerce (Article 9.13)

Figure III-7-4 Comparison of Trade Principles for ICT Services

		Japan - United States Trade Principles for ICT Services	United States - EU Trade Principles for ICT Services
Announced		January 27, 2012	April 4, 2011
Preamble	Intention	Same as United States - EU.	To promote the implementation of these principles within their bilateral economic relationship and in their trade negotiations with third countries.
	Exception	These principles are without prejudice to governments' rights and obligations under the WTO and to exceptions contained in the GATS. These principles are without prejudice to policy objectives and legislation in areas such as the protection of intellectual property and the protection of privacy, including of health information, and of the confidentiality of personal and commercial data. These principles are not intended to apply to financial services.	These principles are without prejudice to policy objectives and legislation in areas such as the protection of intellectual property and the protection of privacy and of the confidentiality of personal and commercial data, and the enhancement of cultural diversity (including through public funding and assistance). These principles are not intended to apply to financial services.
	Management	These principles are to be reviewed annually, with a view to discussing their implementation and use and to further refining and expanding them as appropriate.	These principles are to be reviewed biannually, with a view to discussing their implementation and use and to further refining and expanding them as appropriate.
Provisions	Transparency	Same as United States - EU. (Article 1)	Governments should ensure that all laws, regulations, procedures, and administrative rulings of general application affecting ICT and trade in ICT services are published or otherwise made available, and, to the extent practicable, are subject to public notice and comment procedures. (Article 1)
	Cross-border information flows	Same as United States - EU. (Article 2)	Governments should not prevent service suppliers of other countries, or customers of those suppliers, from electronically transferring information internally or across borders, accessing publicly available information, or accessing their own information stored in other countries. (Article 3)
	Open Networks, Network Access and Use	In addition to the United States - EU, governments recognize that Internet access providers should strive to avoid unreasonable discrimination in transmitting lawful network traffic. (Article 3)	Governments should promote the ability of consumers legitimately to access and distribute information and run applications and services of their choice. Governments should not restrict the ability of suppliers to supply services over the Internet on a cross-border and technologically neutral basis. (Article 2)
	Interconnection	Same as United States - EU. (Article 4)	Governments should ensure that public telecommunications service

		Japan - United States Trade Principles for ICT Services	United States - EU Trade Principles for ICT Services
			suppliers have the right and the obligation to negotiate and to provide interconnection on commercial terms with other providers. In addition, in accordance with the GATS Reference Paper, countries should ensure interconnection with major suppliers at cost-oriented, non-discriminatory rates. (Article 9)
	Unbundling of Network Elements	Governments, through their regulators, should have the authority to require major suppliers in their respective territories to offer public telecommunications service suppliers access to network elements on an unbundled basis on terms and conditions, and at cost-oriented rates, that are reasonable, non-discriminatory and transparent. (Article 5)	No provision.
	Local Infrastructure and Local Presence	Almost the same as United States - EU. (Article 6)	Governments should not require ICT service suppliers to use local infrastructure, or establish a local presence, as a condition of supplying services. (Article 4)
	Foreign Ownership	Same as United States - EU. (Article 7)	Governments should allow full foreign participation in their ICT services sectors. (Article 5)
	Use of Spectrum	Almost the same as United States - EU. (Article 8)	Governments should maximize the availability and use of spectrum by working to ensure that it is managed effectively and efficiently. Governments are encouraged to empower regulators with impartial, market-oriented means, including auctions, to assign terrestrial spectrum to commercial users. (Article 6)
	Digital Products	Governments should provide treatment no less favorable to some digital products as compared to other like digital products based on place of creation or production, and nationality of author. (Article 9)	No provision.
	Regulatory Authorities	Same as United States - EU. (Article 10)	Governments should ensure that the regulatory authorities that oversee ICT services sectors are legally distinct and functionally independent from all service providers and regulatory decisions and procedures should be impartial. (Article 7)
	Authorizations and Licenses	Same as United States - EU. (Article 11)	Governments should authorize the provision of competitive telecommunications services on simple notification, and should not require legal establishment as a

		Japan - United States Trade Principles for ICT Services	United States - EU Trade Principles for ICT Services
			condition of supplying a service. Licenses should be restricted in number for specified regulatory issues, such as the assignment of frequencies. (Article 8)
	International Cooperation	Same as United States - EU. (Article 12)	Governments should cooperate with each other to increase the level of digital literacy globally and reduce the "digital divide". Article 10)