

# CHAPTER 5

## INVESTMENT

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### A. BACKGROUND OF RULES

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#### 1. BACKGROUND

##### 1) INCREASE IN FOREIGN DIRECT INVESTMENT

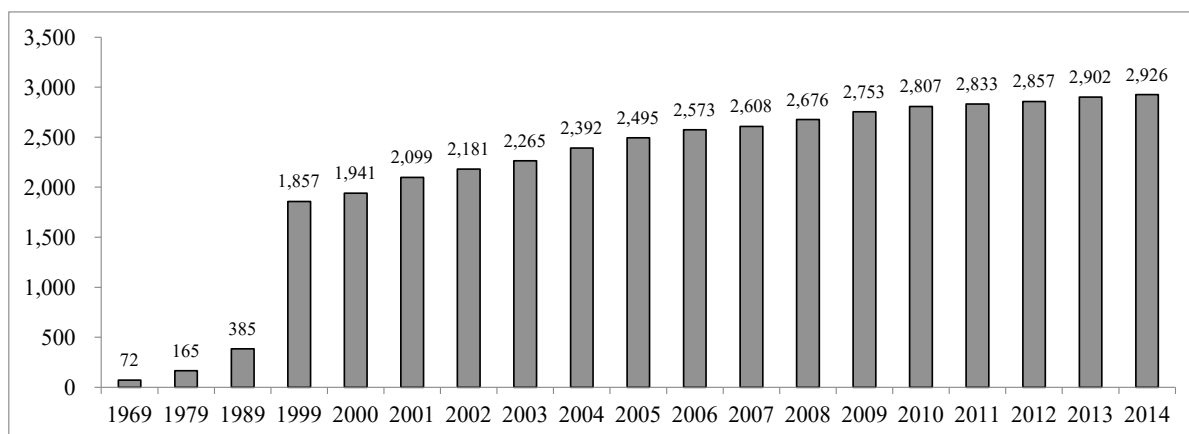
Since the 1980s, foreign direct investment has been growing rapidly worldwide and continues to play a significant role in leading worldwide economic growth. In 1980, the ratio of the foreign direct investment (on a cumulative basis) to GDP was 5.8% in respect of external direct investment and 5.3% in respect of inward direct investment. In 2014, the figures had grown to 33.4% and 33.6%, respectively (source: UNCTAD “World Investment Report 2015”).

With Japan’s balance of payments, which reflects the increases of securities investment and of direct investment, the income balance of FY2014 was approximately 18.1 trillion yen, while the trade deficit is approximately 12.8 trillion yen; that is the income balance is supporting the current balance.

##### 2) TREND IN CONCLUSION OF BILATERAL INVESTMENT TREATIES AND FREE TRADE AGREEMENTS THAT INCLUDE INVESTMENT CHAPTERS

Many countries have concluded a large number of Bilateral Investment Treaties (BITs) since the late 1950s, in order to protect investors and their investments from risks in the host country such as discriminatory treatment or sudden expropriation including nationalization. In 1990s, the number increased rapidly because of the expansion of the foreign direct investment. At the end of 2014, 2,926 (3,271 if FTAs that include investment chapters are included) BITs were in existence.

**Figure III-5-1 Development in the Numbers of Investment Agreements in the World**



### **3) EFFORTS AT THE OECD**

With the acceleration of the expansion of foreign direct investment, new efforts were initiated to regulate the behavior of host countries in both the pre- and post-establishment phases. Specifically, efforts were made to reduce barriers to free cross-border investment such as foreign capital restrictions. In 1995, negotiations on the Multilateral Agreement on Investment (MAI) commenced in the OECD. The member countries attempted to settle on a comprehensive and binding multilateral agreement regarding the liberalization and protection of investment. However, because of the concerns of NGOs and member countries that state regulatory authority, in particular on environmental matters, would be harmed by the MAI, the negotiations went into a deadlock, and France's decision to withdraw led the negotiations to breakdown in 1998. Thus, the MAI was not concluded.

Ever since its early days, the OECD has been tackling the task of formulating international agreements on investment. The Code of Liberalization of Capital Movements, enacted when OECD was established in 1961, provides for the liberalization of capital transactions except in certain cases. The Guidelines for Multinational Enterprises, drafted in 1976, state that governments of member countries would recommend that multinational enterprises behave responsibly, as their behavior may affect the development of the world economy. The guidelines have been revised five times to add descriptions on the environment, employment relations, disclosure and new chapters on consumer interests and combating bribery, in accordance with developments of the world economy and changes in the actions of multinational enterprises. The revisions made in 2011 include: 1) the call for the implementation of due diligence to prevent or lessen negative effects of one's activities, since even if such activities do not directly become an adverse effect, they may still cause it indirectly through one's business relationships; 2) the installation of a new chapter on human rights; and 3) the setting of guidelines on ordinary processing times for the National Contact Points (NCP) established in each country. It should be noted that, the guidelines themselves are not legally binding and their implementation is left to the discretion of each country and of each enterprise.

### **4) THE ENERGY CHARTER TREATY (ECT)**

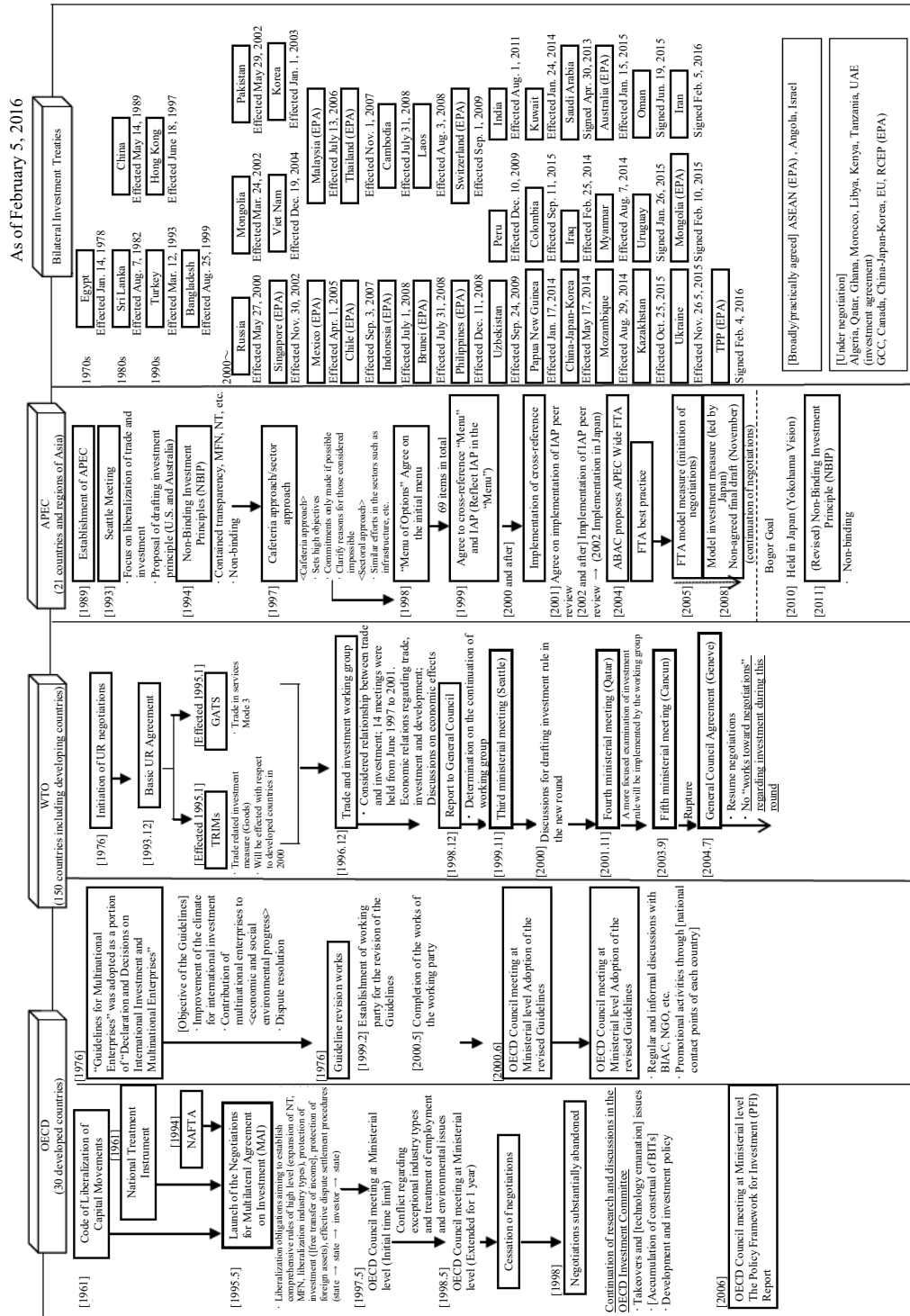
The Energy Charter Treaty (ECT) is an example of efforts made in an individual sector. The treaty was drafted in order to protect energy-related trade, investments and transportation, particularly in the former Soviet bloc countries. The negotiation started at the initiative of European countries; was opened for signing in 1994; and went into effect in 1998. The investment discipline is one of three pillars of the Energy Charter Treaty. Although limited to energy-related investments, it contains major investment rules. Japan signed the treaty in 1995 and ratified it in 2002. Each country of the former Soviet bloc continues to participate in the treaty following the collapse of the Soviet Union. The treaty was only provisionally applied to Russia, which signed the treaty in 1994, but such provisional application was terminated upon notification made by the Russian Federation to the ECT secretariat on October 18, 2009. However, investments by ECT members during the period of the provisional application are to be protected for 20 years after the termination of the provisional application became effective (Article 45.3(b)).

### **5) EFFORTS AT THE WTO**

At the WTO Singapore ministerial meeting in 1996, it was decided to consider whether investment should be included as an area for negotiation in the WTO framework, along with trade facilitation, transparency of governmental procurement and competition (the so-called "Singapore Issues"). Subsequently, discussions in the WTO on possible negotiations regarding "trade and investment" were made while the progress of discussions on the MAI at the OECD (which failed in 1998) was closely watched. It was agreed at the fourth ministerial meeting in 2001, which decided to start the Doha

Development Agenda, to initiate negotiations if a clear consensus on negotiation modalities could be obtained at the fifth ministerial meeting. Starting in April 2002, the Working Group on trade and investment held meetings to discuss the elements (*e.g.*, scope and definitions, transparency) contained in the Doha Declaration. However, due to strong opposition from developing countries to establish rules regarding investments within the WTO framework, commencement of negotiations was not agreed upon at the fifth ministerial meeting held in Cancun, and investment was not included in the items to be negotiated in the Doha Development Agenda.

Figure III-5-2 History of Developments in the International Investment Environment



## **COLUMN: REPATRIATION OF FOREIGN INVESTMENT EARNINGS AND TAX IMPOSITION ISSUES IN EMERGING COUNTRIES**

### **1. INTRODUCTION**

While world demand is increasing mainly in emerging countries, in order for the Japanese economy to maintain sustainable growth, it is important to encourage Japanese companies to develop overseas business and facilitate them to smoothly repatriate the revenue they earn abroad back into Japan. Japanese companies have actually been expanding their business abroad in emerging countries like China and India. Nevertheless, in these host countries, there are many reported cases of improper measures with the intention of fostering their own industries or acquiring foreign currency: examples include aggressive administration of tax deviating from the actual tax that should be imposed on foreign companies, or requirement for the introduction of technology with conditions that are favorable to their countries' companies, and domestic reinvestment of revenues. As a result, multiple problems such as double taxation by unexpected back tax demands, etc. have occurred and in some cases making the continuation of business in host countries difficult. Such problems in emerging countries may possibly function as an obstacle for Japanese companies to extend their operations abroad and to repatriate the revenue back to Japan, so the government should take measures immediately.

### **2. ISSUE OF DOUBLE TAXATION**

When a company globally operates its business, the issue of double taxation may arise in the situation that both Japan and a host country impose taxation on the income from the same transaction, thus posing a significant risk to companies.

### **3. INTERNATIONAL TAXATION RULES**

#### **1) Tax treaties**

Tax treaties aim to avoid double taxation, deal with issues related to tax evasion and tax breaks, and promote sound investment and economic exchange between two countries. As of February 1, 2016, Japan has concluded 65 tax-related treaties, which are applicable to 96 countries and regions. Content such as the following are generally included in those treaties.

#### **a) Provisions for the scope of taxation rights of host country**

In general, when Japanese companies have earnings (business income) through operations within a host country, the tax authorities of the country can only tax if there is a permanent establishment (PE) within the host country such as a branch, an office, and a factory in which business is conducted; in that case, the host country can tax only the earnings made from activities of the PE.

In addition, if the overseas subsidiary pays investment income such as dividends and interest to the Japanese company, such company may be subject to taxation such as withholding tax, etc. in accordance with the laws and regulations of the country where the subsidiary resides (host country). With respect to this investment income, the tax treaties set the upper limit of the tax rate the host country's government can impose or exempt the company from tax in order to reduce international double taxation.

#### **b) Dispute resolution (mutual agreement procedure and arbitration)**

When a company or an individual becomes taxed in a manner not conforming to the tax treaty, the taxpayer can call for a mutual agreement procedure conducted by tax authorities of both countries in order to resolve the issue.

Furthermore, an "arbitration provision" may be provided that enables third-party (arbitrator)

participation in the discussions between the tax authorities. In that case, the taxpayer can request to submit the unsolved portion of such case to arbitration after a specified period has passed since the mutual agreement procedure was commenced. Because the arbitration provision necessitates drawing a conclusion within a specified period, this system will lead to more smooth and effective discussions between the tax authorities and contribute to the avoidance of double taxation. Japan introduced an arbitration provision in the tax treaties concluded with Hong Kong (entered into force in August 2011), the Netherlands (entered into force in December 2011), Portugal (entered into force in July 2013), New Zealand (entered into force in October 2013), Sweden (entered into force in October 2014), and the UK (entered into force in December 2014). The provision is also included in the tax treaties with the United States (signed in January 2013, but not yet in force), Germany (signed in December 2015, but not yet in force), and Chile (signed in January 2016, but not yet in force).

## **2) Transfer pricing taxation**

By arbitrarily manipulating the transaction price between affiliates (for example a parent company and its foreign subsidiaries), income that should be assigned to a country under ordinary circumstances can be transferred to the other country. To prevent such tax avoidance, many countries including Japan maintain a transfer pricing taxation system. Transfer pricing taxation is a system that imposes tax based on income calculated on the presumption that transactions between a company and its overseas affiliates were carried out at a normal transaction price (Arm's Length Price (ALP)).

Furthermore, there is a system for improving the predictability for taxpayers called "Advance Pricing Arrangement (APA)". Under this system, a company gets prior approval for the method of calculating ALP from the national tax authority, and transfer pricing taxation will not be imposed in so far as the company uses that ALP. This system has been introduced in Japan. However, there are some countries, including emerging countries, in which APA systems have not been implemented or have been implemented but do not function properly.

## **4. INTERNATIONAL TAXATION ISSUE IN EMERGING COUNTRIES**

### **1) Transfer pricing taxation**

In emerging countries, there are an increasing number of cases where revenues of overseas subsidiaries of Japanese companies are subject to transfer pricing taxation for the purpose of securing tax revenue of that country.

#### **a) Increase in taxable income due to the application of standardized deemed profit margin**

In some countries, overseas subsidiary companies whose functions and risks are restricted are assessed a certain profit margin regardless of special factors such as a financial crisis. Therefore, their profit margins are calculated higher than in reality and they are forced to pay back taxes (China, etc.).

Furthermore, there are countries in which calculating the profitability that matches the actual situation of each transaction is not approved in practice and a uniform high standard profit rate is set for each industry type (Brazil, etc.).

#### **b) Increase in taxable income due to the application of profit ratio on transactions for different types of businesses**

For a company who runs an operation with low profit level, the profit rate of a separate operation with a higher profit level of that company may be applied, and it is forced to pay back taxes (India, etc.).

### **2) PE certification**

The scope of PE tends to be broadly interpreted in emerging countries. As a result, the risk of

unexpected imposition of tax on Japanese companies has increased.

a) PE certification of liaison office

Commonly, the tasks of liaison offices are to gather information and perform liaison works for their parent companies (Japanese companies). Therefore, it should not receive any PE certification since it does not conduct any business activities. However, in some emerging countries, the scope of PE is broadly interpreted, leading to cases where liaison offices that are not actually conducting business activities are PE certified (emerging countries in general).

b) PE certification of foreign subsidiary

Generally, PE certifications are not granted solely for the reason of being a foreign subsidiary of a Japanese company. However, there have been cases in which tax has been imposed on a Japanese company in emerging countries because (1) its subsidiary was recognized as the PE based on the reasoning that the Japanese parent company makes all the decision and the subsidiary does not make any decision, or (2) that the subsidiary does not bear a risk but simply operates as a commission agent to the parent company (India, etc.).

### 3) Royalty issues

In cases when Japanese companies provide technology to their foreign subsidiaries and receive royalty in return, there may be regulations and administrative guidance that practically restrict upper limits for the royalty rate and contract period in some countries (emerging countries in general, including Brazil). Furthermore, since royalty is considered compensation for creating profit by the tax authorities of emerging country, deduction of payment of a royalty may be denied on ground that “if the foreign subsidiary is not profitable or its profit is not sufficient, the benefit from provision of technology has not been bestowed” (Emerging countries in general).

### 4) Others

Other cases where the taxation systems and their implementation of the host countries impose burdens on companies are as follows:

- a) The taxation system is complex and revised frequently, and/or new provisions are immediately enforced or retroactively applied.
- b) Tax inspector or local governments do not operate their tax law in a uniform fashion.
- c) The administrative lawsuits or the trial system is not effectively functioning or trials related to international taxation may extend for a long time. Therefore, trial fees and administrative burdens may pose a strain on companies.
- d) Even if a tax refund system exists, a significant number of days will be required before receiving repayment.

## 5. APPROACHES TO DEALING WITH THE ISSUES

### 1) Development and utilization of international rules

Development of tax treaties is an effective measure for the avoidance of the international double taxation. It is important to expand the treaty network by promoting the conclusion of tax treaties with new countries and revising the existing treaties for the purpose of clarifying the scope of PE and enhancing the effectiveness of mutual agreement procedure by containing arbitration provisions, etc.

In order to solve problems where regulations or administrative guidance on funds transfer or royalty are the root cause in the partner country, rectifications will be requested from diverse perspectives, such

as the direct prohibition of the royalty rate requirement through a provision prohibiting performance requirements in the investment agreements and the consistency with the freedom of funds transfer and the obligation of national treatment as stipulated by the WTO TRIPS Agreement. In investment arbitrations, taxation measures are generally deemed legitimate exercise of government authority and do not constitute a violation of the Agreements, but in some cases taxation measures targeting specific companies, etc. were deemed to constitute a violation of the provisions of fair and equitable treatment or direct/indirect expropriation (a series of Yukos-related cases such as *RosInvest v. Russia*, *Tza Yap Shum v. Peru*, and *Bogdanov v. Moldova*). Also, taxation practically imposed only on foreign companies was deemed to constitute a violation of the national treatment obligation (*ADM v. Mexico*), and unjustifiable withdrawal of tax exemption measures based on domestic laws of host country was deemed to constitute a violation of the fair and equitable treatment obligation (*Goetz v. Burundi*).

## **2) Efforts toward the improvement of the taxation system and its operation within emerging countries, etc.**

Since resolving the issues on the taxation systems of the host country also leads to the improvement of inward investment environment of that country, it is necessary to call for the partner country (local government at times) to improve its systems both at government level through bilateral and multilateral frameworks and by industrial associations.

## **3) Japanese company's awareness of tax risks**

As the government, it is important to strengthen information-sharing systems through establishing partnership among related organizations such as relevant ministries of the Japanese government, local embassies, JETRO, and local Japan Chamber of Commerce and Industry, to inform companies of the taxation cases actually occurring and of how to deal with such cases, etc., and to advocate changes of companies' management of taxation risks. Needless to say, companies should comply with local laws and regulations and fulfill their tax obligations. In addition, it is important for companies to utilize events such as seminars and consultation meetings, newsletters, etc. held by JETRO, local Japan Chamber of Commerce and Industry, tax accounting corporations and other relevant organizations to enable not only employees in tax-related departments but also employees in other departments such as sales and marketing and managers to fully understand the tax risk in the host country, and then make use of the knowledge in designing business plans, establishing inner systems and appropriately managing document, etc. in order to prevent these problems from occurring. Furthermore, if problems occur, it is essential for companies to consult experts for advice or utilize appropriate measures for relief in accordance with domestic laws and regulations as well as treaties.

## **2. OVERVIEW OF LEGAL DISCIPLINES**

### **1) TRADITIONAL INVESTMENT PROTECTION AGREEMENTS AND NAFTA TYPE INVESTMENT LIBERALIZATION AGREEMENTS**

In the past, BITs were executed primarily with a view to protecting investors and their investments from legal and political risks including expropriation by the government of the country that receives the investments (also called the host country) or arbitrary operation of laws, thus securing proper treatment for the investors. These agreements are of the type usually referred to as "investment protection agreements", major elements of which are post-establishment national treatment and MFN treatment, conditions on expropriation and compensation, free transfer of funds relating to investment, dispute



settlement between the contracting parties and between a contracting party and an investor. Most of the approximately 2,900 investment agreements currently existing in the world are “investment protection agreements.”

A new approach to investment agreements that emerged in the 1990s sought to address entry barriers to investment such as foreign capital restrictions in addition to providing post-establishment protection. Investment agreements reflecting this approach have entered into effect. They provide national treatment and most-favored-nation treatment during the pre-investment phase as well as the post-establishment phase and prohibit “performance requirements,” which are considered to have a distorting effect on investments. A typical example is the investment chapter in NAFTA. These may be referred to as “investment protection/liberalization agreements.”

## **2) MAJOR PROVISIONS IN INVESTMENT AGREEMENTS**

As previously mentioned, there are two types of investment agreements: “investment protection agreements” and “investment protection/liberalization agreements”. The latter contain provisions relating to both investment protection and liberalization. This section will provide an overview of the major elements of “investment protection/liberalization agreements”. However, elements contained in investment agreements vary and all elements mentioned hereunder are not necessarily included in all investment agreements.

### ***(1) Definition of Investments and Investors***

Investment agreements generally define, at the beginning, applicable investments and investors.

Regarding “investment,” a relatively broad definition is common, such as “every kind of asset owned or controlled, directly or indirectly, by an investor.” Particularly important factors are companies and branches, such as local subsidiaries, to which investments are made. “Indirectly owned” refers to a relationship between a parent company and a second-tier subsidiary company where there is a line of capital ties, such as from a parent company to a subsidiary company and then to a second-tier subsidiary company, irrespective of whether such capital ties are established within a single country or via a third country. Investment agreements concluded by the United States and South American countries, which were inspired by the U.S., often specify [i] the commitment of capital or other resources, [ii] the expectation of gain or profit, and [iii] the assumption of risk, as three concrete requirements.

Regarding “investor of a Contracting Party,” they are often defined broadly as “a natural person having the nationality of that Contracting Party in accordance with its applicable laws and regulations” or “an enterprise of that Contracting Party”. However, some agreements require that investors should “carry out substantial business activities in the area/territory of the Party” or contain provisions that benefits under the agreements can be denied if an investor who does not conduct any substantial business activities is owned or controlled by an investor of a non-Contracting Party (Denial of Benefits clause).

Whether certain investors and their investments are protected under the investment agreements is often contested in arbitration.

### ***(2) National Treatment (NT) and Most-Favored-Nation Treatment (MFN)***

A commonly used provision in these agreements is that each party shall accord to investors of the other party and to their investments national treatment or most-favored-nation treatment with respect to investment activities, which include the “establishment, acquisition, expansion, operation, management, maintenance, use, enjoyment and sale or other disposal of investments.” In the case of investment protection agreements, because NT or MFN treatment is accorded only in the post-establishment phase,

the terms “establishment, acquisition, expansion” are often excluded and such agreements provide “national treatment or most-favored-nation treatment with respect to operation, management...or other disposal of investments.”

In the case of the WTO Agreement, which has multiple Member countries, MFN treatment refers to providing equal treatment to goods and services of member countries, while in the case of a BIT it is to secure treatment equivalent to the most favorable treatment provided by that country to investors and the investments of any non-party .

It is natural that MFN treatment clause obliges a contracting party to extend the favorable treatment accorded to non-party under ordinary investment treaties to the other contracting party. However, it may emerge as a point of discussion in the negotiation whether to extend the treatment accorded to a non-party granted through EPAs/FTAs or customs unions. In some cases, treatment under EPAs/FTAs or customs unions is exempted from the MFN obligation.

### **(3) *Fair and Equitable Treatment (FET)***

In recent years, many investment agreements, including those Japan has entered into, provide obligations to accord “fair and equitable treatment” and “full protection and security” to investments. The objective of such a provision is for the host country to accord a certain level of treatment to investments. While NT and MFN treatment are obligations determined in relation to the treatment actually provided to other investors, fair and equitable treatment clause provides the level of treatment that should be accorded absolutely to everyone.

What specific treatment is deemed fair and equitable treatment, in specific instances, depends on the language or the context of the provision, the purpose of the agreement, and individual and specific circumstances. In practice, discussions have centered on whether fair and equitable treatment means the minimum standard under customary international law, or more favorable treatment that exceeds such minimum standard. Some BITs are explicit in this regard using language such as “in accordance with customary international law”, but other BITs do not provide any relationship with customary international law, and therefore can be interpreted as an autonomous standard.

Article 1105, paragraph 1 of NAFTA provides an obligation to accord fair and equitable treatment “in accordance with international law.” However, in *Pope & Talbot v. Canada* it was held that because NAFTA was entered into for the purpose of building a closer economic relationship between the three countries of North America, there is not only an obligation to provide treatment consistent with the minimum standard under international law, but also obligations above the minimum standard. In addition, in the *S.D. Myers* case it was held that a breach of other provisions under NAFTA automatically establishes a breach of fair and equitable treatment obligations. In consequence, criticisms regarding the interpretation of this provision were raised mainly by the United States. In response to these criticisms, the NAFTA Free Trade Commission published “Notes of Interpretation of Certain Chapter 11 Provisions” on August 1, 2001. They confirmed that the fair and equitable treatment obligation grants the customary international law minimum standard of treatment of aliens and does not require treatment beyond that, and that a breach of another provision of the NAFTA, or of a separate international agreement, does not establish that there has been a breach of Article 1105(1). Subsequent arbitration cases have followed this Notes of Interpretation. However, depending on how the customary international law minimum standard is understood, there may be no significant difference between these positions in practice.

Some specific examples of fair and equitable treatment are the obligation to take due care in protecting the investments of foreign investors, the due process obligation, prohibition of denial of justice, and the obligation not to frustrate the legitimate expectations of investors.

#### ***(4) Obligation to Observe the Obligation a Country have Entered into with Regard to an Investor (Umbrella Clause)***

Taking into account that contracts concerning infrastructure products or resource development will be concluded between investors and the government of a host country, these provisions are intended to ensure that the host country performs the obligations it has assumed for individual investments based on such contracts. This clause is referred to as the Umbrella Clause because it is intended to cover the contractual obligation of the host country comprehensively.

Breach of obligation in the investment contract automatically establishes a breach of the obligation in the treaty, and the dispute settlement procedures in the treaty (including arbitration between investor and the state) becomes available in addition to the procedures prescribed in the contract, which is an advantage for investors.

The Umbrella Clause has been included in many investment agreements, but recently there have been contestations in arbitrations over the scope of the host country's obligation that is covered by the Umbrella Clause.

#### ***(5) Prohibition of Performance Requirements (PR)***

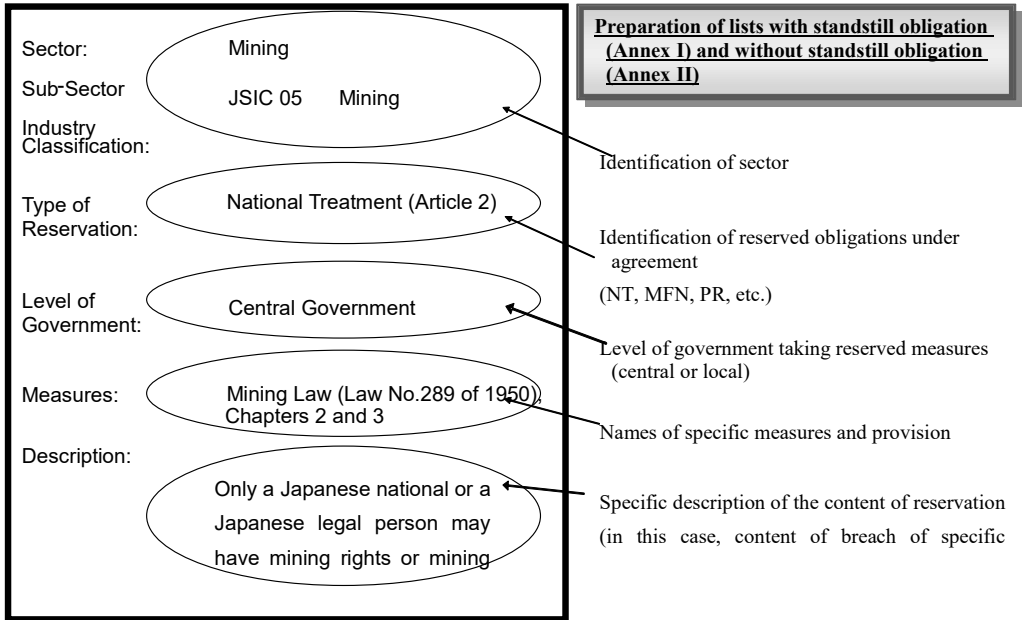
This provision prohibits a contracting party from imposing performance requirements that hinder the free investment activities of investors, such as export requirements, local procurement requirements and technology transfer requirements, as conditions for investment and business activities of the investor in the other contracting party.

First, the WTO TRIMs Agreement prohibits export restrictions, local content requirements (local content requirements for goods), and export/import balance requirements as being “investment measures that have a strong trade-distorting effect”. In addition, export requirements, domestic sale limit requirements, technology transfer requirements, nationality requirements for managements, local citizen employment requirements, headquarter location requirements, research and development requirements, and specific region supply requirements are often prohibited in BITs as “performance requirements.” This concept of prohibiting performance requirements emerged in the discussion of MAI Agreement at the OECD.

Performance requirements are usually classified as one of two types: absolutely prohibited items or items that are permitted if required as a condition for granting benefits. Under investment protection/liberalization agreements, local content requirements and export/import balance requirements, both of which are strictly prohibited in the TRIMs Agreement, are also absolutely prohibited, with a view to maintaining consistency with the rules under the WTO Agreement. Other items such as local citizen employment requirements and technology transfer requirements are often treated as falling in the latter category in order to leave leeway for investment-inducing policies for the contracting parties.

In addition, clauses for prohibiting regulations on royalties in technology agreements were further enhanced by including such clauses in the negotiations of the recently concluded Japan-Mozambique Investment Agreement and Japan-Myanmar Investment Agreement.

**Figure III-5-3 Example of Negative List with standstill obligations**



(Source: Japan-Cambodia BIT)

**(6) Approach to Liberalization Commitment**

Approaches to liberalization commitments can be classified as one of two types: where NT, MFN and prohibition of PR are provided to all sectors except those which the contracting parties list as exceptions (negative list approach); or where only those sectors and content which are inscribed in the “Schedule of Commitments” are committed (positive list approach). Because “investment protection agreements” cover only the post-investment phase, the exception for liberalization commitments is generally not included. In “investment protection/liberalization agreements,” the developed countries including Japan, U.S., Canada, and Singapore tend to adopt the negative list approach, which is highly transparent and legally stable (see e.g. the investment chapter of NAFTA). However, some developing countries tend to adopt the positive list approach, which is the same approach as the WTO GATS, in order to leave political leeway for foreign investment restrictions (see e.g., the investment chapter in Australia-Thailand FTA, and “Schedule of India’s Commitments” in the investment chapter in India-Singapore CECA).

Two types of negative lists are generally prepared: lists “without standstill obligations” allow parties to “maintain” or “adopt” measures not conforming to NT, MFN and prohibition of PR obligations; and lists with “standstill/ratchet obligations”. Under lists with standstill/ratchet obligations: (1) measures that do not conform to the agreement cannot be newly introduced; (2) measures that do not conform to NT, MFN and PR obligations that existed at the time the agreement became effective may be “maintained,” but cannot be revised in a way that makes them more non-conforming to the agreement; and (3) once measures are revised to make them more consistent with the agreement, they cannot be made more inconsistent again (this is called as a “ratchet” obligation to indicate changes can only be made in one direction).

Having the standstill obligation cover as many sectors as possible reduces risks to investors from changes of the legal system (i.e., domestic systems are made less favorable). At the same time, the

contracting parties can register especially sensitive sectors such as those relating to national security (arms and weapons industry; nuclear power industry) on the list “without standstill obligations,” and those that are not so sensitive on the list “with standstill obligations,” thereby leaving leeway for restrictions they consider necessary as well as securing legal stability in their foreign investment policies. Specifically, the negative list adopted in the investment chapter of NAFTA inscribes (i) the relevant sector (sub-sector); (ii) related obligations; (iii) legal grounds for the measure; and (iv) a summary of the measure, thereby helping ensure the transparency of the laws and regulations of the host country.

For example, in Japan-Uzbekistan investment agreement, Japan has reserved the following sectors. The reserved sectors are virtually the same within Japan’s agreements with other countries.

**(With standstill obligations)**

Banking, Heat Supply, Information and Communications, Drugs and Medicines Manufacturing, Leather and Leather Products Manufacturing, Matters related to the Nationality of a Ship, Mining, Oil Industries, Agriculture, Forestry and Fisheries, and Related Services, Security Guard Services, Transport and Water Supply and Waterworks.

**(Without standstill obligations)**

Transfer or dispose of equity interests in, or the assets of a state enterprise or a government entity, Any measures relating to the liberalization of telegraph services or postal services etc., Subsidies, Aerospace Industry, Arms and Explosives Industry, Energy industry (i.e., Electricity Utility Industry, Gas Utility Industry, Nuclear Energy Industry), Fisheries, Broadcasting Industry, Land Transaction, Public Law Enforcement and Correctional Services and Social Services (i.e., income security, social security, social welfare, primary and secondary education, public training, health and child care etc.).

**(7) Expropriation and Compensation**

Provision on expropriation and compensation provide that when the contracting party expropriates the investment of the investor (including nationalization), it should do so in accordance with the following conditions: (i) for a public purpose, (ii) in a non-discriminatory manner, (iii) upon payment of prompt compensation, (iv) in accordance with due process of law, and (v) the compensation equivalent to the fair market value at the time of the expropriation. The provision covers “measures equivalent to expropriation” (indirect expropriation) in addition to direct expropriation that involves transferring assets to the state.

Indirect expropriation refers to measures that hinder the use of investment or income due to policy measures such as discriminatory deprivation of permissions and licenses by the government of the contracting party and the imposition of a maximum limit of production, ultimately resulting in an outcome equivalent to expropriation although the property rights for investments are not transferred. Discussions on indirect expropriation were triggered by arbitration cases in the late 1990s (e.g. *Metalclad v. Mexico (NAFTA)* where environmental protection measures taken by a state government of Mexico allegedly constituted indirect expropriation, *infra* at Dispute Settlement regarding Investment). Questions were raised concerning to what extent restrictive measures of the contracting parties constitute a “measure equivalent to expropriation” which requires compensation. In reaction to these arbitral awards, the recent FTAs/BITs concluded by the U.S. provide that indirect expropriations require a case-by-case inquiry that considers three factors: (i) the economic impact of the government action, although the fact that an action or series of actions by a party has an adverse effect on the economic value of an investment, standing alone, does not establish that an indirect expropriation has occurred; (ii) the extent to which the government action interferes with distinct, reasonable investment-backed expectations; and (iii) the character of the government action. In addition, except in rare circumstances,

non-discriminatory regulatory actions by a party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety, and the environment, do not constitute indirect expropriations.

However, even under the BITs/FTAs that do not contain these provisions, there have been no arbitral awards in which legitimate exercise of state regulatory authority was determined a “measure equivalent to expropriation”.

### ***(8) Protection from Strife***

If investors have suffered loss or damage relating to their investments due to armed conflict, revolution, civil disturbance or any other similar event, this provision guarantees treatment of such investor, as regards indemnification or any other accords, that is no less favorable than that which is accorded to the contracting party’s own investors or investors of a non-party.

### ***(9) Subrogation***

This provision recognizes the assignment to the contracting party or its designated agency of investors’ claims for suffered damages on their investments. For example, if investors suffer any damage due to a natural disaster or bankruptcy of local enterprises, such investor will receive a payment from the contracting party or its designated insurance agency under insurance contract etc. This provision provides that, in such case, the contracting party country or such insurance agency may succeed and exercise the investors’ rights. As for Japan, this provision applies to guarantees and insurance contracts provided by Nippon Export and Investment Insurance (NEXI) and Japan Bank for International Cooperation (JBIC).

### ***(10) Transfers***

This provision obliges each contracting party to ensure that all transfers relating to investments of an investor of the other contracting party may be made freely without delay. Thereby it secures the freedom of sending money from the home country to the host country or sending profit gained in the host country to the home country and guarantees a smooth business environment.

### ***(11) State-to-State Dispute Settlement***

In the event any dispute arises between contracting parties over the interpretation or application of the agreement, consultation shall first be made between the parties, and if no settlement is reached by such consultation, the dispute will be submitted to an arbitral tribunal. Different from BITs, in EPAs/FTAs, it is stipulated that the dispute settlement chapter applies to the entire EPA/FTA including the investment chapter, so the investment chapter does not contain these State-to-State Dispute Settlement provisions. (Discussed later in Chapter 8 “Settlement Dispute between States”).

### ***(12) Investor-to-State Dispute Settlement***

This provision provides that if any dispute arises between the investor and the host country and cannot be settled by consultation, investors may submit the investment dispute to arbitration in accordance with the arbitration rules of the International Centre for Settlement of Investment Disputes (ICSID) or the United Nations Commission on International Trade (UNCITRAL) (discussed later in “Dispute Settlement regarding Investment”). In EPAs/FTAs, it is provided in the chapter on investment.

### ***(13) General Exceptions and Security Exceptions***

It is provided that contracting parties may take exceptional measures that do not conform to the agreement if doing so is necessary for maintaining public order, protecting human, animal or plant life or health, and defending such countries' essential security interests. Arbitral tribunals have handled issues such as in what circumstances exceptional measures may be taken (for example, whether a government's measures taken under an economic crisis fall under the category of exceptional measures). What is often controversial about this issue is the relationship between this provision and the principle of the state of necessity under customary international law (differences in the scope, requirements, legal nature, etc.).

## ***3. CURRENT STATUS OF JAPAN'S CONCLUSION OF INVESTMENT AGREEMENTS (INCLUDING CHAPTERS ON INVESTMENT IN EPAs)***

As of the end of February 2016, Japan has entered into 24 BITs and 11 EPAs with chapters on investment (the Japan-Uruguay BIT, the Japan-Mongolia EPA, etc. have been signed but have not yet entered into force). The content of the chapters on investment of the EPAs are almost the same as the content of the BITs. This means that Japan has entered into 35 investment agreements.

		<b>Date Signed</b>	<b>Date Effected</b>
(Investment Agreements)			
(i)	Egypt	January 1977	January 1978
(ii)	Sri Lanka	March 1982	August 1982
(iii)	China	August 1988	May 1989
(iv)	Turkey	February 1992	March 1993
(v)	Hong Kong	May 1997	June 1997
(vi)	Pakistan	March 1998	May 2002
(vii)	Bangladesh	November 1998	August 1999
(viii)	Russia	November 1998	May 2000
(ix)	Mongolia	February 2001	March 2002
	* Scheduled to be terminated when the Japan-Mongolia EPA signed in February 2015 enters into force.		
(x)	Korea	March 2002	January 2003
(xi)	Viet Nam	November 2003	December 2004
	* Incorporated in the Japan-Viet Nam EPA signed in December 2008.		
(xii)	Cambodia	June 2007	July 2008
(xiii)	Lao P.D.R.	January 2008	August 2008
(xiv)	Uzbekistan	August 2008	September 2009

Part III: EPA/FTA and IIA

		<b>Date Signed</b>	<b>Date Effected</b>
<b>(Investment Agreements)</b>			
(xv)	Peru	November 2008	December 2009
		* Incorporated in the Japan-Peru EPA, signed in May 2011.	
(xvi)	Papua New Guinea	April 2011	January 2014
(xvii)	Columbia	September 2011	September 2015
(xviii)	Kuwait	March 2012	January 2014
(xix)	China and Korea	May 2012	May 2014
(xx)	Iraq	June 2012	February 2014
(xxi)	Saudi Arabia	April 2013	
(xxii)	Mozambique	June 2013	August 2014
(xxiii)	Myanmar	December 2013	August 2014
(xxiv)	Kazakhstan	October 2014	October 2015
(xxv)	Uruguay	January 2015	
(xxvi)	Ukraine	February 2015	November 2015
(xxvii)	Oman	June 2015	
(xxviii)	Iran	February 2016	
<b>(Economic Partnership Agreements)</b>			
*(i)	Japan-Singapore EPA	January 2002	November 2002
*(ii)	Japan-Mexico EPA	September 2004	April 2005
*(iii)	Japan-Malaysia EPA	December 2005	July 2006
*(iv)	Japan-Philippines EPA	September 2006	December 2008
*(v)	Japan-Chile EPA	March 2007	September 2007
*(vi)	Japan-Thailand EPA	April 2007	November 2007
*(vii)	Japan-Brunei EPA	June 2007	July 2008
*(viii)	Japan-Indonesia EPA	August 2007	July 2008
*(ix)	Japan-Switzerland EPA	February 2009	September 2009
*(x)	Japan-India EPA	February 2011	August 2011
*(xi)	Japan-Australia EPA	August 2014	January 2015
*(xii)	Japan-Mongolia EPA	February 2015	
*(xiii)	TPP	February 2016	

(Note) The BITs are applied mutatis mutandis for the Japan-Vietnam EPA and Japan-Peru EPA.



Figure III-5-4 Elements of Japan's Investment Agreements

Name of the agreement (date of entry into force, effectuated)	Japan-Egypt BIT (Jan 1978)	Japan- Sri Lanka BIT (Aug 1982)	Japan-China BIT (May 1989)	Japan-Turkey BIT (Mar 1993)	Japan-Hong Kong BIT (Jun 1997)	Japan-Banglad esh BIT (Aug 1999)	Japan-Russia BIT (May 2000)	Japan-Mongoli a BIT (Mar 2002)	Japan Pakistan BIT (May 2002)
Definition of investments	every kind of assets	every kind of asset	every kind of asset (in accordance with the laws and regulations)	every kind of asset	every kind of asset	every kind of asset	every kind of asset	every kind of asset	every kind of asset
National Treatment (NT)	pre-establihm ent stage	x	x	x	x	x	x	x	x
	post-establish ment stage	o	Δ (exception: measures for public order, national security or sound development of national economy.)	o	o	o	o	o	o
Most-Favored-Nation Treatment (MFN)	pre-establihm ent stage	o (exception: housing projects of member states of the League of Arab States)	o	o	o	o	o	o	o
	post-establish ment stage	o	o	o	o	o	o (exception the former Soviet Union)	o	o
Prohibition of Performance Requirements (PR)		x	x	x	x	x	Δ (4) (only post-establish ment stage)	Δ (4) (only post-establish ment stage) (TRIMs incorporated)	x
	— Export restriction requirement	-	-	-	-	-	o	o	-
	— Local content	-	-	-	-	-	o	o	-

Part III: EPA/FTA and IIA

Name of the agreement (date of entry into force, effectuated)	Japan-Egypt BIT (Jan 1978)	Japan- Sri Lanka BIT (Aug 1982)	Japan-China BIT (May 1989)	Japan-Turkey BIT (Mar 1993)	Japan-Hong Kong BIT (Jun 1997)	Japan-Banglad esh BIT (Aug 1999)	Japan-Russia BIT (May 2000)	Japan-Mongoli a BIT (Mar 2002)	Japan-Pakistan BIT (May 2002)
requirement									
— Local purchase requirement for goods & services	-	-	-	-	-	-	o	o	-
— Export & import balance requirement	-	-	-	-	-	-	o	o	-
—Export requirement	-	-	-	-	-	-	x	x	-
— Domestic sale restriction requirement	-	-	-	-	-	-	x	x	-
— Senior Management & Board of Directors	-	-	-	-	-	-	x	x	-
— Local citizen employment requirement	-	-	-	-	-	-	x	x	-
— Headquarter location requirement	-	-	-	-	-	-	x	x	-
— Research & development requirement	-	-	-	-	-	-	x	x	-
— Technology transfer requirement	-	-	-	-	-	-	x	x	-
—Royalty regulation	-	-	-	-	-	-	-	-	-
— Specific region supply requirement	-	-	-	-	-	-	x	x	-
Reservation list (Negative list)	x	x	x	x	x	x	x	x	x
Fair and equitable treatment	Δ	Δ	Δ	Δ	o	Δ	o	Δ	Δ
Full protection and security	(constant protection and security)	(constant protection and security)	(constant protection and security)	(constant protection and security)	o	(constant protection and security)	o	(constant protection and security)	(constant protection and security)

Name of the agreement (date of entry into force, effectuated)	Japan-Egypt BIT (Jan 1978)	Japan- Sri Lanka BIT (Aug 1982)	Japan-China BIT (May 1989)	Japan-Turkey BIT (Mar 1993)	Japan-Hong Kong BIT (Jun 1997)	Japan-Banglad esh BIT (Aug 1999)	Japan-Russia BIT (May 2000)	Japan-Mongoli a BIT (Mar 2002)	Japan Pakistan BIT (May 2002)
Umbrella clause	x	x	x	x	o	x	o	x	x
Expropriation and compensation	o	o	Δ (only MFN for compensation)	o	o	o	o	o	o
NT & MFN of Protection from strife	o	o	Δ (only MFN)	o	o	o	o	o	o
Transfers	o	o	Δ (exchange restriction allowed)	o	o	o	o	o	o
Entry of investors	o	o	o	o	x	o	o	o	o
Transparency	x	x	x	x	x	x	o	o	x
Public comments	x	x	x	x	x	x	x	x	x
Against corruption	x	x	x	x	x	x	x	x	x
ISDS	o	o	Δ (only for dispute concerning the amount of compensation for expropriation)	o	o	o	o	o	o
SSDS	o	o	o	o	o	o	Δ (sympathetic consideration)	o	o
Joint committee	x	x	Δ (simplified provisions)	x	x	x	x	Δ (simplified provisions)	x

Part III: EPA/FTA and IIA

Name of the agreement (date of entry into force, effectuated)		Japan-Egypt BIT (Jan 1978)	Japan- Sri Lanka BIT (Aug 1982)	Japan-China BIT (May 1989)	Japan-Turkey BIT (Mar 1993)	Japan-Hong Kong BIT (Jun 1997)	Japan-Banglad esh BIT (Aug 1999)	Japan-Russia BIT (May 2000)	Japan-Mongoli a BIT (Mar 2002)	Japan Pakistan BIT (May 2002)
Others	NT exception: registration of aircraft and ownership of ship MFN exception: reciprocity for rights of immovable property	NT exception: registration of aircraft, ownership of ship and banking business MFN exception: reciprocity for rights of immovable property			NT exception: registration of aircraft, ownership of ships and immovable property, and establishment of additional branches of existing banks	NT exception: registration of aircraft and ownership of ships	NT exception: registration of aircraft and ownership of ships	NT exception: registration of aircraft and ownership of ships	NT exception: registration of aircraft and ownership of ships	NT exception: registration of aircraft and ownership of ships

Note 1: ● is prescribed in other chapters

Note 2: The figures in the Prohibition of Performance Requirements (PR) columns indicate the number of prohibited requirements.

Name of the agreement (date effected)	Japan-Singapore EPA (Nov 2002)	Japan-Korea BIT (Jan 2003)	Japan-Viet Nam BIT (Dec 2004)	Japan-Mexico EPA (Apr 2005)	Japan-Malaysia EPA (Jul 2006)	Japan-Chile EPA (Sept 2007)	Japan-Thailand EPA (Nov 2007)	Japan-Cambodia BIT (Jul 2008)	Japan-Brunei EPA (Jul. 2008)	Japan-Indonesia EPA (Jul 2008)	National Treatment(NTT)			Most-Favored-Nation Treatment(MFN)			
											○	○	○	○	○	○	○
Definition of investments	every kind of assets	every kind of assets	every kind of assets	listing approach (excluding short term loan, etc.)	every kind of assets (rights conferred pursuant to laws and regulations depends on its nature and other factors, excluding administrative judgment and order)	every kind of assets	listing approach (direct investment IPR, buyers credit relating to export and import etc.)	every kind of assets	every kind of assets	every kind of assets (restrictive conditions on portfolio investments through non-Party may be excluded)	○	○	○	○	○	○	○
	○	○	○	○	○	○	△	○	○	○	○	○	○	○	○	○	○
pre-establishment stage	○	○	○	○	○	○	△ (only automobiles)	○	○	○	○	○	○	○	○	○	○
post-establishment stage	○	○	○	○	○	○	○	○	○	○	○	○	○	○	○	○	○
pre-establishment stage	× (consideration)	○ (FTA exception)	○ (FTA exception)	○	○	○	×	○	○	○	○	○	○	○	○	○	○
post-establishment stage	× (consideration)	○ (FTA exception)	○ (FTA exception)	○	○	○	○ (FTA exception)	○	○	○	○	○	○	○	○	○	○
Prohibition of Performance Requirements (PR)	○ (9)	○ (11)	○ (10)	○ (8)	△ (TRIMs incorporated)	○ (8)	△ (non service industry only)	○ (11)	△ (TRIMs incorporated)	○ (9)	○	○	○	○	○	○	○
	○	○	○	○	○	○	○	○	○	○	○	○	○	○	○	○	○
Export restriction requirement	×	×	×	×	○	×	×	×	○	×	×	×	×	○	×	×	×

Part III: EPA/FTA and IIA

Name of the agreement (date effected)	Japan-Singapore EPA (Nov 2002)	Japan-Korea BIT (Jan 2003)	Japan-Viet Nam BIT (Dec 2004)	Japan-Mexico EPA (Apr 2005)	Japan-Malaysia EPA (Jul 2006)	Japan-Chile EPA (Sept 2007)	Japan-Thailand EPA (Nov 2007)	Japan-Cambodia BIT (Jul 2008)	Japan-Brunei EPA (Jul. 2008)	Japan-Indonesia EPA (Jul 2008)
— Local content requirement	o	o	o	o	o	o	o	o	o	o
— Local purchase requirement for goods & services	o	o	o	o	o	o	o	o	o	o
— Export & import balance requirement	o	o	o	o	o	o	o	o	o	o
— Export requirement	o	o	o	o	x	o	o	o	x	o
— Domestic sale restriction requirement	o	o	o	o	x	o	x	o	x	o
— Senior Management & Board Directors	x	o	o	o	x	o	x	o	x	o
— Local citizen employment requirement	x	o	x	x	x	x	x	Δ (reserved)	x	x
— Headquarter location requirement	o	o	o	x	x	x	x	o	x	o
— Research & development requirement	o	o	o	x	x	x	x	o	x	o
— Technology transfer requirement	o	o	o	o	x	o	x	o	x	x
— Royalty regulation	-	-	-	-	-	-	-	-	-	-
— Specific region supply requirement	o	o	o	o	x	o	x	o	x	o

Name of the agreement (date effected)	Japan-Singapore EPA (Nov 2002)	Japan-Korea BIT (Jan 2003)	Japan-Viet Nam BIT (Dec 2004)	Japan-Mexico EPA (Apr 2005)	Japan-Malaysia EPA (Jul 2006)	Japan-Chile EPA (Sept 2007)	Japan-Thailand EPA (Nov 2007)	Japan-Cambodia BIT (Jul 2008)	Japan-Brunei EPA (Jul. 2008)	Japan-Indonesia EPA (Jul 2008)
Reservation List (Negative list)	○	○	○	○	○	○	△ (positive list)	○	○	○
Fair and equitable treatment Full protection and Security	○	○	○	○	○	○	○	○	○	○
Umbrella clause	×	×	×	×	×	×	×	○	×	×
Expropriation and compensation	○	○	○	○	○	○	○	○	○	○
NTM & MFN of Protection from strife	○	○	○	○	○	○	○	○	○	○
Transfer	○	○	○	○	○	○	○	○	○	○
Entry of investors	●	○	○	●	○	×	●	○	×	●
Transparency	●	○	○	○	●	○	○	○	●	●
Public comments	×	×	● (EPA)	●	●	●	●	○	●	●
Against corruption	×	×	×	×	×	×	●	○	×	●
ISDS	○	○	○	○	△ (NT•PR excluded)	○	△ (PR, pre-establishment stage excluded)	○	△ (post-establishment stage only)	○
SSDS	●	○	○	●	●	●	●	○	●	●
Joint committee	○	○	○	●	○	●	○	○	○	○

Part III: EPA/ETA and IIA

Name of the agreement (date effected)	Japan-Singapore EPA (Nov 2002)	Japan-Korea BIT (Jan 2003)	Japan-Viet Nam BIT (Dec 2004)	Japan-Mexico EPA (Apr 2005)	Japan-Malaysia EPA (Jul 2006)	Japan-Chile EPA (Sept 2007)	Japan-Thailand EPA (Nov 2007)	Japan-Cambodia BIT (Jul 2008)	Japan-Brunei EPA (Jul. 2008)	Japan-Indonesia EPA (Jul 2008)
Others			Incorporated in Japan-Viet Nam EPA							

Note 1: ● is prescribed in other chapters

Note 2: The figures in the Prohibition of Performance Requirements (PR) columns indicate the number of prohibited requirements.



Name of the agreement (date effected)	Japan-Laos BIT (Aug 2008)	Japan-Philippines EPA (Dec 2008)	Japan-Uzbekistan BIT (Sept 2009)	Japan-Switzerland EPA (Sept 2009)	Japan-Peru BIT (Dec 2009)	Japan-India EPA (Aug 2011)	Japan-Papua New Guinea BIT (Jan 2014)	Japan-Kuwait BIT (Jan 2014)	Japan-Iraq BIT (Jan 2014)	Japan-China-Korea BIT (May 2014)
Definition of investments	every kind of assets (excluding judgments and orders)	every kind of asset	every kind of asset	every kind of asset	every kind of asset (financial assets partly excluded)	every kind of asset (in General Provisions Chapter)	every kind of asset	every kind of asset	every kind of asset	every kind of asset
pre-establishment stage	○	○	○	○	○	○	×	○	×	×
	○	○	○	○	○	○	○	○	○	△ (Collective withholding of existing non-conforming measures)
post-establishment stage	○	○	○	○	○	×	○	○	○	○
	○	○	○	○	○	○	○	○	○	○
pre-establishment stage	○	○	○	○	○	×	×	○	×	○
	○	○	○	○	○	○	○	○	○	○
post-establishment stage	○	○	○	○	○	○	○	○	○	○
	○	○	○	○	○	○	○	○	○	○
Prohibition of Performance Requirements (PR)	○(11)	○(11)	○(12)	△ (TRIMs incorporated)	○(9)	○(9)	○(11) (post-establishment stage only)	○	△(5) (only after entry and consultation)	△ (In addition to compliance with TRIMs, discriminatory measures of relating to unfair requests on export and
	National Treatment(NTT)	Most-Favored-Nation Treatment(MFN)								

Part III: EPA/FTA and IIA

Name of the agreement (date effected)	Japan-Laos BIT (Aug 2008)	Japan-Philippines EPA (Dec 2008)	Japan-Uzbekistan BIT (Sept 2009)	Japan-Switzerland EPA (Sept 2009)	Japan-Peru BIT (Dec 2009)	Japan-India EPA (Aug 2011)	Japan-Papua New Guinea BIT (Jan 2014)	Japan-Kuwait BIT (Jan 2014)	Japan-Iraq BIT (Jan 2014)	Japan-China-Korea BIT (May 2014)
—Export restriction requirement	×	×	○	○	×	○	○	○	×	○
—Local content requirement	△ (reserved)	○	○	○	○	○	○	○	○	○
—Local purchase requirement for goods & services	○	○	○	○	○	○	○	○	○	○
—Export & import balance requirement	○	○	○	○	○	○	○	○	○	○
—Export requirement	△ (reserved)	○	○	×	○	○	○	○	○	△ (Prohibition of unfair or discriminatory measures)
—Domestic sale restriction requirement	○	○	○	×	○	×	○	○	×	×
—Senior Management & Board of Directors	○	○	○	×	△ (reserved)	△ (reserved)	×	○	×	×
—Local citizen employment requirement	△ (reserved)	○	○	×	×	×	○	○	×	×
—Headquarter location	○	○	○	×	○	×	○	○	×	×

Name of the agreement (date effected)	Japan-Laos BIT (Aug 2008)	Japan-Philippines EPA (Dec 2008)	Japan-Uzbekistan BIT (Sept 2009)	Japan-Switzerland EPA (Sept 2009)	Japan-Peru BIT (Dec 2009)	Japan-India EPA (Aug 2011)	Japan-Papua New Guinea BIT (Jan 2014)	Japan-Kuwait BIT (Jan 2014)	Japan-Iraq BIT (Jan 2014)	Japan-China-Korea BIT (May 2014)
requirement										
— Research & development requirement	○	○	○	×	×	×	○	○	×	×
— Technology transfer requirement	△ (reserved)	○	○	×	○	△ (reserved)	○	○	○	△ (Prohibition of unfair or discriminatory measures)
— Royalty regulation	-	-	-	-	-	-	-	-	-	-
— Specific region supply requirement	○	○	○	×	○	○	○	○	×	×
Reservation List (Negative list)	○	○	○	○	○	○	×	○	×	×
Fair and equitable treatment	○	○	○	○	○	○	○	○	○	○
Full protection and Security	○	×	○	○	△ (in preambles)	○	○	○	△ (prior consent is required for arbitration in this BIT)	○
Umbrella clause	○	○	○	○	○	○	○	○	○	○
Expropriation and compensation	○	○	○	○	○	○	○	○	○	○
Protection from	○	○	○	○	○	○	○	○	○	○

Name of the agreement (date effected)	Japan-Laos BIT (Aug 2008)	Japan-Philippines EPA (Dec 2008)	Japan-Uzbekistan BIT (Sept 2009)	Japan-Switzerland EPA (Sept 2009)	Japan-Peru BIT (Dec 2009)	Japan-India EPA (Aug 2011)	Japan-Papua New Guinea BIT (Jan 2014)	Japan-Kuwait BIT (Jan 2014)	Japan-Iraq BIT (Jan 2014)	Japan-China-Korea BIT (May 2014)
strife										
Transfer	○	○	○	○	○	○	○	○	○	○ (Approval period shall be about one month and shall not exceed two months)
Entry of investors	○	●	○	●	○	×	○	○	○	○
Transparency	○	●	○	●	○	●	○	○	○	○
Public comments	×	●	○	×	● (EPA)	×	○	×	×	○
Against corruption	○	○	○	×	○	●	○	○	○	×
ISDS	○	×	○	△ (consent needed for pre-establishment stage)	○	○	○	○	○	○
SSDS	○	●	○	●	○	●	○	○	○	○
Joint committee	○	○	○	●	○	●	○	○	○	○
Others					incorporated in Japan-Peru EPA	General Provisions Chapter has Security Exceptions	NT, MFN and PR shall not affect conditions for admission of investments.		No complete ban on PR but conducted on the condition of a prior consultation.	Provision for a joint committee to discuss the scope of the existing non-conforming measures of NT after entry.

Note 1: ● is prescribed in other chapters

Note 2: The figures in the Prohibition of Performance Requirements (PR) columns indicate the number of prohibited requirements.

Name of the agreement (effective date)	Japan- Mongolia EPA (Feb 2015)	Japan- Ukraine BIT (Jan 2015)	Japan- Uruguay BIT (Signed Jan 2015)	Japan- Kazakhstan BIT (Signed Oct 2014)	Japan- Saudi Arabia BIT (Signed Apr 2013)	Japan-Colombia BIT (Signed Sept 2011)	Japan-Australia EPA (Jan 2015)	Japan- Mozambique BIT (Aug 2014)	Japan- Myanmar BIT (Aug 2014)
Definition of investments	every kind of asset	every kind of asset	every kind of asset	every kind of asset	every kind of asset	every kind of asset (public debts excluded)	every kind of asset	every kind of asset	every kind of asset
	○	×	○	×	×	○	○	○	○
pre-establishment stage	○	○	○	○	○	○	○	○	○
post-establishment stage	○	○	○	○	○	○	○	○	○
pre-establishment stage	○	×	○	○	×	○	○	○	○
post-establishment stage	○	○	○	○	○	○	○	○	○
Prohibition of Performance Requirements (PR) (Note 2)	○(10)	○(11) (post-establishment stage only)	○(8)	○(11) (post-establishment stage only)	×	○(9)	○	○(11)	○(11)
— Export restriction requirement	○	○	×	○	×	×	×	○	○
— Local content requirement	○	○	○	○	×	○	○	○	○
— Local purchase requirement for goods & services	○	○	○	○	×	○	○	○	○
— Export & import balance requirement	○	○	○	○	×	○	○	○	○
— Export requirement	○	○	○	○	×	○	○	○	○
— Domestic sale restriction	○	○	○	○	×	○	○	○	○

Name of the agreement (effective date)	Japan- Myanmar BIT (Aug 2014)	Japan- Mozambique BIT (Aug 2014)	Japan-Australia EPA (Jan 2015)	Japan-Colombia BIT (Signed Sept 2011)	Japan- Saudi Arabia BIT (Signed Apr 2013)	Japan- Kazakhstan BIT (Signed Oct 2014)	Japan- Uruguay BIT (Signed Jan 2015)	Japan- Ukraine BIT (Jan 2015)	Japan- Mongolia EPA (Feb 2015)
requirement									
—Senior Management & Board of Directors	○	○	○ (SMBD)	○	×	○	○ (SMBD)	×	○
—Local citizen employment requirement	×	×	×	×	×	○	×	○	○
—Headquarter location requirement	○	○	×	○	×	○	×	○	○
—Research & development requirement	○	○	×	×	×	○	×	○	×
—Technology transfer requirement	○	○	○	○	×	○	○	○	×
— Royalty regulation	○	○	--	-	-	-	-	-	○
—Specific region supply requirement	○	○	○	○	×	○	○	○	○
Reservation List (Negative list)	○	○	○	○	×	×	○	×	○
Fair and equitable treatment Full protection and Security	○	○	○	○	○	○	○	○	○
Umbrella clause	○	○	×	△ (prior consent is required for arbitration)	×	○	△ (every possible action)	○	○

Name of the agreement (effective date)	Japan- Myanmar BIT (Aug 2014)	Japan- Mozambique BIT (Aug 2014)	Japan-Australia EPA (Jan 2015)	Japan-Colombia BIT (Signed Sept 2011)	Japan- Saudi Arabia BIT (Signed Apr 2013)	Japan- Kazakhstan BIT (Signed Oct 2014)	Japan- Uruguay BIT (Signed Jan 2015)	Japan- Ukraine BIT (Jan 2015)	Japan- Mongolia EPA (Feb 2015)
Expropriation and compensation	○	○	○	○	○	○	○	○	○
Protection from strife	○	○	○	○	○	○	○	○	○
Transfer	○	○	○	○	○	○	○	○	○
Entry of investors	○	○	×	○	○	○	○	○	●
Transparency	○	○	○	○	○	○	○	○	●
Public comments	○	○	○	○	×	○	○	×	●
Against corruption	○	○	×	○	×	○	○	○	●
ISDS	○	○	(further discussion)	○	○	○	○	○	○
SSDS	○	○	●	○	○	○	○	○	●
Joint committee	○	○	○	○	○	○	○	○	○
Others							(* further discussion shall be made on the prohibition of intervention in technology licensing contracts, etc. of PR)		

Note 1: ● is prescribed in other chapters

Note 2: The figures in the Prohibition of Performance Requirements (PR) columns indicate the number of prohibited requirements.

(Note) This table only shows the signed agreements that have been approved by the Diet.





**4. INVESTMENT AGREEMENTS OF OTHER COUNTRIES (INCLUDING CHAPTERS ON INVESTMENT IN EPAs/FTAs)**

**Figure III-5-5 Elements of Other Country's Investment Agreements**

Name of treaty (Date of effect)	NAFTA (Jan 1994)	US-Australia NAFTA (Jan 2005)	US-Korea FTA (Jan 2012)	Singapore- India FTA (Aug 2005)	ASEAN investment Agreement (signed Feb 2009)	Korea ASEAN FTA (Investment chapter) (Sep 2009)	China-ASEAN Investment Agreement (Jan 2010)	Australia-NZ- ASEAN FTA (Investment chapter) (Jan 2010)	India-ASEAN Investment Agreement (Nov 2014)	China-Korea FTA (Jun 2015)
Definition of investment	National Treatment(NT)		Most-Favored-Nation Treatment(MFN)		National Treatment(NT)		Most-Favored-Nation Treatment(MFN)		National Treatment(NT)	
	pre-establishment stage	○	○	○	○	○	○ (Note 2)	×	○	○
post-establishment stage	○	○	○	○	○	○ (Note 2)	○ (existing non-conforming measures are all reserved)	○	○	○
pre-establishment stage	○	○	○	×	○	○ (Note 2)	△ (a wide range of exception allowed)	×	×	○
post-establishment stage	○	○	○	×	○	○ (Note 2)	△ (a wide range of exception allowed)	×	×	○

Name of treaty (Date of effect)	NAFTA (Jan 1994)	US-Australia NAFTA (Jan 2005)	US-Korea FTA (Jan 2012)	Singapore- India FTA (Aug 2005)	ASEAN investment Agreement (signed Feb 2009)	Korea ASEAN FTA (Investment chapter) (Sep 2009)	China-ASEAN Investment Agreement (Jan 2010)	Australia-NZ- ASEAN FTA (Investment chapter) (Jan 2010)	India-ASEAN Investment Agreement (Nov 2014)	China-Korea FTA (Jun 2015)
Prohibition of Performance Requirements (PR)	○ (8)	○ (8)	○ (8)	○ (TRIMs incorporated)	○ (TRIMs incorporated)	○ (Note 2)	×	○ (Note 2)	×	○ (illogical or discriminatory measures are prohibited regarding the incorporation of TRIMs and the import/export of technologies.)
— Export restriction requirements	×	×	×	○	○	○	×	○	×	○
— Local content requirements	○	○	○	○	○	○	×	○	×	○
— Local purchase requirements for goods & services	○	○	○	○	○	○	×	○	×	○
— Export & import balance requirements	○	○	○	○	○	○	×	○	×	○
— Export requirements	○	○	○	×	×	×	×	×	×	×
— Domestic sale restriction requirements	○	○	○	×	×	×	×	×	×	×
— Senior Management & Board of Directors	○	○	○	○	○	○	○	○	×	×

Name of treaty (Date of effect)	NAFTA (Jan 1994)	US-Australia NAFTA (Jan 2005)	US-Korea FTA (Jan 2012)	Singapore-India FTA (Aug 2005)	ASEAN investment Agreement (signed Feb 2009)	Korea-ASEAN FTA (Investment chapter) (Sep 2009)	China-ASEAN Investment Agreement (Jan 2010)	Australia-NZ-ASEAN FTA (Investment chapter) (Jan 2010)	India-ASEAN Investment Agreement (Nov 2014)	China-Korea FTA (Jun 2015)
— Local citizen employment requirements	x	x	x	x	x	x	x	x	x	x
— Headquarter location requirements	x	x	x	x	x	x	x	x	x	x
— Research & development requirements	x	x	x	x	x	x	x	x	x	x
— Technology transfer requirements	o	o	x	x	x	x	x	x	x	Δ (illogical or discriminatory measures are prohibited)
— Specific region supply requirements	o	o	o	x	x	x	x	x	x	x
Reservation List (Negative list)	o	o	o	Δ (positive list)	(Note 1)	(Note 2)	-	(Note 2)	(Note 4)	x
Fair and equitable treatment	o	o	o	x	o	o	o	o	o	o
Full protection and Security	o	o	o	x	o	o	o	o	o	o
Umbrella clause	o (similar stipulation to strife process procedure of external)	x	o (similar stipulation to strife process procedure of external)	x	x	x	o	x	x	x

Name of treaty (Date of effect)	NAFTA (Jan 1994)	US-Australia NAFTA (Jan 2005)	US-Korea FTA (Jan 2012)	Singapore e-India FTA (Aug 2005)	ASEAN investment Agreement (signed Feb 2009)	Korea ASEAN FTA (Investment chapter) (Sep 2009)	China-ASEAN Investment Agreement (Jan 2010)	Australia-NZ- ASEAN FTA (Investment chapter) (Jan 2010)	India-ASEAN Investment Agreement (Nov 2014)	China-Korea FTA (Jun 2015)
	investments		external investments							
Expropriation and compensation	o	o	o	o	o	o	o	o	o	o
NT & MFN related to protection from strife	o	o	o	o	o	o	o	o	x	Δ (non-discrimi natory treatment)
Free transfer of funds	o	o	o	o	o	o	o	o	o	o
ISDS	o	x	o	o	o	Δ (PR excluded) (Note 3)	Δ (PR excluded) (Note 3)	Δ (PR excluded) (Note 3)	o (Note 3)	o
SSDS	o	o	o	o	o	o	o	o	o	o

(Note 1) It is provided that a negative list shall be submitted to the ASEAN secretariat within six months after signing the agreement.

(Note 2) It is provided that discussions on a negative list, MFN, and prohibition of PR in addition to the TRIMS are to be completed within five years after the agreement becomes effective. NT, MFN, and prohibition of nationality requirements for managements shall not be applied until a negative list is prepared. The TRIMS shall be applied upon the effectuation of the agreement except for the case of Lao P.D.R. (Article 27).

(Note 3) A written agreement is necessary when submitting a claim against the Philippines to ICSID.

(Note 4) Discussions on a negative list are to be completed within three years after the agreement becomes effective. NT shall not be applied until a negative list is prepared.

(Note 5) The figures in the Prohibition of Performance Requirements (PR) columns indicate the number of prohibited requirements.

## ***5. INITIATIVES RELATED TO EU INVESTMENT AGREEMENTS***

EU member countries heretofore have concluded over 1200 bilateral investment agreements, implementing investment protection rules in foreign countries. While the EU has stipulated content related to investment liberalization in commercial treaties with other countries, there have not been many provisions on investment protection. However, after the Lisbon Treaty, which became effective as of December 1, 2009, it became clear that the EU has commercial negotiation rights on direct investment protection.

In the document published by the European Commission in July 2010, an approach to include “the guarantee of fair, equitable and non-discriminatory treatment, provision of sufficient protection and safety, compensation for expropriation, freedom of transfers and Investor-to-State Dispute Settlement (ISDS)” as provisions related to investment protection was stated. Furthermore, the investment policies of the EU need to conform to other policies, such as environment protection, health and labor safety, consumer protection, cultural diversity, development policy and competition policy. Therefore, the aim of EU investment policies is not only to protect the rights of investors, but also to promote investment that contributes to social welfare. The EU is currently negotiating FTAs with India, Singapore, Canada and Mercosur aiming to include provisions on investment protection.

Other points of contention include the relationship between the investment agreements of EU member countries and EU law, which can pose a problem. For example, while the EC establishment treaty stipulates restrictions on capital transfer, there are bilateral investment treaties between EU member countries that have not restricted the freedom of remittance. Therefore, the Court of Justice of the European Communities has certified that the investment treaties into which Austria, Sweden and Finland have entered were in violation of the EU establishment treaty. Furthermore, when Eastern European countries started negotiating to join the EU, the relationship between the investment treaties those countries had concluded with third-party nations and the EC establishment treaty became an issue. For example, the Czech Republic revised the treaty they had negotiated with the US.

With regard to the EPA between Japan and the EU, the work to determine the scope of negotiation ended in May 2012, and the European Commission obtained the authority to negotiate in November. The first Japan-EUEPA negotiation meeting was held in April 2013. 14 meetings were held by the end of 2015.

In 2014, agreements were reached on the EU-Canada FTA (CETA) and the EU-Singapore FTA, for which negotiations had been preceding. Provisions including the investment rules were made public. Whether the EU alone can conclude an FTA with Singapore or can do so only in conjunction with its member countries (mixed agreement) is currently under deliberation at the European Court of Justice).

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## **B. DISPUTE SETTLEMENT REGARDING INVESTMENT**

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### ***1. BACKGROUND OF THE RULES***

Regional trade agreements (EPAs/FTAs) and bilateral investment treaties (BITs) provide procedures under which a party may request a decision from a dispute settlement body such as an arbitration board against the other party if any dispute arises in connection with the application or interpretation of the agreement. However, it is rare that such procedures are used under EPAs/FTAs and BITs.

On the other hand, most EPAs/FTAs and BITs provide “investor-to-state (host country)” dispute settlement procedures for investment disputes, under which the investor may submit a dispute to arbitration with the host country when the investor incurs loss or damage due to a breach of any obligation under the agreement by the host country. The investor may receive monetary damages from the host country if the arbitral tribunal finds any breach of the agreement by the host country.

Without ISDS, investors normally have no recourse but to file a dispute with the host country in its domestic court. There is a possibility that the investor will receive an unfavorable decision because of their nationality or the underdeveloped judicial system of host countries. It would be difficult for investors to submit a dispute to arbitration, because submission to arbitration normally requires an agreement between the parties and the host country would never consent after the dispute arises. Therefore, the “investor-to-state” dispute settlement provisions in many EPAs/FTAs and BITs provide prior consent of the contracting parties to submit disputes to arbitration in the form of an unconditional prior consent on arbitration submission. This provision enables investors to submit investment disputes to arbitration immediately, without having to obtain individual consent to arbitration from the government of the host country. In this way, the dispute settlement provisions assume a role of reducing risks in foreign investment by ensuring the opportunity for investors to receive fair decisions.

Furthermore, settling disputes related to investment between investors and countries based on rules agreed upon between countries, when there are no multilateral dispute settlement rules like the WTO on investment, serves to prevent the dispute from escalating into one between countries, and will prove beneficial to both the host country that wants to invite investment through guaranteeing investment security and also to the home country of investors, which would like to protect the investors of their own.

(Note) Several investment agreements such as the investment chapter of the Australia-the U.S. FTA do not provide for Investor-to-State Dispute Settlement provisions. However, in the Australia-the U.S. FTA, it is provided that if a party considers that there has been a change in circumstances affecting the settlement of investment disputes and that the parties should consider allowing an investor to submit to arbitration, the party may request consultations with the other party (Art. 11.16(1)).

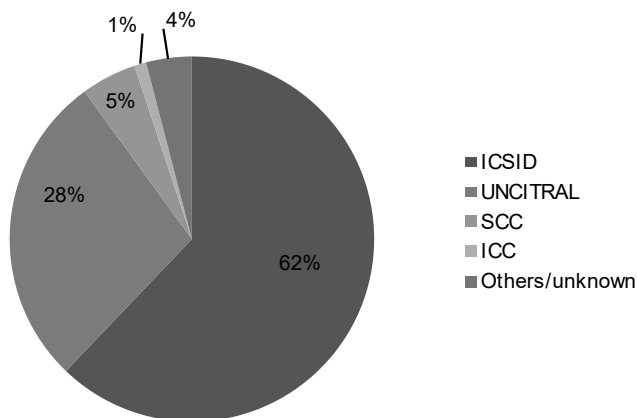
## 2. USE OF THE RULES

### 1) CHANGES IN THE NUMBER OF CASES SUBMITTED TO ARBITRATION PROCEDURES

Countries began to enter into BITs in the 1960s. At that time, BITs generally provided for “investor-to-state” dispute settlement (ISDS) procedures in relation to investment. However, because initially the availability of prior inclusive consent under the agreement was not recognized, the number of arbitration cases submitted by investors remained zero until 1990. In 1990, a settlement of an “investor-to-state” case based on the agreement was achieved for the first time (*AAPL v. Sri Lanka* case). In the *Ethyl* case in 1996, the Canadian government paid a settlement to a U.S. enterprise that had submitted a dispute to arbitration claiming that environmental regulation by the Canadian government constituted “expropriation” under NAFTA. This settlement gained much attention, as did the multilateral investment agreement negotiations launched at the OECD in 1995. (Concerning this case, the Canadian State government instituted a domestic lawsuit against the federal government, and the federal government’s environmental regulation was declared as a violation against the Canadian law. Receiving this decision, the Canadian government reached amiable settlement with the American company, closing the procedures based on the NAFTA). Both contributed to an increased interest in the use of treaty-based investment arbitrations. As a result, the number of cases submitted to arbitral tribunals drastically increased from the late 1990s.

The primary arbitration procedures designated in agreements are the arbitration procedures of: (i) the International Centre for Settlement of Investment Disputes (ICSID); (ii) United Nations Commission on International Trade Law (UNCITRAL); (iii) International Chamber of Commerce (ICC); and (iv) Arbitration Institute of the Stockholm Chamber of Commerce (SCC). The most frequently used procedure is that of ICSID, which was established as an entity of the World Bank group pursuant to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention) which entered into force in 1966. More than sixty percent of past arbitration cases were submitted to ICSID.

**Figure III-5-6 Percentage of Cases Submitted to Major Arbitration Procedures (as of the end of 2013, 568 cases in total)**



(Source: UNCTAD Latest Development in Investor-State Dispute Settlement, IIA Issues Note No.1 (2014))



## 2) COUNTRIES INVOLVED IN ARBITRATION CASES

According to the summary prepared by UNCTAD, of the total 608 “investor- to-state” dispute cases by the end of 2014, 405 cases have been closed. Out of these, the nation’s claim was accepted in approximately 36% cases, the investors’ claims were accepted in approx. 27% cases, and approx. 26% cases were settled amiably. The summary shows that the country which was the “respondent” most frequently in “investor-to-state” dispute cases submitted in the past, was Argentina (56 cases), followed by Venezuela (36 cases), Czech Republic (29 cases), Egypt (24 cases), Canada (23 cases), Ecuador (21 cases), Mexico (21 cases), India (16 cases), Ukraine (16 cases), Poland (15 cases), and the United States (15 cases). A significant number of cases filed against Argentina were due to the political disruption relating to the financial crisis after the end of 2001. As for the Czech Republic, the non-performing loan issues in the financial sector, triggered by the currency crisis in 1997, caused the large number of disputes. The reason Mexico, the U.S., and Canada are respondents in many cases is assumed to be because cases based on Chapter 11 (Investment) of NAFTA have attracted considerable attention and that investors became aware of the effect of using the dispute settlement procedures of NAFTA.

**Figure III-5-7 Number of claims, by defendants (as of the end of 2014)**

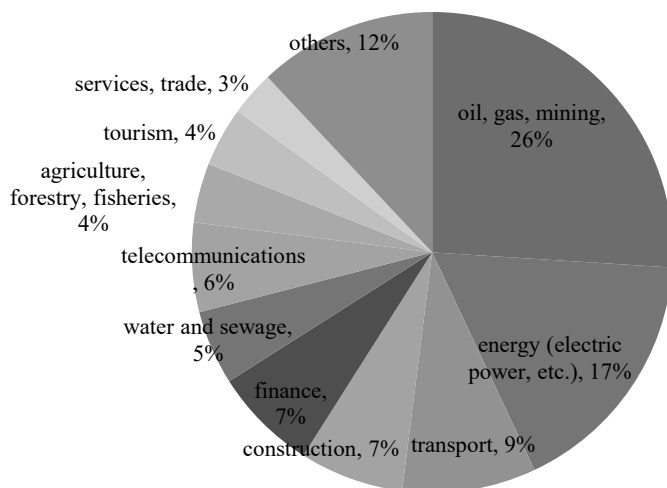
Rank	Country	Number of Cases
1	Argentina	56
2	Venezuela	36
3	Czech Republic	29
4	Egypt	24
5	Canada	23
6	Ecuador	21
7	Mexico	21
8	India	16
9	Ukraine	16
10	Poland	15
11	United States	15
12	Kazakhstan	14
13	Spain	14
14	Hungary	13

(UNCTAD Latest Development in Investor-State Dispute Settlement, IIA Issues Note No.2 (2015))

## 3) STATUS OF USE OF ARBITRATION PROCEDURES BY ENTERPRISES

According to the summary prepared by ICSID, the industry sector using arbitration procedures most frequently is the oil/gas/mining industry at 26%, followed by the energy industry (electric power, etc.) at 17%, transport industry at 9%, construction industry at 7%, and finance industry at 7%.

**Figure III-5-8 Proportion of claims, by industries (as of the end of December 2015)**



(Source: ICSID, The ICSID Caseload – Statistics (2016-1))

Development of energy sources requires an enormous amount of investment, and most of the resource-generating countries are developing countries and sometimes lack social and political stability, presumably resulting in the high demand for investment protection. Therefore, in addition to the provisions in EPAs/FTAs and BITs, in recent years the dispute settlement provisions of the “Energy Charter Treaty” (a multilateral international treaty) have been employed to protect investment in the energy sector.

### ***3. OVERVIEW OF LEGAL DISCIPLINES***

#### **1) FRAMEWORK OF THE INVESTOR-TO-STATE DISPUTE SETTLEMENT PROCEDURES UNDER EPAs/FTAs AND BITs**

The investor-to-state arbitration procedures prescribed in the chapters on investment in EPAs/FTAs and BITs vary between the agreements, but generally provide for the process below:

##### ***(1) Investment Dispute Covered***

If the contracting party breaches any obligation under the agreement, such as those concerning expropriation or fair and equitable treatment, and the investor consequently incurs loss or damage, this dispute is covered by the investor-to-state dispute settlement procedures. Some BITs broadly define the subject disputes as “any dispute between an investor of either Contracting Party and the other Contracting Party with respect to investment”, while some limit the coverage of dispute settlement to a “dispute concerning the amount of compensation” in the case of expropriation.

## ***(2) Consultation between Investors and Counterparty Governments (Respondent Party)***

dispute is not immediately submitted to arbitration on its occurrence. Instead, there is ordinarily a consultation period of between three to six months before submission to arbitration.

## ***(3) Submission of a Claim to Arbitration***

It is generally provided that investors may submit a dispute to arbitration if such dispute could not be settled through consultation. Where there is no BITs or EPAs/FTAs, consent of the respondent party is required to submit a specific investment dispute to arbitration, but many BITs and investment chapter in EPAs/FTAs contain prior consent of their contracting parties to submission to arbitration (prior comprehensive consent). It is often provided that investors can choose from among arbitration procedures of ICSID (where both the home country of the investor and the respondent party are parties to the ICSID Convention), ICSID Additional Facility Rules (where either the home country of the investor or the respondent party is a party to the ICSID Convention) or UNCITRAL Arbitration Rules. Sometimes, ICC Arbitration Rules, SCC Arbitration Rules or other rules, are added to the foregoing (*see* “Framework of Major Arbitration Bodies/Arbitration Rules” below).

In addition, submission to arbitration is usually conditional upon no lawsuit regarding the same dispute being filed with a domestic court. Likewise, filing the same case with a domestic court after submission to arbitration is normally prohibited.

## ***(4) Selection of Arbitrators and Establishment of Arbitral Tribunal***

After the selection of an arbitration body and the rules of the arbitration, the arbitral tribunal is constituted by selecting the arbitrators. In most cases, arbitrations are conducted by three arbitrators. Both the respondent party (host country) and the investor select one arbitrator. The third member, who will serve as the presiding arbitrator, is appointed by agreement of both parties as a general rule. The arbitration is then conducted in accordance with the rules of individual arbitration procedures selected by investors. However, the relevant agreement may add amendments providing additional provisions regarding the obligation to disclose documents that indicate the progress and the result of the arbitration to the contracting parties not involved in the dispute and consolidation of claims.

## ***(5) Decision regarding Jurisdiction of Tribunal***

After constituting the arbitral tribunal, it is first determined whether that arbitral tribunal has jurisdiction over the investment dispute. This may be a significant issue relating to the definition of the investment dispute to be covered as stated in (1).

## ***(6) Decision on Merits***

If it is determined that the arbitral tribunal has jurisdiction, then the tribunal will judge the merits of the case.

## ***(7) Determination of Amount of Monetary Damages***

If a breach of the obligations under the agreement is determined, the amount of monetary damages is also determined.

### ***(8) Annulment of Awards***

With ICSID arbitrations, a disputing party can request annulment of the arbitration award (ICSID Convention Articles 51/52). Furthermore, concerning arbitration award other than those under ICSID, it is possible that a court of a country in which arbitration was held annuls an arbitration award based on the country's legislation. In general, however, there is no system for appeal in international arbitration, since it aims to process the matter promptly by accepting the conclusion given that both parties were involved in procedures such as the selection of arbitrators.

### ***(9) Enforcement of Awards***

The award is final and binding upon the disputing parties. The BITs and the investment chapter of EPAs/FTA/ oblige the respondent party to observe the award; the ICSID Convention also provides for the enforcement of awards (Articles 53-55). In cases based on arbitration rules other than the ICSID Convention, awards may be enforceable pursuant to the domestic laws of the state in which the award is enforced or to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. Most investment treaty arbitration awards are implemented voluntarily.

### ***(10) Transparency of Awards***

As investment treaty arbitrations deal with public interests, the arbitration procedures tend to be transparent. Cases where the disclosure of the documents submitted to the Arbitration Tribunal is clearly stated in treaties are increasing. In addition, the UNCITRAL transparency rules were adopted in 2013, and a significant amount of information on arbitration procedures will be made public when arbitrations are conducted in accordance with those Rules under the investment treaties signed after April 2014. In the case of arbitrations under the ICSID Convention, certain information will be made public as a result of the revision of the UNCITRAL Arbitration Rules in 2006.

## **COLUMN: UTILIZATION OF INVESTMENT AGREEMENT ARBITRATION**

It is said that investment agreement arbitration lasts two to four years on average and requires tens of millions to hundreds of millions of yen. Therefore, whether to apply for arbitration of a dispute is determined by taking such cost-effectiveness into consideration. Consequently, what are to be submitted to arbitration are often cases involving a massive amount of investment, such as those concerning infrastructure development or resource development. In many cases, instead of actually submitting a case to arbitration, that possibility frequently is used as leverage to favorably advance a negotiation toward reconciliation. There are two cases where a Japanese company resorted to investment agreement arbitration (the “*Saluka v. Czech Republic*” case and the case concerning renewable energy). Some companies choose to make investments via a company in a third country, considering whether or not there are any applicable investment agreements, in addition to any preferential tax treatments.

Comparing the characteristics of arbitration under the ICSID Convention and arbitration in accordance with the rules of the UNCITRAL, the former is rather convenient. Because ICSID is established under the World Bank, it has a high availability of meeting rooms and lists of arbitrator candidates, as well as clearly defined standard charges (for example, the registration fee for ICSID arbitration submission is 25,000 dollars, the operation fee after commencing arbitration is 20,000 dollars, compensation per arbitrator is 3,000 dollars a day, and the like). Furthermore, when using

ICSID, if the government of the host country refuses to enforce the arbitration award, it may face the suspension of World Bank loans, so the arbitration award has been enforced in almost all cases. Moreover, as mentioned above, the ICSID Convention provides the specific annulment procedures for the awards of ICSID arbitrations.

In the case of arbitration in accordance with the rules of the UNCITRAL, domestic courts of the place of arbitration are supposed to intervene on the occasion of annulment, as in the case of ordinary commercial arbitration, and the selection of arbitrators can be more flexible than in the case of ICSID. Costs may be higher or lower depending on how procedures actually progress, but while the ICSID arbitration process is managed to some extent by the ICSID secretariat, UNCITRAL arbitration is not supposed to have a secretariat, and therefore in many cases the Permanent Court of Arbitration (PCA) is requested to act as a secretariat. How to share arbitration costs among the disputing parties (investors and the respondent state) is to be determined by an arbitral tribunal unless the parties reach a special agreement. There has been a case where the losing party was required to bear all the costs (in the case of UNCITRAL arbitration, the losing party generally the costs).

### **SOLUTION THROUGH MEANS OTHER THAN INVESTMENT AGREEMENT ARBITRATION**

As described above, investment agreement arbitration requires considerable costs and time, and many companies hesitate to utilize the system. Furthermore, when intending to continue business in the country, the parties concerned have to consider the possibility that the arbitration proceeding may lead to worsened relations with the government of the host country and that media reports may cause negative effects on other fields of their business. Therefore, solutions regarding any breach of investment chapter in EPAs/FTAs or BITs are not always limited to arbitration. Firstly, in some cases, reconciliation can be reached with the government of a host country prior to arbitration. Generally, negotiations are often held in the presence of lawyers around the time when a company presents a notice of intent to the government of the host country prior to submitting a dispute for ICSID arbitration or other forms of arbitration. Though specific cases are rarely made public, there is a case in which an U.S. energy company and Ecuador agreed on a settlement of nearly 80 million dollars.

Furthermore, EPAs that Japan has concluded recently often contain provisions to establish a Committee on the Improvement of the Business Environment, providing a framework for companies to have discussions regarding the improvement of the business environment in a host country prior to the occurrence of any dispute, without having to initiate an investment agreement arbitration (refer to Part III, Chapter 8 “Improvement of Business Environment” for details). A subcommittee brings together not only the government of a host country, but also other related parties from local industries, the government of the home country, JETRO and other organizations in charge of matters that will be consulted. Issues that are difficult for a single company to raise and those related to the overall industry or the investing companies as a whole can be discussed collectively. Matters to be consulted are not limited to those concerning the investment chapter, but cover a wide range of business-related issues, such as the development of industrial infrastructure, the simplification and enhancement of transparency in administrative procedures, and the protection of intellectual property. The government of the host country is required to take appropriate measures in response to a request made via a subcommittee based on the provisions of the EPA and other agreements. As of now, such subcommittees on the improvement of the business environment have been convened based on EPAs with Thailand, Malaysia, Mexico and Chile. Under the Japan-Peru Investment Agreement, a “sub-committee on improvement of investment

environment” was established with a view to exchanging information and having discussions concerning investment-related matters within the scope of the agreement and relate to improvement of investment environment. Furthermore, the “Japan-Brazil Joint Committee on Promoting Trade and Investment” was established in Brazil in July 2008 as a framework not based on an intergovernmental agreement.

## **COLUMN: INVESTOR-STATE DISPUTE SETTLEMENT PROCEDURE OPTIONS WITH FOCUS ON THE ISSUES ON ARBITRATION AND THE POSSIBILITY OF UTILIZATION OF CONCILIATION**

### **1. INTRODUCTION**

There are diverse options of procedures to settle disputes between the investor and state. Recently, BIT/EPA-based arbitrations have been used in many cases, generating certain results that have come to attention. Some pages of this report have been devoted for the systematic outline and explanations about actual cases regarding investment treaty arbitration. On the other hand, awareness of certain issues of investment treaty arbitration have been increasing, such as requiring a long period of time for the dispute settlement, significant cost, and the fact that enforcement of the arbitration award is difficult in some (but rare) cases where the respondent state does not comply with the order to pay a compensation.

However, among the settlement methods for investor-state disputes, there is another way, conciliation, which is inclined to resolve the case amicably. ICSID is starting to recommend the use of conciliation in light of issues relating to investment treaty arbitration and the increasing number of requests for arbitrations.<sup>1</sup> It is said that many Japanese companies hesitate to confront a dispute directly; however, the amicable resolution through conciliation may suit the mentality of such companies. Therefore, in this column, an overview of issues faced by arbitrations as a method to settle investor-state disputes will be presented, along with the introduction of the mechanism of conciliation and its merits and demerits. However, amicable settlement may be sought in the process of arbitration, as there are a considerable number of cases solved peacefully during the arbitration process.<sup>2</sup>

This report also explains the possibility of resolving an investor's problem by consultations on the Committee on the Improvement of the Business Environment established based on the EPA. The comparison of conciliation with amicable settlement and the Committee on the Improvement of the Business Environment will also be briefly mentioned in this column.

### **2. ISSUES AND LIMITATIONS ON ARBITRATION AS AN INVESTOR-STATE DISPUTE SETTLEMENT PROCEDURE**

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<sup>1</sup>Refer to ICSID annual reports of 2004 and 2005. Since 2007, organizations such as the International Bar association, The Center for Effective Dispute Resolution (CEDR) and the United Nations Conference on Trade and Development (UNCTAD) have been promoting and recommending amicable resolution of disputes (refer to Margrete Stevens & Ben Love, Investor State Mediation: Observation on the Role of Institutions, paper presented at the 2009 Conference on Global Resolution: Cost-effective Settlement in International Arbitration, November 26, 2009).

<sup>2</sup> According to ICSID dispute statistics (2016-1), 36% of arbitration cases have been finalized by settlement or other means. See ICSID, The ICSID Caseload – Statistics 2016-1, Chart 7 (available at <https://icsid.worldbank.org/apps/ICSIDWEB/resources/PublishingImages/Caseload%20Stats-2015-1-ENG.png>)

## 1) Issues on time and cost

ICSID indicated the time and cost required for arbitration, and recommended the utilization of conciliation in its annual report.<sup>3</sup> In their study, the United Nations Conference on Trade and Development (UNCTAD) raised the problem of the significant cost needed for arbitration procedures and the fact that attorneys' fees accounts for 60% of the cost.<sup>4</sup> In the same study, UNCTAD indicated that arbitration requires an average of three to four years due to continuous conflicts of the parties about jurisdiction and the frequent request for annulment of awards once made<sup>5</sup>; it asserted that the prolonged periods are significant.<sup>6</sup> In addition, the average time period for ICSID arbitration was said to be 3.6 years excluding the annulment procedure.<sup>7</sup> The issues of time and cost of the arbitration have been recognized as a large burden to both parties, the investor and the respondent state.

## 2) Issues on the state violation of arbitration award

In addition to these issues, practical limitations have been recognized recently as the number of investment treaty arbitration has increased. Article 53 of the ICSID Convention stipulates that the arbitration award is binding on the parties to the arbitration, and the parties shall abide by and comply with the arbitration award. Although a majority of nations will pay compensation in accordance with the arbitration award, some cases have been seen where arbitration awards are not complied with. For example, the government of Argentina has not complied with arbitration awards ordering compensation to CMS Gas Transmission Company (award of 2005, ordering compensation of 130 million dollars), Azurix Corporation (award of 2006, ordering compensation of 160 million dollars), and Vivendi Universal (award of 2007, ordering compensation of 100 million dollars) etc., and the settlements with the investors were finally reached in 2013.<sup>8</sup> In addition to Argentina, it is said that Kazakhstan, Kyrgyz, Russia, Thailand, Zimbabwe and Congo have not complied with arbitration awards ordering compensations against investors.<sup>9</sup>

In most of the cases, the nation paid compensation in the end; however, additional cost and labour were expended by the steps such as the seizure of the respondent party's property by the investor or the diplomatic intervention by the government of the home country. An example of an intervention by the investor's home country that attracted attention was the suspension of Generalized System of Preferences (GSP) for Argentina by the United States. Hence, the intervention by the investor's

<sup>3</sup> Refer to the ICSID annual report of 2004 and the speech on introduction by the secretariat in 2005.

<sup>4</sup> Refer to UNCTAD, *Investor-State Disputes: Prevention and Alternatives to Arbitration* (2010), p.17-18 ([http://unctad.org/en/docs/diaeia200911\\_en.pdf](http://unctad.org/en/docs/diaeia200911_en.pdf)).

<sup>5</sup> Refer to "The Appeal Mechanism of Investment Arbitrations" by Dai Tamada in the FY 2009 report of the METI workshop on Investment Treaty Arbitration for discussions on advantages and problems on general appeal mechanisms in investment treaty arbitrations ([http://www.meti.go.jp:8080/policy/trade\\_policy/epa/pdf/FY21BITreport/ISDS%20review.pdf](http://www.meti.go.jp:8080/policy/trade_policy/epa/pdf/FY21BITreport/ISDS%20review.pdf)).

<sup>6</sup> Refer to UNCTAD, *Investor-State Disputes: Prevention and Alternatives to Arbitration* (2010), p18 ([http://unctad.org/en/docs/diaeia200911\\_en.pdf](http://unctad.org/en/docs/diaeia200911_en.pdf)).

<sup>7</sup> Refer to Anthony Sinclair, *ICSID Arbitration: How Long Does it Take?*, GAR JOURNAL, Vol. 4, Issue 5 ([www.GlobalArbitrationReview.com](http://www.GlobalArbitrationReview.com)). This analysis is targeted at 115 cases of arbitration awards issued before July 1, 2009. If the case transitioned to a revocation procedures, the procedure will typically take two to three years, and the arbitration proceeding is resumed when revocation succeeds (ICSID Article 52 (6)). Therefore, the whole process may take over ten years.

<sup>8</sup> Refer to Luke Eric Peterson, *Argentina by the Numbers: Where Things Stand with Investment Treaty Claims Arising Out of the Argentine Financial Crisis*, Feb. 1, 2011 ([www.iareporter.com](http://www.iareporter.com)).

<sup>9</sup> Refer to Luke Eric Peterson, *How Many States Are Not Paying Awards under Investment Treaties?*, May 7, 2010 ([www.iareporter.com](http://www.iareporter.com)); Luke Eric Peterson, *Deadline Lapses Without Payment by Kazakhstan on BIT Award*, May 7, 2010 ([www.iareporter.com](http://www.iareporter.com)); Luke Eric Peterson, *Zimbabwe Not Paying ICSID Award*, May 7, 2010 ([www.iareporter.com](http://www.iareporter.com)).

home country is not always advantageous for the investor. In order to secure compensation by the Russian government, a German investor filed a petition for seizure of the airplane that the Russian government brought to Germany for an air show. The German government requested the investor to withdraw the petition in fear of causing a diplomatic problem.<sup>10</sup>

The World Bank work operation manual explains that new loans will be terminated if the member country is in a dispute related to expropriation and external debt and the country has no intent of taking remedial actions, or making reasonable effort to settle the dispute.<sup>11</sup> As this rule applies to nations that violate an arbitration award, termination of loans by the World Bank may be a deterrent to the violation. The pressure from the World Bank was said to have led Argentina to accept the settlement with the investors in 2013.

### **3) Difficulties in enforcing an arbitration award (sovereign immunity issues)**

When a nation does not comply with an arbitration award to compensate, the investor can take legal actions such as seizing national property in order to enforce the award. From the perspective of ensuring the effectiveness of ICSID arbitration awards, the ICSID Convention stipulates that the award issued by ICSID arbitration on monetary compensation has validity equivalent to the final judgment of a court in each contracting state (ICSID Convention, Article 54 (1)).<sup>12</sup> An award is generally enforced in a third country other than the nation being ordered to compensate; however, the contracting states mentioned in the ICSID Convention Article 54 (1) include not only the countries involved in the arbitration but also the third country executing the award. Therefore, arbitration awards issued based on the ICSID Convention are self-enforcing in ICSID member countries.<sup>13 14</sup>

Of course, this does not mean that an investor can seize the assets of a nation immediately. Where national assets are exempt from enforcement as a part of sovereign immunity in customary international law, the ICSID Convention continues to affirm the validity of sovereign immunity principles based on effective laws in member countries (ICSID Convention, Article 55).<sup>15</sup> Also, an arbitration agreement by a nation is not necessarily equivalent to a waiver of sovereign immunity in the enforcement stages. Hence, a nation that is ordered to compensate can invoke sovereign immunity and impede seizure of assets. Recently, the International Court of Justice (ICJ) ruled that sovereign immunity principles do not apply to certain cases such as when a national asset is not used for governmental (non-commercial) activities; however, the scope in which sovereign immunity is non-applicable is still limited.<sup>16</sup> If the asset that is petitioned for seizure is provided

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<sup>10</sup> Refer to Luke Eric Peterson, *How Many States Are Not Paying Awards under Investment Treaties?*, May 7, 2010 (www.iareporter.com).

<sup>11</sup> Refer to the World Bank Operational Manual : OP 7.40 - Disputes over Defaults on External Debt, Expropriation, and Breach of Contract (<http://web.worldbank.org/WBSITE/EXTERNAL/PROJECTS/EXTPOLICIES/EXTOPMANUAL/0,,menuPK:64701763~pagePK:64719906~piPK:64710996~theSitePK:502184,00.html>).

<sup>12</sup> Certain performance of actions, restitutions or seizure other than monetary compensation are not deemed as self-execution.

<sup>13</sup> An arbitration award revocation procedure exists in the ICSID Convention, and as mentioned above, the ICSID itself indicates that this may inhibit the smooth execution of an award.

<sup>14</sup> For awards other than the arbitration award based on the ICSID Convention, the New York Convention, a convention that approves and executes foreign arbitration awards, may be applied, however, the New York Convention includes various reasons for refusing the enforcement. The most frequently applied reason is the violation of public order of the nation being accused.

<sup>15</sup> Examples sovereign immunities stipulated by member states include the Foreign Sovereign Immunities Act of the United States and the State Immunity Act of the United Kingdom.

<sup>16</sup> Refer to *Jurisdictional Immunities of the State* (Germany v. Italy: Greece intervening), I.C.J., Judgment (Feb. 3, 2012) para 118.



exclusively for commercial use, it may be subject to seizure, but government are not involved in many commercial activities. In addition, even if public assets are provided for commercial use, they are often under the rule of an entity separate from the government: the addressee of the award. Seizure that is petitioned for may be rejected in these cases. Also, with regard to laws on sovereign immunity in the United States and the United Kingdom, where the global financial activities are centred, sovereign immunity is applied to assets of financial authorities including foreign central banks regardless of their use (for commercial use or not).<sup>17</sup> In view of these hurdles, a valid seizure of national asset by an investor is difficult in practice, and seizures by investors often do not succeed. Of course, the elimination of enforcement on assets by sovereign immunity does not change the legal obligations of the nation to comply with the arbitration award.<sup>18</sup> The ICSID Convention stipulates that diplomatic protection may be obtained from the investor's home country in case an arbitration award is violated (ICSID Convention, Article 27), and an appeal may be made to the International Court of Justice (ICSID Convention, Article 64).

#### **4) Avoidance of investment treaty arbitration by the host country**

Recently, there have been host countries that denounce investment treaty arbitration. This trend reflects the fact that it has proved its effectiveness to provide remedy for investors, but there are concerns that this trend may reduce its usability in the future. The reasons given for the denunciations by these nations are that a systematic bias towards the investor exists in the investment treaty arbitration, and the necessity of securing national sovereignty and flexible policy range.

As of the end of 2013, Bolivia, Ecuador, and Venezuela have denounced the ICSID Convention based on Article 71 of the Convention. Also, Argentina is seeking legislation to denounce the ICSID Convention.<sup>19</sup> (Denunciations take effect sixty days after the date of notice (Article 71)). However, the validity of individual investment treaties is not affected by denunciation of the ICSID Convention, and in many cases the enforcement of arbitration awards is typically protected by the New York Convention.

In addition, there is a trend of denouncing the individual investment treaties. Bolivia notified its denunciation of the investment treaty with the United States; the Congress of Ecuador approved legislation to denounce their investment treaties with 10 other countries (the Congress had already approved the denouncement of treaties with five more countries); Russia ended provisional application of the Energy Charter Treaty; and Venezuela withdrew from its investment treaty with the Netherlands. However, in general, investment treaties remain valid for a certain period of time after the notification. For instance, Article 45 (3) (b) of the Energy Charter Treaty stipulates that, the obligation of the signatory under the Treaty shall remain in effect for twenty years following the effective date of termination with respect to any investments made during provisional application by investors of other signatories.

It is also reported that India is considering the exclusion of arbitration provisions from investment treaties that have been concluded or are under negotiations with the EU, Australia, and New Zealand.<sup>20</sup>

<sup>17</sup> Foreign Sovereign Immunities Act Article 1611(b)(1), State Immunity Act Article 14 (4).

<sup>18</sup> "Problems Concerning the Enforcement of Investment Arbitral Awards", Tomonori Mizushima, RIETI DP 13-J-078 <http://www.rieti.go.jp/jp/publications/summary/13120005.html>

<sup>19</sup> Bills from the Argentine National Congress (April 21, 2012) can be obtained from <http://www1.hcdn.gov.ar/proyxml/expediente.asp?fundamentos=si&numexp=1311-D-2012>.

<sup>20</sup> BIT of Legal Bother," Business Today, May 27, 2012

(<http://businesstoday.intoday.in/story/india-planning-to-exclude-arbitration-clauses-from-bits/1/24684.html>).

### **3. THE MECHANISM, MERITS AND DEMERITS OF CONCILIATION AS AN INVESTOR-STATE DISPUTE SETTLEMENT PROCEDURE**

#### **1) Outline of Arbitration**

In general, arbitration is a proceeding for the purpose of having a neutral third-party entity pronounce a binding decision based on the laws. On the other hand, conciliation is a proceeding performed outside of a formal dispute proceeding for the purpose of dispute settlement by the agreement of the parties in dispute. The method is informal and flexible compared to arbitration.<sup>21</sup>

Articles 28 to 35 of the ICSID Convention and the ICSID Conciliation Rule stipulate the rules and procedures relating to ICSID conciliation. The conciliation proceeding begins when a disputing party, an ICSID Convention contracting state or any national of a contracting state, addresses to the ICSID Secretary General a request for initiation of conciliation, and the other party to the dispute cannot impede the initiation of conciliation proceedings (ICSID Convention, Article 28(1)).<sup>22</sup> Thereafter, conciliation commission that will conduct the conciliation is composed (ICSID Convention, Article 29).<sup>23</sup> If the parties do not agree on the conciliators, the Secretary-General of the ICSID Administrative Council will constitute the conciliation commission (ICSID Convention, Article 30). The role of the conciliation commission is to clarify the issues in dispute between the parties and to endeavour to bring about agreement between them upon mutually acceptable terms (ICSID Convention, Article 34(1)). The conciliation commission does not necessarily confirm facts or define the application of law. Although conciliation proceedings are more flexible than arbitrations, the adversary structure of the dispute has been maintained to a certain extent. Arguments by the disputing parties are heard by the conciliation commission at oral proceedings (ICSID Conciliation Rule, Article 22). Dispute parties file a written statement within 30 days of constitution of the conciliation commission (ICSID Conciliation Rule, Article 25). Thereafter, either party may file statements that it deems useful and relevant at any stage of the proceeding (ICSID Conciliation Rule, Article 25 (1)). The conciliation commission may request oral explanations, documents and other information from a party, as well as evidence from other persons (ICSID Conciliation Rule, Article 22 (3)). The conciliation commission recommends to the parties terms of settlement with the reasons for them, and it may recommend refraining from specific actions that might aggravate the dispute (ICSID Conciliation Rule, Article 22 (2); also, ICSID Convention, Article 34 (1)). Although the recommendations are not binding, the parties are obliged to give their most serious consideration to the recommendations (ICSID Convention, Article 34 (1)). When the conciliation has concluded, the commission shall, regardless whether or not a settlement has been reached, draw up a report regarding the conciliation proceedings (ICSID Convention, Article 34 (2)). If the parties transition to arbitration proceedings, neither party is entitled to invoke or rely on anything expressed in the conciliation or the report or any recommendations made by the conciliation commission (ICSID Convention, Article 35). Consideration is given so that concessions made by parties in the course of conciliation do not affect the arbitration.

#### **2) Number of conciliations**

As of the end of 2015, nine cases had utilized ICSID conciliations, of which one is currently in

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<sup>21</sup> Linda C. Reif, *Conciliation as a Mechanism for the Resolution of International Economic and Business Disputes*, 14 *FORDHAM INT'L L.J.* 578, at 587, 634-638 (1991). Mediation is another procedure for amicable resolution. More strictly, while conciliators offer settlement proposals in conciliations, settlement proposals are proposed by mediators in mediations. However, in many cases conciliation and mediations are used interchangeably.

<sup>22</sup> Non-contracting countries and any nationals thereof can utilize the ICSID conciliation under the Additional Facility Rules.

<sup>23</sup> Unlike ICSID arbitration, the conciliator may be a national of the dispute party.

progress.<sup>24</sup> Among the eight cases of conciliation proceedings that have been finalized, at least three have reached a settlement.<sup>25</sup> There have been 549 cases utilizing ICSID arbitrations as of the end of 2015, which is significantly higher than conciliations.<sup>26</sup>

### 3) Merits and demerits of ICSID conciliations

#### (1) Saving time and cost

The primary merit of ICSID conciliations is that it is time- and cost-saving compared to arbitrations. It has been mentioned that eight cases of ICSID conciliations out of nine have been finalized, but the time periods from the initiation of conciliation to the end are from 8 to 35 months. On the other hand, as aforementioned, the average period of time for ICSID arbitrations is 3.6 years excluding revocation procedures. In conciliation, conciliators take the initiative to clarify the issue and reach a settlement, and time and cost can be saved because the argument is focused on a particular point in this process. Also, in arbitration, time and cost swells due to the exchange of documents between the parties including a massive amount of evidence, which is a procedure close to discovery procedures in the United States. In contrast, conciliators restrict the scope of document exchange in conciliation. Naturally, the demerit is that time and money is wasted if the conciliation does not succeed, and the investor may have to start over by initiating arbitration.

#### (2) Early dispute settlement and the restoration/continuance of a relationship

A large merit of conciliation in comparison to arbitration is that early reconciliation may raise the probability of continuing and restoring the relationship between the investor and the host country and resuming investment activities after settling the dispute.<sup>27</sup> Therefore, conciliation can be advantageous when the parties are involved in a long-term project that is in progress and a large sunk cost has been expended. Typically, this situation applies to joint ventures and long-term contracts on oil and gas development, gas pipeline transport, mineral resource development, and infrastructure development.<sup>28</sup> Both the *Tesoro Petroleum Corporation v. Trinidad and Tobago* case (ICSID Case No. CONC/83/1) and the *TG World Petroleum Limited v. Republic of Niger* case (ICSID Case No. CONC/03/1) were disputes concerning oil development where successful conciliations occurred. Also, the case currently undergoing conciliation is a dispute related to oil or gas exploration and development.

However, the possibility of reaching a resolution by conciliation is low when the conflict between the investor and the host country is strong, and it may be a rational choice for the investor to resolve the case in arbitration from the beginning. Similarly, when a dispute is not settled despite

<sup>24</sup> Including 2 cases which are conducted under the Additional Facility Rules. ICSID, Refer to the Cases (<https://icsid.worldbank.org/apps/ICSIDWEB/cases/Pages/AdvancedSearch.aspx?aprl=CD20,CD19;CD21,CD19>). The numbers can also be obtained from the dispute statistics published by the ICSID twice a year (<https://icsid.worldbank.org/apps/ICSIDWEB/resources/Pages/ICSID-Caseload-Statistics.aspx>).

<sup>25</sup> *TG World Petroleum Limited v. Republic of Niger* (ICSID Case No. CONC/03/1) (2005); *SEDITEX Engineering Beratungsgesellschaft für die Textilindustrie m.b.H. v. Democratic Republic of Madagascar* (ICSID Case No. CONC/82/1) (1983); *Tesoro Petroleum Corporation v. Trinidad and Tobago* (ICSID Case No. CONC/83/1) (1985). The last case is said to have reached a settlement based on the recommendation of the conciliation committee. Refer to CHRISTOPH H. SCHREUER *ET AL.*, *THE ICSID CONVENTION: A COMMENTARY* 445, 449 (2d ed. 2009).

<sup>26</sup> Including 48 cases that are conducted under the Additional Facility Rules. Refer to ICSID dispute statistics (2016-1) Chart 3 ([https://icsid.worldbank.org/apps/ICSIDWEB/resources/Documents/ICSID%20Web%20Stats%202016-1%20\(English\)%20final.pdf](https://icsid.worldbank.org/apps/ICSIDWEB/resources/Documents/ICSID%20Web%20Stats%202016-1%20(English)%20final.pdf)).

<sup>27</sup> Refer to KENNETH J. VANDELDE, *BILATERAL INVESTMENT TREATIES* 437 (2010); CHRISTOPH H. SCHREUER *ET AL.*, *THE ICSID CONVENTION: A COMMENTARY* 445 (2d ed. 2009).

<sup>28</sup> Linda C. Reif, *Conciliation as a Mechanism for the Resolution of International Economic and Business Disputes*, 14 *FORDHAM INT'L L.J.* 578, 635 (1991).

the investor's efforts to use all kinds of amicable measures including negotiations, it may be rational to transfer to arbitration.<sup>29</sup>

### **(3) Confidentiality**

Confidentiality of conciliation is higher than that of arbitration. In arbitration, some of the positions and opinions of the parties and the arbitration award are publicized. This may raise concerns for the host country regarding national security, the outflow of information related to important economic policies and bad reputation caused by the investor's argument. The investor may also have concerns over falling stock prices, etc.<sup>30</sup> Regular commercial arbitration is highly confidential; however, the confidentiality of investment treaty arbitration is lower because a large amount of compensation is expected and the grounds must be publicized. On the other hand, conciliation may lack transparency regarding the dispute settlement process compared to arbitration.<sup>31</sup>

### **(4) Accountability to relevant parties**

The reconciliation proposed by the conciliators is informal compared to an arbitration award, and it lacks explanatory reasons. Therefore, the use of the national budget cannot be justified if the reconciliation involves compensation, leading to hesitation by the host country to accept such reconciliation.<sup>32</sup> Furthermore, as investment disputes are often related to public benefit or important economic or resources policies, host countries may hesitate to accept the decision because of consideration of public opinion. Investor companies also may have concerns regarding how to explain to their stockholders about accepting the proposed settlement by conciliation that is not legally binding, unlike that by an arbitral tribunal.

### **(5) Issues on legally binding power and execution of a settlement**

With regard to settlement as a result of ICSID conciliation, neither the ICSID Convention nor the ICSID Conciliation Rule express legally binding powers over the parties, but in theory a settlement agreed as a result of ICSID conciliation is legally binding.<sup>33</sup> As aforementioned, the ICSID Convention stipulates that the award issued by ICSID arbitration has validity equivalent to a final judgment of a court in a member country, which ensures the self-enforcing nature of the arbitration award. However, settlement by ICSID conciliation is not binding with respect to enforcement. Therefore, there are cases in which the parties to the conciliation are forced to resettle the non-compliance of obligations set by reconciliation separately by arbitration or trial. Arbitration provisions stipulating resolution by arbitration concerning disputes regarding the non-compliance with obligations set by reconciliation should be included in the terms of reconciliation if a trial is not desirable. This may constitute a demerit of conciliation. Nevertheless, the non-compliance risk of conciliation should be smaller than that of an arbitration award because an ICSID conciliation is

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<sup>29</sup> Refer to Barton Legum, *The Difficulty of Conciliation in Investment Treaty Cases: A Comment on Professor Jack C. Coe's "Toward A Complementary Use of Conciliation in Investor-State Disputes- A Preliminary Sketch,"* MEALEY'S International Arbitration Report Vol. 21, #4 April 2006, at 1-2.

<sup>30</sup> Refer to Jack J. Coe, Jr., *Toward a Complementary Use of Conciliation in Investor-State Disputes-A Preliminary Sketch*, 12 U.C.Davis J. Int'l L. & Pol'y 7 2005-2006, 23.

<sup>31</sup> Refer to Jack J. Coe, Jr., *Toward a Complementary Use of Conciliation in Investor-State Disputes-A Preliminary Sketch*, 12 U.C.Davis J. Int'l L. & Pol'y 7 2005-2006, 27.

<sup>32</sup> Refer to Barton Legum, *The Difficulty of Conciliation in Investment Treaty Cases: A Comment on Professor Jack C. Coe's "Toward A Complementary Use of Conciliation in Investor-State Disputes- A Preliminary Sketch,"* MEALEY'S International Arbitration Report Vol. 21, #4 April 2006, at 2. Nevertheless, the indications are made based on experience in the United States, where governance is relatively strict.

<sup>33</sup> Refer to CHRISTOPH H. SCHREUER *ET AL.*, *THE ICSID CONVENTION: A COMMENTARY* 451 (2d ed. 2009); Nassib Ziadé, *ICSID Conciliation*, NEWS FROM ICSID, Vol. 13/2, at 3, 6

settled based on the agreement of the parties.

#### 4. COMPARISON WITH PROBLEM-SOLVING BY THE BUSINESS ENVIRONMENT DEVELOPMENT SUBCOMMITTEE

The Business Environment Development Subcommittee is a committee for bilateral talks involving governments and private sectors established pursuant to EPAs concluded by Japan. In this forum, investors can raise issues with the host country in order to improve various business environments. So far, Japan has held Business Environment Development Subcommittee forums with Thailand, Malaysia, Mexico, Chile, and Peru. Participation in the Subcommittee is wide, consisting of the government of the investor's home country, JETRO, the government of the host country, and relevant persons of the local industries. It differs from arbitration and conciliation in that a neutral third person does not intervene. Improvements in general business environments that affect the majority of investment enterprises are discussed. Some of the issues are not suited to be settled by conciliation or arbitration. In the past, the Business Environment Development Subcommittee has been utilized regarding public issues such as maintaining public safety, smooth immigration procedures, infrastructure development and improvement, measures against counterfeit products, and confirmation of equivalency.

### 1) SUMMARY OF MAJOR ARBITRAL BODIES AND ARBITRATION RULES

Note: While investment treaties provide that arbitration procedures are conducted in accordance with one of these arbitration rules, they may provide for procedures different from such arbitration rules (for instance, appointment of arbitrators, place of arbitration and information disclosure). In that case, designated arbitration rules are applied with changes made by the investment treaty.

Figure III-5-9

	ICSID Convention (the “Convention”) and the Arbitration Rules (the “Rules”)	ICSID Additional Facility Rules
Arbitration Body, Arbitration Rules, etc.	<ul style="list-style-type: none"> <li>- The International Centre for Settlement of Investment Disputes (ICSID) is a permanent international arbitration institution and is one of the organizations of the World Bank Group. It is located in the U.S. (Washington D.C.).</li> <li>- The ICSID Convention came into force in 1966. There were 160 Contracting States and 152 effective as of the end of 2015.</li> <li>- The ICSID Convention provides for arbitration, and the “Arbitration Rules” provide further details.</li> </ul>	<ul style="list-style-type: none"> <li>- The ICSID Additional Facility Rules were established in 1978 for the Administrative Council to grant the ICSID Secretariat the authority to administer the dispute settlement procedures that are not covered by the Convention, such as in cases where one party is not a Contracting State or a national of a Contracting State.</li> <li>- The ICSID Additional Facility Rules have three schedules. “Schedule C” provides for arbitration of investment disputes between a Contracting State and a Non-contracting State.</li> </ul>
Subject Matter (listed when special restrictions)	- Investment disputes between the nationals of a Contracting State and other Contracting States. (Convention, Articles 1(2) and	- Investment disputes in which either party is a Non-contracting State or national of a Non-contracting State. (Rules, Rule 2(a))

	ICSID Convention (the “Convention”) and the Arbitration Rules (the “Rules”)	ICSID Additional Facility Rules
exist)	25(1))	
Commencement of Arbitration Proceedings	<ul style="list-style-type: none"> <li>- The arbitration proceedings shall commence upon a written request to the arbitration body by the claimant. (Convention, Article 36(1))</li> <li>- A Request for Arbitration shall be registered and notified to the parties unless the arbitration body determines from the information included in the Request for Arbitration that it is clearly beyond the jurisdiction of the ICSID. (Article 36(3))</li> </ul>	<ul style="list-style-type: none"> <li>- The arbitration proceedings shall commence upon a written request to the arbitration body by the claimant. (Schedule C, Article 2)</li> <li>- After the arbitration body confirms that the Request for Arbitration meets the requirements, the Request shall be registered as quickly as possible and the parties shall be notified of the registration. (Schedule C, Article 4)</li> </ul>
Appointment of Arbitrators	<p>&lt;Number of arbitrators&gt;</p> <ul style="list-style-type: none"> <li>- The parties can agree to appoint one or more odd number of arbitrators; three arbitrators are appointed if they cannot agree. (Convention, Article 37(2)(a) and (b))</li> </ul> <p>&lt;Where the Arbitral Tribunal consists of three arbitrators&gt;</p> <ul style="list-style-type: none"> <li>- Each party shall appoint one arbitrator, and the third arbitrator shall be appointed upon agreement between the parties. (Convention, Article 37(2)(b))</li> </ul> <p>* Refer to the Rules, Article 3 for the details of the appointment of arbitrators.</p> <ul style="list-style-type: none"> <li>- If the parties do not appoint the arbitrators within 90 days from the notice of the registration of the Request for Arbitration or the period agreed upon between the parties, the arbitration body shall appoint them from the Panel of Arbitrators. (Convention, Article 38, Article 40(1))</li> </ul> <p>&lt;Where the Arbitral Tribunal consists of a sole arbitrator&gt;</p> <ul style="list-style-type: none"> <li>- If the parties do not appoint the arbitrator within 90 days from the notice of the registration of the Request for Arbitration or the period</li> </ul>	<p>&lt;Number of arbitrators&gt;</p> <ul style="list-style-type: none"> <li>- The parties can agree to appoint one or more odd number of arbitrators; three arbitrators are appointed if they cannot agree. (Schedule C, Article 6(1))</li> </ul> <p>&lt;Where the Arbitral Tribunal consists of three arbitrators&gt;</p> <ul style="list-style-type: none"> <li>- Each party shall appoint one arbitrator, and the third arbitrator shall be appointed upon agreement between the parties. (Schedule C, Article 6(1))</li> <li>* Refer to the Schedule C, Article 9 for the details of the appointment of arbitrators.</li> <li>- If the parties do not appoint the arbitrators within 90 days from the notice of the registration of the Request for Arbitration or the period agreed upon between the parties, the arbitration body shall appoint them from the Panel of Arbitrators, and the arbitrators shall be of nationalities different from the parties. (Schedule C, Article 6(4), Article 7(2))</li> </ul> <p>&lt;Where the Arbitral Tribunal consists of a sole arbitrator&gt;</p> <ul style="list-style-type: none"> <li>- If the parties do not appoint the arbitrators within 90 days from the notice of the registration of the Request for Arbitration or the period agreed upon between the parties, the</li> </ul>

	ICSID Convention (the “Convention”) and the Arbitration Rules (the “Rules”)	ICSID Additional Facility Rules
	<p>agreed upon between the parties, the arbitration body shall appoint one from the Panel of Arbitrators. (Convention, Article 38, Article 40(1))</p> <p>&lt;Nationality of arbitrators, etc.&gt;</p> <ul style="list-style-type: none"> <li>- The majority of the Arbitral Tribunal shall be of nationalities different from the parties (except where arbitrators are appointed upon agreement between the parties). (Convention, Article 39) That is, where the Arbitral Tribunal consists of three arbitrators, each arbitrator shall be of nationality different from either party.</li> </ul>	<p>arbitration body shall appoint them from the Panel of Arbitrators, and the arbitrators shall be of nationalities different from the parties. (Schedule C, Article 6(4), Article 7(2))</p> <p>&lt;Nationality of arbitrators, etc.&gt;</p> <ul style="list-style-type: none"> <li>- The majority of the Arbitral Tribunal shall be of nationalities different from the parties (except where arbitrators are appointed upon agreement between the parties). (Schedule C, Article 7(1)) That is, where the Arbitral Tribunal consists of three arbitrators, each arbitrator shall be of nationality different from either party.</li> </ul>
Arbitration Proceedings	<p>&lt;Place of arbitration, etc.&gt;</p> <ul style="list-style-type: none"> <li>- Arbitration proceedings shall be held at the ICSID, unless otherwise agreed between the parties. (Convention, Articles 62 and 63; Rules, Rule 13(3))</li> <li>- The Arbitral Tribunal shall apply the rules of law designated by the parties, or, in the absence of the parties’ agreement on the applicable law, the law of the party to the dispute and such rules of international law as may be applicable. (Convention, Article 42(1))</li> </ul> <p>&lt;Language used in arbitration proceedings&gt;</p> <ul style="list-style-type: none"> <li>- In accordance with the agreement between the parties, one or two languages may be used in the arbitration proceedings (approval of the arbitration body is needed if the languages are not the official languages of the ICSID (English, French, and Spanish)). If it is not agreed upon, it will be selected from the official languages of the ICSID. (Rules, Rule 22(1))</li> <li>- If two languages are selected,</li> </ul>	<p>&lt;Place of arbitration, etc.&gt;</p> <ul style="list-style-type: none"> <li>- The place of arbitration shall be determined by the Arbitral Tribunal after consultation with the parties. (Schedule C, Article 20(1))</li> <li>- Arbitration proceedings shall be held only in States that are parties to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards. (New York Convention) (Schedule C, Article 19)</li> </ul> <p>&lt;Applicable law, etc.&gt;</p> <ul style="list-style-type: none"> <li>- The Arbitral Tribunal shall apply the rules of law designated by the parties, or, in the absence of the parties’ agreement on the applicable law, the law of the party to the dispute and such rules of international law as may be applicable. (Schedule C, Article 54(1))</li> </ul> <p>&lt;Language used in arbitration proceedings&gt;</p> <ul style="list-style-type: none"> <li>- In accordance with the agreement between the parties, one or two languages may be used in the arbitration proceedings (approval of the arbitration body is needed if the languages are not the official languages of the ICSID (English,</li> </ul>

	ICSID Convention (the “Convention”) and the Arbitration Rules (the “Rules”)	ICSID Additional Facility Rules
	<p>documents may be submitted in either language.</p> <ul style="list-style-type: none"> <li>- If either language is used in tribunal proceedings, the translation shall be provided at the request of the Arbitral Tribunal.</li> </ul> <p>&lt;Availability of interim measures of protection&gt;</p> <ul style="list-style-type: none"> <li>- The parties may request interim measures of protection. (Rules, Rule 39)</li> </ul> <p>&lt;Necessity of making public the tribunal proceedings&gt;</p> <ul style="list-style-type: none"> <li>- The Arbitral Tribunal at its discretion may make public the tribunal proceedings. (Rules, Rule 32(2))</li> </ul>	<p>French, and Spanish)). If it is not agreed upon, it will be selected from the official languages of the ICSID. (Schedule C, Article 30(1))</p> <p>&lt;Availability of interim measures of protection&gt;</p> <ul style="list-style-type: none"> <li>- The parties may request interim measures of protection. (Schedule C, Article 46)</li> </ul> <p>&lt;Necessity of making public the tribunal proceedings&gt;</p> <ul style="list-style-type: none"> <li>- The Tribunal at its discretion may make public the tribunal proceedings. (Schedule C, Article 39(2))</li> </ul>
Award	<p>&lt;Determination of awards&gt;</p> <ul style="list-style-type: none"> <li>- Awards shall be determined by a majority of the votes of all the Tribunal members. (Convention, Article 48(1))</li> </ul> <p>&lt;Final and binding nature of awards&gt;</p> <ul style="list-style-type: none"> <li>- The award shall be binding on the parties. (Convention, Article 53(1))</li> <li>- Either party may request annulment of the award as provided for in the Convention. The award shall not be subject to any appeal or to any other remedy except those provided for in the Convention. (Convention, Articles 52 and 53(1))</li> </ul> <p>&lt;Others&gt;</p> <ul style="list-style-type: none"> <li>- Each party shall abide by and comply with the terms of the award except to the extent that enforcement shall have been stayed pursuant to the relevant provisions of this Convention. (Convention, Article 53(1))</li> </ul>	<p>&lt;Determination of awards&gt;</p> <ul style="list-style-type: none"> <li>- Awards shall be determined by a majority of the votes of all the Tribunal members. (Schedule C, Article 24(1))</li> </ul> <p>&lt;Final and binding nature of awards&gt;</p> <ul style="list-style-type: none"> <li>- The award shall be final and binding on the parties. (Schedule C, Article 52(4))</li> </ul>



	UNCITRAL Arbitration Rules	ICC Rules of Arbitration
Arbitration Body, Arbitration Rules, etc.	<ul style="list-style-type: none"> <li>- The United Nations Commission on International Trade Law (UNCITRAL) was established by the General Assembly in 1996. It is located in Austria (Vienna).</li> <li>- UNCITRAL is not an arbitration body (it only adopts arbitration rules).</li> <li>- The UNCITRAL Arbitration Rules were adopted in 1976. (The UNCITRAL Model Law on International Commercial Arbitration was adopted in 1985.)</li> <li>- The latest version was revised in 2013.</li> <li>- Rules on Transparency in Treaty-based Investor-State Arbitration were adopted in 2013 (effective in 2014). When the UNCITRAL Arbitration Rules are applied under the treaties signed since April 2014, the Rules on Transparency shall also apply unless otherwise agreed between the parties.</li> </ul>	<ul style="list-style-type: none"> <li>- The International Chamber of Commerce (ICC) was founded in 1923. It is located in France (Paris).</li> <li>- Currently, 7,400 companies and associations from 130 countries have joined as members.</li> <li>- The latest version was revised in Jan. 2012.</li> </ul>
Subject Matter	-	-
Commencement of Arbitration Proceedings	- When the claimant submits a Request for Arbitration to the respondent in writing, the arbitration proceedings shall commence on the date on which the notice of arbitration is received by the respondent. (Article 3.2)	- When the claimant submits a Request for Arbitration to the arbitration body in writing, the arbitration proceedings shall commence on the date on which the Request is received by the arbitration body. (Article 4.2)
Appointment of Arbitrators	<p>&lt;Number of arbitrators&gt;</p> <ul style="list-style-type: none"> <li>- If the parties cannot agree on the number of arbitrators, three arbitrators shall be appointed unless within 30 days after the receipt by the respondent of the notice of arbitration the parties have not agreed that there shall be only one arbitrator. (Article 7)</li> </ul> <p>&lt;Designating and appointing authorities&gt;</p> <ul style="list-style-type: none"> <li>- Unless the parties have already agreed on the choice of an appointing authority, a party may at</li> </ul>	<p>&lt;Number of arbitrators&gt;</p> <ul style="list-style-type: none"> <li>- Where the parties have not agreed upon the number of arbitrators, a sole arbitrator shall be appointed by the arbitration body; except where it is deemed reasonable to appoint three arbitrators, three arbitrators shall be appointed. (Article 12.2)</li> </ul> <p>&lt;Where the Arbitral Tribunal consists of a sole arbitrator&gt;</p> <ul style="list-style-type: none"> <li>- The parties may, by agreement, nominate the sole arbitrator for confirmation. If the parties fail to nominate a sole arbitrator within 30</li> </ul>

	UNCITRAL Arbitration Rules	ICC Rules of Arbitration
	<p>any time propose the name or names of one or more institutions or persons. If the parties cannot agree on that choice, other party may request the Secretary-General of the Permanent Court of Arbitration (PCA) to designate the appointing authority. (Articles 6.1 and 6.2)</p> <p>* UNCITRAL is not an arbitration body, and needs to designate the authorities to appoint arbitrators.</p> <p>&lt;Where the Arbitral Tribunal consists of three arbitrators&gt;</p> <ul style="list-style-type: none"> <li>- Each party shall appoint one arbitrator, and the third arbitrator shall be appointed by the arbitrators appointed by the parties. (Article 9.1)</li> <li>- If within 30 days after the receipt of a party's notification of the appointment of an arbitrator the other party has not notified the first party of the arbitrator it has appointed, the first party may request the appointing authority to appoint the second arbitrator. (Article 9.2)</li> <li>- If within 30 days after the appointment of the second arbitrator the two arbitrators have not agreed on the choice of the presiding arbitrator, the presiding arbitrator shall be appointed by the appointing authority in the same way as a sole arbitrator would be appointed (refer to Article 8.2). (Article 9.3)</li> </ul> <p>&lt;Where the Arbitral Tribunal consists of a sole arbitrator&gt;</p> <ul style="list-style-type: none"> <li>- If within 30 days after receipt by all other parties of a proposal for the appointment of a sole arbitrator the parties have not reached agreement thereon, a sole arbitrator shall be appointed by the appointing authority. (Article 8.1)</li> </ul> <p>* Refer to Article 8.2 for the details of the appointment of arbitrators by</p>	<p>days from the date when the claimant's Request for Arbitration has been received by the other party, or within such additional time as may be allowed by the arbitration body, the sole arbitrator shall be appointed by the arbitration body. (Article 12.3)</p> <p>&lt;Where the Arbitral Tribunal consists of three arbitrators&gt;</p> <ul style="list-style-type: none"> <li>- Each party shall nominate one arbitrator, and the third arbitrator shall be appointed by the arbitration body unless the parties have agreed upon another procedure for such appointment. (Article 12.4)</li> </ul> <p>&lt;Nationality of arbitrators, etc.&gt;</p> <ul style="list-style-type: none"> <li>- The sole arbitrator or the third arbitrator shall be of a nationality other than those of the parties in principle. (Article 13.5)</li> </ul>

	UNCITRAL Arbitration Rules	ICC Rules of Arbitration
	<p>the appointing authorities. &lt;Nationality of arbitrators, etc.&gt; - The appointing authority shall have regard to such considerations as are likely to secure the appointment of an independent and impartial arbitrator, and shall take into account the advisability of appointing an arbitrator of a nationality other than the nationalities of the parties. (Article 6.7)</p>	
Arbitration Proceedings	<p>&lt;Place of arbitration, etc.&gt; - If the parties have not previously agreed on the place of arbitration, it shall be determined by the Arbitral Tribunal. (Article 18.1) - The Arbitral Tribunal may meet at any location it considers appropriate for deliberations. (Article 18.2) - Unless otherwise agreed by the parties, the Arbitral Tribunal may also meet at any location it considers appropriate for any other purpose, including hearings. (Article 18.2) * The place of arbitration is a legal concept, and the location where tribunal proceedings, including hearings, etc., are actually conducted and the place of arbitration need not necessarily be the same. &lt;Applicable law, etc.&gt; - The Arbitral Tribunal shall apply the rules of law designated by the parties. Failing such designation, the Arbitral Tribunal shall apply the law that it determines to be appropriate. (Article 35.1) - The Arbitral Tribunal shall decide in accordance with the terms of the contract, if any, and shall take into account any usage of trade applicable to the transaction. (Article 35.3) &lt;Language used in arbitration proceedings&gt; - Subject to an agreement by the parties, the Arbitral Tribunal shall</p>	<p>&lt;Place of arbitration, etc.&gt; - The place of arbitration shall be fixed by the arbitration body, unless agreed upon by the parties. (Article 18.1) - The Arbitral Tribunal may deliberate at any location it considers appropriate. (Article 18.3) - The Arbitral Tribunal may conduct hearings and meetings at any location it considers appropriate, unless otherwise agreed by the parties. (Article 18(2)) * Refer to the column of the UNCITRAL Arbitration Rules for details of the place of arbitration. &lt;Applicable law, etc.&gt; - The Arbitral Tribunal shall apply the rules of law designated by the parties. Failing such designation, the Arbitral Tribunal shall apply the law that it determines to be appropriate. (Article 21.1) - The Arbitral Tribunal shall make its decision in accordance with the terms of the contract, if any, and shall take into account any usage of trade applicable to the transaction. (Article 21.2) &lt;Language used in arbitration proceedings&gt; - In the absence of an agreement by the parties, the Arbitral Tribunal shall determine the language or languages of the arbitration, due regard being given to all relevant circumstances,</p>

	UNCITRAL Arbitration Rules	ICC Rules of Arbitration
	<p>determine the language or languages to be used in the proceedings. (Article 19.1)</p> <p>&lt;Availability of interim measures of protection&gt;</p> <ul style="list-style-type: none"> <li>- The parties may request interim measures of protection. (Article 26.1)</li> </ul> <p>&lt;Necessity of making public the tribunal proceedings&gt;</p> <ul style="list-style-type: none"> <li>- Hearings shall be held in private in principle. (Article 28.3)</li> </ul>	<p>including the language of the contract. (Article 20)</p> <p>&lt;Availability of interim measures of protection&gt;</p> <ul style="list-style-type: none"> <li>- The parties may request interim measures of protection. (Article 28)</li> </ul> <p>&lt;Necessity of making public the tribunal proceedings&gt;</p> <ul style="list-style-type: none"> <li>- Hearings shall be held in private in principle. (Article 26.3)</li> </ul> <p>&lt;Others&gt;</p> <ul style="list-style-type: none"> <li>- A system for emergency arbitrator is available. (Article 29)</li> </ul> <p>* An emergency arbitrator refers to an arbitrator appointed when a party that needs urgent interim or conservatory measures that cannot await the constitution of an Arbitral Tribunal.</p>
Award	<p>&lt;Determination of awards&gt;</p> <ul style="list-style-type: none"> <li>- Awards shall be determined by a majority of the votes of all the Tribunal members. (Convention, Article 33.1)</li> </ul> <p>* In the case of questions of procedure, when there is no majority or when the Arbitral Tribunal so authorizes, the third arbitrator may decide alone. (Article 33.2)</p> <p>&lt;Final and binding nature of awards&gt;</p> <ul style="list-style-type: none"> <li>- The award shall be final and binding on the parties. (Article 34.2)</li> </ul>	<p>&lt;Determination of awards&gt;</p> <ul style="list-style-type: none"> <li>- Awards shall be determined by a majority of the votes of all the Tribunal members. If there is no majority, the award shall be made by the third arbitrator alone. (Article 31.1)</li> </ul> <p>&lt;Final and binding nature of awards&gt;</p> <ul style="list-style-type: none"> <li>- The award shall be binding on the parties. (Article 34.6)</li> </ul> <p>&lt;Others&gt;</p> <ul style="list-style-type: none"> <li>- The Arbitral Tribunal must render its final award within six months from the date of the last signature by the Arbitral Tribunal or by the parties of the Terms of Reference, etc. (the time limit may be extended). (Articles 30.1 and 30.2)</li> </ul> <p>* The Terms of Reference refers to documents drawn up by the Arbitral Tribunal to clarify the outlines of the parties' respective claims and issues to be determined, etc. (refer to Article 23).</p> <ul style="list-style-type: none"> <li>- The Arbitral Tribunal shall submit the award in draft form to the arbitration body for review. (Article 33)</li> </ul>

	Arbitration Rules of the SCC Institute	KLRCA Arbitration Rules
Arbitration Body, Arbitration Rules, etc.	<ul style="list-style-type: none"> <li>- The Arbitration Institute of the Stockholm Chamber of Commerce (SCC Institute) was established in 1917 as an entity affiliated with the Stockholm Chamber of Commerce.</li> <li>- The latest version of the Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce came into force on January 1, 2010.</li> </ul>	<ul style="list-style-type: none"> <li>- The Kuala Lumpur Regional Centre for Arbitration (KLRCA) was founded in 1978 as an achievement of the Asian-African Legal Consultative Organization (AALCO). It is wholly owned by the Malaysian government.</li> <li>- The UNCITRAL Arbitration Rules have been applied as part of the KLRCA rules.</li> <li>- It is one of the organizations that conciliations and arbitrations are submitted to pursuant to the Japan-Malaysia EPA (Chapter on Investment). (Article 85.4(a) of the Agreement)</li> </ul>
Subject Matter	-	-
Commencement of Arbitration Proceedings	- When the claimant submits a claim to the arbitration body in writing, the arbitration proceedings shall commence on the date on which the request is received by the arbitration body. (Articles 2 and 4)	- When the claimant submits a claim to the arbitration body in writing, the arbitration proceedings shall commence on the date on which the request is received by the arbitration body. (Rules 2.1 and 2.2)
Appointment of Arbitrators	<p>&lt;Number of arbitrators&gt;</p> <ul style="list-style-type: none"> <li>- Where the parties have not agreed on the number of arbitrators, the Arbitral Tribunal shall consist of three arbitrators, unless the arbitration body, taking into account the complexity of the case, the amount in dispute or other circumstances, decides that the dispute is to be decided by a sole arbitrator. (Article 12)</li> <li>&lt;Where the Arbitral Tribunal consists of three arbitrators&gt;</li> <li>- Each party shall appoint an equal number of arbitrators and the Chairperson shall be appointed by the arbitration body. Where a party fails to appoint arbitrator(s) within the stipulated time period, the arbitration body shall make the appointment. (Article 13(3))</li> <li>&lt;Where the Arbitral Tribunal consists of a sole arbitrator&gt;</li> </ul>	<p>&lt;Number of arbitrators&gt;</p> <ul style="list-style-type: none"> <li>- Where the parties fail to determine the number of arbitrators, the Arbitral Tribunal shall consist of three arbitrators in the case of an international arbitration, and shall consist of a sole arbitrator in the case of a domestic arbitration. (Rule 4.4)</li> <li>&lt;Where the Arbitral Tribunal consists of a sole arbitrator&gt;</li> <li>- If within 30 days of the other party's receipt of the notice of arbitration, the parties have not reached an agreement on the appointment of the sole arbitrator, either party may request that the sole arbitrator be appointed by the arbitration body. (Rule 4.5)</li> <li>&lt;Where the Arbitral Tribunal consists of three arbitrators&gt;</li> <li>- Each party shall appoint one arbitrator. The two arbitrators thus appointed shall appoint the third</li> </ul>

	Arbitration Rules of the SCC Institute	KLRCA Arbitration Rules
	<p>- The parties shall be given 10 days within which to jointly appoint the arbitrator. If the parties fail to make the appointment within this time period, the arbitrator shall be appointed by the arbitration body. (Article 13(2))</p> <p>&lt;Nationality of arbitrators, etc.&gt;</p> <p>- If the parties are of different nationalities, the sole arbitrator or the third arbitrator shall be of a different nationality than the parties, unless the parties have agreed otherwise or unless otherwise deemed appropriate by the arbitration body. (Article 13(5))</p>	<p>arbitrator. (Rule 4.6(a))</p> <p>- If within 30 days after the receipt of a party's notification of the appointment of an arbitrator the other party has not notified the first party of the arbitrator it has appointed, the first party may request the arbitration body to appoint the second arbitrator. (Rule 4.6(b))</p> <p>- If within 30 days after the appointment of the second arbitrator the two arbitrators have not agreed on the choice of the third arbitrator, the third arbitrator shall be appointed by the arbitration body. (Rule 4.6(c))</p>
Arbitration Proceedings	<p>&lt;Place of arbitration, etc.&gt;</p> <p>- Unless agreed upon by the parties, the Board shall decide the place of arbitration. (Article 20(1))</p> <p>- The Arbitral Tribunal may meet and deliberate at any place that it considers appropriate. (Article 20(2))</p> <p>- The Arbitral Tribunal may, after consultation with the parties, conduct hearings at any place that it considers appropriate. (Article 20(2))</p> <p>* Refer to the column of the UNCITRAL Arbitration Rules for details of the place of arbitration.</p> <p>&lt;Applicable law, etc.&gt;</p> <p>- The Arbitral Tribunal shall decide the merits of the dispute on the basis of the law(s) or rules of law agreed upon by the parties. In the absence of such agreement, the Arbitral Tribunal shall apply the law or rules of law that it considers to be most appropriate. (Article 22(1))</p> <p>&lt;Language used in arbitration proceedings&gt;</p> <p>- Unless agreed upon by the parties, the Arbitral Tribunal shall determine</p>	<p>&lt;Place of arbitration, etc.&gt;</p> <p>- If the parties fail to agree on the place of arbitration, the place of arbitration shall be Kuala Lumpur, Malaysia unless the Arbitral Tribunal determines, having regard to all the circumstances of the case, that another place is more appropriate. (Rule 6.1)</p> <p>- The Arbitral Tribunal may meet at any location it considers appropriate for deliberations. (Rule 6.2)</p> <p>- Unless otherwise agreed by parties, the Arbitral Tribunal may also meet at any location it considers appropriate for any purpose, including hearings. (Rule 6.2)</p> <p>* Refer to the column of the UNCITRAL Arbitration Rules for details of the place of arbitration.</p> <p>&lt;Applicable law, etc.&gt;</p> <p>- The Arbitral Tribunal shall apply the rules of law designated by the parties. Failing such designation by the parties, the Arbitral Tribunal shall apply the law that it determines to be appropriate. (Part II (=UNCITRAL Article 35.1))</p> <p>- The Arbitral Tribunal shall decide</p>

	Arbitration Rules of the SCC Institute	KLRCA Arbitration Rules
	<p>the language(s) of the arbitration (the Arbitral Tribunal shall have due regard to all relevant circumstances and shall give the parties an opportunity to submit comments). (Article 21(1))</p> <p>&lt;Availability of interim measures of protection&gt;</p> <p>- The parties may request interim measures of protection. (Article 32)</p> <p>&lt;Necessity of making public the tribunal proceedings&gt;</p> <p>- Unless otherwise agreed by the parties, hearings will be held in private. (Article 27(3))</p> <p>&lt;Others&gt;</p> <p>- A system for emergency arbitrator is available. (Appendix II)</p> <p>* Refer to the column of the ICC Rules of Arbitration for details of emergency arbitrator.</p>	<p>in accordance with the terms of the contract, if any, and shall take into account any usage of trade applicable to the transaction. (Part II (=UNCITRAL Article 35.3))</p> <p>&lt;Language used in arbitration proceedings&gt;</p> <p>- Subject to an agreement by the parties, the Arbitral Tribunal shall determine the language or languages to be used in the proceedings. (Part II (=UNCITRAL Article 19.1))</p> <p>&lt;Availability of interim measures of protection&gt;</p> <p>- The parties may request interim measures of protection. (Part II (=UNCITRAL Article 26.1))</p> <p>&lt;Necessity of making public the tribunal proceedings&gt;</p> <p>- Hearings shall be held in private in principle. (Part II (=UNCITRAL Article 28.3))</p> <p>&lt;Others&gt;</p> <p>- A system for emergency arbitrator is available. (Schedule 2)</p> <p>* Refer to the column of the ICC Rules of Arbitration for details of emergency arbitrator.</p>
Award	<p>&lt;Determination of awards&gt;</p> <p>- Awards shall be determined by a majority of the votes of all the Tribunal members. If there is no majority, the award shall be made by the third arbitrator alone. (Article 35(1))</p> <p>&lt;Final and binding nature of awards&gt;</p> <p>- The award shall be final and binding on the parties. (Article 40)</p> <p>&lt;Others&gt;</p> <p>- The final award shall be made not later than six months from the date upon which the arbitration was referred to the Arbitral Tribunal (the time limit may be extended). (Articles 37 and 18)</p>	<p>&lt;Determination of awards&gt;</p> <p>- Awards shall be determined by a majority of the votes of all the Tribunal members. (Part II (=UNCITRAL Article 33.1))</p> <p>* In the case of questions of procedure, when there is no majority or when the Arbitral Tribunal so authorizes, the third arbitrator may decide alone. (Part II (=UNCITRAL Article 33.2))</p> <p>&lt;Final and binding nature of awards&gt;</p> <p>- The award shall be final and binding on the parties. (Part II (=UNCITRAL Article 34.2))</p> <p>&lt;Others&gt;</p> <p>- The Arbitral Tribunal shall render</p>

	Arbitration Rules of the SCC Institute	KLRCA Arbitration Rules
		its final award within a period limited to three months (the time limit may be extended). (Rules 11.1 and 11.2)

	SIAC Arbitration Rules	HKIAC Arbitration Rules
Arbitration Body, Arbitration Rules, etc.	<ul style="list-style-type: none"> <li>- The Singapore International Arbitration Centre (SIAC) was established in 1991 jointly by the Trade Development Council and the Economic Development Board.</li> <li>- The latest version was revised in 2013 (5th Edition)</li> </ul>	<ul style="list-style-type: none"> <li>- The Hong Kong International Arbitration Centre (HKIAC) was established in 1985 by volunteer legal and industrial circles.</li> <li>- The latest version was revised in November 2013.</li> </ul>
Subject Matter	-	-
Commencement of Arbitration Proceedings	- When the claimant submits a claim to the arbitration body in writing, the arbitration proceedings shall commence on the date on which the request is received by the arbitration body. (Rules 3.1 and 3.3)	- When the claimant submits a claim to the arbitration body in writing, the arbitration proceedings shall commence on the date on which the request is received by the arbitration body. (Articles 4.1 and 4.2)
Appointment of Arbitrators	<p>&lt;Number of arbitrators&gt;</p> <ul style="list-style-type: none"> <li>- A sole arbitrator shall be appointed unless the parties have agreed otherwise or unless it appears to the arbitration body, giving due regard to any proposals by the parties, the complexity, the quantum involved or other relevant circumstances of the dispute, that the dispute warrants the appointment of three arbitrators. (Rule 6.1)</li> </ul> <p>&lt;Where the Arbitral Tribunal consists of a sole arbitrator&gt;</p> <ul style="list-style-type: none"> <li>- If within 21 days after receipt by the arbitration body of the notice of arbitration, the parties have not reached an agreement on the nomination of one or more arbitrators, or if at any time either party so requests, the arbitration body shall make the appointment. (Rules 7.1 and 7.2)</li> </ul> <p>&lt;Where the Arbitral Tribunal consists of three arbitrators&gt;</p> <ul style="list-style-type: none"> <li>- Each party shall nominate one arbitrator. (Rule 8.1)</li> </ul>	<p>&lt;Number of arbitrators&gt;</p> <ul style="list-style-type: none"> <li>- If the parties have not agreed upon the number of arbitrators, the Arbitral Tribunal shall decide whether the case shall be referred to a sole arbitrator or to three arbitrators, taking into account the circumstances of the case. (Article 6.1)</li> </ul> <p>&lt;Where the Arbitral Tribunal consists of a sole arbitrator&gt;</p> <ul style="list-style-type: none"> <li>- Where the parties have agreed that the dispute shall be referred to a sole arbitrator, if they fail to designate the sole arbitrator within 30 days from the date when the notice of arbitration was received by the respondent, the arbitration body shall appoint the sole arbitrator. (Articles 7.1(a) and 7.2)</li> <li>- Where the parties have not agreed upon the number of arbitrators and the arbitration body has decided that the dispute shall be referred to a sole arbitrator, if they fail to jointly designate the sole arbitrator within</li> </ul>



	SIAC Arbitration Rules	HKIAC Arbitration Rules
	<p>- If a party fails to make a nomination within 14 days after receipt of a party's nomination of an arbitrator, the arbitration body shall proceed to appoint the arbitrator on its behalf. (Rule 8.2)</p> <p>- If the procedure does not result in a nomination within the time limit fixed by the parties or by the arbitration body, the third arbitrator shall be appointed by the arbitration body. (Rule 8.3)</p>	<p>30 days from the date when the arbitration body's decision was received by the last of them, the arbitration body shall appoint the sole arbitrator. (Articles 7.1(b) and 7.2)</p> <p>&lt;Where the Arbitral Tribunal consists of three arbitrators&gt;</p> <p>- Where the parties have agreed that the dispute shall be referred to three arbitrators, each party shall designate, in the notice of arbitration and the answer to the notice of arbitration, respectively, one arbitrator. If either party fails to designate an arbitrator, the arbitration body shall appoint the arbitrator. (Article 8.1(a))</p> <p>- Where the parties have not agreed upon the number of arbitrators and the arbitration body has decided that the dispute shall be referred to three arbitrators, the claimant shall designate an arbitrator within 15 days from receipt of the arbitration body's decision, and the respondent shall designate an arbitrator within 15 days from receipt of notification of the claimant's designation. If either party fails to designate an arbitrator, the arbitration body shall appoint the arbitrator. (Article 8.1(b))</p> <p>- If the two arbitrators so appointed fail to designate a third arbitrator within 30 days from the confirmation of the second arbitrator, the arbitration body shall appoint the third arbitrator. (Article 8.1(c))</p>
Arbitration Proceedings	<p>&lt;Place of arbitration, etc.&gt;</p> <p>- If the parties fail to agree on the place of arbitration, the place of arbitration shall be Singapore, unless the Tribunal determines, having regard to all the circumstances of the case, that</p>	<p>&lt;Place of arbitration, etc.&gt;</p> <p>- Where there is no agreement as to the place, the place of arbitration shall be Hong Kong, unless the Arbitral Tribunal determines, having regard to the circumstances of the case, that another seat is more</p>

	SIAC Arbitration Rules	HKIAC Arbitration Rules
	<p>another place is more appropriate. (Rule 18.1)</p> <ul style="list-style-type: none"> <li>- The Arbitral Tribunal may meet at any location it considers appropriate for deliberations. (Rule 18.2)</li> <li>- The Arbitral Tribunal may, after consultation with the parties, conduct hearings at any place that it considers appropriate. (Rule 18.2)</li> </ul> <p>* Refer to the column of the UNCITRAL Arbitration Rules for details of the place of arbitration.</p> <p>&lt;Applicable law, etc.&gt;</p> <ul style="list-style-type: none"> <li>- The Arbitral Tribunal shall apply the rules of law designated by the parties. Failing such designation, the Arbitral Tribunal shall apply the law that it determines to be appropriate. (Rule 27.1)</li> </ul> <p>&lt;Language used in arbitration proceedings&gt;</p> <ul style="list-style-type: none"> <li>- Unless the parties have agreed otherwise, the Tribunal shall determine the language to be used in the proceedings. (Rule 19.1)</li> </ul> <p>&lt;Availability of interim measures of protection&gt;</p> <ul style="list-style-type: none"> <li>- The parties may request interim measures of protection. (Rule 26.1)</li> </ul> <p>&lt;Necessity of making public the tribunal proceedings&gt;</p> <ul style="list-style-type: none"> <li>- Hearings shall be held in private in principle. (Rule 35.1)</li> </ul> <p>&lt;Others&gt;</p> <ul style="list-style-type: none"> <li>- A system for emergency arbitrator is available. (Schedule 1)</li> </ul> <p>* Refer to the column of the ICC Rules of Arbitration for details of emergency arbitrator.</p> <ul style="list-style-type: none"> <li>- A more simple and rapid procedure (expedited procedure) is available for use in cases that meet certain conditions. (Rule 5)</li> </ul>	<p>appropriate. (Article 14.1)</p> <ul style="list-style-type: none"> <li>- The Arbitral Tribunal may meet at any location it considers appropriate for deliberations. (Article 14.2)</li> <li>- Unless otherwise agreed by the parties, the Arbitral Tribunal may also meet at any location it considers appropriate for any other purpose, including hearings. (Article 14.2)</li> </ul> <p>* Refer to the column of the UNCITRAL Arbitration Rules for details of the place of arbitration.</p> <p>&lt;Applicable law, etc.&gt;</p> <ul style="list-style-type: none"> <li>- The Arbitral Tribunal shall apply the rules of law designated by the parties. Failing such designation, the Arbitral Tribunal shall apply the law that it determines to be appropriate. (Article 35.1)</li> </ul> <p>&lt;Language used in arbitration proceedings&gt;</p> <ul style="list-style-type: none"> <li>- Unless the parties have agreed otherwise, the Tribunal shall determine the language to be used in the proceedings. (Article 15.1)</li> </ul> <p>&lt;Availability of interim measures of protection&gt;</p> <ul style="list-style-type: none"> <li>- The parties may request interim measures of protection. (Article 23.1)</li> </ul> <p>&lt;Necessity of making public the tribunal proceedings&gt;</p> <ul style="list-style-type: none"> <li>- Hearings shall be held in private in principle. (Article 22.7)</li> </ul> <p>&lt;Others&gt;</p> <ul style="list-style-type: none"> <li>- A system for emergency arbitrator is available. (Schedule 4)</li> </ul> <p>* Refer to the column of the ICC Rules of Arbitration for details of emergency arbitrator.</p> <ul style="list-style-type: none"> <li>- A more simple and rapid procedure (expedited procedure) is available for use in cases that meet certain conditions. (Article 41)</li> </ul>

	SIAC Arbitration Rules	HKIAC Arbitration Rules
Award	<p>&lt;Determination of awards&gt;</p> <ul style="list-style-type: none"> <li>- Awards shall be determined by a majority of the votes of all the Tribunal members. If there is no majority, the award shall be made by the third arbitrator alone. (Rule 28.5)</li> </ul> <p>&lt;Final and binding nature of awards&gt;</p> <ul style="list-style-type: none"> <li>- The award shall be final and binding on the parties. (Rule 28.9)</li> </ul> <p>&lt;Others&gt;</p> <ul style="list-style-type: none"> <li>- The Arbitral Tribunal shall submit the award in draft form to the arbitration body for review. (Rule 28.2)</li> </ul>	<p>&lt;Determination of awards&gt;</p> <ul style="list-style-type: none"> <li>- Awards shall be determined by a majority of the votes of all the Tribunal members. If there is no majority, the award shall be made by the third arbitrator alone. (Article 32.1)</li> </ul> <p>&lt;Final and binding nature of awards&gt;</p> <ul style="list-style-type: none"> <li>- The award shall be final and binding on the parties. (Article 34.2)</li> </ul>

	VIAC Rules of Arbitration	CIETAC Arbitration Rules
Arbitration Body, Arbitration Rules, etc.	<ul style="list-style-type: none"> <li>- The Viet Nam International Arbitration Centre (VIAC) was established in 1993 by the Prime Minister's order.</li> <li>- The headquarters is located in Hanoi with a branch in Ho Chi Minh City.</li> <li>- The VIAC is a subordinate organization of the Chamber of Commerce and Industry.</li> <li>- The latest version was revised in in January 2012.</li> </ul>	<ul style="list-style-type: none"> <li>- The China International Economic and Trade Arbitration Commission (CIETAC) was established in 1956.</li> <li>- Also known as the Arbitration Court of the China Chamber of International Commerce.</li> <li>- A subordinate organization of the China Council for the Promotion of International Trade and the China Chamber of International Commerce.</li> <li>- The secretariat is located in Beijing with branches in Shenzhen, Shanghai, Tianjin, Chongqing, and Hong Kong.</li> <li>* Shenzhen and Shanghai branches were detached and became independent arbitration bodies in 2012.</li> <li>- The latest version was revised in November 2014 it (entered into force in January 2015).</li> <li>* Other Arbitration Rules can be used in arbitrations managed by CIETAC upon agreement between both parties. (Article 4.3)</li> </ul>
Subject Matter	-	-
Commencement of Arbitration Proceedings	<ul style="list-style-type: none"> <li>- When the claimant submits a claim to the arbitration body in writing, the arbitration proceedings shall</li> </ul>	<ul style="list-style-type: none"> <li>- When the claimant submits a claim to the arbitration body in writing, the arbitration proceedings shall</li> </ul>

	VIAC Rules of Arbitration	CIETAC Arbitration Rules
	commence on the date on which the request is received by the arbitration body. (Article 5)	commence on the date on which the request is received by the arbitration body. (Articles 11 and 12)
Appointment of Arbitrators	<p>&lt;Number of arbitrators&gt;</p> <ul style="list-style-type: none"> <li>- Unless the parties have agreed that the dispute shall be resolved by a sole arbitrator, the dispute shall be resolved by an Arbitral Tribunal comprising three arbitrators. (Article 10.2)</li> <li>&lt;Where the Arbitral Tribunal consists of three arbitrators&gt;</li> <li>- The claimant shall select an arbitrator or request the arbitration body to appoint an arbitrator.</li> <li>- Where the claimant requests the arbitration body to appoint an arbitrator, the arbitration body shall, within 7 days from the date of receipt of the request, make a decision to appoint an arbitrator. (Article 11.1)</li> <li>- The claimant shall, in the Request for Arbitration, select an Arbitrator or request the arbitration body to appoint an arbitrator. (Article 6.2(e))</li> <li>- The respondent shall select an arbitrator or request the arbitration body to appoint an arbitrator within 30 days from the date of receipt of the Request for Arbitration.</li> <li>- Where the respondent requests the arbitration body to appoint an arbitrator, the arbitration body shall, within 7 days from the date of receipt of the request, make a decision to appoint an arbitrator. If the respondent fails to select an arbitrator within the previously mentioned period, the arbitration body shall make a decision to appoint an arbitrator. (Article 11.2)</li> <li>- If the two arbitrators appointed by the respondent or the arbitration body fail to select the third arbitrator within 15 days from the date on which the arbitration body receives</li> </ul>	<p>&lt;Number of arbitrators&gt;</p> <ul style="list-style-type: none"> <li>- Unless otherwise agreed by the parties or provided by these Rules, the Arbitral Tribunal shall be composed of three arbitrators. (Article 25.2)</li> <li>&lt;Where the Arbitral Tribunal consists of three arbitrators&gt;</li> <li>- Within 15 days from the date of receipt of the notice of arbitration, the claimant and the respondent shall each nominate, or entrust the arbitration body to appoint, an arbitrator, failing which the arbitrator shall be appointed by the arbitration body. (Article 27.1)</li> <li>- Within 15 days from the date of the respondent’s receipt of the notice of arbitration, the parties shall jointly nominate the third arbitrator. Where the parties have failed to jointly nominate the third arbitrator, the third arbitrator shall be appointed by the arbitration body. (Articles 27.2, 27.3, and 27.4)</li> <li>* The methods for the parties to jointly appoint an arbitrator are provided for in Article 27.3.</li> <li>&lt;Where the Arbitral Tribunal consists of a sole arbitrator&gt;</li> <li>- Within 15 days from the date of the respondent’s receipt of the notice of arbitration, the parties shall jointly nominate the sole arbitrator. Where the parties have failed to jointly nominate the sole arbitrator, the sole arbitrator shall be appointed by the arbitration body. (Article 28)</li> <li>* The methods for the parties to jointly appoint an arbitrator are provided for in Article 27.3.</li> <li>&lt;Others&gt;</li> <li>- The parties shall nominate</li> </ul>

	VIAC Rules of Arbitration	CIETAC Arbitration Rules
	<p>the notice of the selection or appointment, the arbitration body shall, within 7 days after the expiry date of the period of time, make a decision to appoint the third arbitrator. (Article 11.3)</p> <p>&lt;Where the Arbitral Tribunal consists of a sole arbitrator&gt;</p> <p>- If the parties fail to agree on the selection of a sole arbitrator or request the arbitration body to appoint a sole arbitrator within 30 days from the date on which the respondent receives the Request for Arbitration, the arbitration body shall, within 7 days after the expiry date of the aforesaid period of time, make a decision to appoint the sole arbitrator. (Article 12)</p>	<p>arbitrators from the Panel of Arbitrators provided by the arbitration body in principle. (Article 26.1)</p> <p>- Where the parties have agreed to nominate arbitrators from outside the arbitration body's Panel of Arbitrators, an arbitrator so nominated is subject to the confirmation by the arbitration body. (Article 26.2)</p>
Arbitration Proceedings	<p>&lt;Place of arbitration, etc.&gt;</p> <p>- If the parties have not previously agreed on the place of arbitration, the place of arbitration shall be determined by the Arbitral Tribunal. (Article 20.1)</p> <p>- The Arbitral Tribunal may meet at any location it considers appropriate for deliberations. (Article 20.2)</p> <p>- The Arbitral Tribunal may, after consultation with the parties, conduct hearings at any place that it considers appropriate. (Article 20.2)</p> <p>* Refer to the column of the UNCITRAL Arbitration Rules for details of the place of arbitration.</p> <p>&lt;Applicable law, etc.&gt;</p> <p>- For disputes without a foreign element, the Arbitral Tribunal shall apply the law of Vietnam. (Article 22.1)</p> <p>- For disputes with a foreign element, the Arbitral Tribunal shall apply the law agreed by the parties; if the parties do not have any agreement on the applicable law, the Arbitral Tribunal shall determine the</p>	<p>&lt;Place of arbitration, etc.&gt;</p> <p>- Where the parties have not agreed on the place of arbitration or their agreement is ambiguous, the place of arbitration shall be the domicile of the arbitration body or its branch administering the case. The arbitration body may also determine the place of arbitration to be another location having regard to the circumstances of the case. (Articles 7.1 and 7.2)</p> <p>- Where the parties have agreed on the place of an oral hearing, the case shall be heard at that agreed place in principle. (Article 36.1)</p> <p>- Unless otherwise agreed by the parties, the place of oral hearings shall be in Beijing for a case administered by the arbitration body or at the domicile of the branch administering the case. If the Arbitral Tribunal considers it necessary and with the approval of the arbitration body, the place of oral hearings can be at another location. (Article 36.2)</p>

	VIAC Rules of Arbitration	CIETAC Arbitration Rules
	<p>law it considers the most appropriate. (Article 22.2)</p> <p>- If the applicable law does not contain specific provisions relevant to the merits of the dispute, the Arbitral Tribunal may apply appropriate trade usages to resolve the dispute. (Article 22.3)</p> <p>&lt;Language used in arbitration proceedings&gt;</p> <p>- For disputes without a foreign element, the language of arbitration shall be Vietnamese. (Article 21.1)</p> <p>- For disputes with a foreign element and disputes to which at least one party is an enterprise with foreign investment capital, the language of arbitration shall be as agreed by the parties. Otherwise, the Arbitral Tribunal shall determine the language or languages to be used in the arbitral proceedings, taking account of the relevant circumstances including the language of the contract. (Article 21.2)</p> <p>&lt;Availability of interim measures of protection&gt;</p> <p>- The parties may request interim measures of protection. (Article 19)</p> <p>&lt;Necessity of making public the tribunal proceedings&gt;</p> <p>- Hearings shall be held in private in principle. (Article 23.3)</p>	<p>* There are special provisions that for an arbitration administered by the CIETAC Hong Kong Arbitration Center, the place of arbitration shall be Hong Kong and the law applicable to the arbitral proceedings shall be the arbitration law of Hong Kong, etc. (Article 74)</p> <p>&lt;Applicable law, etc.&gt;</p> <p>- Where the parties have not agreed on the law applicable to the merits of their dispute or where such agreement is in conflict with a mandatory provision of the law, the Arbitral Tribunal shall determine the law applicable to the merits of the dispute. (Article 49.2)</p> <p>&lt;Language used in arbitration proceedings&gt;</p> <p>- Where the parties have not agreed on the language of arbitration, the language of arbitration to be used in the proceedings shall be Chinese. The arbitration body may also designate another language as the language of arbitration having regard to the circumstances of the case. (Article 81)</p> <p>&lt;Availability of interim measures of protection&gt;</p> <p>- The parties may request interim measures of protection. (Articles 23 and 77)</p> <p>&lt;Necessity of making public the tribunal proceedings&gt;</p> <p>- Hearings shall be held in private in principle. (Article 38.1)</p> <p>&lt;Others&gt;</p> <p>- A system for emergency arbitrator is available. (Schedule III)</p> <p>* Refer to the column of the ICC Rules of Arbitration for details of emergency arbitrator.</p> <p>- A more simple and rapid procedure (expedited procedure) is available for use in cases that meet certain</p>

	VIAC Rules of Arbitration	CIETAC Arbitration Rules
		conditions. (Articles 56-72)
Award	<p>&lt;Determination of awards&gt;</p> <ul style="list-style-type: none"> <li>- Awards shall be determined by a majority of the votes of all the Tribunal members. If there is no majority, the award shall be made by the third arbitrator alone. (Article 29)</li> </ul> <p>&lt;Final and binding nature of awards&gt;</p> <ul style="list-style-type: none"> <li>- The award is final and binding on the parties. (Article 30.5)</li> </ul> <p>&lt;Others&gt;</p> <ul style="list-style-type: none"> <li>- The arbitral award shall be made no later than 30 days from the date on which the final hearing concludes. (Article 30.3)</li> </ul>	<p>&lt;Determination of awards&gt;</p> <ul style="list-style-type: none"> <li>- Awards shall be determined by a majority of the votes of all the Tribunal members. If there is no majority, the award shall be made by the third arbitrator alone. (Articles 49.5 and 49.6)</li> </ul> <p>&lt;Final and binding nature of awards&gt;</p> <ul style="list-style-type: none"> <li>- The award shall be final and binding on the parties. (Article 47.9)</li> </ul> <p>&lt;Others&gt;</p> <ul style="list-style-type: none"> <li>- The Arbitral Tribunal shall render an arbitral award within 6 months from the date on which the Arbitral Tribunal is formed (the time limit may be extended). (Articles 48.1 and 48.2)</li> <li>- The Arbitral Tribunal shall submit the award in draft form to the arbitration body for review. (Article 51)</li> </ul>

	JCAA Rules of Arbitration
Arbitration Body, Arbitration Rules, etc.	<ul style="list-style-type: none"> <li>- The International Commercial Arbitration Committee, the former body of the Japan Commercial Arbitration Association (JCAA), was established in 1950 within the Japan Chamber of Commerce and Industry. In 1953, the Arbitration Committee was reorganized to become independent from the Japan Chamber of Commerce and Industry, and changed its name to the present name in 2003. Its head office is located in Tokyo.</li> <li>- The latest version was revised in February 2014.</li> </ul>
Subject Matter	-
Commencement of Arbitration Proceedings	- When the claimant submits a claim to the arbitration body in writing, the arbitration proceedings shall commence on the date on which the request is received by the arbitration body. (Rules 14.1 and 14.6)
Appointment of Arbitrators	<p>&lt;Number of arbitrators&gt;</p> <ul style="list-style-type: none"> <li>- If the parties fail to notify the arbitration body in writing of their agreement about the number of arbitrators within four weeks from the respondent's receipt of the notice of the Request for Arbitration, such number shall be one. (Rule 26.1)</li> <li>- Either party, within four weeks from the respondent's receipt of the notice of the Request for Arbitration, may request the arbitration body in writing that such number shall be three. Such number shall be three, if the arbitration body considers the request appropriate, taking into account the amount in dispute, the complexity of the case and other relevant circumstances. (Rule 26.2)</li> </ul>

	JCAA Rules of Arbitration
	<p>&lt;Where the Arbitral Tribunal consists of a sole arbitrator&gt;</p> <ul style="list-style-type: none"> <li>- If the parties have agreed that there shall be only one arbitrator, the parties shall agree on and appoint such arbitrator within two weeks from the respondent's receipt of the notice of the Request for Arbitration. (Rule 27.1)</li> <li>- If the parties fail to notify the arbitration body of their agreement about the number of arbitrators and it is determined that there shall be one arbitrator, the parties shall agree on and appoint such arbitrator within two weeks from the time limit of the notification period. (Rule 27.2)</li> <li>- If the parties fail to notify the arbitration body of the appointment of an arbitrator within the time limit, the arbitration body shall appoint an arbitrator. (Rule 27.3)</li> </ul> <p>&lt;Where the Arbitral Tribunal consists of three arbitrators&gt;</p> <ul style="list-style-type: none"> <li>- If the parties have agreed that the number of arbitrators shall be three, each party shall appoint one arbitrator within three weeks from the respondent's receipt of the notice of the Request for Arbitration. (Rule 28.1)</li> <li>- If the arbitration body determines that the number of arbitrators shall be three at the request of either party, each party shall appoint one arbitrator within three weeks from the party's receipt of the notice of the determination by the arbitration body. (Rule 28.2)</li> <li>- If the two arbitrators appointed by the parties fail to agree on the appointment of the third arbitrator within three weeks from the two arbitrators' receipt of the notice that the arbitration body has confirmed their appointment, the arbitration body shall appoint such arbitrator. (Rules 28.4 and 28.5)</li> </ul> <p>&lt;Nationality of arbitrators, etc.&gt;</p> <ul style="list-style-type: none"> <li>- In case the arbitration body appoints an arbitrator and a party requests that the arbitrator be a person of a different nationality from that of any of the parties, the arbitration body shall respect such request. (Rules 27.4 and 28.6)</li> </ul>
Arbitration Proceedings	<p>&lt;Place of arbitration, etc.&gt;</p> <ul style="list-style-type: none"> <li>- Unless agreed upon by the parties, the Board shall decide the place of arbitration. (Article 36(1)).</li> <li>- Unless otherwise agreed by the parties, the place of arbitration shall be the city of the office of the arbitration body (=Tokyo). (Rule 36.1)</li> <li>- The Arbitral Tribunal may meet at any location it considers appropriate for deliberations. (Rule 36.2)</li> <li>- Unless otherwise agreed by the parties, the Arbitral Tribunal may also meet at any location it considers appropriate for any other purpose, including hearings. (Rule 36.2)</li> </ul> <p>* Refer to the column of the UNCITRAL Arbitration Rules for details of the place of arbitration.</p> <p>&lt;Applicable law, etc.&gt;</p> <ul style="list-style-type: none"> <li>- If the parties fail to agree on the rules of law applicable to the substance of the dispute, the Arbitral Tribunal shall apply the substantive law of the country or state to which the dispute referred to the arbitral proceedings is most closely connected. (Rules 60.1 and 60.2)</li> </ul>



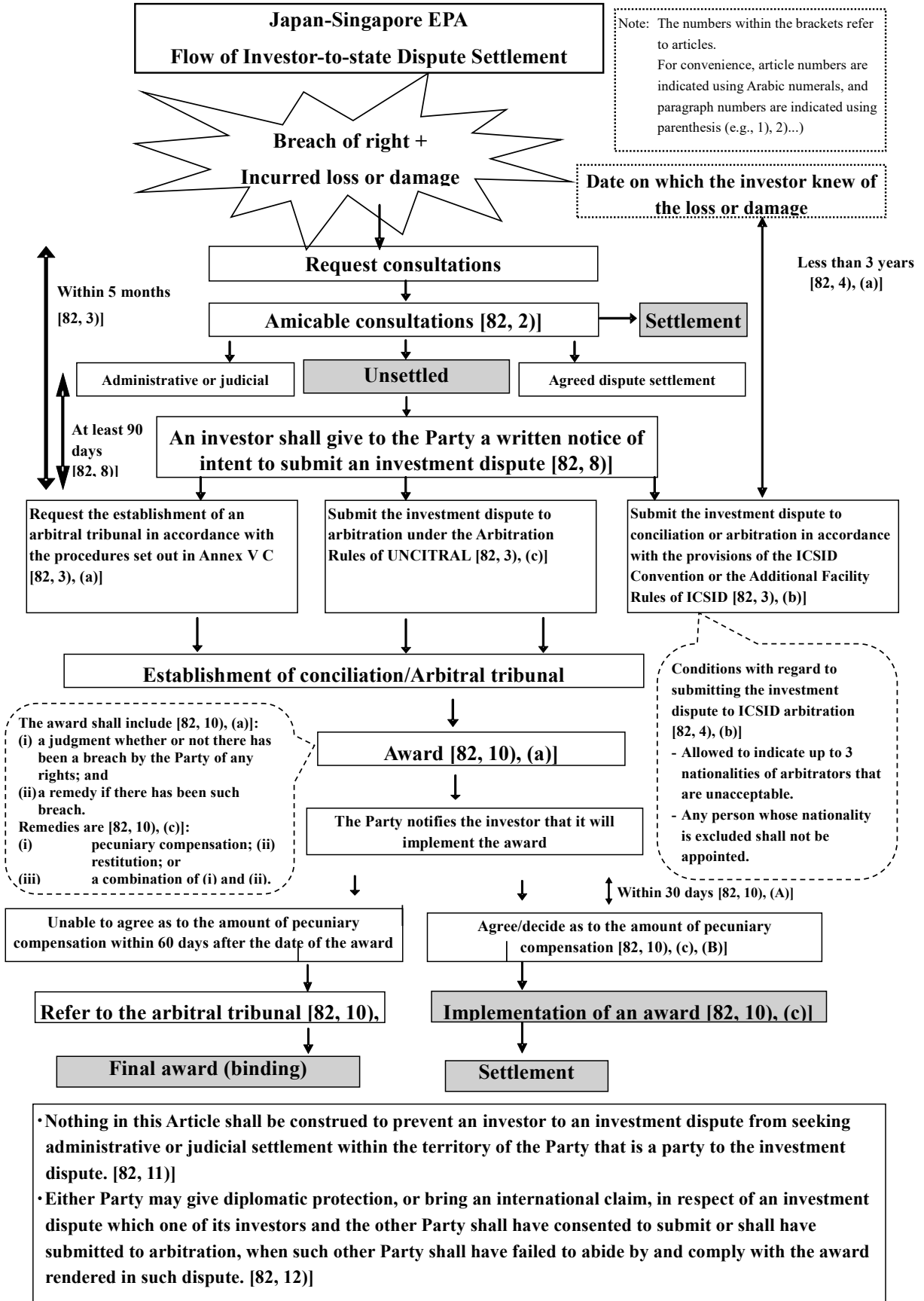
	JCAA Rules of Arbitration
	<p>&lt;Language used in arbitration proceedings&gt;</p> <ul style="list-style-type: none"> <li>- Unless the parties have agreed on the language(s) to be used in the arbitral proceedings, the Arbitral Tribunal shall determine such language(s). The arbitral tribunal, in so determining, shall take into account the language of the contract containing the Arbitration Agreement and the cost thereof. (Rule 11.1)</li> </ul> <p>&lt;Availability of interim measures of protection&gt;</p> <ul style="list-style-type: none"> <li>- The parties may request interim measures of protection. (Rule 66)</li> </ul> <p>&lt;Necessity of making public the tribunal proceedings&gt;</p> <ul style="list-style-type: none"> <li>- Hearings shall be held in private in principle. (Rule 38.1)</li> </ul> <p>&lt;Others&gt;</p> <ul style="list-style-type: none"> <li>- A system for emergency arbitrator is available. (Rules 70-74)</li> <li>* Refer to the column of the ICC Rules of Arbitration for details of emergency arbitrator.</li> <li>- A more simple and rapid procedure (expedited procedure) is available for use in cases that meet certain conditions. (Rules 75-82)</li> </ul>
Award	<p>&lt;Determination of awards&gt;</p> <ul style="list-style-type: none"> <li>- Awards shall be determined by a majority of the votes of all the Tribunal members. (Rule 7.1). If there is no majority, the award shall be made by the third arbitrator alone. (Rule 7.2)</li> <li>* Procedural matters in arbitral proceedings may be decided by the third arbitrator alone, if the other members of the Arbitral Tribunal or all parties so agree. (Rule 7.3)</li> </ul> <p>&lt;Final and binding nature of awards&gt;</p> <ul style="list-style-type: none"> <li>- The award shall be final and binding on the parties. (Rule 59)</li> </ul>

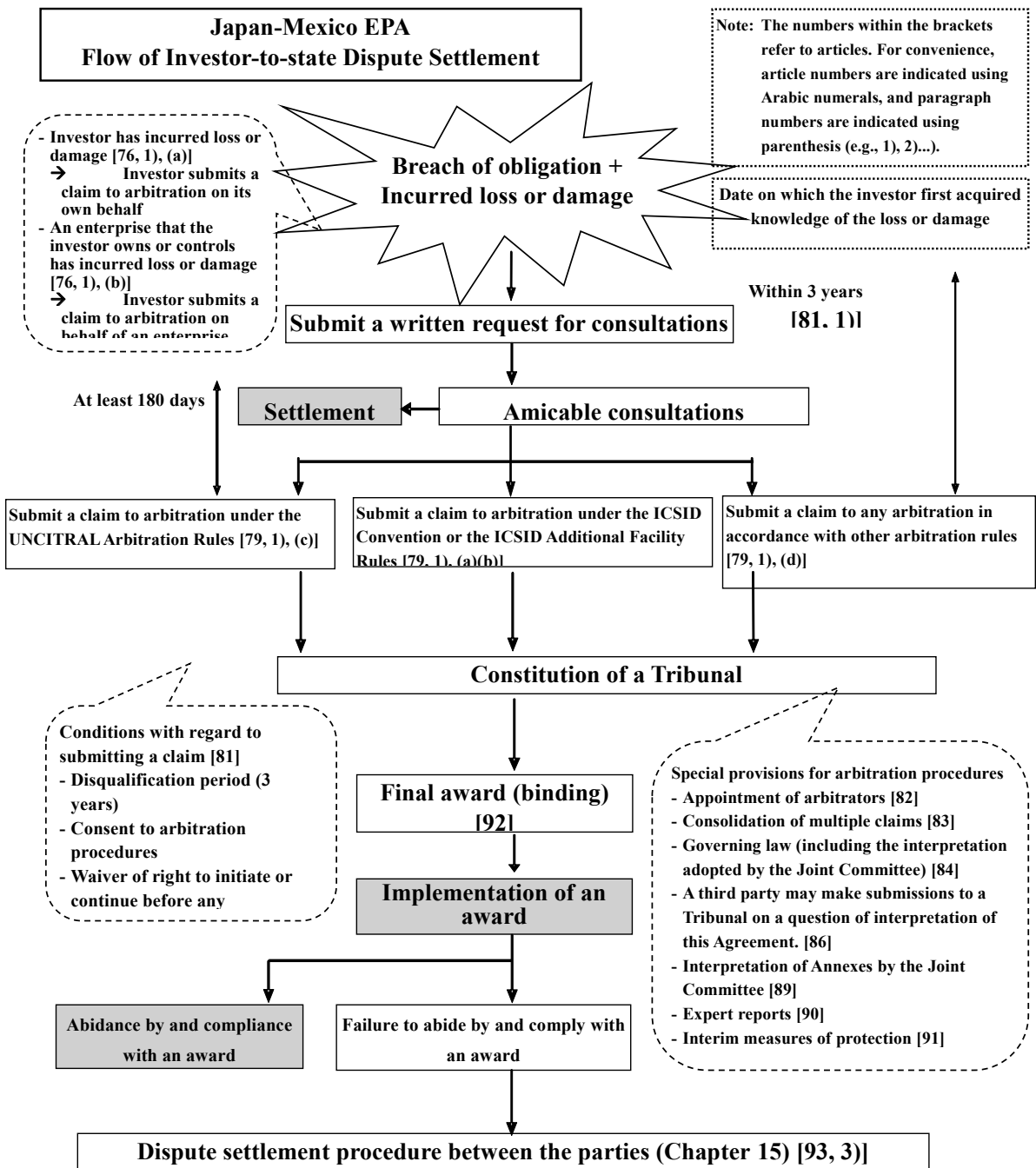
## 2) THE DISPUTE SETTLEMENT PROVISIONS FOR INVESTOR-TO-STATE DISPUTES THAT ARE PROVIDED IN THE INVESTMENT CHAPTER IN THE EPAs ENTERED INTO BY JAPAN

The dispute settlement provisions for investor-to-state (see Chapter 7 for the provisions related to “state-to-state” disputes)

Most of the EPAs entered into by Japan adopt the following common sequence of procedural steps: i) first, the parties to the dispute shall consult with each other with the view to settling the investment dispute; ii) if the dispute is not settled through consultation, the disputing investor may submit the dispute to an arbitration proceeding; and iii) pursuant to the award, if required, the respondent nation shall provide monetary damages. While the foregoing procedural structure is used not only in the EPAs entered into by Japan, but also in common with the regional trade agreements executed between other countries, the specific text of the provisions differ depending on the agreements (the provisions in investment treaties on “state-to-state” disputes are often simpler than the provisions of the EPAs).

The following are the flowcharts of the dispute settlement procedures (investor-to-state) provided for in the “Japan-Singapore EPA,” “Japan-Mexico EPA,” and “Japan-Malaysia EPA,” and for reference, the investment chapter of NAFTA.

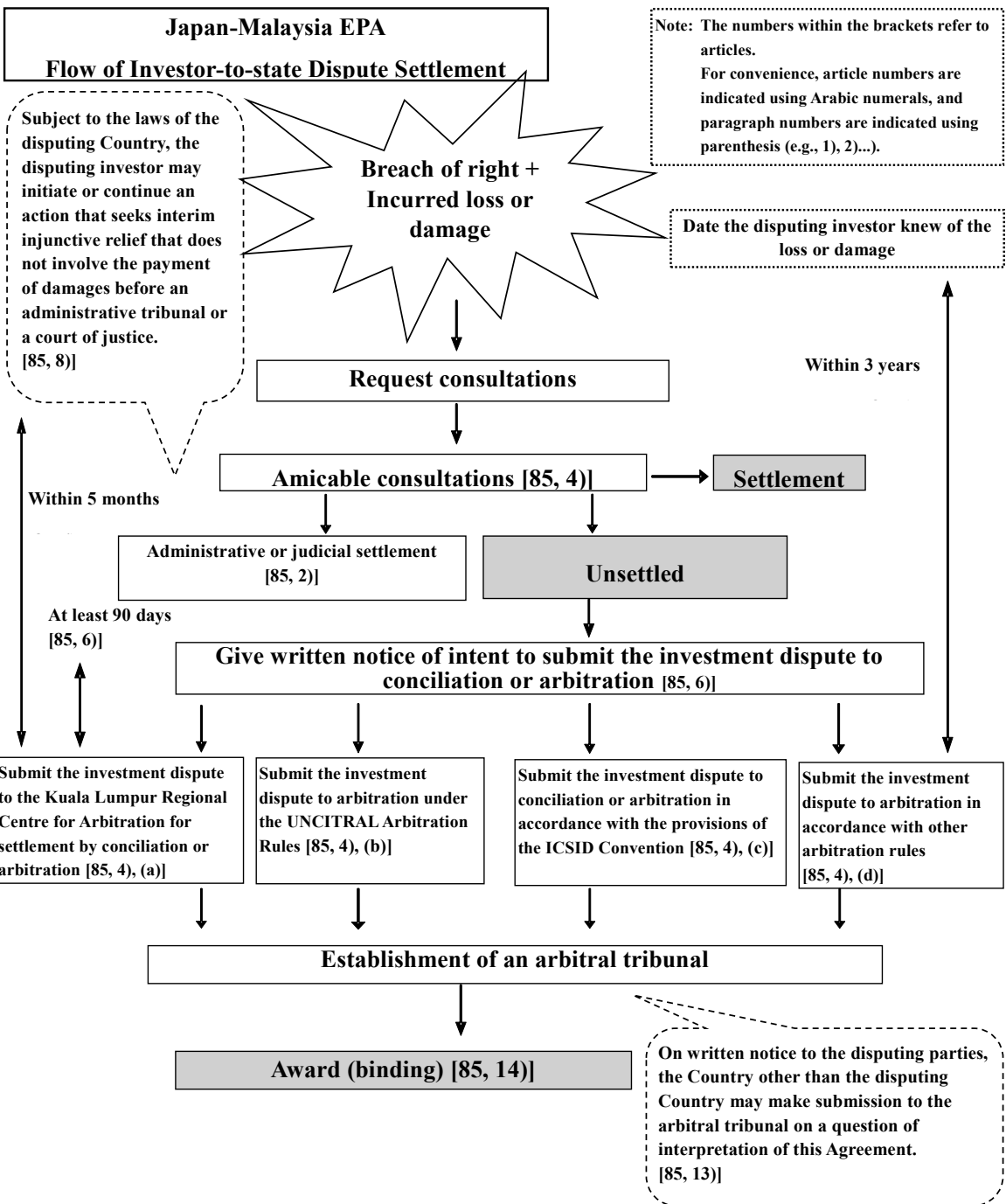




**If a disputing Party fails to abide by or comply with a final award, the Party whose investor was a party to the arbitration may have recourse to the dispute settlement procedure under Chapter 15. In this event, the requesting Party may seek:**

**(a) a determination that the failure to abide by or comply with the final award is inconsistent with the obligations of this Agreement; and**

**(b) a recommendation that the Party abide by or comply with the final award. [93, 3)]**



- **Nothing in this Article (Settlement of Investment Disputes between a Country and an Investor of the Other Country) shall be construed to prevent a disputing investor from seeking administrative or judicial settlement within the disputing Country. [85, 2]**
- **Either Country may, in respect of an investment dispute that one of its investors shall have submitted to arbitration, give diplomatic protection, or bring an international claim before another forum, when the other Country shall have failed to abide by and comply with the award rendered in such investment dispute. [85, 16]**

**NAFTA**  
**Flow of Investor-to-state Dispute Settlement Procedure**

