CHAPTER 5

INVESTMENT

BACKGROUND OF RULES

1. BACKGROUND

(1) INCREASE IN FOREIGN DIRECT INVESTMENT

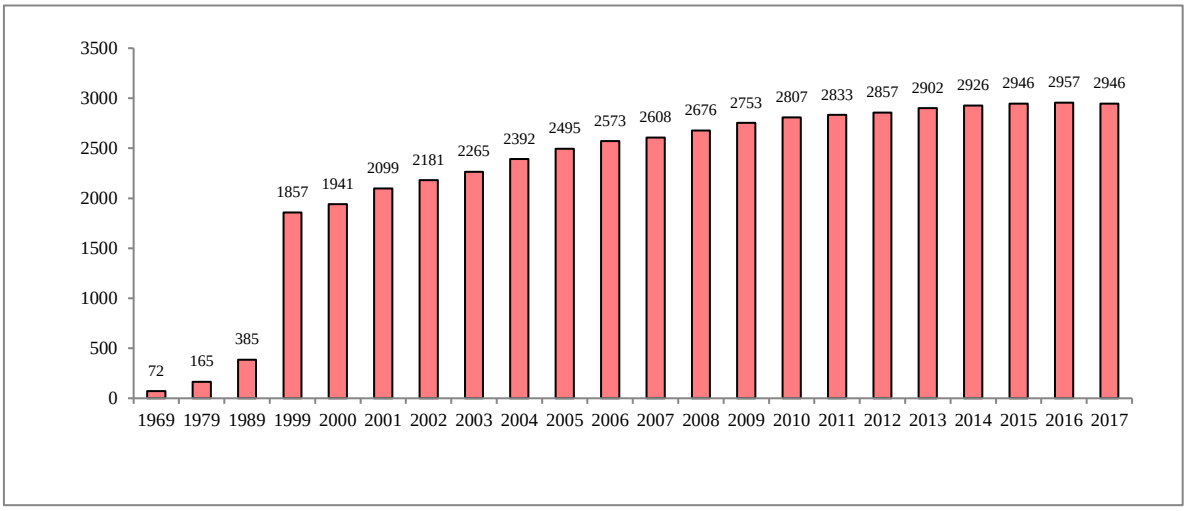
Since the 1980s, foreign direct investment has been growing rapidly worldwide and continues to play a significant role in leading worldwide economic growth. In 1980, the ratio of the foreign direct investment (on a cumulative basis) to GDP was 5.8% in respect of external direct investment and 5.3% in respect of inward direct investment. In 2017, the figures had grown to 38.6% and 39.5%, respectively (source: UNCTAD “World Investment Report 2018”).

With Japan’s balance of payments, which reflects the expansion of surplus from direct investment income and , the raising the surplus to FY2017 was approximately 19.7 trillion yen (the surplus shrank due to the decrease in securities investment income), while the trade surplus is approximately 4.9 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 2017, 2,946 (3,322 if FTAs that include investment chapters are included) BITs were in existence. Moreover, while this number was 2,957 as of the end of 2016, since 22 were terminated, and 17 were abandoned by Ecuador, now the number has dropped by 11.

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 Liberalisation of Capital Movements, enacted when OECD was established in 1961, provides for the liberalisation 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 establishment of a new chapter to the effect that enterprises have a responsibility to respect human rights; (2) reference to due diligence, including that enterprises should properly monitor their supply chains as well and take necessary prevention or response measures if any problem has been found; and (3) introduction of guidelines concerning the position of parallel proceedings in dispute settlement proceedings handled by National Contact Points (NCP). 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)). For details, see the section concerning energy in Part III, Chapter 8.

(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.

In addition, for an action differ from conventional initiatives where the primary objective is “protection” or “liberalization” of investment, earnest discussions spread through developing nations concerning the facilitation of investment from 2017. At the eleventh Ministerial Conference in Buenos Aires (MC11), 70 Members voluntarily issued a Ministerial declaration. This declaration included the following decisions: (1) the 70 Members affirm the importance of preserving the multilateral system for discussion; (2) the main purpose of the framework is to facilitate developing countries and LDCs’ participation in international investment; and (3) a meeting will be held in early 2018 to discuss how outreach activities and structured discussion will be promoted.

After the decision at MC11, it was agreed to hold the first joint meeting in March 2018, the 8th joint meeting during the year, and to further accelerate discussions between the Members heading into the twelfth Ministry Conference. Up to this point, this meeting has discussed on rationalization and facilitation of investment procedures required in promoting domestic investment that leads to economic growth, mainly from the perspective of developing countries.

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

OECD (35 developed countries)
[2012]
Establishment of Advisory Task Force on the OECD Codes of Liberalisation (ATFC)
・Discussed the position of financial measures in individual countries in the context of the Codes
[2016]
・Discussed the review of the Codes

[2000]
Fourth update at the OECD Council meeting at Ministerial level
[2003]
OECD Council meeting at Ministerial level
Japan’s proposal concerning Investment for Development
[2006]
OECD Council meeting at Ministerial level
Policy Framework for Investment approved
[2008]
Amended the OECD Benchmark Definition of Foreign Direct Investment
[2011]
Fifth update at the OECD Council meeting at Ministerial level
・Introduction of a chapter concerning human rights, etc.
[2013]
Established the OECD Working Party on Responsible Business Conduct (WPRBC)
・Responsible for the Guidelines for Multinational Enterprises
[2015]

OECD Council meeting at Ministerial level
Policy Framework for Investment approved

WTO
(164 countries including developing countries)
[2017.12]
Eleventh ministerial meeting (Buenos Aires)
A Ministerial declaration was adopted by 70 members

APEC
(21 countries and regions of Asia)
[2008]
Model investment measure (led by Japan)
Non-agreed final draft (November)
(work suspended)

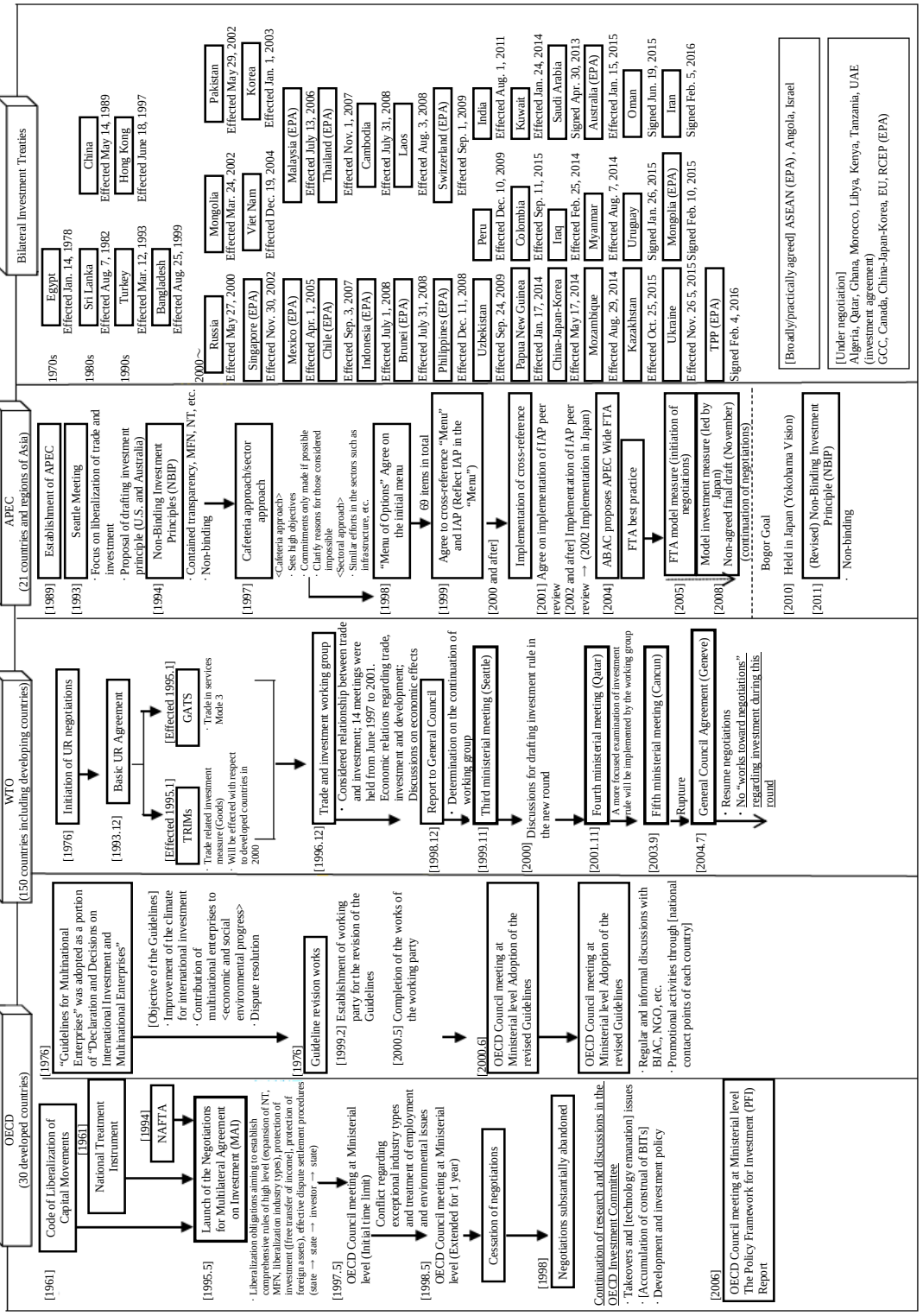
[2008]
APEC Investment Facilitation Action Plan (IFAP) (2008 – 2010)
・Priority Theme:
(1) E-transparency
(2) Reducing investor risk
(3) Simplifying business regulation
[2012]
IFAP II (2012 – 2014)
・Priority Theme:
(1) Enhance stability of investment environments, security of property and protection of investments
(2) Improve the efficiency and effectiveness of investment procedures
(3) Building and maintaining constructive stakeholder relationships
[2015]
IFAP III (2015 – 2017)
・Priority Theme:
(1) E-transparency
(2) Reducing investor risk
(3) Simplifying business regulation
IFAP IV
(Continuation of negotiations)

Saudi Arabia
Effected Apr. 7, 2017
Uruguay
Effected Apr. 14, 2017
Iran
Effected Apr. 26, 2017
Oman
Effected Jul. 21, 2017
Kenya
Effected Sep. 14, 2017
Israel
Effected Oct. 5, 2017

Armenia
Signed Feb. 14, 2018
UAE
Signed Apr. 30, 2018
Jordan
Signed Nov. 27, 2018
Argentina
Signed Dec. 1, 2018
EU (EPA)
Effected February 1, 2019

[Broadly/practically agreed, negotiation completed]
ASEAN (EPA)

[Under negotiation]
Angola, Algeria, Qatar, Ghana, Cote d'Ivoire, Senegal, Georgia, Tanzania, Turkmenistan, Nigeria, Bahrain, Morocco, Kyrgyz, Zambia (investment agreement)
RCEP, Canada, Turkey, China-Japan-Korea, (EPA)


As of February 5, 2016
OECD
(30 developed countries)
WTO
(150 countries including developing countries)
APEC
(21 countries and regions of Asia)
Bilateral Investment Treaties
[1961] Code of Liberalization of Capital Movements
[1961] National Treatment Instrument
[1994] NAFTA
[1995.5] Launch of the Negotiations for Multilateral Agreement on Investment (MAI)
· Liberalization obligations aiming to establish comprehensive rules of high level (expansion of NT, MFN, liberalization industry types), protection of investment ((free transfer of income), protection of foreign assets), effective dispute settlement procedures (state → state → investor → state)
[1997.5] OECD Council meeting at Ministerial level (Initial time limit)
Conflict regarding exceptional industry types and treatment of employment and environmental issues
[1998.5] OECD Council meeting at Ministerial level (Extended for 1 year)
Cessation of negotiations
[1998] Negotiations substantially abandoned
Continuation of research and discussions in the OECD Investment Committee
· Takeovers and [technology emanation] issues
· [Accumulation of construal of BITs]
· Development and investment policy
[2006] OECD Council meeting at Ministerial level
The Policy Framework for Investment (PFI) Report
[1976] "Guidelines for Multinational Enterprises" was adopted as a portion of "Declaration and Decisions on International Investment and Multinational Enterprises"
[Objective of the Guidelines]
· Improvement of the climate for international investment
· Contribution of multinational enterprises to <economic and social environmental progress>
· Dispute resolution
[1976] Guideline revision works
[1999.2] Establishment of working party for the revision of the Guidelines
[2000.5] Completion of the works of the working party
[2000.6] OECD Council meeting at Ministerial level/ Adoption of the revised Guidelines
OECD Council meeting at Ministerial level/ Adoption of the revised Guidelines
· Regular and informal discussions with BIAC, NGO, etc.
· Promotional activities through [national contact points of each country]
[1976] Initiation of UR negotiations
[1993.12] Basic UR Agreement
[Effected 1995.1] TRIMs
· Trade related investment measure (Goods)
· Will be effected with respect to developed countries in 2000
[Effected 1995.1] GATS
· Trade in services Mode 3
[1996.12] Trade and investment working group
· Considered relationship between trade and investment; 14 meetings were held from June 1997 to 2001.
Economic relations regarding trade, investment and development;
Discussions on economic effects
[1998.12] Report to General Council
· Determination on the continuation of working group
[1999.11] Third ministerial meeting (Seattle)
[2000] Discussions for drafting investment rule in the new round
[2001.11] Fourth ministerial meeting (Qatar)
· A more focused examination of investment rule will be implemented by the working group
[2003.9] Fifth ministerial meeting (Cancun)
· Rupture
[2004.7] General Council Agreement (Geneve)
· Resume negotiations
· No "works toward negotiations" regarding investment during this round
[1989] Establishment of APEC
[1993] Seattle Meeting
· Focus on liberalization of trade and investment
· Proposal of drafting investment principle (U.S. and Australia)
[1994] Non-Binding Investment Principles (NBIP)
· Contained transparency, MFN, NT, etc.
· Non-binding
[1997] Cafeteria approach/sector approach
<Cafeteria approach>
· Sets high objectives
· Commitments only made if possible
· Clarify reasons for those considered impossible
<Sectoral approach>
· Similar efforts in the sectors such as infrastructure, etc.
[1998] "Menu of Options" Agree on the initial menu
69 items in total
[1999] Agree to cross-reference "Menu" and IAP (Reflect IAP in the "Menu")
[2000 and after] Implementation of cross-reference
[2001] Agree on implementation of IAP peer review
[2002 and after] Implementation of IAP peer review → (2002 Implementation in Japan)
[2004] ABAC proposes APEC Wide FTA
FTA best practice
[2005] FTA model measure (initiation of negotiations)
[2008] Model investment measure (led by Japan)
· Non-agreed final draft (November)
[continuation of negotiations]
Bogor Goal
[2010] Held in Japan (Yokohama Vision)
[2011] (Revised) Non-Binding Investment Principle (NBIP)
· Non-binding
1970s Egypt Effected Jan. 14, 1978
1980s Sri Lanka Effected Aug. 7, 1982
1990s Turkey Effected Mar. 12, 1993
Bangladesh Effected Aug. 25, 1999
2000~
Russia Effected May 27, 2000
Singapore (EPA) Effected Nov. 30, 2002
Mexico (EPA) Effected Apr. 1, 2005
Chile (EPA) Effected Sep. 3, 2007
Indonesia (EPA) Effected July 1, 2008
Brunei (EPA) Effected July 31, 2008
Philippines (EPA) Effected Dec. 11, 2008
Uzbekistan Effected Sep. 24, 2009
Papua New Guinea Effected Jan. 17, 2014
China-Japan-Korea Effected May 17, 2014
Mozambique Effected Aug. 29, 2014
Kazakhstan Effected Oct. 25, 2015
Ukraine Effected Nov. 26 5, 2015
TPP (EPA) Signed Feb. 4, 2016
Mongolia Effected Mar. 24, 2002
Viet Nam Effected Dec. 19, 2004
Malaysia (EPA) Effected July 13, 2006
Thailand (EPA) Effected Nov. 1, 2007
Cambodia Effected July 31, 2008
Laos Effected Aug. 3, 2008
Switzerland (EPA) Effected Sep. 1, 2009
Peru Effected Dec. 10, 2009
Colombia Effected Sep. 11, 2015
Iraq Effected Feb. 25, 2014
Myanmar Effected Aug. 7, 2014
Uruguay Signed Jan. 26, 2015
Mongolia (EPA) Signed Feb. 10, 2015
China Effected May 14, 1989
Hong Kong Effected June 18, 1997
Pakistan Effected May 29, 2002
Korea Effected Jan. 1, 2003
India Effected Aug. 1, 2011
Kuwait Effected Jan. 24, 2014
Saudi Arabia Signed Apr. 30, 2013
Australia (EPA) Effected Jan. 15, 2015
Oman Signed Jun. 19, 2015
Iran Signed Feb. 5, 2016
[Broadly/practically agreed] ASEAN (EPA), Angola, Israel
[Under negotiation]
Algeria, Qatar, Ghana, Morocco, Libya, Kenya, Tanzania, UAE (investment agreement)
GCC, Canada, China-Japan-Korea, EU, RCEP (EPA)

2. OVERVIEW OF LEGAL DISCIPLINES

(1) TRADITIONAL INVESTMENT PROTECTION AGREEMENTS, AND NAFTA INVESTMENT CHAPTER AND OTHER 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-favoured-nation treatment during the pre-investment phase as well as the post-establishment phase. A typical example is the investment chapter in NAFTA. These may be referred to as "investment liberalization agreements."

(2) MAJOR PROVISIONS IN INVESTMENT AGREEMENTS

As previously mentioned, there are two types of investment agreements: "investment protection agreements" and "investment 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 liberalization agreements." However, elements contained in investment agreements vary and all elements mentioned hereunder are not necessarily included in all investment agreements.

(a) 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.

(b) National Treatment (NT) and Most-Favoured-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-favoured-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-favoured-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 favourable 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 favourable 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.

(c) 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 favourable 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.

(d) 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.

(e) 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.

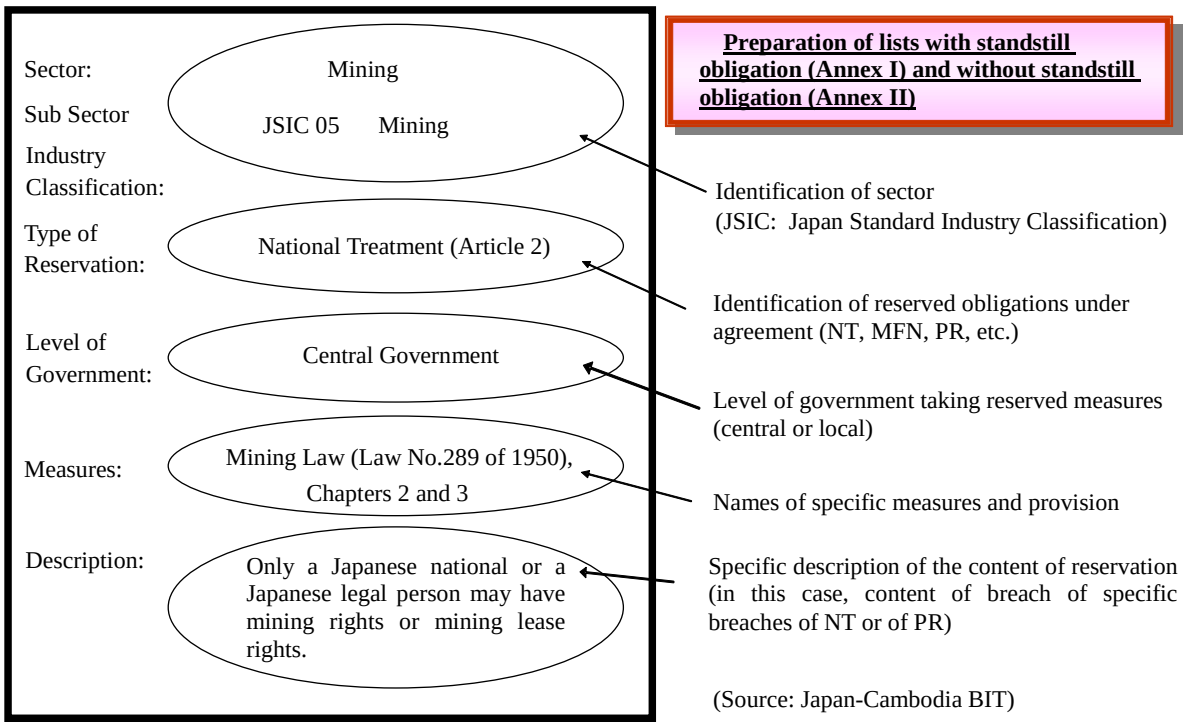
First, the WTO TRIMs Agreement prohibits export restrictions, local content requirements (local content requirements for goods), and export/import balance requirements as being "investment measures that have a strong trade-distorting effect." In addition, export requirements, domestic sale limit requirements, 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 prohibiting the party from intervening in a license contract on royalties in technology agreements were further enhanced by including them in the recently concluded Japan-Mozambique Investment Agreement, Japan-Myanmar Investment Agreement, Japan-Mongolia EPA, Comprehensive and Progressive Agreement of the Trans-Pacific Partnership (CPTPP), Japan-Israel Investment Agreement, Japan-Armenia Investment Agreement, Japan-UAE Investment Agreement, and Japan-EU EPA. These clauses are significant for the purpose of recovering due compensation for research and development activities. Furthermore, the CPTPP includes a clause prohibiting requirement for use of specific technology. This article has an important significance in

preventing a requirement for use of technology recommended by the parties.

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



(f) 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 in their “schedules of commitments” (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, schedules of commitments are generally not included. In “investment 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 favourable). 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.).

(g) 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".

(h) 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 favourable than that which is accorded to the contracting party's own investors or investors of a non-party.

(i) 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).

(j) 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.

(k) 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").

(l) 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.

(m) 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 2019, Japan has entered into 29 BITs and 14 EPAs with chapters on investment. 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 43 investment agreements.

		Date Signed	**Date of Entry into Force**
(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)	Korea	March 2002	January 2003
(x)	Viet Nam	November 2003	December 2004
	* Incorporated in the Japan-Viet Nam EPA signed in December 2008.		
(xi)	Cambodia	June 2007	July 2008
(xii)	Lao P.D.R.	January 2008	August 2008
(xiii)	Uzbekistan	August 2008	September 2009
(xiv)	Peru	November 2008	December 2009
		* Incorporated in the Japan-Peru EPA, signed in May 2011.	
(xv)	Papua New Guinea	April 2011	January 2014
(xvi)	Columbia	September 2011	September 2015
(xvii)	Kuwait	March 2012	January 2014
(xviii)	China and Korea	May 2012	May 2014
(xix)	Iraq	June 2012	February 2014
(xx)	Saudi Arabia	April 2013	April 2017
(xxi)	Mozambique	June 2013	August 2014
(xxii)	Myanmar	December 2013	August 2014
(xxiii)	Kazakhstan	October 2014	October 2015
(xxiv)	Uruguay	January 2015	April 2017
(xxv)	Ukraine	February 2015	November 2015
(xxvi)	Oman	June 2015	July 2017
(xxvii)	Iran	February 2016	April 2017
(xxviii)	Kenya	August 2016	September 2017
(xxix)	Israel	February 2017	October 2017
(xxx)	Armenia	February 2018	
(xxxi)	UAE	April 2018	
(xxxii)	Jordan	November 2018	
(xxxiii)	Argentina	December 2018	
(Economic Partnership Agreements)			

		Date Signed	Date of Entry into Force
(Investment Agreements)			
*(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	June 2016
*(xiii)	TPP	February 2016	
*(xiv)	CPTPP	March 2018	December 2018
*(xv)	Japan-EU EPA	July 2018	February 2019

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

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

Name of the agreement (date of entry into force. effected)		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-Bangladesh BIT (Aug 1999)	Japan-Russia BIT (May 2000)	Japan-Mongolia 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-establishment stage	×	×	×	×	×	×	×	×	○
	post-establishment stage	○	○	△ (exception: measures for public order, national security or sound development of national economy.)	○	○	○	○	○	○
Most-Favoured-Nation Treatment (MFN)	pre-establishment stage	○ (exception: housing projects of member states of the League of Arab States)	○	○	○	○	○	○	○	× (consideration)
	post-establishment stage	○	○	○	○	○	○	○ (exception the former Soviet Union)	○	× (consideration)
Prohibition of Performance Requirements (PR)		×	×	×	×	×	×	△(4) (only post-establishment stage)	△(4) (only post-establishment stage) (TRIMs incorporated)	×
	-Export restriction requirement	×	-	-	-	-	-	○	○	-
	-Local content	-	-	-	-	-	-	○	○	-

Name of the agreement (date of entry into force. effected)		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-Bangladesh BIT (Aug 1999)	Japan-Russia BIT (May 2000)	Japan-Mongolia BIT (Mar 2002)	Japan Pakistan BIT (May 2002)
	requirement									
	-Local purchase requirement for goods & services	-	-	-	-	-	-	○	○	-
	-Export & import balance requirement	-	-	-	-	-	-	○	○	-
	-Export requirement	-	-	-	-	-	-	×	×	-
	-Domestic sale restriction requirement	-	-	-	-	-	-	×	×	-
	-Senior Management & Board of Directors	-	-	-	-	-	-	×	×	-
	-Local citizen employment requirement	-	-	-	-	-	-	×	×	-
	-Headquarter location requirement	-	-	-	-	-	-	×	×	-
	-R&D requirement	-	-	-	-	-	-	×	×	-
	-Technology transfer requirement	-	-	-	-	-	-	×	×	-
	-Royalty regulation	-	-	-	-	-	-	×	×	-
	-Specific region supply requirement	-	-	-	-	-	-	×	×	-
	-Use of specified technology/request for use restrictions	-	-	-	-	-	-	×	×	-
Reservation list (Negative list)		×	×	×	×	×	×	×	×	×
Fair and equitable treatment Full protection and security		△ (constant protection and security)	△ (constant protection and security)	△ (constant protection and security)	△ (constant protection and security)	○	△ (constant protection and security)	○	△ (constant protection and security)	△ (constant protection and security)

Name of the agreement (date of entry into force. effected)	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-Bangladesh BIT (Aug 1999)	Japan-Russia BIT (May 2000)	Japan-Mongolia BIT (Mar 2002)	Japan Pakistan BIT (May 2002)
Umbrella clause	×	×	×	×	○	×	○	×	×
Expropriation and compensation	○	○	△ (only MFN for compensation)	○	○	○	○	○	○
NT & MFN of Protection from strife	○	○	△ (only MFN)	○	○	○	○	○	○
Transfers	○	○	△ (exchange restriction allowed)	○	○	○	○	○	○
Entry of investors	○	○	○	○	×	○	○	○	○
Transparency	×	×	×	×	×	×	○	○	×
Public comments	×	×	×	×	×	×	×	×	×
Against corruption	×	×	×	×	×	×	×	×	×
General exceptions	×	×	△ (only NT)	×	×	×	×	×	×
National security exceptions	×	×	△ (only NT)	×	×	△ (only NT)	△ (only NT)	×	×
ISDS	○	○	△ (only for dispute concerning the amount of compensation for expropriation)	○	○	○	○	○	○
SSDS	○	○	○	○	○	○	△ (sympathetic consideration)	○	○
Joint committee	×	×	△ (simplified provisions)	×	×	×	×	△ (simplified provisions)	×
Others	NT exception: registration of	NT exception: registration of		NT exception: registration of	NT exception: registration of	NT exception: registration of	NT exception: registration of	NT exception: registration of	NT exception: registration of

Name of the agreement (date of entry into force. effected)	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-Bangladesh BIT (Aug 1999)	Japan-Russia BIT (May 2000)	Japan-Mongolia BIT (Mar 2002)	Japan Pakistan BIT (May 2002)
	aircraft and ownership of ship MFN exception: reciprocity for rights of immovable property	aircraft, ownership of ship and banking business MFN exception: reciprocity for rights of immovable property		aircraft, ownership of ships and immovable property, and establishment of additional branches of existing banks	aircraft and ownership of ships	aircraft and ownership of ships	aircraft and ownership of ships	aircraft and ownership of ships	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)
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 investment, investments through non-Party may be excluded
National Treatment(NTT)	pre-establishment stage	○	○	○	○	○ (portfolio investment excluded)	○	○	○	○	○
	post-establishment stage	○	○	○	○	○	○	○	○	○	○
Most-Favoured-Nation Treatment(MFN)	pre-establishment stage	○ (FTA exception)	○ (FTA exception)	○ (FTA exception)	○	○	○	○	○	○	○
	post-establishment stage	○ (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	×	×	×	×	○	×	×	×	○	×
	-Local content requirement	○	○	○	○	○	○	○	○	○	○

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 purchase requirement for goods & services	○	○	○	○	○	○	○	○	○	○
-Export & import balance requirement	○	○	○	○	○	○	○	○	○	○
-Export requirement	○	○	○	○	×	○	○	○	×	○
-Domestic sale restriction requirement	○	○	○	○	×	○	×	○	×	○
-Senior Management & Board of Directors	×	○	○	○	×	○	×	○	×	○
-Local citizen employment requirement	×	○	×	×	×	×	×	△(reserved)	×	×
-Headquarter location requirement	○	○	○	×	×	×	×	○	×	○
-Research & development requirement	○	○	○	×	×	×	×	○	×	○
-Technology transfer requirement	○	○	○	○	×	○	×	○	×	×
-Royalty regulation	×	×	×	×	×	×	×	×	×	×
-Specific region supply requirement	○	○	○	○	×	○	×	○	×	○
-Use of specified technology/request for use restrictions	×	×	×	×	×	×	×	×	×	×
Reservation List (Negative list)	○	○	○	○	○	○	△ (positive list)	○	○	○
Fair and equitable treatment Full protection and Security	○	○	○	○	○	○	○	○	○	○
Umbrella clause	×	×	×	×	×	×	×	○	×	×

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)
Expropriation and compensation	○	○	○	○	○	○	○	○	○	○
NTM & MFN of Protection from strife	○	○	○	○	○	○	○	○	○	○
Transfer	○	○	○	○	○	○	○	○	○	○
Entry of investors	●	○	○	●	○	×	●	○	×	●
Transparency	●	○	○	○	●	○	○	○	●	●
Public comments	×	×	● (EPA)	●	●	●	●	○	●	●
Against corruption	×	×	×	×	×	×	●	○	×	●
General exceptions	○	○	○	●	●	●	●	○	●	●
National security exceptions	●	○	○	●	●	●	●	○	●	●
ISDS	○	○	○	○	△ (NT･PR excluded)	○	△ (PR、pre-establishment stage excluded)	○	△ (post-establishment stage only)	○
SSDS	●	○	○	●	●	●	●	○	●	●
Joint committee	○	○	○	●	○	●	○	○	○	○

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
National Treatment(NTT)	pre-establishment stage	○	○	○	○	○	○	×	○	×	×
	post-establishment stage	○	○	○	○	○	○	○	○	○	△ (Collective withholding of existing non-conforming measures)
Most-Favoured-Nation Treatment(MFN)	pre-establishment stage	○	○	○	○ (FTA exception)	○	×	× (endeavour clause)	○	× (endeavour clause)	○ (FTA exception)
	post-establishment stage	○	○	○	○	○	○	○	○	○	○ (FTA exception)
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 technology transfer are prohibited.)
	-Export restriction requirement	×	×	○	○	×	○	○	○	×	○
	-Local content requirement	△ (reserved)	○	○	○	○	○	○	○	○	○
	-Local purchase requirement for goods & services	○	○	○	○	○	○	○	○	○	○
	-Export & import balance requirement	○	○	○	○	○	○	○	○	○	○
	-Export requirement	△ (reserved)	○	○	×	○	○	○	○	○	△ (Prohibition of

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)
										unfair or discriminatory measures)
-Domestic sale restriction requirement	○	○	○	×	○	×	○	○	×	×
-Senior Management & Board of Directors	○	○	○	×	△(reserved)	△(reserved)	×	○	×	×
-Local citizen employment requirement	△ (reserved)	○	○	×	×	×	○	○	×	×
-Headquarter location requirement	○	○	○	×	○	×	○	○	×	×
-Research & development requirement	○	○	○	×	×	×	○	○	×	×
-Technology transfer requirement	△ (reserved)	○	○	×	○	△(reserved)	○	○	○	△ (Prohibition of unfair or discriminatory measures)
-Royalty regulation	×	×	×	×	×	×	×	×	×	×
-Specific region supply requirement	○	○	○	×	○	○	○	○	×	×
-Use of specified technology/request for use restrictions	×	×	×	×	×	×	×	×	×	×
Reservation List (Negative list)	○	○	○	○	○	○	×	○	×	×
Fair and equitable treatment Full protection and Security	○	○	○	○	○	○	○	○	○	○
Umbrella clause	○	×	○	○	△ (in preambles)	○	○	○	△ (prior consent is required for	○

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)
									arbitration submission under this BIT)	
Expropriation and compensation	○	○	○	○	○	○	○	○	○	○
Protection from strife	○	○	○	○	○	○	○	○	○	○
Transfer	○	○	○	○	○	○	○	○	○	○ (Approval period shall be about one month and shall not exceed two months)
Entry of investors	○	●	○	●	○	×	○	○	○	○
Transparency	○	●	○	●	○	●	○	○	○	○
Public comments	×	●	○	×	● (EPA)	×	○	×	×	○
Against corruption	○	○	○	×	○	●	○	○	○	×
General exceptions	○	○	○	○	○	●	×	○	×	×
National security exceptions	○	○	○	○	○	●	×	○	×	○
ISDS	○	× (further discussion)	○	△ (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.

Part III: EPA/FTA and IIA

Name of the agreement (effective date)		Japan-Myanmar BIT (Aug 2014)	Japan-Mozambique BIT (Aug 2014)	Japan-Australia EPA (Jan 2015)	Japan-Colombia BIT (Sep 2015)	Japan- Saudi Arabia BIT (Apr 2017)	Japan-Kazakhstan BIT (Oct 2015)	Japan-Uruguay BIT (Apr 2017)	Japan- Ukraine BIT (Nov 2015)	Japan-Mongolia EPA (Jun 2016)
Definition of investments		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	every kind of asset	every kind of asset
National Treatment(NT)	pre-establishment stage	○	○	○	○	×	×	○	×	○
	post-establishment stage	○	○	○	○	○	○	○	○	○
Most-Favoured-Nation Treatment(MFN)	pre-establishment stage	○	○	○	○	×	○ (FTA exception)	○	× (endeavour clause) (FTA exception)	○
	post-establishment stage	○	○	○	○	○ (FTA exception)	○ (admission) (FTA exception)	○	○ (FTA exception)	○
Prohibition of Performance Requirements (PR) (Note 2)		○（11）	○（11）	○	○(9)	×	○（11） (post-establishment stage only)	○（8）	○（11） (post-establishment stage only)	○（10）
	－Export restriction requirement	○	○	×	×	-	○	×	○	○
	－Local content requirement	○	○	○	○	-	○	○	○	○
	－Local purchase requirement for goods & services	○	○	○	○	-	○	○	○	○
	－Export & import balance requirement	○	○	○	○	-	○	○	○	○
	－Export requirement	○	○	○	○	-	○	○	○	○
	－Domestic sale restriction requirement	○	○	○	○	-	○	○	○	○
	－Senior Management & Board of	○	○	○ (SMBD)	○	-	○	○ (SMBD)	×	○

Name of the agreement (effective date)		Japan-Myanmar BIT (Aug 2014)	Japan-Mozambique BIT (Aug 2014)	Japan-Australia EPA (Jan 2015)	Japan-Colombia BIT (Sep 2015)	Japan- Saudi Arabia BIT (Apr 2017)	Japan-Kazakhstan BIT (Oct 2015)	Japan-Uruguay BIT (Apr 2017)	Japan- Ukraine BIT (Nov 2015)	Japan-Mongolia EPA (Jun 2016)
	Directors									
	－Local citizen employment requirement	×	×	×	×	-	○	×	○	○
	－Headquarter location requirement	○	○	×	○	-	○	×	○	○
	－Research & development requirement	○	○	×	×	-	○	×	○	×
	－Technology transfer requirement	○	○	○	○	-	○	○	○	×
	－ Royalty regulation	○	○	×	×	-	×	×	×	○
	－Specific region supply requirement	○	○	○	○	-	○	○	○	○
	-Use of specified technology/request for use restrictions	×	×	×	×	-	×	×	×	×
Reservation List （Negative list）		○	○	○	○	×	×	○	×	○
Fair and equitable treatment Full protection and Security		○	○	○	○	○	○	○	○	○
Umbrella clause		○	○	×	△ (prior consent is required for arbitration submission; priority is given to the dispute settlement procedures of private contracts)	×	○	△ (every possible action within the authorities power shall be taken regarding written agreements)	○	○
Expropriation and compensation		○	○	○	○	○	○	○	○	○

Part III: EPA/FTA and IIA

Name of the agreement (effective date)	Japan-Myanmar BIT (Aug 2014)	Japan-Mozambique BIT (Aug 2014)	Japan-Australia EPA (Jan 2015)	Japan-Colombia BIT (Sep 2015)	Japan- Saudi Arabia BIT (Apr 2017)	Japan-Kazakhstan BIT (Oct 2015)	Japan-Uruguay BIT (Apr 2017)	Japan- Ukraine BIT (Nov 2015)	Japan-Mongolia EPA (Jun 2016)
Protection from strife	○	○	○	○	○	○	○	○	○
Transfer	○	○	○	○	○	○	○	○	○
Entry of investors	○	○	×	○	○	○	○	○	●
Transparency	○	○	○	○	○	○	○	○	●
Public comments	○	○	○	○	×	○	○	○	●
Against corruption	○	○	×	○	×	○	○	○	●
General exceptions	○	○	○	○	×	×	○	×	●
National security exceptions	○	○	●	○	×	○	○	○	●
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.

Name of the agreement (effective date)		Japan-Oman BIT (Jul 2017)	TPP (Signed Feb 2016)	Japan-Iran BIT (Apr 2017)	Japan-Kenya BIT (Sep 2017)	Japan-Israel BIT (Oct 2017)	Japan-Armenia BIT (signed Feb 2018)	Japan-UAE BIT (signed April 2018)	Japan-Jordan BIT (signed November 2018)	Japan-Argentina BIT (signed December 2018)
Definition of investments		every kind of asset	every kind of asset	every kind of asset	every kind of asset	every kind of asset (excluding sovereign debt and some commercial debts)	every kind of asset	every kind of asset (natural resources are excluded)	every kind of asset (excluding sovereign debt and some commercial debts)	every kind of asset
National Treatment(NT)	pre-establishment stage	×	○	×	×	○	×	×	×	○
	post-establishment stage	○	○	○	○	○	○	○	○	○
Most-Favoured-Nation Treatment(MFN)	pre-establishment stage	×	○	×	○ (FTA exception)	○ (FTA exception)	○	○ (FTA exception)	×	○ (FTA exception)
	post-establishment stage	○ (FTA exception)	○	○ (FTA exception)	○ (FTA exception)	○ (FTA exception)	○	○ (FTA exception)	○	○ (FTA exception)
Prohibition of Performance Requirements (PR) (Note 2)		×	○(10)	○(3) (post-establishment stage only)	○(2) (post-establishment stage only)	○(13)	○(13)	○(11) (only post-establishment stage)	×	×
	－Export restriction requirement	-	×	○	×	○	○	○	-	-
	－Local content requirement	-	○	×	×	○	○	○	-	-
	－Local purchase requirement for goods & services	-	○	×	×	○	○	○	-	-
	－Export & import balance requirement	-	○	○	○	○	○	○	-	-
	－Export requirement	-	○	○	○	○	○	○	-	-
	－Domestic sale restriction requirement	-	○	×	×	○	○	○	-	-

Part III: EPA/FTA and IIA

Name of the agreement (effective date)	Japan-Oman BIT (Jul 2017)	TPP (Signed Feb 2016)	Japan-Iran BIT (Apr 2017)	Japan-Kenya BIT (Sep 2017)	Japan-Israel BIT (Oct 2017)	Japan-Armenia BIT (signed Feb 2018)	Japan-UAE BIT (signed April 2018)	Japan-Jordan BIT (signed November 2018)	Japan-Argentina BIT (signed December 2018)
－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	-	○	×	×	○	○	○	-	-
-Use of specified technology/request for use restrictions	-	○	×	×	×	×	×	-	-
Reservation List（Negative list）	×	○	×	×	×	○	×	×	○
Fair and equitable treatment Full protection and Security	○	○	○	○	○	○	○	○	○
Umbrella clause	△ (prior consent is required for arbitration submission under this BIT)	△ (provisions concerning investment contracts)	○	×	×	△ (provisions concerning investment contracts)	○	×	△ (provisions concerning investment contracts)

Name of the agreement (effective date)	Japan-Oman BIT (Jul 2017)	TPP (Signed Feb 2016)	Japan-Iran BIT (Apr 2017)	Japan-Kenya BIT (Sep 2017)	Japan-Israel BIT (Oct 2017)	Japan-Armenia BIT (signed Feb 2018)	Japan-UAE BIT (signed April 2018)	Japan-Jordan BIT (signed November 2018)	Japan-Argentina BIT (signed December 2018)
Expropriation and compensation	○	○	○	○	○	○	○	○	○
Protection from strife	○	○	○	○	○	○	○	○	○
Transfer	○	○	○	○	○	○	○	○	○
Entry of investors	○	●	×	○	×	○	○	○	○
Transparency	○	●	×	○	○	○	○	○	○
Public comments	×	●	×	×	×	○	○	○	×
Against corruption	○	●	×	×	×	○	○	○	○
General exceptions	×	×	○	×	○	○	×	○	○
National security exceptions	○	●	○	○	○	○	○	○	○
ISDS	○	○	○	○	○	○	○	○	○
SSDS	○	●	○	○	○	○	○	○	○
Joint committee	○ (discussion)	●	○	○ (discussion)	○	○	○	○	○
Others	×	○	×	×	○				There are provisions protecting WTO rights and obligations

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.

Part III: EPA/FTA and IIA

Name of the agreement (effective date)		CPTPP (Investment chapter) (December 2018)	Japan-EU EPA (Freedom of investment chapter) (February 2019)
Definition of investments		every kind of asset	×
National Treatment(NT)	pre-establishment stage	○	○
	post-establishment stage	○	○
Most-Favoured-Nation Treatment(MFN)	pre-establishment stage	○	○ (FTA exception)
	post-establishment stage	○	○ (FTA exception)
Prohibition of Performance Requirements (PR) (Note 2)		○(10)	○(13)
	－Export restriction requirement	×	○
	－Local content requirement	○	○
	－Local purchase requirement for goods & services	○	○
	－Export & import balance requirement	○	○
	－Export requirement	○	○
	－Domestic sale restriction requirement	○	○
	－Senior Management & Board of Directors	○（SMBD）	○（SMBD）
	－Local citizen	○	○

Name of the agreement (effective date)		CPTPP (Investment chapter) (December 2018)	Japan-EU EPA (Freedom of investment chapter) (February 2019)
	employment requirement		
	－Headquarter location requirement	○	○
	－Research & development requirement	○	○
	－Technology transfer requirement	○	○
	－ Royalty regulation	○	○
	－Specific region supply requirement	○	○
	-Use of specified technology/request for use restrictions	○	×
Reservation List（Negative list）		○	○
Fair and equitable treatment Full protection and Security		○	×
Umbrella clause		×	×
Expropriation and compensation		○	×
Protection from strife		○	×
Transfer		○	×
Entry of investors		●	×
Transparency		●	●
Public comments		●	●
Against corruption		●	×
General exceptions		×	○
National security exceptions		●	●

Part III: EPA/FTA and IIA

Name of the agreement (effective date)	CPTPP (Investment chapter) (December 2018)	Japan-EU EPA (Freedom of investment chapter) (February 2019)
ISDS	○	×
SSDS	●	●
Joint committee	●	●
Others		

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 (Mar 2012)	Korea ASEAN FTA (Investment chapter) (May 2015)	China-ASEAN Investment Agreement (Jan 2010)	Australia-NZ-ASEAN FTA (Investment chapter) (Jan 2010)	India-ASEAN Investment Agreement (signed Nov 2014)	China-Korea FTA (Dec 2015)
Definition of investment		every kind of asset	every kind of asset	every kind of asset	every kind of asset	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-establishment stage	○	○	○	○	○	○ (Note 2)	×	× (Note 2)	○	×
	post-establishment stage	○	○	○	○	○	○ (Note 2)	○ (existing non-conforming measures are all reserved)	○	○	○
Most-Favoured-Nation Treatment(MFN)	pre-establishment stage	○	○	○	×	○	○ (Note 2)	△ (a wide range of exception allowed)	× (succeeding negotiation)	×	○
	post-establishment stage	○	○	○	×	○	○ (Note 2)	△ (a wide range of exception allowed)	× (succeeding negotiation)	×	○
Prohibition of Performance Requirements (PR) (Note 5)		○ (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	×	×	×	○	○	○	-	○	-	○

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 (Mar 2012)	Korea ASEAN FTA (Investment chapter) (May 2015)	China-ASEAN Investment Agreement (Jan 2010)	Australia-NZ-ASEAN FTA (Investment chapter) (Jan 2010)	India-ASEAN Investment Agreement (signed Nov 2014)	China-Korea FTA (Dec 2015)
	― Local content requirements	○	○	○	○	○	○	-	○	-	○
	― Local purchase requirements for goods & services	○	○	○	○	○	○	-	○	-	○
	―Export & import balance requirements	○	○	○	○	○	○	-	○	-	○
	― Export requirements	○	○	○	×	×	×	-	×	-	×
	― Domestic sale restriction requirements	○	○	○	×	×	×	-	×	-	×
	― Senior Management & Board of Directors	○	○	○	○	○	○	-	○	-	×
	― Local citizen employment requirements	×	×	×	×	×	×	-	×	-	×
	― Headquarter location requirements	×	×	×	×	×	×	-	×	-	×
	― Research & development requirements	×	×	×	×	×	×	-	×	-	×
	― Technology transfer requirements	○	○	○	×	×	×	-	×	-	△ (illogical or discriminatory measures are prohibited)
	― Specific region supply requirements	○	○	○	×	×	×	-	×	-	×
Reservation List (Negative list)		○	○	○	△ (positive list)	(Note 1)	(Note 2)	-	(Note 2)	(Note 4)	×
Fair and equitable treatment Full protection and Security		○	○	○	×	○	○	○	○	○	○

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 (Mar 2012)	Korea ASEAN FTA (Investment chapter) (May 2015)	China-ASEAN Investment Agreement (Jan 2010)	Australia-NZ-ASEAN FTA (Investment chapter) (Jan 2010)	India-ASEAN Investment Agreement (signed Nov 2014)	China-Korea FTA (Dec 2015)
Umbrella clause	○ (similar stipulation to strife process procedure of external investments)	×	○ (similar stipulation to strife process procedure of external investments)	×	×	×	○	×	×	×
Expropriation and compensation	○	○	○	○	○	○	○	○	○	○
NT & MFN related to protection from strife	○	○	○	○	○	○	○	○	×	△ (non-discriminatory treatment)
Free transfer of funds	○	○	○	○	○	○	○	○	○	○
ISDS	○	×	○	○	○	△ (PR excluded) (Note 3)	△ (PR excluded) (Note 3)	△ (PR excluded) (Note 3)	○ (Note 3)	○
SSDS	○	○	○	○	○	○	○	○	○	○

(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 1,200 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 labour 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.

In 2014, agreements were reached on the EU-Canada FTA (CETA) and the EU-Singapore FTA. Provisions including the investment rules were made public.

As for the EU-Singapore FTA, the Court of Justice of the European Union issued an opinion in May 2017 to the effect that the provisions of the agreement relating to direct foreign investment fall within the exclusive competence of the EU, while those relating to non-direct foreign investment and dispute settlement fall within a competence shared between the EU and the Member States.

The EU-Singapore FTA was signed in October 2018. Based on the above judgment, ratification procedures are required in all EU member countries, as well as in the European Board and Council. Besides, CETA started its preliminary operation in a part of the regulations from September 2017, and will enter into formal effect after ratification procedures in all member countries.

The Japan-EU EPA entered into effect on February 1, 2019 after a total of 18 negotiation meetings starting from April 2013. However, investment protections and dispute resolution are not included in the EPA and to be further discussed.

DISPUTE SETTLEMENT REGARDING INVESTMENT

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 unfavourable 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. (Paragraph 1, Article 11.16).

2. USE OF THE RULES

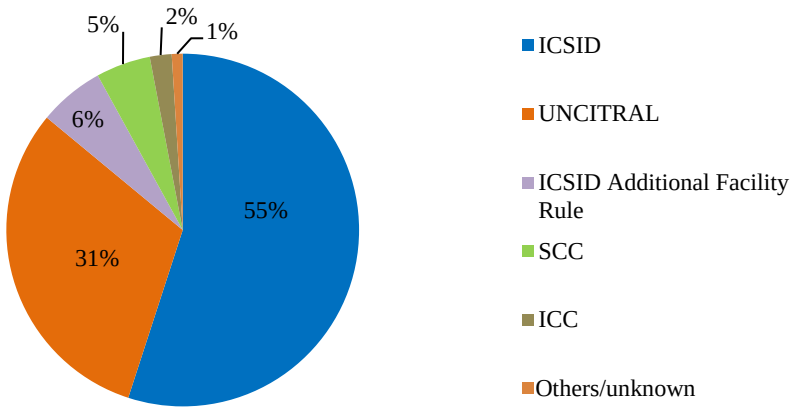
(1) CHANGES IN THE NUMBER OF CASES SUBMITTED TO ARBITRATION PROCEDURES

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);; and (iii) Arbitration Institute of the Stockholm Chamber of Commerce (SCC); and, (iv) ICSID Additional Facility Rule. 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 50 percent of past arbitration cases were submitted to ICSID (2017).

Figure III-5-6 Percentage of Cases Submitted to Major Arbitration Procedures (from 1987 to the end of July of 2017)



(Source: UNCTAD Special Update on Investor-State Dispute Settlement: Facts And Figures [IIA Issue Note, No. 3, 2017])

(2) Countries involved in Arbitration Cases

According to the summary prepared by UNCTAD, of the total 855 "investor- to-state" dispute cases by the end of December 2017, of which 548 cases have been closed. Out of these, the nation's claim was accepted in approximately 37% cases, the investors' claims were accepted in approx. 28% cases, and approx. 23% 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 (60 cases), followed by Venezuela (44 cases), Spain (43 cases), Czech Republic (35 cases), Egypt (31 cases), Canada (27 cases), Mexico (27 cases), Poland (26 cases), India (24 cases), Russia (24 cases), Ecuador (23 cases) and Ukraine (22 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 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 (from 1987 to the end of December of 2017)

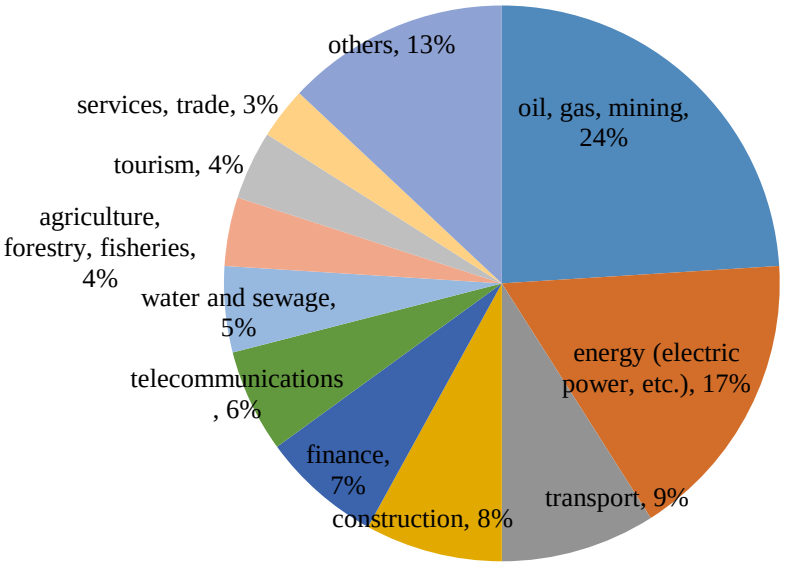
Rank	Country	Number of Cases
1	Argentina	60
2	Venezuela	44
3	Spain	43
4	Czech Republic	35
5	Egypt	31
6	Canada	27
6	Mexico	27
8	Poland	26
9	India	24
9	Russia	24
11	Ecuador	23
12	Ukraine	22

(UNCTAD Investor-State Dispute Settlement: Review of Developments in 2017, IIA Issues Note No.2 (June 2018))

(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%. 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.

Figure III-5-8 Proportion of claims, by industries (as of the end of June 2018)



(Source: ICSID, The ICSID Caseload – Statistics (Issue 2018-2)

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:

(a) 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.

(b) 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.

(c) 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.

(d) 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.

(e) 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).

(f) Decision on Merits

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

(g) 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.

(h) 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. Nonetheless, in recent years, an increasing number of the EU's AAIs include an appeal system.

(i) 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.

(j) 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.

REFERENCE

UTILIZATION OF INVESTMENT AGREEMENT ARBITRATION

It is said that investment agreement arbitration lasts three 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 favourably advance a negotiation toward reconciliation. There are four 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.

REFERENCE

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.[1] 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.[2]

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

(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.[3] 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.[4] 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;[5] it asserted that the prolonged periods are significant.[6] In addition, the average time period for ICSID arbitration was said to be 3.6 years excluding the annulment procedure.[7] 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

[1] 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).

[2] According to ICSID dispute statistics (2017-1), 34% of arbitration cases have been finalized by settlement or other means. *See* ICSID, The ICSID Caseload – Statistics 2017-1, Chart 8 (available at https://icsid.worldbank.org/en/Documents/resources/ICSID%20Web%20Stats%202018-1(English).pdf)

[3] Refer to the ICSID annual report of 2004 and the speech on introduction by the secretariat in 2005.

[4] Refer to UNCTAD, Investor–State Disputes: Prevention and Alternatives to Arbitration （2010）, p.17-18 （http://unctad.org/en/docs/diaeia200911_en.pdf）.

[5] 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）.

[6] Refer to UNCTAD, Investor–State Disputes: Prevention and Alternatives to Arbitration（2010）, p. 18 （http://unctad.org/en/docs/diaeia200911_en.pdf）.

[7] Refer to Anthony Sinclair, ICSID Arbitration: How Long Does it Take?, GAR JOURNAL, Vol. 4, Issue 5 (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.

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.[8] 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.[9]

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 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.[10]

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.[11] 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)).[12] 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

[8] 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).

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

[10] Refer to Luke Eric Peterson, How Many States Are Not Paying Awards under Investment Treaties?, May 7, 2010 (www.iareporter.com).

[11] 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).

[12] Certain performance of actions, restitutions or seizure other than monetary compensation are not deemed as self-execution.

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.[13] [14]

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).[15] 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.[16] If the asset that is petitioned for seizure is provided 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 centered, sovereign immunity is applied to assets of financial authorities including foreign central banks regardless of their use (for commercial use or not).[17] 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.[18] 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 2012, Bolivia, Ecuador, and Venezuela have denounced the ICSID Convention based on Article 71 of the Convention. Also, Argentina is seeking legislation to denounce the

[13] 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.

[14] 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.

[15] 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.

[16] Refer to Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening), I.C.J., Judgment (Feb. 3, 2012) para 118.

[17] Foreign Sovereign Immunities Act Article 1611(b)(1), State Immunity Act Article 14 (4).

[18] “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)

ICSID Convention.[19] (Denunciations take effect sixty days after the date of notice (ICSID Convention, 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.[20] Indonesia has been reviewing investment treaties since 2014, and has not renewed existing treaties that are not consistent with revisions under consideration. Its investment treaties with the Netherlands, Malaysia, etc. was terminated.

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.[21]

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)).[22] Thereafter, conciliation commission that will conduct the conciliation is composed (ICSID Convention, Article 29).[23] 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

[19] 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.

[20] 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).

[21] 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.

[22] Non-contracting countries and any nationals thereof can utilize the ICSID conciliation under the Additional Facility Rules.

[23] Unlike ICSID arbitration, the conciliator may by a national of the dispute party.

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 form 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.

Furthermore, in November 2018, the Kyoto International Arbitration Center was established as the first international mediation expert facility in Japan.

(2) Number of conciliations

As of February 2018, eleven cases had utilized ICSID conciliations, of which two are currently in progress.[24] Among the nine cases of conciliation proceedings that have been finalized, at least three have reached a settlement.[25] There have been 665 cases utilizing ICSID arbitrations, which is significantly higher than conciliations.[26]

(3) Merits and demerits of ICSID conciliations

i) 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 nine cases of ICSID conciliations out of eleven 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

[24] Including 2 cases which are conducted under the Additional Facility Rules. ICSID, Refer to the Cases (https://icsid.worldbank.org/en/Pages/cases/searchcases.aspx).
The numbers can also be obtained from the dispute statistics published by the ICSID twice a year (https://icsid.worldbank.org/en/Pages/resources/ICSID-Caseload-Statistics.aspx.

[25] 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).

[26] Including 57 cases that are conducted under the Additional Facility Rules. Refer to ICSID dispute statistics (2018-1) Chart 3.

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.

ii) 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.[27] 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.[28] 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 the investor's efforts to use all kinds of amicable measures including negotiations, it may be rational to transfer to arbitration.[29]

iii) 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.[30] 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.[31]

iv) Accountability to relevant parties

The reconciliation proposed by the conciliators is informal compared to an arbitration award, and it lacks explanatory reasons. Consequently, 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.[32] Furthermore, as investment disputes are often related to public benefit or

---

[27] Refer to KENNETH J. VANDEVELDE, BILATERAL INVESTMENT TREATIES 437 （2010）; CHRISTOPH H. SCHREUER ET AL., THE ICSID CONVENTION: A COMMENTARY 445 (2d ed. 2009).

[28] 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).

[29] 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.

[30] 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.

[31] Ibid.

[32] Refer to Barton Legum, The Difficulty of Conciliation in Investment Treaty Cases: A Comment on Professor Jack C. Coes' "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.

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.

v) 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.[33] 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 settled based on the agreement of the parties.

(2) 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.

[33] 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

Figure III-5-9

	ICSID Convention (the "Convention") and the Arbitration Rules (the "Rules")	ICSID Additional Facility Rules
Arbitration Body, Arbitration Rules, etc.	- 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.). - The ICSID Convention came into force in 1966. There were 161 Contracting States and 153 effective as of the end of 2017. - The ICSID Convention provides for arbitration, and the "Arbitration Rules" provide further details.	- 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. - 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.
Subject Matter (listed when special restrictions exist)	- Investment disputes between the nationals of a Contracting State and other Contracting States. (Convention, Articles 1(2) and 25(1))	- Investment disputes in which either party is a Non-contracting State or national of a Non-contracting State. (Rules, Rule 2(a))
Commencement of Arbitration Proceedings	- The arbitration proceedings shall commence upon a written request to the arbitration body by the claimant. (Convention, Article 36(1)) - 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))	- The arbitration proceedings shall commence upon a written request to the arbitration body by the claimant. (Schedule C, Article 2) - 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)
Appointment of Arbitrators	<Number of arbitrators> - 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)) <Where the Arbitral Tribunal consists of three arbitrators> - Each party shall appoint one arbitrator, and the third arbitrator shall be appointed upon agreement between the parties. (Convention, Article 37(2)(b)) * Refer to the Rules, Article 3 for the details of the appointment of arbitrators. - If the parties do not appoint the	<Number of arbitrators> - 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)) <Where the Arbitral Tribunal consists of three arbitrators> - Each party shall appoint one arbitrator, and the third arbitrator shall be appointed upon agreement between the parties. (Schedule C, Article 6(1)) * Refer to the Schedule C, Article 9 for the details of the appointment of arbitrators. - If the parties do not appoint the

	ICSID Convention (the "Convention") and the Arbitration Rules (the "Rules")	ICSID Additional Facility Rules
	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)) <Where the Arbitral Tribunal consists of a sole arbitrator> - 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 agreed upon between the parties, the arbitration body shall appoint one from the Panel of Arbitrators. (Convention, Article 38, Article 40(1)) <Nationality of arbitrators, etc.> - 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.	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)) <Where the Arbitral Tribunal consists of a sole arbitrator> - 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)) <Nationality of arbitrators, etc.> - 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.
Arbitration Proceedings	<Place of arbitration, etc.> - Arbitration proceedings shall be held at the ICSID, unless otherwise agreed between the parties. (Convention, Articles 62 and 63; Rules, Rule 13(3)) - 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)) <Language used in arbitration proceedings> - In accordance with the agreement between the parties, one or two languages may be used in the arbitration proceedings (approval of the arbitration	<Place of arbitration, etc.> - The place of arbitration shall be determined by the Arbitral Tribunal after consultation with the parties. (Schedule C, Article 20(1)) - 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) <Applicable law, etc.> - 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.

	ICSID Convention (the "Convention") and the Arbitration Rules (the "Rules")	ICSID Additional Facility Rules
	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)) - If two languages are selected, documents may be submitted in either language. - If either language is used in tribunal proceedings, the translation shall be provided at the request of the Arbitral Tribunal. <Availability of interim measures of protection> - The parties may request interim measures of protection. (Rules, Rule 39) <Necessity of making public the tribunal proceedings> - The Arbitral Tribunal at its discretion may make public the tribunal proceedings. (Rules, Rule 32(2))	(Schedule C, Article 54(1)) <Language used in arbitration proceedings> - 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. (Schedule C, Article 30(1)) <Availability of interim measures of protection> - The parties may request interim measures of protection. (Schedule C, Article 46) <Necessity of making public the tribunal proceedings> - The Tribunal at its discretion may make public the tribunal proceedings. (Schedule C, Article 39(2))
Award	<Determination of awards> - Awards shall be determined by a majority of the votes of all the Tribunal members. (Convention, Article 48(1)) <Final and binding nature of awards> - The award shall be binding on the parties. (Convention, Article 53(1)) - 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)) <Others> - 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))	<Determination of awards> - Awards shall be determined by a majority of the votes of all the Tribunal members. (Schedule C, Article 24(1)) <Final and binding nature of awards> - The award shall be final and binding on the parties. (Schedule C, Article 52(4))

	UNCITRAL Arbitration Rules	SCC Rules of Arbitration
Arbitration Body, Arbitration Rules, etc.	- The United Nations Commission on International Trade Law (UNCITRAL) was established by the General Assembly in 1996. It is located in Austria (Vienna). - UNCITRAL is not an arbitration body (it only adopts arbitration rules). - The UNCITRAL Arbitration Rules were adopted in 1976. (The UNCITRAL Model Law on International Commercial Arbitration was adopted in 1985.) - The latest version was revised in 2013. - 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.	- 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. - The latest version of the Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce came into force on January 1, 2017.
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. (Articles 6 and 8)
Appointment of Arbitrators	<Number of arbitrators> - 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) <Designating and appointing authorities> - Unless the parties have already agreed on the choice of an appointing authority, a party may at 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	<Number of arbitrators> - If the parties cannot agree on the number of arbitrators, the Arbitral Tribunal shall consist of three arbitrators, unless the arbitration body, considering complexity of the case, amount in dispute or other circumstances, decides that there shall be sole arbitrator. (Article 16) <Where the Arbitral Tribunal consists of a sole arbitrator> - The parties shall jointly appoint the arbitrator within 10 days. If the parties fail to nominate the arbitrator within this time, the sole arbitrator shall be appointed by the arbitration body. (Article 17(3))

	UNCITRAL Arbitration Rules	SCC Rules of Arbitration
	the Permanent Court of Arbitration (PCA) to designate the appointing authority. (Articles 6.1 and 6.2) * UNCITRAL is not an arbitration body, and needs to designate the authorities to appoint arbitrators. <Where the Arbitral Tribunal consists of three arbitrators> - Each party shall appoint one arbitrator, and the third arbitrator shall be appointed by the arbitrators appointed by the parties. (Article 9.1) - 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) - 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) <Where the Arbitral Tribunal consists of a sole arbitrator> - 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) * Refer to Article 8.2 for the details of the appointment of arbitrators by the appointing authorities. <Nationality of arbitrators, etc.> - 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	<Where the Arbitral Tribunal consists of three arbitrators> - Each party shall nominate one arbitrator, and the third arbitrator shall be appointed by the arbitration body. If an arbitrator is not appointed by the party within the specified time, the arbitrator shall be appointed by the arbitration body. (Article 17.4) <Nationality of arbitrators, etc.> - 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

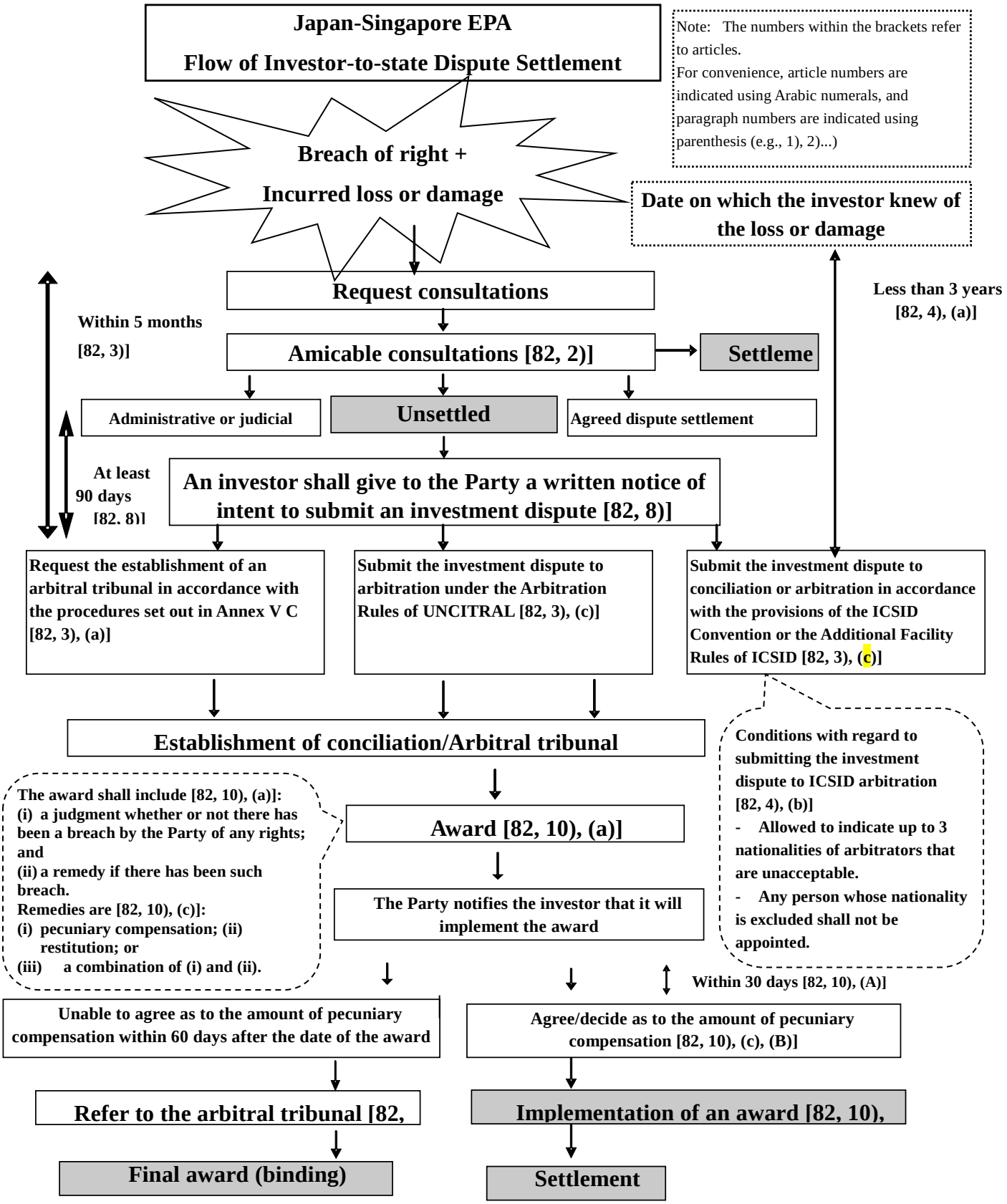
	UNCITRAL Arbitration Rules	SCC Rules of Arbitration
	of a nationality other than the nationalities of the parties. (Article 6.7)	arbitration body. (Article 17(6))
Arbitration Proceedings	<Place of arbitration, etc.> - If the parties have not previously agreed on the place of arbitration, it shall be 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.	<Place of arbitration, etc.> - The place of arbitration shall be fixed by the arbitration body, unless agreed upon by the parties. (Article 20(1)) - The Arbitral Tribunal may deliberate at any location it considers appropriate. (Article 25(2)) - The Arbitral Tribunal may conduct hearings and meetings at any location it considers appropriate, unless otherwise agreed by the parties. (Article 25(2)) * Refer to the column of the UNCITRAL Arbitration Rules for details of the place of arbitration.
	<Applicable law, etc.> - 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)	<Applicable law, etc.> - 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 27(1))
	<Language used in arbitration proceedings> - Subject to an agreement by the parties, the Arbitral Tribunal shall determine the language or languages to be used in the proceedings. (Article 19.1)	<Language used in arbitration proceedings> - Unless agreed upon by the parties, the Arbitral Tribunal shall determine 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 26(1))
	<Availability of interim measures of protection> - The parties may request interim measures of protection. (Article 26.1)	<Availability of interim measures of protection> - The parties may request interim measures of protection. (Article 37)
	<Necessity of making public the tribunal proceedings>	<Necessity of making public the tribunal proceedings>

	UNCITRAL Arbitration Rules	SCC Rules of Arbitration
	- Hearings shall be held in private in principle. (Article 28.3)	- Hearings will be held in private. (Article 32(3)) <Others> - A system for emergency arbitrator is available. (Apendix II) * Refer to the column of the ICC Rules of Arbitration for details of emergency arbitrator.
Award	<Determination of awards> - Awards shall be determined by a majority of the votes of all the Tribunal members. (Convention, Article 33.1) * 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) <Final and binding nature of awards> - The award shall be final and binding on the parties. (Article 34.2)	<Determination of awards> - 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 41.1) <Final and binding nature of awards> - The award shall be final and binding on the parties. (Article 46) <Others> - 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 43 and 22)

(3) THE DISPUTE SETTLEMENT PROVISIONS FOR INVESTOR-TO-STATE DISPUTES THAT ARE PROVIDED IN THE INVESTMENT CHAPTER IN THE EPAS ENTERED INTO BY JAPAN (SEE CHAPTER 7 FOR THE PROVISIONS RELATED TO "STATE-TO-STATE" DISPUTES)

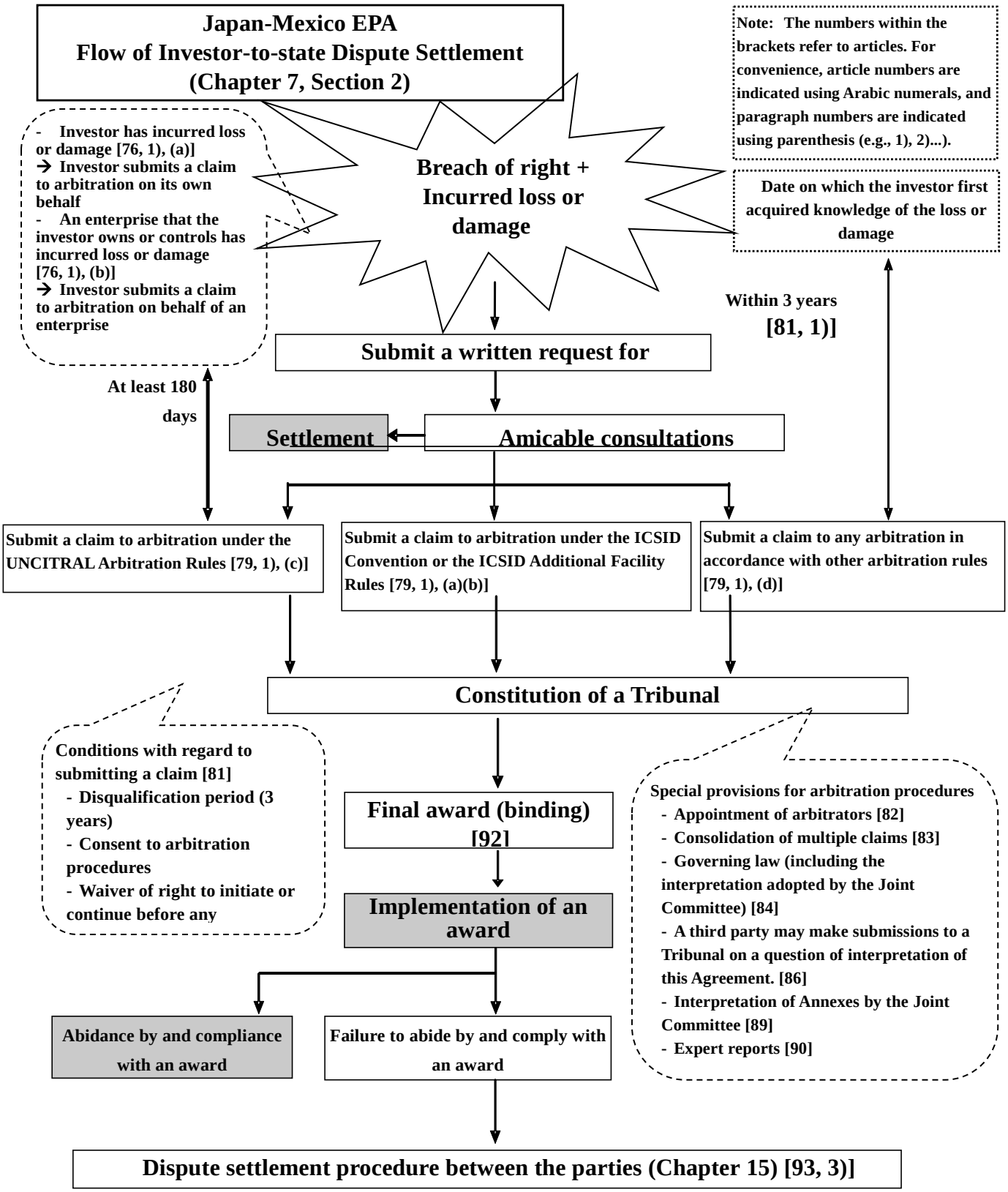
Most of the EPAs entered into by Japan adopt the following common sequence of procedural steps: i) first, the parties to the dispute shall consult with each other with the view to settling the investment dispute; ii) if the dispute is not settled through consultation, the disputing investor may submit 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.

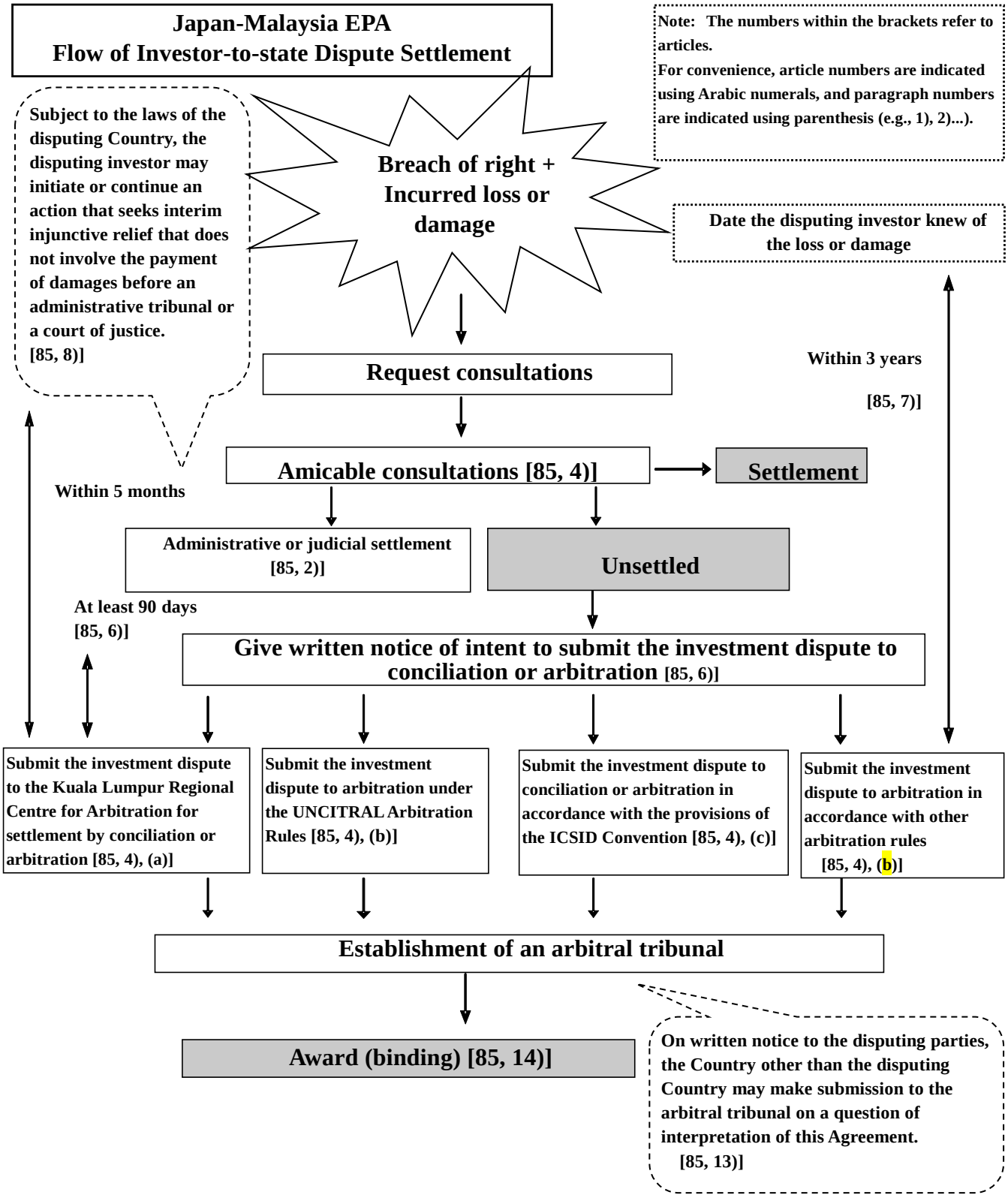


・Nothing in this Article shall be construed to prevent an investor to an investment dispute from seeking administrative or judicial settlement within the territory of the Party that is a party to the investment dispute. [82, 11)]

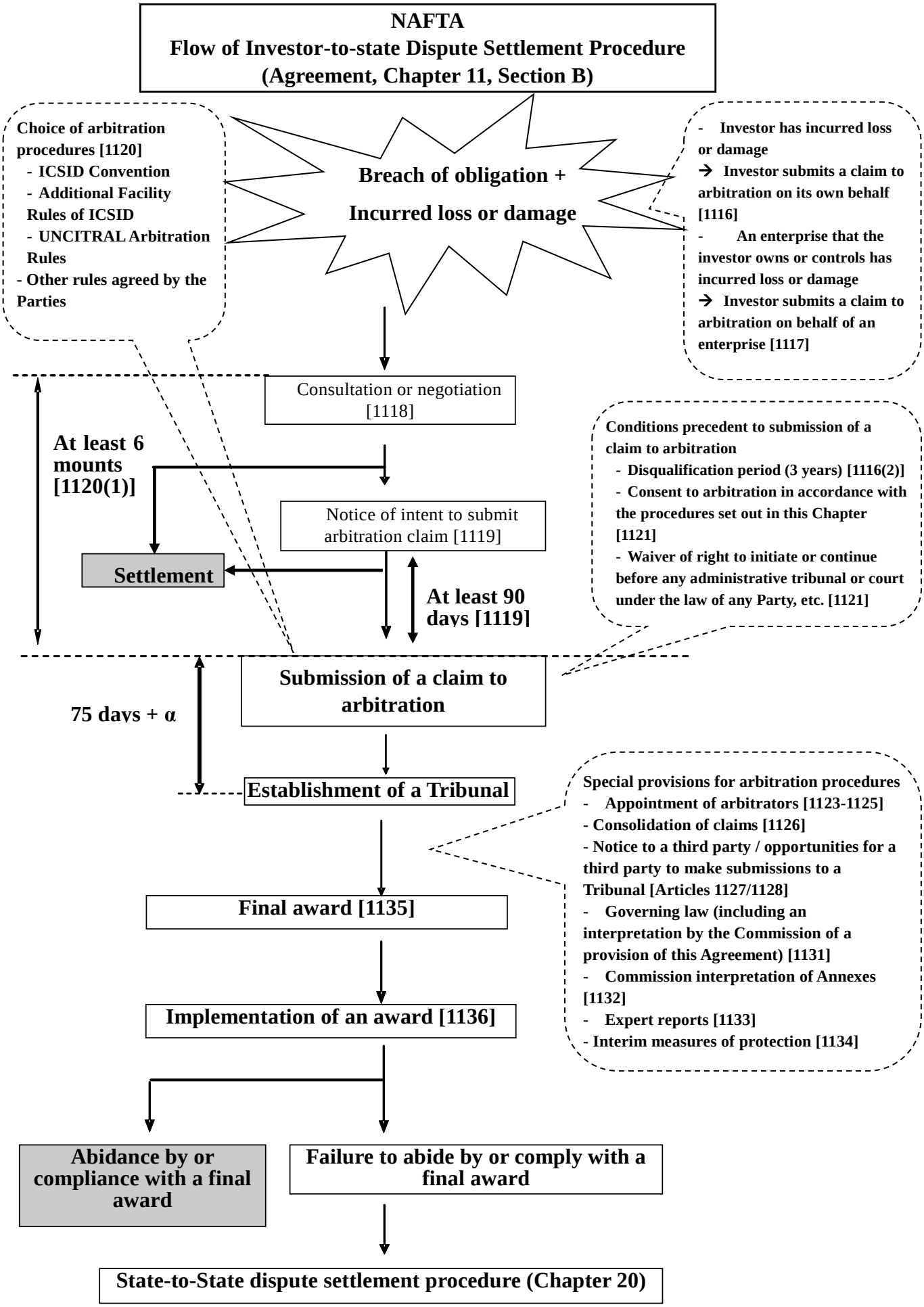
・Either Party may give diplomatic protection, or bring an international claim, in respect of an investment dispute which one of its investors and the other Party shall have consented to submit or shall have submitted to arbitration, when such other Party shall have failed to abide by and comply with the award rendered in such dispute. [82, 12)]



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
(Agreement, Chapter 11, Section B)
Choice of arbitration procedures [1120]
- ICSID Convention
- Additional Facility Rules of ICSID
- UNCITRAL Arbitration Rules
- Other rules agreed by the Parties
Breach of obligation +
Incurred loss or damage
- Investor has incurred loss or damage
→ Investor submits a claim to arbitration on its own behalf [1116]
- An enterprise that the investor owns or controls has incurred loss or damage
→ Investor submits a claim to arbitration on behalf of an enterprise [1117]
Consultation or negotiation [1118]
At least 6 mounts [1120(1)]
Notice of intent to submit arbitration claim [1119]
Settlement
At least 90 days [1119]
Conditions precedent to submission of a claim to arbitration
- Disqualification period (3 years) [1116(2)]
- Consent to arbitration in accordance with the procedures set out in this Chapter [1121]
- Waiver of right to initiate or continue before any administrative tribunal or court under the law of any Party, etc. [1121]
Submission of a claim to arbitration
75 days + α
Establishment of a Tribunal
Special provisions for arbitration procedures
- Appointment of arbitrators [1123-1125]
- Consolidation of claims [1126]
- Notice to a third party / opportunities for a third party to make submissions to a Tribunal [Articles 1127/1128]
- Governing law (including an interpretation by the Commission of a provision of this Agreement) [1131]
- Commission interpretation of Annexes [1132]
- Expert reports [1133]
- Interim measures of protection [1134]
Final award [1135]
Implementation of an award [1136]
Abidance by or compliance with a final award
Failure to abide by or comply with a final award
State-to-State dispute settlement procedure (Chapter 20)