Chapter 7

ENERGY, ENVIRONMENT AND ELECTRONIC COMMERCE

Energy

Background of the Rules

As Japan does not have an abundance of natural resources, establishing a secure supply of energy and mineral resources is one of its most important issues. Due to the recent hike in the cost of energy this issue is becoming even more prevalent. The following paragraphs summarize Japan’s policies and provisions concerning energy and mineral resources in FTAs/EPAs, and compare such policies and provisions with those of FTAs/EPAs outside Japan.

Japan’s past efforts

Japan’s relationship with Indonesia and Brunei are particularly significant in the matter of energy and mineral resources. As a result, separate chapters are dedicated to the subject in EPAs with both countries. The EPA with Indonesia was signed on August 20, 2007 and went into effect on June 2, 2008; the Japan-Brunei EPA, signed in June 2007, has not yet gone into effect. With these EPAs, Japan is strengthening its ties with both countries.

1. Indonesia

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

(a) Definitions (Article 97)
Mineral resources, such as copper and nickel, in addition to energy resources, such as natural gas, crude oil, and coal, shall be subject to this chapter.
(b) Promotion and Facilitation of Investment (Article 98)
Each party shall cooperate in promoting and facilitating investments through ways such as discussing, exchanging information and supporting investment promotion activities.

(c) Import and Export Restrictions (Article 99)
Each party shall have obligations to provide relevant information as early as possible, etc. when import and export restrictions are introduced.

(d) Export Licensing Procedures and Administrations (Article 100)
Each party shall have obligations, including providing relevant information concerning the administration of the restrictions, etc., when export licensing procedures are adopted or maintained.

(e) Energy and Mineral Resource Regulatory Measures (Article 101)
Each party shall have such obligations to ensure its regulatory bodies to avoid disruption of existing contractual relationship in application of the regulatory measure, and to notify the other party as soon as possible in adaptation of any new regulatory measure etc.

(f) Environmental Aspects (Article 102)
Each party confirms the importance of avoiding or minimizing harmful environmental impacts and shall have such obligations to take account of environmental considerations etc.

(g) Community Development (Article 103)
Each party welcomes any contribution by investors to community development.

(h) Cooperation (Article 104)
Each party shall cooperate in the areas including policy development, capacity building and technology transfer in Indonesia.

(i) Sub-Committee on Energy and Mineral Resources (Article 105)
Parties shall establish a subcommittee as a place to exchanging information, reviewing, etc. In this committee, parties shall discuss energy security, and the development of an open and competitive market, etc.

2. Brunei

Brunei is a major producer of liquefied natural gas (LNG), and one of Japan’s top suppliers of LNG. The Japan-Brunei EPA signed in June 2007 was the first of Japan’s FTAs/EPAs to include a chapter concerning energy. It encourages the maintenance and strengthening of a stable and mutually beneficial relationship for both countries by introducing rules on regulatory measures, conducting cooperation and establishing a framework of dialogue as specified below:
Chapter 7 Energy, Environment and Electronic Commerce

(a) Basic Principle (Article 89)
Both parties recognize the importance of strengthening stable and mutually beneficial relationship in the energy sector.

(b) Definitions (Article 90)
Natural gas and crude oil shall be subject to this Chapter.

(c) Import and Export Restrictions (Article 91)
Each party shall have such obligations to give due consideration to contractual relationships in application of the import / export restrictions, and to give written notice, and hold consultation, upon the request, when import / export restrictions are introduced.

(d) Energy Regulatory Measures (Article 92)
Each party shall have such obligations to seek to ensure its regulatory bodies minimize adverse effects upon contractual relationships in application of the regulatory measures, and to give written notice, and hold consultation, upon the request, when import / export restrictions are introduced etc.

(e) Environmental Aspect (Article 93)
Each party shall endeavour to minimize, in an economically efficient manner, harmful environmental impacts of all activities related to energy.

(f) Cooperation (Article 94)
Each party shall cooperate in the areas including policy development, human resource development and technological development, for strengthening stable and mutually beneficial relationship in the energy sector.

(g) Sub-Committee on Energy (Article 95)
Parties shall establish a subcommittee as a place to exchanging information, reviewing, etc.

3. Australia

Australia is a major supplier of iron ore, coal, natural gas and uranium for Japan. The “Joint Study for Strengthening Ties between Japan and Australia (including feasibility or merits and demerits of FTA)” concluded in December 2006 states in paragraph 37 of its final report that Japan and Australia could consider a chapter on minerals and energy that included the following commitments: (i) provisions concerning promotion of free markets (for example, prohibiting quotas on imports and exports); (ii) provisions concerning the liberalization and protection of investments which will improve the investment environment; (iii) measures to enhance transparency of policies and regulations in the area of minerals and resources; (iv) provisions for including the business sector in the negotiation structure and process for minerals and resources; and (v) provisions on revision of clauses applicable to the area of minerals and resources. The Japan-Australia EPA has been in negotiations since April 2007.
International Energy Decisions

1. Energy Charter Treaty (ECT)

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

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

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

Second, Article 7 provides that each contracting party shall take the necessary measures to facilitate the transit of energy materials and products consistent with the principle of freedom of transit and without distinction as to the origin, destination or ownership of such energy materials and products. Transit is defined in Item 10 of Article 7, and basically covers transit of oil or natural gas via pipelines, or transit of electricity via electric transmission facilities running through three or more regions (countries). The ECT also provides that: each contracting party shall work to promote competition (Article 6); each contracting party shall agree to promote access to and transfer of energy technology (Article 8); each contracting party shall strive to minimize harmful environmental impacts occurring within or outside its area, and strive to stimulate public awareness and cooperation (Article 19); measures for dispute settlement (Part V); and provisional application for contracting parties (Article 45).

As of November 2008, the ECT has been signed by 46 countries and states, and one international institution. Russia and Australia have signed, but not yet ratified. There are also several countries who choose to remain as observers (US, Canada, China, Korea, Saudi Arabia, etc. For more details, refer to www.encharter.org).

(The ECT also addresses issues related to energy other than those mentioned above. Please refer to Section III, Chapter 5 Investment).

Overview of Legal Disciplines

There are no substantive rules on minerals and resources in Japan’s FTAs/EPAs. Therefore, as examples of internationally recognized rules on this topic, the provisions of NAFTA and the Energy Charter Treaty are discussed below.

1) NAFTA

NAFTA provides in Chapter 6 (Energy and Basic Petrochemicals) as follows:
(a) Principles (Article 601)

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

(b) Definitions (Article 602)

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

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

(c) Import and Export Restrictions (Article 603)

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

(d) Export Taxes (Article 604)

The article provides that no party may adopt or maintain any duty, tax or other charge on the export of any energy or basic petrochemical good to the territory of another Party, unless such duty, tax or charge is adopted or maintained on exports of any such good to the territory of all other parties; and any such good when destined for domestic consumption. In addition, Chapter 3 on Trade in Goods includes provisions to the same effect (Article 314; with basic foods such as eggs, salt and flour in Mexico excluded under Annex 314).
(e) Other Export Measures (Article 605)

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

i) the restriction does not reduce the proportion of the total export shipments of the specific energy or basic petrochemical good made available to that other party relative to the total supply of that good of the party maintaining the restriction as compared to the proportion prevailing in the most recent 36-month period for which data is available prior to the imposition of the measure;

ii) the party does not impose a higher price for exports of an energy or basic petrochemical good to the other party than the price charged for such good when consumed domestically; and

iii) the restriction does not require the disruption of normal channels of supply to that other party or normal proportions among specific energy or basic petrochemical goods supplied to that other party, such as, for example, between crude oil and refined products and among different categories of crude oil and of refined products.

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

(f) Energy Regulatory Measures (Article 606)

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

<table>
<thead>
<tr>
<th>Column: OECD Initiative</th>
</tr>
</thead>
<tbody>
<tr>
<td>In 2010, the OECD adopted the Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas. Its objective is to help companies respect human rights and avoid contributing to conflict through their mineral sourcing practices. The Guidance is also intended to cultivate transparent mineral supply chains and sustainable corporate engagement in the mineral sector with a view to enabling countries to benefit from their natural mineral resources.</td>
</tr>
</tbody>
</table>
Chapter 7 Energy, Environment and Electronic Commerce

Environment

Background of the Rules

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

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

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

Some intellectual property chapters of FTAs/EPAs provide that the parties sign or intend to sign specific treaties or agreements such as the Paris Convention or Union Internationale pour la Protection des Obtentions Végétales (UPOV). Likewise in the environmental area, it is foreseeable that FTAs/EPAs will provide that the parties shall sign or strive to sign environment-related agreements such as the Framework Convention on Climate Change, Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, Convention on Biological Diversity, together with the list of cooperative measures as a package.
Overview of Legal Disciplines

The FTA/EPAs entered into by Japan so far include the following rules on the environment:

1. Japan-Singapore EPA

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

2. Japan-Mexico EPA

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

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

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

3. Japan-Malaysia EPA

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

4. Japan-Philippines EPA

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

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

5. Japan-Chile EPA

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

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

6. Japan-Thailand EPA

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

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

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

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

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

8. Japan-Indonesia EPA

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

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

9. Japan –ASEAN Comprehensive EPA

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

10. Japan – Vietnam EPA

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

11. Japan – Switzerland EPA

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

12. Japan – India EPA

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

13. Japan – Peru EPA

In the preamble, the parties commit to implement this Agreement in a manner consistent with environmental protection and conservation. In the chapter on Cooperation (Chapter 14), it is clearly stated that the fields of cooperation shall include the environment (Article 200). In the Implementing Agreement, Chapter 3 Article 25 specifies the areas and forms of cooperation. Additionally, on the occasion of signing the agreement, the Joint Statement on Trade and Environment was released, reaffirming the importance of, and the parties’ commitments to, the Convention on Biological Diversity and the United Nations Framework Convention on Climate Change.


The Energy Charter Treaty, which is not an FTA but an international agreement regulating transfer of energy resources and investment protection, provides that contracting parties shall strive to minimize in an economically efficient manner harmful environmental impacts. The contracting parties agree that the polluter should, in principle, bear the cost of pollution. The ECT further provides that: contracting parties shall take into account environmental considerations throughout the formulation and implementation of their energy policies; promote market-oriented price formation and fuller reflection of environmental costs and benefits throughout the Energy Cycle; have particular regard for cooperation in the field of international environmental standards, improving energy efficiency for developing and using renewable energy sources; promote public awareness of the environmental impacts of energy systems; and promote transparent assessment at an early stage (Article 19, Item 1).
The ECT provides that, at the request of one or more contracting parties, disputes concerning the application or interpretation of provisions therein shall, to the extent that arrangements for the consideration of such disputes do not exist in other appropriate international fora, be reviewed by the Charter Conference with the aim of finding a solution (Article 19, Item 2).

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

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

1. **United States**

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

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

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

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

Regional trade agreements signed by EU member states set the principles and scope of environmental cooperation as a cross-sectoral theme.

For example, the EU-Chile Association Agreement includes a provision that the intent of environmental cooperation is to encourage conservation and improvement of the environment, prevent contamination and degradation of natural resources and ecosystems, and encourage rational use of the ecosystem in the interest of sustainable development. The agreement further provides that the following are particularly significant: the relationship between poverty and the environment; the environmental impact of economic activities; environmental problems and land-use management; projects to reinforce Chile’s environmental structure and policies; exchanges of information, technology and experience in areas including environmental standards and models, training and education; environmental education and training to involve citizens more; and technical assistance and joint regional research programmes (Article 28).

3. **Other Countries**

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

In addition to resources, energy and the environment, labor issues are a field that should not be overlooked as a non-trade issue of concern in FTAs/EPAs. As well as examples of FTAs/EPAs that prescribe that their provisions shall not hinder the application of labor-related measures in each country, there are cases, particularly in the FTAs concluded by the United States, where such agreements set forth the discipline of imposing the obligation to make the best possible effort to protect workers.

1. Japan’s efforts concerning FTAs/EPAs

The FTAs/EPAs entered by Japan so far do not include independent chapters on labor, but do include provisions on labor-related issues.

(1) Japan-Singapore EPA

The chapter on Trade in Goods (Chapter 2) includes the provision that subject to the requirement that such measures are not applied in a manner that would constitute a means of arbitrary or unjustifiable discrimination against the other party, or a disguised restriction on trade in goods between the parties, nothing therein shall be construed to prevent the adoption or enforcement by either party of measures relating to the products of prison labor (Article 19, Item 1 (e)). In addition, the chapter on Investment (Chapter 8) includes the provision that nothing therein shall be construed to prevent the adoption or enforcement by either party of measures relating to prison labor (Article 83, Item 1(d)).

(2) Japan-Mexico EPA

The chapter on Services (Chapter 8) includes a provision that this chapter shall not apply to measures affecting natural persons seeking access to the employment market of a country, or measures regarding employment on a permanent basis (Article 97, Item 2 (h)). The provisions of the chapter herein, which prescribe entry into the country for business purposes and temporary visits (Chapter 10), reflect the necessity of protecting the labor force and permanent employment in both countries (Article 113, Item 1), and are not applied to measures that affect those who try to participate in the employment market, or that pertain to permanent employment (Article 114, Item 1).

The chapter on Government Procurement (Chapter 11) includes the provision that nothing herein prevents taking measures relating to goods or services of prison labor (Article 126, Item 2(d)). Moreover, the chapter on Cooperation includes the provision that each party shall develop cooperation in the field of technical and vocational education and training, and such cooperation may include exchange of information related to best practices on the field above, including labor policy (Article 143 (a)).

(3) Japan Malaysia EPA

The chapter on Trade in Services (Chapter 8) shall not apply to measures affecting natural persons seeking access to the employment market of a country, or measures regarding employment on a permanent basis (Article 94, Item 2(d)).
(4) Japan-Philippines EPA

The chapter on Investment (Chapter 8) includes provisions concerning investment and labor. The chapter provides that it is inappropriate to encourage investment by weakening or reducing the protections afforded in domestic labor laws, and that each party shall strive to ensure that it does not waive or otherwise derogate from, or offer to waive or otherwise derogate from, such laws in a manner that weakens or reduces adherence to the internationally recognized labor rights such as: the right of association, the right to organize and bargain collectively, a prohibition on the use of any form of forced or compulsory labor, labor protections for children and young people, and acceptable conditions of work with respect to minimum wages, hours of work, and occupational safety and health. Also the chapter provides that if a party considers that the other party has offered such an encouragement, it may request consultations with the other party (Article 103).

(5) Japan-Chile EPA

The chapters on Services (Chapter 9) and Financial Services (Chapter 10) include provisions that this chapter shall not apply to measures affecting natural persons seeking access to the employment market of a country, or measures regarding employment on a permanent basis (Article 106, Item 2 (f), Article 117, Item 4 (d)). Also, the chapter that prescribes Entry and Temporary Stay of Nationals for Business Purposes (Chapter 11), includes the provisions that this chapter reflect the necessity of protecting the labor force and permanent employment in both countries (Article 129, Item 1) and is not applied to measures that affect those who try to participate in the employment market, or that pertain to permanent employment (Article 130, Item 1). The chapter on Government Procurement (Chapter 12) includes the provision that nothing herein prevents taking measures relating to goods or services of prison labor (Article 151 (d)).

(6) Japan-Thailand EPA

The chapter on Services (Chapter 7) includes the provision that this chapter shall not apply to measures affecting natural persons seeking access to the employment market of a country, or measures regarding employment on a permanent basis (Article 72, Item 2 (e)), and that the total number of employees in a specific service in the sectors where market-access commitments are undertaken shall not be limited (Article 74, Item 2 (d)). Also, the chapter on the Movement of Natural Persons (Chapter 9) includes the provision that this chapter shall not apply to measures affecting natural persons seeking access to the employment market of a country, or measures regarding employment on a permanent basis (Article 115, Item 2).

(7) Japan-Brunei EPA

The chapter on Services (Chapter 6) includes the provision that this chapter shall not apply to measures affecting natural persons seeking access to the employment market of a country, or measures regarding employment on a permanent basis (Article 73, Item 2 (d)), and that the total number of employees in a specific service in the sectors where market-access commitments are undertaken shall not be limited (Article 75, Item 2 (d)).
(8) Japan-Indonesia EPA

The chapter on Services (Chapter 6) includes the provision that this chapter shall not apply to measures affecting natural persons seeking access to the employment market of a country, or measures regarding employment on a permanent basis (Article 76, Item 2 (e)), and that the total number of employees in a specific service in the sectors where market-access commitments are undertaken shall not be limited (Article 78, Item 2 (d)). Also, the chapter on the Movement of Natural Persons (Chapter 7) includes the provision that this chapter shall not apply to measures affecting natural persons seeking access to the employment market of a country, or measures regarding employment on a permanent basis (Article 92, Item 2).

(9) Japan – Vietnam EPA

The chapter on Services stipulates that, adhering to the basic principle of GATS, it does not treat the provision of labor – that is to say, natural persons seeking to enter the employment market – as a service, so the provisions of the chapter on Services do not apply to measures that have an impact on such natural persons or measures relating to nationality, residence or employment on a permanent basis (Article 57, Paragraph 2 (d)). Moreover, in fields in which a commitment has been made regarding the obligation of market access in relation to trade in services, it is stipulated that the total number of those employed in a specific service field must not be restricted (Article 59, Paragraph 2 (d)). Furthermore, the chapter on the Movement of Natural Persons also prescribes that its provisions on the movement of natural persons do not apply to measures that have an impact on natural persons seeking access to the employment market or measures relating to nationality, residence or employment on a permanent basis (Article 74, Paragraph 2). It also sets forth the principle that the chapter on the Movement of Natural Persons should reflect the necessity of protecting the domestic workforce and permanent employment in each signatory country (Article 63, Paragraph 1).

(10) Japan – Switzerland EPA

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

(11) Japan – India EPA

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

(12) Japan – Peru EPA

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

2. Labor issues in FTAs of other countries

(1) United States

(i) NAFTA

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

(ii) North American Agreement on Labor Cooperation of NAFTA

In August 1993, the trilateral North American Agreement on Labor Cooperation, which was to complement NAFTA in the area of labor protection, was concluded between the United States, Canada and Mexico. The agreement became effective in January 1994, as did NAFTA. The conclusion of the complementary agreement was as a result of the opposition to NAFTA by the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) due to concerns that NAFTA would promote shifting of industrial plants and factories to Mexico (whose labor conditions, including wages, are less than those of the US), and thus worsen already tough US employment conditions. An outline of the principal items of this agreement is as follows:

(a) Promotion of Labor Principles

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

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

(c) Establishment of Commission for Labor Cooperation

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

(d) Resolution of Disputes

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

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

3) In order to ensure implementation of the action plan, the arbitration panel may from time to time hold a meeting and impose a monetary contribution on a state complained against that does not implement the action plan. If the panel determines that such state has not made the required monetary contribution and continues to refrain from implementation of the action plan, the panel can stop the payment of benefits under NAFTA within a certain amount (maximum of USD 20,000,000) when the case relates to the United States and Mexico, or file a suit in a Canadian court to implement the payment and action plan when the case relates to Canada.

(iii) Other FTAs concluded by U.S.

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

Other FTAs signed by the U.S. include provisions on labor to the same effect (e.g., U.S.-Singapore, U.S.-Panama, U.S.-Bahrain, U.S.-Australia, U.S.-Chile, and CAFTA-DR).

(2) **EU**

The EU deals with labor issues within the framework for cooperation in FTAs. For example, the EC-Chile Association Agreement (in force since 2003) recognizes the importance of social development along with economic development, and gives priority to the creation of employment and respect for fundamental social rights, notably by promoting the relevant conventions of the ILO covering such topics as the freedom of association, the right to collective bargaining and non-discrimination, the abolition of forced and child labor, and equal treatment between men and women (Article 44, Item 1). This agreement also provides that cooperation may cover any area of interest of the parties (Article 44, Item 2); and lists priority measures aimed at: reduction of poverty and the fight against social exclusion; promoting the role of women in the economic and social development process; developing and modernizing labor relations, working conditions, social welfare and employment security; promoting vocational training and development of human resources; and promoting projects and programmes which generate opportunities for the creation of employment within micro, small and medium-sized enterprises (Item 4).

The EU-Egypt Association Agreement (in force since 2004) also reaffirms the importance of the fair treatment of workers legally residing and employed in the territory of the contracting party, and upon the request of a counter party, each party agrees to initiate talks on reciprocal bilateral agreements related to working conditions (Article 62). The agreement further provides that the parties thereto shall conduct regular dialogue on social matters, and that this dialogue shall be used to find ways to achieve progress in the field of movement of workers and equal treatment and social integration of the nationals legally residing in the territories of their host countries (Article 63).
Electronic Commerce

1. Overview of the Rules
(1) Background
i) General Remarks

Over the course of the 1990s, in parallel with the massive worldwide growth experienced by the Internet, commercial transactions conducted via various wide-area data transmission networks, as typified by the Internet, rapidly became prevalent in a broad range of areas. Compared with the transactions conducted hitherto via telephone or fax, commercial transactions conducted via wide-area data transmission networks have not only made possible the two-way transmission of more information cheaply and swiftly, but have also utilized the functions of high-performance information terminals connected to networks to the maximum extent possible, and have automated the process of handling complex information, without human intervention, thereby making commercial activity itself far more efficient. For example, whereas hitherto, a merchant receiving an order by phone had to go through the process of writing the order themselves on an order form, sending it to the production management division and having them check the inventory or manufacture and delivery date, now the person placing the order can access the database of the distributor directly to check the inventory status and it is possible to construct a mechanism whereby subsequent orders are also sent directly to the distributor and manufacturer automatically in real time.

Thus, as various commercial activities have become more efficient, wide-area data transmission networks have not only been used simply as a communication channel for conveying information, but have also been positioned as part of large-scale information systems that include high-performance information terminals connected to networks, as a result of which, the production, marketing, distribution, sale and delivery processes of a diverse range of goods and services have come to be carried out in a more integrated fashion over a wider area. One of the reasons why the construction of such mechanisms has developed so swiftly is that Internet connection and usage services adopted a charging system that did not depend on the transmission distance. Consequently, for example, it became possible cheaply to construct an integrated information system between sales hubs deployed over a large area, as well as making it easy to connect to production management systems at the plants of business partners, even when they are located in remote areas. In such information systems, the information was all conveyed in both directions as electronic data, so the commercial trading that took place using it came to be known widely as electronic commerce. Since then, up to the present day, examples of such activities that have actually achieved commercial success and have become well-known include online shopping and Internet auctions.

Electronic commerce has undergone dramatic advances, along with the Internet, and its use in international trade, because it has the advantage that the transmission distance hardly impacts the cost, has become the focus of attention; however, even now there is no wide-ranging statistical information about the international use of electronic commerce, and the quantification of its real impact on trade has not yet been carried out. Based on a private sector survey issued in 2001, the volume of trade through the channel of international electronic commerce was only around 1% of the total volume of trade\(^1\). In addition, in this

private sector survey, international electronic commerce was defined as transactions where the buyer in the international trade in goods and services placed their final order on the Internet, but the definition was not limited to situations in which the whole transaction through to production and delivery was conducted electronically. Accordingly, it also included transactions such as imports and exports of fruit where the orders were submitted electronically.

Even though there is no official statistical information, the Declaration on Global Electronic Commerce, which was adopted at the WTO Ministerial Conference in May 1998, states “Recognizing that global electronic commerce is growing and creating new opportunities for trade”. The view that electronic commerce is important as a form of trade, that is to say international transactions, is shared internationally. In Japan as well, in light of the importance of creating concrete routes in order to ensure the further development of electronic commerce and implementation of internationally harmonized environmental improvements, the country has actively participated in discussions within the WTO. More specifically, the Ministry of Economy, Trade and Industry (formerly the Ministry of International Trade and Industry) set forth the points that would need to be considered in relation to electronic commerce and the WTO and, with the aim of raising them for discussion, published its Ministry of Economy, Trade and Industry proposal in June 2001 (regarding the content of the proposals, refer to Section II, Chapter 11, Column E-Commerce-Main Points of Discussion 1) Main Points in WTO Discussion on E-Commerce d) Japan’s Effort).

However, although the question of to what kind of legal controls or regulatory frameworks international trade using this new format would be subject has been discussed by authorities in each country with jurisdiction over trade, as well as international institutions, an effective conclusion has not been reached, and even now electronic commerce is continuing to develop as a virtually unregulated trade sector. (Nevertheless, as described hereinafter, with regard to existing trade frameworks and electronic commerce associated with such things as goods, services and intellectual property, discussions about the pros and cons of the scope of application of specific regulations have become internationally comprehensive, and the application of regulations in existing trade frameworks has become clear to some extent in relation to a number of limited events. For example, in the event that things statically recorded on a tangible medium such as a Compact Disc (CD) or Digital Versatile Disc (DVD) are traded as goods, regulations concerning trade in goods are applied, while if services classified as being subject to regulations on trade in services, such as legal services, are provided electronically, regulations concerning trade in services are applied; this point has been affirmed almost without dissent in all discussions).

The more the volume of international electronic commerce expands, the more its economic significance will increase, and, as a result, the aspects that promote the application of regulations based on the respective political background in each state will grow stronger. However, as well as being intrinsically unstable, the current situation, which is “effectively” unregulated, without any international consensus, means that there is no guarantee that any trade regulations that are introduced in a country in the future will be fair, objective and transparent. In essence, the danger that unfair trade measures will emerge in electronic commerce is being ignored. However, with particular regard to the forms of FTA, measures to deal with this danger have been discussed in bilateral trade negotiations, and there are a

---

2 The service sector classification list is set forth in the WTO document MTN.GNS/W/120, and is widely incorporated into GATS, as well as various bilateral and regional service trade agreements.
Part III FTA/EPA and BIT

growing number of examples of measures being prescribed in FTAs (Free Trade Agreements) as legal controls.

While discussions within international institutions have been becoming greater in scope, from the perspective of the strong awareness of the importance of using electronic commerce in trade, Japan has been working on setting forth effective legal controls during negotiations concerning bilateral EPAs (Economic Partnership Agreements). Before discussing individual legal controls, the following looks at “the definitions and outline of electronic commerce”, “the methodology of classifying digital contents”, and “the failure to impose tariffs”, which are broad points at issue that relate to multiple matters; it also provides a brief overview of the status of discussions within such major international institutions as the WTO, OECD, UNCITRAL and APEC (see Figure 7-1).

ii) The Definitions and Outline of Electronic Commerce

There is no internationally consistent definition of the term “electronic commerce”. Hereinafter, this section will mainly limit this word to trade – in other words, the international trade aspects – and the economic significance of the rules relating to this will be discussed; however, in the WTO, OECD, UNCITRAL and APEC, which are major international institutions and forums where discussions and proposals are being undertaken relating to this, the term either remains undefined or is used on the basis of individual definitions that have nothing in common with each other (see Figure 7-2). Even in the chapters on electronic commerce set forth in the bilateral FTAs of the United States and Australia in recent years, the term “electronic commerce” is used as a chapter heading without any definition whatsoever being provided. This lack of a fundamental definition is believed to have a profound impact on the approach to individual legal controls. In particular, with regard to the relationship with existing trade frameworks relating to goods, services, investment and intellectual property, in both the aforementioned international institutions and bilateral trade negotiations, the discussions concerning the pros and cons of the scope of application of specific regulations are becoming complicated. However, at the same time, even though there is no clear definition, the impression of a specific form of trade, in the form of shopping on the Internet, is held more-or-less in common internationally, and even in discussions within various international institutions and bilateral trade negotiations, it is possible to identify core aspects that are held in common to some degree. Such aspects can be broadly collated into the following three points:

a) Technological neutrality

This is a concept that seeks to grasp the essence of electronic commerce, based on the principle that the only difference between “electronic” commerce implemented through modern advances in technology and the commerce traditionally conducted hitherto is technology as the means of implementation, with all elements relating to commerce other than this being neutral with regard to the technological difference. However, the nature of the discussion differs as shown below, depending on what specific elements are discussed.
### Chapter 7 Energy, Environment and Electronic Commerce

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

<table>
<thead>
<tr>
<th>Year</th>
<th>WTO</th>
<th>OECD</th>
<th>UNCITRAL</th>
<th>APEC</th>
<th>Bilateral Agreements (Date of Signature)</th>
</tr>
</thead>
<tbody>
<tr>
<td>1980</td>
<td></td>
<td>OECD Guidelines Governing the Protection of Privacy and Transborder Flows of Personal Data</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>1999</td>
<td></td>
<td>OECD Guidelines for Consumer Protection in the Context of Electronic Commerce</td>
<td>Electronic Commerce Steering Group</td>
<td></td>
<td></td>
</tr>
<tr>
<td>2000</td>
<td></td>
<td>Local Access Pricing and E-Commerce, Round Table Discussions on Electronic Commerce</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>2001</td>
<td></td>
<td>Model Law on Electronic Signature</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>2002</td>
<td></td>
<td>Guideline for the Security of Information Systems and Networks</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>2003</td>
<td></td>
<td>OECD Guidelines for Protecting Consumers from Fraudulent and Deceptive Commercial Practice Across Borders</td>
<td></td>
<td></td>
<td>Australia - Singapore FTA, USA - Singapore FTA, USA - Chile FTA</td>
</tr>
<tr>
<td>2004</td>
<td></td>
<td>Guidelines on Techniques for Issuing Certificates That Can be Provided for Use in Electronic Commerce Throughout the APEC Region</td>
<td>USA - Australia FTA, Australia - Thailand FTA</td>
<td></td>
<td></td>
</tr>
<tr>
<td>2006</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>USA - Peru TPA, USA - Colombia FTA</td>
</tr>
<tr>
<td>2007</td>
<td></td>
<td>APEC Data Privacy Pathfinder, agreement on APEC Trade Facilitation Model Measures Concerning Electronic Commerce Chapters of FTAs</td>
<td></td>
<td></td>
<td>Korea - USA FTA</td>
</tr>
<tr>
<td>2008</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>Australia - Chile FTA</td>
</tr>
<tr>
<td>2009</td>
<td></td>
<td>Extension of the moratorium on the non-imposition of tariffs</td>
<td></td>
<td></td>
<td>Japan - Switzerland EPA</td>
</tr>
</tbody>
</table>
### Various Definitions of “Electronic Commerce”

<table>
<thead>
<tr>
<th>Source</th>
<th>Definition</th>
</tr>
</thead>
<tbody>
<tr>
<td>From the WTO Electronic Commerce Action Plan adopted in September 1998</td>
<td>Exclusively for the purposes of the work programme, and without prejudice to its outcome, the term “electronic commerce” is understood to mean the production, distribution, marketing, sale or delivery of goods and services by electronic means.</td>
</tr>
<tr>
<td>From the UNCITRAL Model Law on Electronic Commerce adopted by United Nations General Assembly resolution in January 1997.</td>
<td>Noting that an increasing number of transactions in international trade are carried out by means of electronic data interchange and other means of communication, commonly referred to as “electronic commerce”, which involve the use of alternatives to paper-based methods of communication and storage of information.</td>
</tr>
<tr>
<td>From Measuring Electronic Commerce, a document published by the OECD in January 1997</td>
<td>Electronic commerce refers generally to all forms of transactions relating to commercial activities, including both organizations and individuals, that are based upon the processing and transmission of digitized data, including text, sound and visual images.</td>
</tr>
</tbody>
</table>

i) When discussing declarations of intent relating to commerce or the elements of the contract itself, whereas, traditionally, most declarations of intent were paper-based, there must be no difference in the legal effect of declarations of intent made by electronic means.

ii) As a means of providing international services, for example, when providing research services, a paper-based report may be posted, it may be sent by facsimile, the content of the report may be conveyed verbally by phone, or the report may be sent by electronic mail. With regard to this, in relation to the differences in technological methods associated with the provision of the service, the rules regarding the service trade should be neutral.

iii) Intangible products such as software can be divided up into those traded as goods after being statically recorded onto a tangible medium such as a Compact Disc (CD) or a Digital Versatile Disc (DVD), and those where the same product is transmitted internationally through an intangible or virtual medium in the form of some kind of communications network, such as electromagnetic waves for broadcasting purposes or the Internet; naturally, the rules of trade should be neutral in relation to differences in technological methods, in the form of the type of medium or the means of transmission.

b) Economic growth and opportunity

Electronic commerce has permeated society rapidly, along with the development of the Internet, and the value of electronic commerce has also expanded swiftly. This is a concept that seeks to grasp the true nature of electronic commerce, based on the principle that there should be a proper awareness of the advantages of multiple international transactions specific to electronic commerce and that internationally consistent initiatives aimed at the maintenance and further development of these advantages should be promoted in order to maintain this trend and aim for further growth. From this perspective, the effect of trade facilitation in electronic commerce is particularly important.

c) Environment of trust and confidence

This is a concept that seeks to grasp the essence of electronic commerce, focusing on the risks, such as increased opportunities for fraud or the leakage of information, based on the principle that there should be a proper awareness of the nature of such risks and that internationally consistent initiatives should be promoted in order to avoid or reduce such risks. The chapters on electronic commerce set forth in the bilateral FTAs concluded by the United States and Australia do not stipulate a general definition of “electronic commerce.”
commerce”, as stated previously, but instead, set forth provisions at the beginning of the chapter in question regarding the core principles, such as those above. At the same time, with regard to the problem that the outer edges of the scope of the various concrete, individual legal regulations are unclear, in many cases, a method is adopted that involves setting forth the scope of application and exclusions for each individual regulation. If a method like this is used, which describes the basic principles rather than the general definition, it has the advantage that one can avoid insubstantial, abstract philosophical discussions when setting forth each of the legal rules. However, it omits setting out a solid logical foundation, so, when setting forth the individual legal rules, one is constantly compelled to develop inductive trade substantialism and to consider the pros and cons thereof. In addition, the modality of the substance of trade differs in each country, so the modality of the approach to the legal regulations reached inductively will also differ depending on the country. In fact, many differences have actually been observed in the content of the regulations of various bilateral FTAs. There is collateral evidence that most of these differences are the result of political subtleties inevitably being reflected in negotiations. This point hints at the possibility that, even when Japan is negotiating bilateral EPAs in the future and is working on setting out effective legal regulations, different legal rules will be set for each partner country, bringing about the problem of how such a situation can be avoided and, in the event that such a situation does arise, how the relevant trade authorities can correctly and legally implement a country-specific response. In the Japan – Switzerland EPA, no general definition of “electronic commerce” has been prescribed, so one cannot deny the possibility that this kind of problem will surface in the future in negotiations with other countries. Consequently, one cannot completely deny that at some stage, there will be a necessity to return to the discussion about approaches to a general definition of “electronic commerce”. There is at least a degree of common awareness of the core elements, through the various bilateral FTAs, so it would be desirable if the task of deductively considering the approach to a general definition from that point were promoted sooner or later by various international institutions.

iii) The Classification of Digital Content

(With regard to the detailed classification methodology employed in the WTO, please refer to Section II, Chapter 11, Column E-Commerce-Main Points of Discussion 1) Main Points in WTO Discussion on E-Commerce a) Handling of Digital Content Under Current Agreements) In discussions within the WTO, the United States and Australia have maintained a stance of not adopting a particular opinion with regard to classification, and have continued to take a neutral position in relation to trends. Moreover, this stance is frequently cited in the chapters on electronic commerce in the bilateral FTAs concluded by the United States and Australia, in the form of an annotation or comment. Japan has also adopted the same stance in its EPA with Switzerland. The stance of being neutral with regard to classification trends and results is predicated on the attitude of acknowledging the significance of classification in influencing legal regulations, while believing that it goes without saying that the settlement of this matter is, ultimately, essential to laws relating to measures to deal with unfair trading. Within the scope that is unquestionably encompassed by trade through traditional transactions without direct contact, that is to say the GATT and GATS regulations, for example, in regard to specific measures such as import licensing procedures for agricultural produce, it has been noted that it is possible that the application of laws relating to
goods and services could overlap when it comes to electronic commerce\(^3\). In essence, with regard to the legal framework regulating measures to deal with unfair trading, it can be said that it is not necessarily vital to establish an arbitrary classification for the purpose of exclusively setting forth the scope of application of each and every trade regulation. In the first place, whether something is a good or a service, an asset with a specific value is produced and it is usual for it to pass through multiple commercial channels until it is consumed, and it is not necessarily the case that there is only one possible form of trade for a particular asset. For example, with regard to a particular movie, while it can be delivered to the consumer in the form of a screening service or a television broadcast, the same work can also be brought to the consumer via retail stores as a packaged product. Perhaps because it has recently also become possible to bring the product to consumers through watching it on the Internet, it has become difficult to define its fundamental nature based on the criterion of being digital or non-digital, as various forms of delivering it are possible, from a packaged product to a broadcast. Thus, the logic of uniquely prescribing an approach to trade regulations based on the sole criterion of whether or not the nature of the asset is digital or non-digital is not that clear. Consequently, rather than the rigid and exclusive perception of whether something is “a good or a service”, it will be important to develop a highly flexible and commercially effective classification methodology in the approach to classification methodology in the future, while taking into consideration the symmetry with existing trade law frameworks that have dealt with non-digital content.

iv) Non-imposition of Customs Tariffs
(With regard to the details of WTO discussions concerning the non-imposition of customs tariffs, refer to Section II, Chapter 11, Column E-Commerce-Main Points of Discussion 1) Main Points in WTO Discussion on E-Commerce b) Taxation of Electronic Transmissions) Discussions concerning the import and export of tangible media, such as CDs containing digital content such as software, have been active within international trade frameworks since before the inception of the WTO\(^4\), and the discussions that have developed concerning electronic commerce since the inception of the WTO have stemmed from the issue of the non-imposition of tariffs; until now, this has been the issue attracting the greatest amount of commercial interest, associated with the fact that trade using electronic commerce is a virtually unregulated field. Consequently, if, hypothetically speaking, it became technologically possible to “capture” electronic transmissions for the purpose of imposing tariffs, one absolutely cannot predict in general terms how the political significance of imports or exports will be perceived and how, as a result, it will be reflected in the form of policies.

Amidst this kind of situation, in the chapters on electronic commerce in bilateral FTAs concluded by the United States and Australia in recent years, the non-imposition of tariffs is stipulated as a permanent legal obligation, and, except in a handful of cases, these regulations do not include descriptions limiting revisions or legal effects to a certain period in the event that the imposition of tariffs becomes technologically possible in the future. At the same time, the biggest problem in the event that there is a legal commitment between two countries not to

---

\(^3\) Paragraph 222 of the WTO Appellate Body Report concerning the EC Bananas dispute (WT/DS27/AB/R): "Therefore, the Appellate Body upheld the Panel's finding that the EC banana import licensing procedures are subject to both the GATT and the GATS, and that the GATT and the GATS may overlap in their application to a particular measure."

\(^4\) Since the inception of the WTO, discussion of tax levies has developed, in a form that takes over from the decision of the Committee on Customs Valuation (VAL/8), which was adopted at the conclusion of the Tokyo Round in 1984 (VAL/M/10). Please refer to the latter part (3) (i) (b).
impose tariffs is free rides by non-signatories. In particular, in the current situation, it is technologically impossible to capture electronic transmissions for the purpose of imposing tariffs. It is impossible to impose tariffs that target only electronic transmissions from countries other than those that have concluded an agreement not to impose tariffs, so it is not possible to prevent the political benefits of the non-imposition of tariffs going beyond the free trade areas established through agreements to encompass the whole world.

As a further technological issue, even when there is an electronic transmission from a signatory country, it is difficult to identify the country of origin of an electronic transmission (to put it in terms of the trade in goods, understanding the source of the product), that is to say, whether it has actually originated in the signatory country or whether something transmitted from a non-signatory country has just passed via a signatory country; accordingly, it is not possible to achieve political benefits from the non-imposition of tariffs that are confined to the two countries signing the treaty. This interpretation is envisaged to be a very great cause for concern from the perspective of a country in the position of identifying the positive significance of the finite nature of the moratorium.

If we look at the matter from the standpoint of acknowledging that the technological impossibility of imposing tariffs has been an important political factor that has made it possible to establish the moratorium, the prospect arises that the moratorium itself will cease with the end of the technological impossibility, and, at the same time, it will become technologically possible to realize the selective non-imposition of tariffs that is specific to a free trade area implemented through a bilateral or region-wide agreement. To put it another way, anxiety about free rides by non-signatory countries is substantially limited to the moratorium period, and it is possible to interpret this to mean that it will not have any substantial impact on the pros and cons of imposing a legal obligation not to impose tariffs after the moratorium period.

Moreover, in the current situation, in which a moratorium exists from the start, none of the WTO member countries impose tariffs, so one can interpret this to mean that, even if there is a legal commitment between two countries not to impose tariffs, there will be no substantive impact on the worldwide non-imposition of tariffs. In addition, contributing to the reduction of tariffs and the abolition of barriers to trade is enshrined in the preamble to the agreement that established the WTO, and whatever the political background to the formation of this moratorium, it is appropriate to believe that, ultimately, advocating free trade that transcends the technological pros and cons has consistent benefits for all of the Member countries of the WTO. Accordingly, it is not easy to imagine a situation in which WTO Member countries would impose tariffs as soon as the restriction, in the form of the technological impossibility, was removed. Naturally, at this stage, even if there were a country that imposed tariffs once it ceased to be technologically impossible to do so, as a result of the diverse political background, there is no established regulation that questions its essential illegality. However, if examples of the United States and Australia establishing legal obligations not to impose tariffs in bilateral FTAs continue to increase in the future, in view of the prospect that the “tariff non-imposition community” that is effectively formed as a chain of such agreements will be established as an effective category in the same way, along with the end of the technological impossibility, then it is anticipated that a situation will arise in which each country will weigh the balance between the fiscal incentives of tariff imposition and the principle of trade reciprocity, and will be under economic pressure to judge the political pros and cons. In addition, among advanced countries, the moratorium is not positioned as something for the purpose of reserving the right to impose tariffs, and there are countries that
are avoiding discussions within bilateral trade negotiations, as they take the standpoint that the setting of permanent regulations should be conducted within the WTO forum.

v) Discussions Within Major International Organizations

(a) WTO

As stated in iv) (a) above, discussions within the WTO regarding electronic commerce arose from the issue of the non-imposition of tariffs. After the United States submitted to the General Council of the WTO in February 1998 a document proposing that customs duties not be imposed on electronic transmission\(^5\), the Ministerial Declaration on Global Electronic Commerce was adopted at the 2\(^{nd}\) WTO Ministerial Conference, which was held in Geneva in May 1998. In this declaration, as well as deciding to formulate an action plan for considering all issues concerning trade relating to electronic commerce, the basic principle of the non-imposition of tariffs on electronic commerce was agreed. (For further details of the development of work and discussions within the WTO, refer to Section II, Chapter 11, Column E-Commerce-Main Points of Discussion 2) Background of WTO Discussion). From the very outset, discussions and proposals within the WTO concerning electronic commerce have primarily taken place from the viewpoint of existing trade frameworks (services, goods, intellectual property and development), but outside the WTO, although deliberations from a cross-cutting perspective in particular have been viewed as important, discussions have not really progressed. What was explicitly stated at the Hong Kong Ministerial Conference in December 2005 was that, ultimately, the non-imposition of tariffs and the classification of digital content would be the main focus. However, with regard to the latter, it is very interesting that this would not involve discussion of digital content in general, but rather discussions with a narrower focus on “software provided electronically”, which also makes one think about the fact that the EU has expressed concerns about classification in relation to visual images and broadcasting services. In any case, this is a discussion that directly impacts on profits from trade, and even if one looks at the chapters on electronic commerce in the bilateral FTAs being implemented in parallel by such countries as the United States and Australia, there are many cases in which, although they do not specify any concrete content, they affirm “the applicability of the WTO Agreement”. In particular, in the relationship between existing trade frameworks and electronic commerce such as that detailed above, even if there is no comprehensive agreement at this point in time, with regard to sections where there is an internationally unified awareness to some extent concerning the applicability of the WTO Agreement in individual fields (for example, in cases where laws concerning trade in goods are applied where something is traded as a good statically recorded on a tangible medium such as a Compact Disc (CD) or Digital Versatile Disc (DVD)), this can be interpreted to mean that, at the very least, the WTO Agreement/regulations are not completely non-applicable. Moreover, with regard to agreements in comprehensive applicability relationships that do not currently exist, it is acknowledged that there are aspects where the applicability of those agreements will be checked in case WTO discussions progress in the future. In essence, even now, the WTO can be said to be potentially the most influential forum for discussion. In the Ministry of Economy, Trade and Industry proposal published in June 2001 (for details of the content of the proposal, refer to Section II, Chapter 11, Column E-Commerce-Main Points of Discussion 1) Main Points in WTO Discussion on E-Commerce d) Japan’s Effort), Japan has summed up the importance of establishing “the basis of an international framework concerning.

\(^5\) WT/GC/W/78
e-commerce that will benefit both developed and developing countries” and the importance of “continuing to implement legitimate policies that reflect in a well-balanced fashion the interests of both consumers and businesses” as the concept of “eQuality”, and has submitted proposals for issues that should be tackled by the WTO and frameworks for studying them.

(b) OECD

Within the OECD, an action plan has been constructed in the form of a summary of impacts on the economy resulting from various issues in the technological field. Since before the term electronic commerce became widely known, the OECD has engaged actively in such activities as formulating guidelines on the protection of privacy resulting from the development of information and communications technology; it was the OECD Ministerial Conference on Electronic Commerce, which was held in the Canadian city of Ottawa in October 1998, with the participation of both member and non-member countries, that spearheaded deliberations under the keyword electronic commerce. At this conference, the OECD Action Plan for Electronic Commerce was adopted, in which the four principles of “building trust with users and consumers”, “setting the basic rules for digital markets”, “strengthening information infrastructure for electronic commerce” and “maximizing the benefits brought about by electronic commerce” were included.

(i) Building trust with users and consumers

The main activities that are derived from this principle are consumer protection, privacy protection, and information security and authentication. In particular, with regard to consumer protection, a document was published in December 1999, entitled The OECD Guidelines for Consumer Protection in the Context of Electronic Commerce. This document sets forth eight principles: “transparent, effective consumer protection”; “fair sales, advertising and marketing behavior”; “online information disclosure”; “verification processes”; “payment”; “conflict resolution and redress”; “privacy protection”; and “education and publicity”. In addition to the aforementioned eight basic principles, the OECD is recommending and proposing the implementation of guidelines and global cooperation. In particular, in 2003, the OECD Guidelines for Protecting Consumers from Fraudulent and Deceptive Commercial Practice Across Borders were established, giving more concrete form to part of the aforementioned principle of “fair sales, advertising and marketing behavior”. At the same time, the OECD Guidelines Governing the Protection of Privacy and Transborder Flows of Personal Data, which was enacted in September 1980, is the cornerstone of privacy protection, and, through their implementation, the OECD is promoting activities such as the technological verification of improved privacy protection and increased user awareness. Finally, with regard to information security and authentication, the OECD Guidelines on Security of Information Systems were formulated in 1992, while in 1997, the Guidelines on Cryptography Policy were enacted. The former were revised in 2002 as the Guideline for the Security of Information Systems and Networks.

(ii) Setting the basic rules for digital markets

The main activities derived from this principle relate to the tax system, trade policy and market access, competition and electronic finance. Firstly, with regard to the tax system, the basic principles and an action plan were formulated
in the Electronic Commerce: Taxation Framework Conditions, which were reported at the OECD Ministerial Conference on Electronic Commerce in Ottawa in 1998. Ahead of this, discussion took place at the Turku Conference, which was held in Finland in 1997, concerning the basic framework for the taxation of electronic commerce, and the 1998 report was the result of ongoing efforts thereafter. With regard to the basic principles of the tax system relating to electronic commerce, it was proposed that the principles of neutrality, efficiency, clarity and certainty, effectiveness and fairness, and flexibility are necessary; with regard to the tax system framework for implementing these principles, it specifies that the elements covered are services for taxpayers, tax administration (administration of information about individual taxpayers and authentication of taxpayers), the collection of taxes, consumption tax, and cooperation with the international tax system. Of these, with regard to the international (direct) taxation system, consumption tax and the administration of tax affairs, the OECD compiled an investigative report in 2001, concerning the implementation of its 1998 Taxation Framework Conditions. A progress report compiled in 2003 stated that it was not appropriate to hold isolated discussions about the tax system concerning electronic commerce alone, while referring to the principle of neutrality in the Taxation Framework Conditions; and it was decided that the issue should basically be integrated into discussions about the tax system including forms of trade other than electronic commerce, while keeping an eye on future worldwide trends. With regard to trade policy and market access, the OECD has been carrying out various types of analytical work, primarily with the aim of supplementing discussions within the WTO. In December 2000, the OECD submitted a report with an analysis of a table showing each country’s GATS commitments from the particular perspective of the provision of online services. Competition was discussed at the Roundtable on Electronic Commerce held in October 2000; the issue of competition in electronic commerce infrastructure services on the Internet in particular, and the question of what impact this has had on competition policy to date in commerce itself were pointed out as issues for consideration. Finally, with regard to electronic finance, there are no particular meetings, proposals or reports.

(iii) Strengthening information infrastructure for electronic commerce

The main activities stemming from this principle relate to access to and use of information infrastructure, Internet management and the domain names system. Firstly, with regard to access to and use of information infrastructure, consideration has primarily been given to market trends and policy implications with regard to communications technology, such as approaches to network service prices, telecommunications regulations and interconnectivity between businesses. In particular, with regard to the relationship with electronic commerce, a report entitled Local Access Pricing and E-Commerce was published in 2000, which appealed for an awareness of the “international digital divide” brought about by differences in the degree to which international networks have become pervasive. In addition, with regard to the status of the international development of information and communications infrastructure, the OECD conducts research and provides reports almost every year, in the form of the OECD Information Technology Outlook and the OECD Communications Outlook. With regard to Internet management and the domain names system (DNS), substantial administrative work has been carried out since ICANN
(Internet Corporation for Assigned Names and Numbers) was established as an international private-sector non-profit management group focused on DNS in 1998. However, the OECD has not engaged in any particular deliberations or published any reports, but in May 2005, it did submit a report providing statistical information to the Working Group on Internet Governance, which was formed under the auspices of the United Nations.

(iv) Maximizing the benefits brought about by electronic commerce

The main activities arising from this principle relate to the impact on the economy and society, electronic government, small and medium-sized enterprises, education and skills, remote area development and information and communications technology, cooperation in development, and global participation. In order to develop highly consistent international statistics, the OECD has published various reports that scrutinize various private sector surveys, while proposing a definition of electronic commerce and various relevant indicators. What are particularly interesting are the survey activities carried out from 2001 to 2002 as part of the Electronic Commerce Business Impacts Project (EBIP), which even went so far as to conduct a detailed analysis of the business models of individual companies from member countries, with detailed individual reports being made on the usage status of electronic commerce within the industrial sectors of Canada, France, Italy, South Korea, the Netherlands, Norway, Portugal, Spain and Sweden. Without promoting substantive policies, the OECD has achieved wide-ranging, detailed outcomes in the form of research into and publication of various guidelines. Partly due to the fact that major advanced countries have been involved in the formulation of these reports and proposals, many of the individual items are easy to adopt in bilateral trade negotiations, as guidelines regarding whose direction there is already a consensus; the provisions relating to consumer protection in the chapter on electronic commerce in the FTA between Australia and Chile actually partially incorporate phrases from the OECD Guidelines for Consumer Protection in the Context of Electronic Commerce.

(c) UNCITRAL

Within UNCITRAL, which was established in 1966 as a committee under the direct control of the United Nations General Assembly, there are six working groups. It is Working Group IV within which electronic commerce is being discussed. This working group has changed its theme several times in the past, but since 1997, it has continually functioned as a working group focused on electronic commerce. (Before 1997, its theme was EDI (Electronic Data Interchange).)

UNCITRAL itself has as its mission the gradual harmonization and unification of international trade law; discussions within the working groups are limited to aspects of international trade between the parties in private-sector transactions, and they do not generally handle matters relating to trade between sovereign states. The three main outcomes of the working group in question are as follows:

(i) Model Law on Electronic Commerce

This was adopted by UNCITRAL at the 29th Session of the General Assembly in 1996, and was adopted as an international resolution of the General Assembly in January 1997. Its objective is “for each sovereign state to
strengthen its national laws focused on controlling the use of alternatives to paper-based methods of communication and information storage, or, if such laws have not yet been enacted, to provide significant support in the formulation of such laws.” To explain in more detail, it is designed to establish a functional-equivalent for electronic media with regard to the concepts of “writing”, “signature” and “original” in paper-based transactions, and the main relevant provisions include “the legal weight, effectiveness or enforceability of information must not be denied on the grounds that it takes the form of a data message (Article 5)”, and “in relation to the completion of contracts, as long as there is no particular agreement between the parties, it is possible to display applications and consent to applications by means of data messages (Article 11)” (This model law underwent a few revisions in 1998; it is the latest version.) Even after formulating this model law, the working group has continued to monitor whether or not it has been reflected in the national laws of each country and accept reports about this situation; it also publishes on its website country names and information about the years when laws were enacted. Various countries have incorporated the model law in their domestic legislation in some form, from advanced countries such as Australia, South Korea, Hong Kong, Canada, the UK, Singapore, France and the USA to developing countries such as Vietnam, the UAE, China, Mexico, Sri Lanka and Thailand. Japan does not submit such reports, so its name does not appear on the website, but the main content of this model law is substantively reflected in “the Law Concerning Electronic Signatures and Certification Services (Law No. 102, 31 May 2000)” and “the Act on Special Provisions to the Civil Code Concerning Electronic Consumer Contracts and Electronic Acceptance Notice (Law No.95, 29 June 2001)”.

(ii) Model Law on Electronic Signature
Provisions concerning electronic signatures were already incorporated into Article 7 of the Model Law on Electronic Commerce, but this model law was adopted by UNCITRAL in 2001, reflecting in particular the latest technological developments relating to electronic signatures; in the same year, it was adopted as an international resolution of the General Assembly. The concepts that were added to this model law were the establishment of standards relating to technological reliability in order to certify the equivalence of electronic signatures with written signatures, and the guaranteeing of technological neutrality to ensure that no legal advantage is given to a particular technological product used for electronic signatures. The status of the reflection of this law in national laws is also shown on the website, but few laws reflect this model law and it is more or less confined to the developing countries of China, Mexico, Thailand, the UAE and Vietnam.

(iii) United Nations Convention on the Use of Electronic Communications in International Contracts
This was adopted by UNCITRAL in 2005, and in the same year, it was adopted as a resolution of the United Nations General Assembly. While the aforementioned two model laws are aimed at forming internationally harmonized domestic laws in each country, the objective of this convention is to strengthen legal certainty and commercial predictability in the field of international contracts where there is no exclusive jurisdiction, especially in
cases where electronic communication is used. In particular, it deals with the questions of how to determine the location of the parties to a transaction carried out in an electronic environment, and how to determine the time and place of the transmission and receipt of electronic communications. At the same time, it also incorporates such concepts as the functional equivalence of electronic certification methods with handwritten signatures, just as in the model laws. A total of 18 countries have signed the convention. Most of these are developing countries, such as China, the Central African Republic, Paraguay, and the Russian Federation, but South Korea and Singapore have also signed it. However, none of them have ratified it or put it into effect. Thus, there is the view that the activities of UNCITRAL are aimed at the international harmonization of legal systems, so this convention is being proactively used as a useful outcome by states with underdeveloped legal systems. In essence, unlike the various discussions within the OECD, the harmonization of legal systems being sought by UNCITRAL relates in particular to contracts in general, irrespective of the individual form of commercial transaction used, so there is little prospect that particularly constructive discussions will be developed within the working group in question in the future. Reflecting this situation, there are few cases in which the latest discussions within UNCITRAL are directly cited or utilized when dealing with electronic commerce in bilateral trade negotiations. However, historically, it is a fact that the legislation relating to electronic signatures enacted by developed countries contains provisions that are harmonized with the UNCITRAL model law to some degree; so among those bilateral FTAs that have already established the basic principles for electronic signatures and other electronic certification methods, one does see some examples where basic principles held in common with the model laws have been incorporated into those agreements, specifically such principles as the neutrality of authentication technology. The EPA between Japan and Switzerland prescribes this neutrality, with the domestic legislation of both countries relating to electronic signatures serving as the laws guaranteeing this.

In 2009, after the adoption of the United Nations Convention on the Use of Electronic Communications in International Contracts mentioned in (iii) above, the working group examined a number of themes aimed at investigating future research topics in the field of electronic commerce, and it published a paper entitled Legal Issues on International Use of Electronic Authentication and Signature Methods, which summarizes current trends relating to electronic signatures and electronic authentication, which are likely to become the focus of future discussions.

(d) APEC

In the section entitled “A Vision for the 21st Century”, the Leaders’ Declaration issued at the APEC Leaders’ Meeting held in November 1997 states that “electronic commerce is one of the most important technological breakthroughs of this decade”, and that the cabinet ministers of each country should make a commitment to an action plan for the region; in addition, it stipulates that this initiative “should recognize the leading role of the business sector and promote a predictable and consistent legal and regulatory environment”. Subsequently, in 1998, the APEC Blueprint for Action on Electronic Commerce was published as the APEC Leaders’ Declaration. In particular, it stated that APEC ministers recognize the enormous potential of electronic commerce to facilitate the greater participation of small business in global commerce. Moreover, it
Part III FTA/EPA and BIT

cites the 1997 APEC Leaders’ Declaration, stating that, “While recognizing that some degree of government regulation may be necessary, technology-neutral, competitive market-based solutions which can be safeguarded by competition policy, and effective industry self-regulation, should be favored”. Furthermore, cooperation with the OECD and UNCITRAL is also mentioned. In 1999, the ECSG (Electronic Commerce Steering Group) was established as an APEC Senior Officials’ Special Task Force. Since 2007, the ECSG has been working in partnership with the APEC CTI (Committee on Trade and Investment), and issues relating to trade and investment are the main focus of discussions.

(i) Data privacy

With the aim of promoting consistent information privacy protection measures in APEC member countries, in order to prevent flows of information relating to trade between member countries being hindered unnecessarily, the APEC Privacy Framework was adopted at the APEC Leaders’ Summit held in November 2005. This framework was designated as technical assistance for each country in tackling the issue of privacy from a regulatory and policy-related viewpoint, and stated that countries that had already put in place a legal system relating to the protection of personal information should voluntarily promote its harmonization with the existing legal system in those countries. Moreover, this framework also refers to the actual operational aspects, such as remedial measures in the event that privacy is violated, providing notification concerning the status of investigations of privacy violations, and the sharing of information and cooperation in investigations relating to the enforcement of relevant laws. In addition, this framework itself acknowledges that it is fundamentally consistent with the 1980 OECD Guidelines Governing the Protection of Privacy and Transborder Flows of Personal Data. Subsequently, in order to achieve the international implementation of the APEC Privacy Framework, the APEC Data Privacy Pathfinder was adopted in 2007 by both the APEC Ministers’ Meeting and the APEC Leaders’ Summit; this document has as its objective the implementation of the Cross-border Privacy Rules (CBPRs) formulated by organizations handling personal information. The Pathfinder project, which began in 2008, involves discussions aimed at the formulation of documents such as self-assessment guidelines for businesses, CBPR conformity screening criteria for businesses, and agreements for international cooperation in the enforcement of laws on the cross-border protection of personal information.

(ii) Paperless trade

In the implementation of Strategies and Actions Toward a Cross-border Paperless Trading Environment, work that will facilitate the electronic transmission of trade-related information within the APEC region by 2020 is being considered and promoted by the ECSG. The specific areas of work were specified to be electronic certificates of origin, electronic invoices, electronic documentation and electronic trade financing. Furthermore, as a separate initiative from the ECSG, a declaration made at the time of the APEC Leaders’ Summit held in the South Korean city of Busan in 2005 welcomed the formulation of the APEC Trade Facilitation Model Measures for RTAs/FTAs, and stated that as many model measures as possible should be developed by 2008 in the chapters of FTAs that are usually accepted; in addition, the formulation of a framework that would not be legally binding but which could
serve as a useful reference for member countries when negotiating regional trade agreements and FTAs was promoted. In response to this, the chapter on electronic commerce was agreed at the 2007 APEC Ministers’ Meeting, and model measures were formulated for 15 chapters by the end of 2008. Under the leadership of the APEC Committee on Trade and Investment, APEC member countries discussed and formulated these model measures. The model measures concerning electronic commerce consist of sections entitled General Considerations, WTO Applicability, Electronic Supply of Services, Customs Duties, Non-discriminatory Treatment of Digital Products, Electronic Authentication and Digital Certificates, Online Consumer Protection, Paperless Trade Administration, Transparency, Domestic Regulatory Frameworks, Online Data Protection, Cooperation, and Definitions. Moreover, in December 2004, the eSecurity Task Group, which was established within the Telecommunications and Information Working Group, which itself is one of the working groups under the auspices of the APEC Senior Officials’ Meeting Steering Committee on Economic and Technological Cooperation, put together the Guidelines for Schemes to Issue Certificates Capable of Being Used in Cross Jurisdiction eCommerce. This taskforce emphasizes interaction with schemes relating to the use of the various Public Key Infrastructure (PKI) technology that has already evolved in Europe; this initiative seeks to compare and identify differences and similarities between the many and varied technological standards that exist in the use of certificates using PKI in electronic commerce in the fields of contract formation, online purchasing and shipment-related documentation between businesses, as well as in customs, quarantine, taxation and the receipt of social security between governments and businesses or between governments and the general public, not to mention the exchange of information between governments about passenger and cargo movements.

Given that it is strongly emphasizing leadership by the business sector and cooperation between the public and private sectors, APEC is promoting initiatives that differ considerably from those of the WTO and UNCITRAL. It identifies itself as conducting similar activities to those of the OECD, and this is also clearly stipulated in the APEC Privacy Framework. At the same time, it has formulated model measures and member governments have taken up trade-related issues, so it is also embarking on the promotion of substantive policies, unlike the OECD. In one sense, one can describe it as a forum for comprehensive discussions, but one cannot deny that it is easier for discussions to progress in this forum, because there are fewer impediments related to the subtleties of policies than in the WTO, as APEC does not include India or the countries of Western Europe. With regard to this point, it is profoundly significant that cooperation with the OECD can be reflected in a trans-regional, global outlook such as APEC. Nevertheless, as can be seen in the principle of WTO applicability incorporated into the model measures, the stance that the WTO should take the lead in the formation of trade rules has not been destroyed. Thus, more than the nature of APEC itself, the reason why APEC is a forum where the most substantive discussions of any region of the world concerning electronic commerce have progressed is believed to be the existence and proactive endeavors of its leading member countries: the United States and Australia. Both of these countries are promoting the formulation of provisions concerning electronic commerce in their bilateral trade negotiations; they have actually put in place chapters concerning electronic commerce in their bilateral
FTAs with other countries within the APEC region, and the outcomes of these can be seen to have been reflected in the APEC model measures over time. Rather than serving as a forum for discussions, it would be more appropriate for APEC to introduce advanced private-sector initiatives and best-practice initiatives for each trade-related endeavor undertaken by each member government, to share these and to present itself as playing an intermediary role in feeding these back into individual initiatives undertaken by both governments and the private sector.

(2) Legal Regulations in General

As stated in (1) (i) above, the number of examples of effective legal regulations being put in place in bilateral FTAs has increased, with the United States and Australia taking the lead. Japan has also set forth legal regulations in the EPA with Switzerland. However, as stated in (1) (ii) above, each agreement has various differences and variations, reflecting as they do the differing nature of trade itself and the political backgrounds of the parties to each agreement. Consequently, before describing the individual provisions of each agreement, the author would like to compare the differences between them; below is a summary of the differences and similarities, which the author hopes will serve as an aid to achieving an overall understanding of the content of the individual agreements. With regard to the structure of these generalized regulations, firstly there is i) the scope of application of the regulation and ii) provisions concerning consistency with other regulations; after this come the substantive provisions that fall in line with the foregoing provisions: iii) non-discriminatory treatment of digital products, iv) non-discriminatory treatment of services transferred electronically, v) access to electronic commerce markets, vi) customs, vii) domestic regulations, viii) electronic signatures and authentication services, ix) paperless trade administration, x) online consumer protection, and xi) private sector participation. Moreover, cases in which matters relating to cooperation between the two countries specific to the field of electronic commerce are set forth are detailed in xii) cooperation.

i) Scope

As stated in (1) ii) Definitions and Outline of Electronic Commerce above, the margins of the concept of electronic commerce have not been fixed, so there is constant debate about the scope of each legal regulation. In the chapters on electronic commerce in bilateral agreements, the scope is mainly set out on the basis of the following three methods:

(a) Confirming only its positioning as the electronic supply of services, without specifying the scope

As stated in the section on technological neutrality in (1) ii) (a) above, there is the principle that “with regard to differences in technological techniques relating to provision, service trade regulations should be neutral”. To put it another way, this means that, for example, if we compare a case in which people meet directly for the provision of legal consultation services, and a case in which the legal consultation service is provided online in a remote place by such means as e-mail or video conferencing, the only difference is a technological one, which lies in the means of providing the service, so a distinction should not be drawn in regulations concerning service trade between the two formats in which the service is provided. If this principle is reflected in the substantive provisions, regulations concerning trade in services would apply to the provision of services by an electronic means in exactly the same way as the provision of services by any other means. In essence,
this is a discussion about the scope of application of service trade regulations, but in bilateral agreements, there are many examples of provisions being set forth that also affirm this principle from the perspective of laws concerning electronic commerce. However, this is not to prejudge the wording of the scope of application of regulations concerning electronic commerce, and when thinking about the relationship with the substantive provisions, in the case of online consumer protection, for example, it would be too unnatural to interpret this as meaning that online consumer protection does not apply to electronic legal consultation services. Accordingly, this kind of provision does not, in principle, prevent the interpretation that regulations concerning electronic commerce apply universally in an overlapping fashion to all relevant matters, including services provided electronically.

(b) Clearly stipulating items exempt from the application of the regulation, as well as items in (a) above

In relation to the fact that the interpretation of (a) above specifies “the universal, overlapping application to all relevant matters”, in bilateral agreements, there are cases in which issues that are deemed by one or both parties to be sensitive issues are exempted from the scope of application. With regard to the exemption method, there are cases where a particular issue is exempted from the application of the chapter as a whole, in the sense of being made the target of all regulations concerning electronic commerce, and other cases where the issue is exempted from the application of specific substantive provisions. Examples of issues that are exempted include domestic taxation, subsidies and government procurement, broadcasting and audiovisual services, general exceptions and exceptional measures relating to security in GATT and GATS, and measures concerning regulatory inconsistencies in investment services (so-called “non-conforming” measures).

(c) Clearly stipulating the scope of application, and then the individual exceptions

After clearly stating the scope of application in the form “This chapter applies to measures affecting electronic commerce by the signatories”, this method involves clearly stipulating the individual exceptions to its application, as described in (b) above. This is the method adopted by Japan in its EPA with Switzerland, but it is otherwise unprecedented at present. There is no change in the fact that the term “electronic commerce” is not defined, so it has substantially the same effect as (b). In addition, separately from these, the applicability of the WTO Rules Agreement is often affirmed. This is fundamentally an “affirmation/recognition” provision, and does not have any legal weight that would delimit the scope of application. Moreover, in a situation in which there is still nothing in the existing WTO trade rules and agreements that relate comprehensively to electronic commerce or have any legal weight, it is unclear specifically which content of what kind of agreements or regulations are being affirmed. Firstly, though, with regard to trade in goods or services using electronic commerce, the relationship with existing trade frameworks is being discussed, as described in the section on technological neutrality in (1) ii) (a) above. In this particular case, the concrete scope of application of the provision being affirmed is not specified, but with regard to instances of electronic commerce in which there is an overlap with WTO jurisdiction as an existing trade framework, at the very least, one valid interpretation is that the provision reserves the notion that the WTO
Rules Agreements are not exclusively inapplicable. Furthermore, this can be interpreted as a statement of intent that the results of WTO discussions will be respected, in preparation for a time in the future when discussions within the WTO concerning a comprehensive framework on electronic commerce have progressed. This affirmation provision has not been set forth in the Japan – Switzerland EPA.

ii) Provisions concerning consistency with other regulations

In relation to the method of setting forth the scope of application, if it is based on the premise of overlapping with other regulations, provisions concerning consistency are required, in the event that the regulations are not consistent. In this kind of situation, the provision usually takes the form “...do not apply to the extent of inconsistency with...” More specifically, the only examples that are subject to this kind of consistency provision are inconsistencies in regulations concerning intellectual property in the United States – Australia FTA and inconsistencies in regulations concerning trade in goods, trade in services, investment and intellectual property in the Japan – Switzerland EPA. If we look at the situation from the perspective of the premise that specific issues of concern to the signatory countries are dealt with individually in the form of exceptions to the scope of application, we can say that these consistency provisions at least provide an interpretation in the event that there is a dispute over the operation of the treaty regulations, rather than dealing with substantive concerns relating to trade.

iii) Non-discriminatory treatment of digital products

The classification of digital content in the WTO has become deadlocked, so the United States has set a precedent in a specific provision in its bilateral trade negotiations. Firstly, it defines digital content as “digital products” and sets forth the details of national treatment and most-favored-nation treatment in relation to such products.

a) The definition of digital products

To begin with, the debate within the WTO became embroiled in an argument about whether digital products are goods or services, and there is no consistent international definition. However, the definition provided in the United States – Singapore FTA, which was the first to set out a definition, has subsequently been adopted in most bilateral agreements. The common definition is “digital products are computer programs, text, video, images, sound recordings or other products that have undergone digital encoding”; in particular, many of the FTAs concluded by the United States specify in regard to such product formats that “there is no distinction between them, whether they are transmitted electronically or fixed on a carrier medium.” Carrier media include Compact Discs (CDs) or Digital Versatile Discs (DVDs), so in essence, visual images and software, which had hitherto been traded as goods, are also included in the category of digital products. At the same time, digital content fixed on a carrier medium is not included in the definition in the United States – Chile FTA or the Japan – Switzerland EPA, and only content transmitted electronically is defined as a “digital product”. This difference is thought to be based on the difference in approach with regard to how the concept that “trade regulations should be neutral in regard to differences in technological methods, such as types of media and transmission methods” described in the section on technological neutrality in (1) ii) (a) above is expressed in the relationship with the substantive provisions. In the FTAs concluded by the United
States, neutrality is expressed by adopting a definition method that states that there is no distinction between formats. With regard to digital products fixed on a carrier medium, the existing GATT/WTO regulations concerning the trade in goods have already been established, so the Japan – Switzerland EPA has adopted an approach of giving priority to the stability of law and order by applying new trade regulations in an overlapping fashion, thereby avoiding the risk that existed hitherto, that there would be scope for changing interpretations of international law. The specific regulations concerning the trade in goods referred to here include national treatment, etc., and in order to clarify the intent of the regulations, the Japan – Switzerland EPA contains a supplementary note stating that “digital products that are fixed on a carrier medium are subject to trade regulations relating to goods.” As a result, as well as clarifying that only the chapter on trade in goods and not the chapter on electronic commerce is applicable to digital products fixed on a carrier medium, the chapter on electronic commerce establishes provisions for the handling of tariffs relating to digital content transmitted electronically, regarding which there are no existing trade regulations. In addition, based on the stance of ultimately maintaining a distance from trends in classification methodology within the WTO, the FTAs concluded by the United States contain a note stating that “this definition should not be understood to reflect the opinion of the signatories regarding whether trade in digital products conducted via electronic transmission should be regarded as trade in services or trade in goods.” However, the definition of tariffs that are the subject of non-imposition, which is dealt with in the chapter on electronic commerce, is that they are imposed on goods, so irrespective of a country’s stance on classification methodology, the provisions on the non-imposition of tariffs are only valid in cases where electronic transmission is treated as trade in goods.

b) National treatment in relation to digital products

This is the stipulation that there will be no discrimination between domestic and foreign with regard to the country of origin or nationality of the manufacturer, etc. of digital products; this is the same concept as the national treatment concept in trade in goods and services. There are a number of subtle variances in the methods employed in the provisions, and the details of the differences will be described later in the section on the interpretation of individual bilateral agreements.

c) Most-favored-nation treatment in relation to digital products

This is the same concept as the national treatment concept in trade in goods and services, and stipulates that there will be no discrimination against non-signatory countries with regard to the country of origin or nationality of the manufacturer, etc. of digital products. There are a number of subtle variances in the methods employed in the provisions, and the details of the differences will be described later in the section on the interpretation of individual bilateral agreements.

iv) Non-discriminatory treatment of services transferred electronically

This is only prescribed in the Japan – Switzerland EPA. Whereas the provision mentioned in the section on technological neutrality in (1) ii) (a) above, that “with regard to differences in technological techniques relating to provision, service trade regulations should be neutral” merely guarantees technological neutrality of the
provisions concerning trade in services set forth in that agreement, this provision stipulates that domestic measures taken by each signatory must not discriminate technologically. The actual provision has the wording that “measures governing electronic commerce” shall not discriminate against services transferred electronically, and even if it is merely a measure relating to electronic commerce and it is unclear whether or not it directly relates to services, it also incorporates an aspect that excludes the possibility that this will infringe upon the technological neutrality of services in a roundabout way.

v) Access to electronic commerce markets

This is only prescribed in the Japan – Switzerland EPA. In the same way as the concept of market access in trade in goods and services, this provision is based on the approach that, even if there are measures that do not recognize discrimination on the grounds of nationality, quantitative restrictions can have a trade-distorting effect, and so should be regulated; accordingly, it prohibits the maintenance and application of measures that unduly impose prohibitions or restrictions relating to electronic commerce in general. Conceivable examples of prohibitions or restrictions include undue restrictions imposed by governments on the number of participants in a transaction and unreasonable preferential treatment or exclusions relating to specific technologies used in transactions.

vi) Customs

The moratorium on the imposition of customs tariffs has continued since the 2nd WTO Ministerial Meeting in 1998, right up to the present day; this is given substance in bilateral agreements as a permanent regulation that is legally binding. However, with regard to the fine points of the provision, there are two models: the United States model, which states that “apart from domestic taxes, tariffs, fees or other levies” shall not be imposed “in relation to the export or import of digital products”; and the Australian model, which adopts the WTO moratorium wording and states that “the signatories shall maintain the current customary practice of not imposing tariffs on electronic transmissions between the parties to this agreement”. With regard to the former, as stated in (2) iii) (a) above, to begin with, the United States definition of “digital content” includes “content fixed on a carrier medium” (apart from in the case of the United States – Chile FTA), so this means that there is a legal obligation not to impose tariffs on software and visual images simply exported or imported as trade in goods in the form of CDs and DVDs. In the Japan – Switzerland EPA, there is no permanent legal obligation not to impose tariffs applied only to bilateral trade, and the provision confirms the WTO moratorium, so it prescribes that the two countries should just work together within the WTO framework to achieve the establishment of a legal obligation. However, just as in the existing bilateral agreements of other countries, the Japan – Switzerland EPA prescribes that domestic taxes are excluded from the scope of tariffs subject to the non-imposition obligation.

vii) Domestic regulations

This is a provision mainly incorporated by Australia when concluding FTAs with the countries of the APEC region, which adopts the wording of the Domestic Regulatory Framework in the APEC model measures, which themselves substantiated the principles propounded in the APEC Blueprint for Action on Electronic Commerce and the UNCITRAL Model Law on Electronic Commerce. With regard to the content, the provision prescribes the formulation of a domestic legal framework based on the
UNCITRAL model law, the formulation of a regulatory framework that clearly stipulates the basic principle that industry should take the lead, and the greatest possible lightening of the regulatory burden. Without especially adopting the general drift of the UNCITRAL model law, the Japan – Switzerland EPA summarizes the remaining principles as the conditions on “private sector participation” detailed below; and a similar principle has also been newly formulated in the clause on national regulations in GATS (Article VI of GATS), stating that “the operation of measures relating to electronic commerce should be undertaken transparently, objectively, rationally and fairly, and they must not impose an unnecessarily heavy burden.”

viii) Electronic signatures and authentication services (refer to Figure 7 – 3)

The APEC eSecurity Task Group conducts research activities aimed at supporting the utilization of PKI (Public Key Infrastructure) in all types of electronic commerce. In light of this, Australia in particular has incorporated into the FTAs that it has concluded with APEC member countries provisions prescribing the pursuit of interoperability with regard to electronic certificates that use PKI, and the pursuit of the mutual recognition between signatories of electronic certificates, particularly those issued by governments in relation to administrative services. Moreover, it has also incorporated the “guarantee of technological neutrality, whereby legislative priority shall not be granted to any individual technological product used for electronic signatures”, which is prescribed in the UNCITRAL Model Law on Electronic Signature. Furthermore, with regard to all authentication technology relating to electronic transactions in a broad sense, without being restricted to electronic signatures or electronic certificates, Australia has stipulated the principle that the selection and adoption of this technology will be left to the parties to the transaction and that the country will not intervene, as well as the principle that it will not legislate to inhibit opportunities for the parties to a transaction to testify in court regarding the legal compatibility of electronic transactions. These principles have also been introduced in the APEC model measures, but perhaps because the United States is not all that enthusiastic, particularly with regard to the promotion of PKI, no such provisions have been set forth when concluding bilateral trade agreements with Australia; even when concluding bilateral trade agreements with Peru and South Korea, after the Australian agreement, although the aspect of technological neutrality and general principles relating to authentication remained from the proposals of UNCITRAL, provisions relating to the APEC-endorsed principle of interoperability had been deleted. In Japan’s case, technological neutrality is prescribed in the Japan – Switzerland EPA.
In addition, in the Law Concerning Electronic Signatures and Certification Services (Law No. 102, 31 May 2000), “certification service” is defined as “a service that, in compliance with either the request of a person who uses such service (hereinafter referred to as “user”) with regard to the electronic signature that he himself performs Discretionary authentication systems and PKI mechanisms for specific certification services or the request of another person, certifies that an item used to confirm that the user performed an electronic signature belongs to the user.” (Article 2, Item 2); of these services, a person meeting set standards relating to technology, equipment or services “may receive an accreditation from the related ministers” (Article 4, Item 1), and those receiving accreditation may be described as “accredited certification service providers”, with those seeking to undertake such a service “by means of an office located in a foreign country” also able to receive accreditation (Article 15, Item 1). With the aim of making this kind of accreditation system (Figure 7 – 4) more prevalent, Japan has, in the past, discussed with Singapore and Switzerland the finer points of their accreditation systems. In the case of Singapore, provisions relating to cooperation between the two countries regarding accreditation systems are incorporated into the implementing agreement pertaining to the Japan – Singapore EPA, while in the case of Switzerland, they are included in the actual provisions of the Japan – Switzerland EPA.
ix) Paperless trade administration

These regulations stipulate provisions that extract the main principles from the content discussed within APEC. Australia has taken the initiative in formulating these regulations and they are also reflected in the APEC model measures. For example, they stipulate that trade administration documents should be in a form that can be used officially as an electronic format, and that governments should accept trade administration documents submitted electronically as being legally equivalent to those submitted as paper documents. However, the legal power of these provisions varies according to each agreement; the stronger ones form obligations, and in this case, these obligations are not applied in cases where there are requirements under existing domestic or international laws, or cases in which computerization would actually decrease the efficiency of trade administration.

<Figure 7 – 4> Concerning electronic signatures and certification services

Electronic signatures (Article 2, Paragraph 1 of the law)

“Electronic signatures” are measures taken in regard to information that can be registered on electromagnetic records, and to which both of the following requirements apply:

1. It is a measure to indicate that the information was created by the person who performed the measure; and
2. It is a measure that can confirm whether or not any alteration of the information has been performed.

(Article 2 Paragraph 2 of the Law: Certification Service)
For the purpose of this law, "certification service" shall mean a service that, in compliance with either the request of a person who uses such service (hereinafter referred to as "user") with regard to the electronic signature that he himself performs or the request of another person, certifies that an item used to confirm that the user performed an electronic signature belongs to the user.

(Article 2 Paragraph 3 of the Law: Designated Certification Service)
For the purpose of this law, "designated certification service" shall mean a certification service that is performed with regard to those electronic signatures that conform to the standards prescribed by the ordinance of the related ministries as ones that, according to the method thereof, can only be substantially performed by that person.

Standards Prescribed in Ordinances of the Competent Ministry (Article 2 of the Enforcement Ordinance, Article 3 of the Guidelines)
- RSA method (SHA-1) 1024 bit or higher
- RSA-PSS (SHA-1) 1024 bit or higher
- ECDSA method (SHA-1) 160 bit or higher
- DSA method (SHA-1) 1024 bit or higher

(Article 4 Paragraph 1 of the Law: Accreditation)
A person seeking to perform or who has been performing designated certification service may receive an accreditation from the related ministers.

(Accreditation Standards: Article 6 Paragraph 1 of the Law)
i) Standards concerning equipment used for providing the service.
ii) Methods of checking the authenticity of users.
iii) Other service methods (formulation of service regulations, explanations to users, etc.)

For the purpose of this law, "designated certification service" shall mean a certification service that is performed with regard to those electronic signatures that conform to the standards prescribed by the ordinance of the related ministries as ones that, according to the method thereof, can only be substantially performed by that person.

Standards Prescribed in Ordinances of the Competent Ministry (Article 2 of the Enforcement Ordinance, Article 3 of the Guidelines)
- RSA method (SHA-1) 1024 bit or higher
- RSA-PSS (SHA-1) 1024 bit or higher
- ECDSA method (SHA-1) 160 bit or higher
- DSA method (SHA-1) 1024 bit or higher
In addition, the WCO Customs Data Model was completed in 2005 for the harmonization and standardization of trade-related information requirements in order to facilitate the exchange of information between customs authorities involved in import and export. At present, 171 countries are participating in the WCO, (World Customs Organization). (Its predecessor was the CCC (Customs Cooperation Council), which was established in 1952 and changed its name to the WCO in 1994; it was established with the objective of contributing to the development of international trade by promoting the harmonization and integration of customs procedures and promoting international cooperation in customs administration.) So far, the only country in the world to have introduced this is Japan, with respect to exports to Canada (December 2005). This data model recommends UN/EDIFACT (the United Nations Electronic Data Interchange for Administrations, Commerce and Transport and XML (eXtensible Mark-up Language) as the international technological standards for use in EDI (Electronic Data Interchange); there is a strong possibility that discussions within bodies such as the UN and the ISO concerning individual technological standards will influence approaches to trade administration documents.

Moreover, since the simultaneous terror attacks of September 11, 2001, awareness of trade security has increased, and in 2005, the WCO adopted the WCO Framework of Standards to Secure and Facilitate Global Trade; with the necessity of formulating standards for combining trade security and trade facilitation being advocated, international cooperation and the harmonization of systems is increasing, not only with regard to the computerization of trade administration documents, but also with a view to the utilization of high-level information technology in trade administration systems themselves. In addition, rather than the framework of electronic commerce, Japan has set forth regulations relating to customs in a wider sense, in the form of cooperation with customs authorities focused on customs procedures and trade facilitation. The same is the case in the United States and Australia, and there is a Chapter on Customs Procedures in their FTAs, with paperless trade being dealt with in this chapter. Technological standards and discussions relating to the WCO have not focused solely on electronic commerce, but rather have been positioned as one of the topics for discussion relating to customs procedures that also include conventional trade in goods in a wider sense.

x) Online consumer protection

The discussions concerning electronic commerce at the OECD have progressed from the 1998 OECD Action Plan for Electronic Commerce, which was the trigger for discussions of electronic commerce, consistently advocating “building trust among users and consumers”, with the principles of the action plan being carried on in the 1999 OECD Guidelines for Consumer Protection in the Context of Electronic Commerce. This provision deals with the principle that the adoption and maintenance by each country of measures relating to consumer protection in particular must be transparent and effective. Depending on the agreement, there are those that also advocate cooperation between consumer protection groups in each country. (As in the case of electronic signatures and certification services, Australia is the main proponent of this.) In addition, the Japan – Switzerland EPA incorporates stipulations concerning privacy protection into this provision, but in the FTAs of other countries, it is usual for this to be dealt with as a separate clause. With regard to privacy, the two main documents are the 2005 APEC Privacy Framework and its forerunner, the 1980 OECD Guidelines Governing the Protection of Privacy and Transborder Flows of Personal Data; the main provisions in bilateral agreements advocate the necessity of protection.
and give consideration to international standards.

xi) Private sector participation

As stated in (2) vii) Domestic regulations, this was originally formulated as a separate clause by Australia after summarizing the section that incorporated into bilateral agreements the principle that industry should take the initiative, which is contained in the Domestic Regulatory Framework in the APEC model measures; it exists only in the Japan – Switzerland EPA. Moreover, the provision advocating self-regulation by the private sector that was summarized as “cooperation” in the APEC model measures is contained in this clause.

xii) Cooperation

There are few examples of cooperation being specified separately as a provision relating to electronic commerce. It is clearly set forth in the APEC model measures, with the principles of the promotion of electronic commerce by small and medium-sized enterprises, the sharing of information concerning advanced technologies and business practices, and active participation in discussions in international forums being incorporated into the APEC Blueprint for Action on Electronic Commerce.

(3) Details of Specific Provisions in Bilateral Agreements (see Figure 7 – 5)

i) Other countries (in order of the date of signing)

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

Chapter 14 of this agreement is the chapter on electronic commerce, and is composed of the Preamble, Purposes and Definitions (Article 1), Transparency (Article 2), Customs Duties (Article 3), Domestic Regulatory Frameworks (Article 4), Electronic Authentication and Electronic Signatures (Article 5), Online Consumer Protection (Article 6), Online Personal Data Protection (Article 7), Paperless Trading (Article 8), Exceptions (Article 9) and Non-Application of Dispute Settlement Provisions (Article 10). Most of the main provisions are incorporated, apart from those relating to digital products, non-discriminatory treatment of services, market access, and cooperation. With regard to transparency, it contains the same provisions as the similar clause in GATS (Article III), apart from the provision concerning the establishment of an enquiry point and notification to the Committee on Trade in Services. The maintenance of the practice of non-imposition of customs duties is set forth as a legal obligation, but in the provisions, it is just stated that “Each Party shall maintain its current practice of not imposing customs duties on electronic transmissions between Australia and Singapore.” The definition of customs duties is stipulated in the chapter concerning trade in goods, while Article 1 of the chapter on electronic commerce stipulates that “customs duties’ has the same meaning as Article 1(a) of Chapter 2 (Trade in Goods).” As well as exempting domestic taxes from the scope of customs duties on electronic transmissions between Australia and Singapore, the general and security exceptions in the chapter concerning trade in services apply to this chapter as well. In particular, of the provisions that are legal obligations, this section stipulates that dispute settlement provisions shall not apply to the sections on domestic regulatory frameworks (including the elements of (2) xi) Private sector participation), electronic authentication and electronic signatures, online consumer protection, and online personal data protection. With regard to the content of each provision, there are no major deviations from the content detailed in (2) Legal Regulations in General,
but the points worthy of note are the fact that the only wording relating to the scope of application is the clause referring to “the applicability of relevant WTO rules”; and that, in the provision concerning online consumer protection. Nothing has been adopted from the OECD Guidelines for Consumer Protection in the Context of Electronic Commerce; the agreement merely prescribes that the parties shall be obliged to endeavor to “provide protection for consumers using electronic commerce that is at least equivalent to that provided for consumers of other forms of commerce under their respective domestic laws.”

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

Chapter 14 of this agreement is the chapter on electronic commerce, and is composed of clauses entitled General (Article 14.1), Electronic Supply of Services (Article 14.2), Digital Products (Article 14.3) and Definitions (Article 14.4). The wording relating to the scope of application is prescribed in Articles 14.1 and 14.2, and is similar to that described in (2) i) (b) above. However, there is a definition of “using electronic means” as referred to in Article 14.2, which is “employing computer processing”, but it is unclear whether this definition broadens or reduces the meaning of “electronic” in general usage. Moreover, it is not prescribed in this chapter, but the general exceptions in the chapter entitled General and Final Provisions (Article 21.1 Paragraph 2) prescribe that the GATS clause on general exceptions (Article XIV) is applicable to the provisions of the chapter on electronic commerce as well. In addition, there is a footnote concerning the adoption of the GATS exception clause in regard to electronic commerce, stating that, “This is without prejudice to the classification of digital products as a good or a service”. In terms of items set forth in the individual regulations, with specific regard to the regulation concerning non-discriminatory treatment of digital products (Article 14.3 Paragraphs 3 & 4), Article 14.3 Paragraph 5 states that these regulations do not apply to any non-conforming measure described in the chapters on cross-border trade in services, finance and investment (so-called reservation measures). Moreover, with particular regard to broadcasting services, it specifies that the whole of Article 14.3 (non-application of customs duties and non-discriminatory treatment of digital products) does not apply (Article 14.3 Paragraph 6). There are provisions in other chapters as well, specifically the exceptions in the chapter on finance (Article 10.10 Paragraphs 1 & 2), which state that the provisions of the chapter on electronic commerce do not apply to financial prudential measures. There are no special provisions on coordination with other chapters. The regulations on non-discriminatory treatment of digital products are set forth in Article 14.3 Paragraphs 3 & 4. The definition of digital products is given as products “that are digitally encoded, regardless of whether they are fixed on a carrier medium or transmitted electronically”. What is characteristic in the regulations is that, particularly with regard to national treatment (Paragraph 3), just as in the provisions on national treatment in GATT and GATS, it prescribes that a party shall not accord less favorable treatment to some digital products than it accords to other like digital products on the basis of a particular reason, rather than dividing the products and services and service providers subject to discrimination on the basis of nationality and prescribing a discrimination situation between like products with this as a criterion. The specific grounds given are limited to cases in which the digital products receiving less favorable treatment are created outside its territory and cases in which the author or developer of such digital products is “a person of the other Party or a non-Party”. In addition, there is an additional provision regarding the specific grounds, which clearly precludes protectionism (item (b) of the same paragraph). At the same time, in the paragraph on most-favored-nation treatment (Paragraph 4), the items listed are more or less the same,
but there is no distinction in relation to “some” and “other”; in regard to digital products that correspond to the conditions directly listed, it prescribes that there must be no discrimination against “like” products on the grounds of territory or the nationality of a person. There are no regulations on the non-discriminatory treatment of services or market access, while the non-imposition of customs tariffs is prescribed in Paragraphs 1 & 2 of Article 14.3. The provisions of Paragraph 1 conform to the United States model described in (2) vi) above, stipulating that “apart from domestic taxes, tariffs, fees or other levies” shall not be imposed “in relation to the export or import of digital products”. However, there is the provision that “A Party shall not apply customs duties or other duties, fees, or charges on or in connection with the importation or exportation of digital products by electronic transmission” (Paragraph 1). At the same time, “each Party shall determine the customs value of an imported carrier medium bearing a digital product according to the cost or value of the carrier medium alone, without regard to the cost or value of the digital product stored on the carrier medium.” (Paragraph 2). Incidentally, the method of evaluating customs duties conforms to the 1994 WTO decision 6 relating to the interpretation, etc. of agreements on the implementation of GATT Article VII (Valuation for Customs Purposes).

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

Chapter 15 of the agreement is the chapter on electronic commerce, and the chapter consists of General Provisions (Article 15.1), Electronic Supply of Services (Article 15.2), Customs Duties on Digital Products (Article 15.3), Non-Discrimination for Digital Products (Article 15.4), Cooperation (Article 15.5) and Definitions (Article 15.6). The wording regarding the scope of application is set forth in Articles 15.1 and 15.2, and conforms to the content detailed in (2) i) (b) above. However, as in the United States – Singapore FTA, there is a definition of “using electronic means” as referred to in Article 15.2, which is “employing computer processing”, and there is a proviso that “nothing in this Chapter imposes obligations to allow the electronic supply of a service nor the electronic transmission of content associated with those services.” Moreover, although it is not prescribed in this chapter, the section on general exceptions in the chapter on exceptions (Article 23.1 Paragraph 2) stipulates that the general exception clauses in GATS (Article XIV) also apply to the provisions of the chapter on electronic commerce. Moreover, as in the United States – Singapore FTA, there is a footnote stating that the adoption of the GATS exception clauses in relation to electronic commerce “is without prejudice to the classification of digital products as a good or a service”. Unlike the United States – Singapore FTA, there are no provisions set forth in the individual regulations, and Article 15.1 Paragraph 3 states in general that the chapter is subject to any other relevant provisions, exceptions, or nonconforming measures set forth in other chapters or annexes of the agreement. On the other hand, in the same way as in the United States – Singapore FTA, the exceptions in the chapter on finance (Article 12.10 Paragraphs 1 & 2) state that the provisions of the chapter on electronic commerce do not apply in regard to financial prudential measures. There are no special provisions on coordination with other chapters. The regulations concerning the non-discriminatory treatment of digital products are set forth in Article 15.4. Firstly, the definition of “digital product” differs greatly from that in the United States – Singapore FTA, and content fixed on a carrier medium is excluded from the definition. At the same time, in the definition, there is a footnote distancing it from the handling of classification methodology in domestic law and in WTO discussions. With regard to the content of the regulations, as in the United States – Singapore FTA, particularly with regard to national treatment (Paragraph 1) there is a provision that a party shall not accord less favorable treatment to a digital product than it accords to other like
digital products on the basis of a particular reason. The items listed as specific grounds are the same as in the United States – Singapore FTA, but there is a footnote concerning the application of the listed items, which states that if one or more of the criteria is satisfied, the obligation to accord no less favorable treatment to that digital product applies, even if one of the listed activities occurs outside the territory of the other party or one of the persons listed is a person of the other party or a non-party. For example, if “a” digital product was produced outside the territory of its home country, even if the author is a person of its home country, national treatment is applied. In addition, unlike in the case of the United States – Singapore FTA, there are no provisions precluding protectionism. On the other hand, the substantive content relating to most-favored-nation treatment (Paragraph 2) is exactly the same as the provisions in the United States – Singapore FTA, and with regard to digital products that meet the directly listed conditions, it stipulates that there must be no discrimination between “like” products on the basis of the criteria of territory or the nationality of persons. Moreover, Article 15.4 Paragraph 3 states that existing measures that do not conform to Paragraphs 1 and 2 can be maintained for up to one year after the entry into force of the agreement, and that if the treatment under those measures has not deteriorated since the time the agreement entered into force by the time a year has passed, it is possible to maintain those measures thereafter, by specifying the measures in question in Annex 15.4. However, it also stipulates that such measures cannot be revised in a direction that will have a deleterious effect on conformity with the regulations in Paragraphs 1 and 2. There are no regulations concerning the non-discriminatory treatment of services or market access, while the non-imposition of tariffs is prescribed in Article 15.3. This provision conforms to the United States model described in (2) vi) above, but in the first place, the definition of “digital product” does not include content fixed on a carrier medium. The provision simply stipulates that “Neither Party may apply customs duties on digital products of the other Party” and there is no stipulation on fees other than customs duties. In addition, domestic taxes are not subject to the regulation, as in the case of the United States – Singapore FTA, and this is stipulated in Article 15.1 Paragraph 2. With regard to cooperation (Article 15.5), the content is identical to that of the APEC model measures (however, as this agreement was concluded first, the order of influence is actually the reverse). More specifically, it covers such matters as support for the resolution of issues faced by small and medium-sized enterprises, the sharing of information and experience in the field of advanced technology, such as cyber-security, the maintenance of cross-border information flows, the recommendation of self-regulation by the private sector, and cooperative discussions in various international institutions.

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

Chapter 16 of this agreement is the chapter concerning electronic commerce and it consists of sections entitled General (Article 16.1), Electronic Supply of Services (Article 16.2), Customs Duties (Article 16.3), Non-Discriminatory Treatment of Digital Products (Article 16.4), Authentication and Digital Certificates (Article 16.5), Online Consumer Protection (Article 16.6), Paperless Trade Administration (Article 16.7) and Definitions (Article 16.8). The wording regarding the scope of application is set forth in Article 16.1 and 16.2, and conforms to the content detailed in (2) i) (b) above. However, unlike in the United States – Singapore and United States – Chile FTAs, there is no definition of “using electronic means” as referred to in Article 16.2, and it prescribes “the supply of a service delivered or performed electronically”. Moreover, although not stipulated in this chapter, as in the United States – Singapore and United States – Chile FTAs, the section on general exceptions in the chapter on exceptions (Article 22.1 Paragraph 2) prescribes that the general exception clauses
in GATS (Article XIV) also apply to the provisions of the chapter on electronic commerce; however, unlike in these other two FTAs, there is no footnote stating that, “This is without prejudice to the classification of digital products as a good or a service”. In terms of matters set forth in the individual regulations, Article 16.4 Paragraph 3 stipulates specifically that the regulations concerning non-discriminatory treatment of digital products (Article 16.4 Paragraphs 1 & 2) do not apply to non-conforming measures set forth in the chapters on cross-border trade in services, financial services and investment (so-called reservation measures) (Sub-paragraph (a)), nor do they apply to subsidies or services supplied in the exercise of governmental authority (including so-called government services) (Sub-paragraphs (c) & (d)); moreover, this article states that it does not apply to broadcasting and audio-visual services in particular (Paragraph 4). On the other hand, as in the United States – Singapore and United States – Chile FTAs, the section on exceptions in the chapter on financial services (Article 13.10 Paragraphs 1 & 2) states that the provisions of the chapter on electronic commerce do not apply to financial prudential measures. The provisions on coordination with other chapters are specified in the individual regulations. More specifically, the agreement states that the regulations concerning non-discriminatory treatment of digital products (Article 16.4 Paragraphs 1 & 2) do not apply to “the extent that they are inconsistent with Chapter Seventeen (Intellectual Property Rights)” (Article 16.4 Paragraph 3 (c)). The regulations on non-discriminatory treatment of digital products are set forth in Article 16.4 Paragraphs 1 & 2, including the definition of digital products and fundamentally the same content as the United States – Singapore FTA; in particular, the various characteristics of the section on national treatment (Paragraph 1) are the same (such as the presence of the provision that a party “may not discriminate on the basis of a specific reason” and the fact that there is a provision precluding protectionism). At the same time, in terms of the substantive content, the section on most-favored-nation treatment (Paragraph 2) has exactly the same provisions as the United States – Singapore and United States – Chile FTAs, and there is a provision that there must be no discrimination against “like” products on the grounds of territory or a person’s nationality in regard to digital products that meet the directly listed conditions. However, there is a footnote stating that “Nothing in this Article shall be construed as affecting the Parties’ rights and obligations with respect to each other under Article 4 of the TRIPS Agreement.” (Incidentally, Article 4 of the TRIPS Agreement is a provision concerning the MFN exemption in that agreement.) In addition, while the definition of digital product contains the footnote “The definition of digital products should not be understood to reflect a Party’s view on whether trade in digital products through electronic transmission should be categorized as trade in services or trade in goods.”, there is also a footnote stating that “digital products can be a component of a good, be used in the supply of a service, or exist separately”. There are no regulations concerning non-discriminatory treatment of services or market access, while the non-imposition of tariffs is prescribed in Article 16.3. The content conforms to the United States model described in (2) vi) above, and, as in the United States – Singapore FTA, contains the provision that “apart from domestic taxes, tariffs, fees or other levies” shall not be imposed “in relation to the export or import of digital products”. Where this FTA differs from the United States – Singapore FTA is in that, with regard to non-imposition of customs duties, it does not distinguish between content “transmitted electronically” and that “fixed on a carrier medium”, thereby committing the parties to the non-imposition of tariffs on all digital products equally. The definition of tariffs subject to the non-imposition obligation is prescribed in the chapter on general provisions; it states that this applies not only to the chapter on trade in goods, but also to the chapter on electronic commerce, and as well as excluding domestic taxes from the scope of customs duties, it stipulates that customs duties are imposed on goods. There are no clauses that correspond to domestic regulations. With regard to authentication and digital certificates (Article 16.5), the content is more or less the
same as the Australia – Singapore FTA. However, the focus is not electronic signatures, but rather digital certificates, which are generally used outside of electronic signatures as well, so the scope covered by these provisions is broader than in the case of the Australia – Singapore FTA. With regard to online consumer protection (Article 16.6), as described in (2) x) above), the principle adopted from the OECD Guidelines for Consumer Protection in the Context of Electronic Commerce (guaranteeing the transparency and effectiveness of consumer protection measures) is stipulated here. The provisions on paperless trade administration (Article 16.7) are based on the principles described in (2) ix) above.

(e) Australia – Thailand FTA (signed July 2004, entered into force January 2005)

Chapter 11 of this agreement is the chapter on electronic commerce and the chapter consists of sections entitled Objectives and Definitions (Article 1101), Customs Duties (Article 1102), Domestic Regulatory Frameworks (Article 1103. Also includes the elements contained in (2) xi) Private sector participation above), Electronic Authentication and Digital Certificates (Article 1104), Online Consumer Protection (Article 1105), Online Personal Data Protection (Article 1106), Paperless Trading (Article 1107), Cooperation on E-Commerce (Article 1108) and Non-Application of Dispute Settlement Provisions (Article 1109). There are none of the provisions concerning digital products that are incorporated into the United States – Australia FTA. With regard to provisions that overlap with the Australia – Singapore FTA, the content is basically similar. With regard to differences, firstly, the content relating to electronic authentication and digital certificates (Article 1004) is substantively the same as in the case of the Australia – Singapore FTA, but as in the United States – Australia FTA, the subject is digital certificates rather than electronic signatures, so the scope of application of these provisions is broader than in the case of the Australia – Singapore FTA. Next, in the provisions regarding paperless trade (Article 1107), the stipulation that trade administration documents must be in a form that can be used officially as an electronic format has been deleted. In the section on cooperation (Article 1108), which does not exist in the Australia – Singapore FTA, cooperation in the field of research and training activities aimed at developing electronic commerce is proposed. The dispute settlement provisions of this agreement do not apply to any of the provisions of this chapter, apart from the section concerning customs duties (Article 1102).


Chapter 10 of this agreement is the chapter on electronic commerce, and this chapter consists of sections entitled Objectives and Definitions (Article 10.1), Customs Duties (Article 10.2), Domestic Regulatory Frameworks (Article 10.3 also includes the elements contained in (2) xi) Private sector participation above), Online Consumer Protection (Article 10.4), Online Personal Data Protection (Article 10.5), Paperless Trading (Article 10.6), Cooperation on Electronic Commerce (Article 10.7) and Non-Application of Dispute Settlement Provisions (Article 10.8). Apart from the fact that there are no provisions relating to electronic authentication and digital certificates, the content is identical to that of the Thailand – Australia FTA, including the content of the clauses.
Chapter 7 Energy, Environment and Electronic Commerce

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

Chapter 10 of this agreement is the chapter on electronic commerce, and this chapter consists of sections entitled General (Article 10.1), Definitions (Article 10.2), Electronic Supply of Services (Article 10.3), Digital Products (Article 10.4), Exceptions (Article 10.5) and Transparency (Article 10.6). The substantive content is more or less the same as in the case of the United States – Singapore FTA. The non-imposition of tariffs is prescribed in Paragraphs 1 and 2 of the section on digital products (Article 10.4), and the content is identical to that of the United States – Singapore FTA. As far as the differences are concerned, firstly there is the existence of a provision concerning transparency, the content of which is the same as Paragraphs 1 and 2 (publication and disclosure of laws, regulations and measures of general application in relation to electronic commerce) of the same clause in GATS (Article III). Next, there are regulations concerning digital products (Article 10.4 Paragraph 3), but there are no provisions concerning most-favored-nation treatment. Furthermore, with regard to national treatment, unlike in the case of the United States – Singapore FTA, it does not make a judgment on distinctions between digital products on the basis of specific grounds that distinguish between “some” and “other”; rather, with regard to digital products corresponding to the directly listed conditions, it prescribes that the parties must not distinguish between “like” products on the grounds of territory or the nationality of a person (in the United States – Singapore FTA as well, this stipulation is used in regard to most-favored-nation treatment). The items listed are more or less the same as in the United States – Singapore FTA; the only provision contained in the United States – Singapore FTA that has been deleted from the India – Singapore Comprehensive Economic Cooperation Agreement is the condition “transmitted (within the territory)”. Moreover, a provision contained in the India – Singapore agreement that is not in the United States – Singapore FTA is the provision aimed at making the content of “treatment” clearer; it states that discriminatory treatment is defined as “all measures affecting the contracting for, commissioning, creation, publication, production, storage, distribution, marketing, sale, purchase, delivery or use of such digital products.” Furthermore, it is not restrictive with regard to the items listed, and stipulates that a party “shall not accord treatment less favourable to some digital products” on the basis of factors not listed in the agreement “which have the effect of affording protection to its own digital products and/or which act as a disguised restriction to trade in digital products of the other Party” (Article 10.4 Paragraph 4). Finally, with regard to exceptions, the stipulation that none of the regulations in this chapter apply to government procurement differs from the United States – Singapore FTA. Apart from this, the general exceptions and security exceptions, measures that do not conform to other chapters (reservations) and broadcasting services are all exceptions to the regulations in this chapter (in the United States – Singapore FTA, this was deemed an exception in the individual regulation concerning digital products). In addition, with regard to broadcasting services, the United States – Singapore FTA uses an abstract expression rather than clearly stipulating broadcasting, but the India – Singapore agreement clearly stipulates “broadcasting, webcasting, cable broadcasting and video on demand”.

(h) Korea-Singapore FTA (signed August 2005, entered into force March 2006)

Chapter 14 of this agreement is the chapter on electronic commerce, and this chapter consists of sections entitled Definitions (Article 14.1), Scope (Article 14.2), Electronic Supply
of Services (Article 14.3) and Digital Products (Article 14.4). Although there are clauses concerning the scope, the content is substantively that of the general provisions in the United States – Singapore FTA, to which an exclusion concerning broadcasting services has been added; other than that, it has more or less the same content as the United States – Singapore FTA. The biggest difference is the fact that there is no most-favored-nation treatment in the regulations concerning digital products (Article 14.4 Paragraphs 3 & 4). In addition, after this agreement was signed, side letters were exchanged concerning the non-imposition of customs duties (Article 14.4 Paragraphs 1 & 2), stating that “in the event of any changes in the content of the WTO Ministerial Declaration, the Parties will review this clause.”

(i) United States – Peru TPA (signed April 2006, entered into force February 2009)

Chapter 15 of this agreement is the chapter on electronic commerce, and this chapter consists of sections entitled General (Article 15.1), Electronic Supply of Services (Article 15.2), Digital Products (Article 15.3), Transparency (Article 15.4), Consumer Protection (Article 15.5), Authentication (Article 15.6), Paperless Trade Administration (Article 15.7) and Definitions (Article 15.8). As in the United States – Australia, United States – Singapore, and United States – Chile FTAs, the section on exceptions in the chapter on financial services (Article 12.10 Paragraphs 1 & 2) states that the provisions of the chapter on electronic commerce do not apply to financial prudential measures. Although not stipulated in this chapter, as in the United States – Australia, United States – Singapore and United States – Chile FTAs, the section on general exceptions in the chapter on exceptions (Article 22.1 Paragraph 2) prescribes that the general exception clauses in GATS (Article XIV) also apply to the provisions of the chapter on electronic commerce, and just as in the FTAs of the United States with Singapore and Chile, there is a footnote stating that, “This is without prejudice to the classification of digital products as a good or a service”. The United States – Singapore FTA is basically the prototype for the content of the regulations in terms of the wording, but it does incorporate a number of additional provisions, as well as aspects of the new provisions in the United States – Australia FTA. With regard to differences between this agreement and that between the United States and Singapore, firstly, the wording of the scope of application is prescribed in Articles 15.1 and 15.2, and although it has the content described in (2) i) (b) above, the content of Article 15.2 in particular differs from the United States – Singapore FTA and the United States – Chile FTA, and is closer to the wording of the United States – Australia FTA, setting forth provisions concerning “the supply of services delivered or performed electronically”. Moreover, the United States – Singapore FTA stipulates broadcasting services as an exception to the non-discriminatory treatment of digital products and the non-imposition of customs duties, but in the same way as the United States – Chile FTA, this provision has disappeared from the agreement. In addition, the content of the provisions relating to the non-imposition of tariffs and non-discriminatory treatment of digital products is identical to the United States – Singapore FTA in terms of its wording. The provision regarding transparency does not appear in the agreements concluded by the United States with Singapore, Chile and Australia, and the wording is similar to the agreement between India and Singapore, being the same as Paragraphs 1 and 2 (publication and disclosure of laws, regulations and measures of general application in relation to electronic commerce) of the same clause in GATS (Article III). With regard to the provisions concerning consumer protection, as well as having the same wording as the United States – Australia FTA (guaranteeing the transparency and effectiveness of measures), it also prescribes that both parties “recognize the importance of cooperation between their respective national
consumer protection agencies on activities related to cross-border electronic commerce in order to enhance consumer protection.” The provision on authentication is not included in the United States – Singapore FTA or the United States – Chile FTA, and adopts the wording of the provision on “Authentication and Digital Certificates” in the United States – Australia FTA, with only the part of the provision relating to mutual recognition of digital certificates being deleted. The section on paperless trade administration is something that is not in the FTAs of the United States with Singapore and Chile, and the wording has been adopted from the United States – Australia FTA.

(j) United States – Colombia FTA (signed November 2006, has not yet entered into force)

Chapter 15 of this agreement is the chapter on electronic commerce, and this chapter consists of sections entitled General (Article 15.1), Electronic Supply of Services (Article 15.2), Digital Products (Article 15.3), Transparency (Article 15.4), Consumer Protection (Article 15.5), Authentication (Article 15.6), Paperless Trade Administration (Article 15.7) and Definitions (Article 15.8). It is all identical to the United States – Peru TPA.

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

Chapter 15 of this agreement is the chapter on electronic commerce, and this chapter consists of sections entitled General (Article 15.1), Electronic Supply of Services (Article 15.2), Digital Products (Article 15.3), Electronic Authentication and Electronic Signatures (Article 15.4), Online Consumer Protection (Article 15.5), Paperless Trading (Article 15.6), Principles on Access to and Use of the Internet for Electronic Commerce (Article 15.7), Cross-border Information Flows (Article 15.8) and Definitions (Article 15.9). Just like the agreements of the United States with Australia, Singapore, Chile and Peru, the section on exceptions in the chapter on financial services (Article 13.10 Paragraphs 1 & 2) states that the provisions of the chapter on electronic commerce do not apply to financial prudential measures. Although not stipulated in this chapter, as in the United States – Australia, United States – Singapore, United States – Chile and United States – Peru agreements, the section on general exceptions in the chapter on exceptions (Article 23.1 Paragraph 2) prescribes that the general exception clauses in GATS (Article XIV) also apply to the provisions of the chapter on electronic commerce, and just as in the trade agreements of the United States with Singapore, Chile and Peru, there is a footnote stating that, “This is without prejudice to the classification of digital products as a good or a service”. Otherwise, it has fundamentally the same content as the United States – Australia FTA, but with the following differences. Firstly, the non-imposition of tariffs is dealt with as part of the provisions relating to digital products (Article 15.3 Paragraph 1), but it distinguishes between content “transmitted electronically” and content “fixed on a carrier medium”; with regard to the former, this chapter stipulates that the Committee on Trade in Goods, which is established in the chapter of this agreement on trade in goods, “shall consult on and endeavor to resolve any difference that may arise between the Parties on classification matters”. With regard to the latter, the fact that there is a restriction in that tariffs shall not be imposed “if it is an originating good” differs from the similar provision in the United States – Australia FTA. With regard to the means of stipulating the definition of customs duties subject to non-imposition, just as in the United States – Australia FTA, as well as excluding domestic taxes from the scope of customs duties, it stipulates that customs duties are imposed on goods. Next, with regard to the non-discriminatory treatment of digital products (Article 15.3 Paragraphs 2 & 3), the biggest
Part III FTA/EPA and BIT

difference from the United States – Australia FTA is the fact that the context of “bilateral trade” is emphasized, particularly in relation to the provision concerning national treatment (Paragraph 2). A footnote to Paragraph 2 states “Recognizing the Parties’ objective of promoting bilateral trade”; furthermore, with regard to the grounds for discrimination, whereas the United States – Australia FTA lists content produced “outside of the territory of a Party” and cases where the developer or author is a person of the other Party or a non-Party, the Korea – United States FTA stipulates “within the territory of the other Party” and “persons of the other party”, and the element relating to non-parties has been expressly deleted from the provision. Separately from this, the regulation on most-favored-nation treatment is the same as the provision in the United States – Australia FTA (but the note regarding Article 4 of the TRIPS Agreement has been deleted). Furthermore, with regard to the list of grounds for discrimination, in the context of regulations concerning national treatment, there has been no increase or decrease in the number of elements or the content of items relating to acts carried out in the territory of “the other Party” compared with the United States – Australia FTA, but if we compare the two agreements with regard to items listed in the context of a party’s own territory or the territory of a third party, the words “stored” and “transmitted” have been deleted from the Korea – United States FTA. Moreover, the word “distributor” has been deleted and the word “owner” has been added instead. Furthermore, with regard to items excepted individually with regard to the non-discriminatory treatment of digital products, unlike in the case of the United States – Australia FTA, subsidies and services supplied in the exercise of governmental authority are only excluded from national treatment (Paragraph 5). Moreover, the only exception restricted to a particular sector is that relating to broadcasting; audio-visual services are not included (Paragraph 6). However, the provisions of this paragraph are abstract and do not specify clearly what is meant by “broadcasting”, as in the case of the agreements between the United States and Singapore, and South Korea and Singapore, so there is a possibility that one cannot clearly determine the actual overlap of the scope. Next, the provisions regarding electronic authentication and electronic signatures (Article 15.4) state with regard to electronic signatures that the parties may not “deny a signature legal validity solely on the basis that the signature is in electronic form”, which is an additional provision that does not exist in the United States – Australia and the United States – Peru trade agreements (Paragraph 1 (c)). This provision is a principle that has been formulated in common with the two UNCITRAL model laws described in (1) v) (c) above (the Model Law on Electronic Commerce and the Model Law on Electronic Signature). In addition, the Korea – United States FTA contains no provision relating to interoperability concerning the promotion of PKI, which was stipulated in the United States – Australia FTA. There is an exceptional provision stating that, if a requirement “serves a legitimate governmental objective and is substantially related to achieving that objective”, a government may impose the requirement that, for a particular category of transactions, the method of authentication meet certain performance standards or be certified by an authority accredited in accordance with the party’s law. Next, with regard to online consumer protection (Article 15.5), in addition to guaranteeing the transparency and effectiveness of measures relating to consumer protection, as in the United States – Peru TPA, the Korea – United States FTA has added the provision that “The Parties recognize the importance of cooperation between their respective national consumer protection agencies on activities related to cross-border electronic commerce in order to enhance consumer welfare.” Furthermore, there is a provision that “Each Party’s national consumer protection enforcement agencies shall endeavor to cooperate with those of the other Party, in appropriate cases of mutual concern, in the enforcement of laws against fraudulent and deceptive commercial practices in electronic commerce”, which was not in the United States – Peru TPA. Finally, there are principles on access to and use of the Internet for electronic commerce (Article 15.7) and the section on cross-border
information flows (Article 15.8), neither of which exists in the United States – Australia FTA. The former is prefaced by the phrase “To support the development and growth of electronic commerce” and stipulates that each party recognizes the importance of guaranteeing the rights of consumers, unless these rights infringe governmental laws. More specifically, these rights include the right to access to and use of digital products, the right to run applications and services of their choice, the right to connect their choice of devices to the Internet, provided that such devices do not harm the network, and the right to have the benefit of competition among various businesses (communications network providers, application and service providers, and content providers). For reference, this content is almost the same as the principle adopted in the Policy Statement (Document No. FCC 05-151) published by the FCC (US Federal Communications Commission) on 23 September 2005, “to ensure that broadband networks are widely deployed, open, affordable, and accessible to all consumers” (however, instead of the phrase “digital products” used in the Korea – United States FTA, the FCC Policy Statement uses the term “legal Internet content”). The latter provision prescribes the principle that “acknowledging the importance of protecting personal information, the Parties shall endeavor to refrain from imposing or maintaining unnecessary barriers to electronic information flows across borders.” This is fundamentally the same as the content of the principle in the APEC Privacy Framework described in (1) v) (d) (i) above.

(1) Australia – Chile FTA (signed July 2008, entered into force March 2009)

Chapter 16 of this agreement is the chapter on electronic commerce, and this chapter consists of sections entitled Definitions (Article 16.1), General Provisions (Article 16.2), Electronic Supply of Services (Article 16.3), Customs Duties (Article 16.4), Domestic Electronic Transactions Frameworks (Article 16.5), Electronic Authentication (Article 16.6), Online Consumer Protection (Article 16.7), Online Personal Data Protection (Article 16.8), Paperless Trading (Article 16.9) and Consultations (Article 16.10). The wording of each provision has a number of differences from previous agreements entered into by Australia and Chile, so they are explained individually below. The wording regarding the scope of application is set forth in Articles 16.2 and 16.3, and there is none of the content described in (2) i) (a) above; that is to say, there are no application exclusions set forth. However, the provisions of Article 16.2 are the same as in the United States – Chile FTA, stipulating that “Nothing in this Chapter imposes obligations to allow the electronic supply of a service nor the electronic transmission of content associated with those services.” In addition, although there are no provisions concerning application exclusions in this chapter, there are provisions in other chapters just as in the United States – Chile and United States – Australia FTAs: firstly, the section on general exceptions in the chapter on general provisions and exceptions (Article 22.1 Paragraph 2) prescribes that the general exception clauses in GATS (Article XIV) also apply to the provisions of the chapter on electronic commerce, and just like the United States – Chile FTA, there is a footnote stating that, “This is without prejudice to the classification of digital products as a good or a service”. Moreover, just as in the agreements of the United States with Chile and Australia, the section on exceptions in the chapter on financial services (Article 12.11 Paragraphs 1 & 2) states that the provisions of the chapter on electronic commerce do not apply to financial prudential measures. There are no special provisions concerning coordination with other chapters. In the section on general provisions (Article 16.2), in addition to general provisions that are common to all agreements to date, the only provision that has not appeared in agreements hitherto stipulates that, “The Parties agree that, to the maximum extent possible, bilateral trade in electronic commerce shall be no more
restricted than comparable non-electronic bilateral trade” (Paragraph 3). The general thrust of this is the same as the provision regarding “non-discriminatory treatment of services transferred electronically” described in (2) iv) above, but it differs in that it applies to trade in general, not only services, and stipulates that efforts should be made “to the maximum extent possible”. There are no regulations set forth concerning digital products. However, in the definition of “electronic transmission” (Article 16.1 (g)) used in the provisions on the electronic supply of services (Article 16.3) and customs duties (Article 16.4), it states that “electronic transmission means the transfer of digital products using any electromagnetic or photonic means”, but there is no regulation that directly uses the definition of digital product. Moreover, as stated above, Article 16.2 Paragraph 3 is a provision concerning the restriction of trade in general, so it can be interpreted broadly as being applicable to trade in digital products. There is no provision concerning access to electronic commerce markets. With regard to customs duties (Article 16.4), the provisions have the same content as the trade agreements between Australia and Singapore, Australia and Thailand, and Thailand and New Zealand. The provisions regarding domestic electronic transactions frameworks (Article 16.5) have fundamentally the same content as that stipulated in the section on Domestic Regulatory Frameworks in the trade agreements between Australia and Singapore, Australia and Thailand, and Thailand and New Zealand. Moreover, the elements of section (2) xi) Private sector participation above are also included in this section, but where those agreements specify that they are “based on the UNCITRAL Model Law on Electronic Commerce”, this agreement transcribes the principles of that model law, without directly citing UNCITRAL (Paragraph 1). However, in Paragraph 2, there is a new exception provision that states that “Nothing in paragraph 1 prevents the Parties from making exceptions in their domestic laws to the general principles outlined in that paragraph.” The provisions on electronic authentication (Article 16.6) are fundamentally the same as similar provisions in the Australian trade agreements with Singapore and Thailand, but with the addition of the provision that “The Parties recognize that electronic authentication represents an element that facilitates trade” (Paragraph 1). With regard to online consumer protection (Article 16.7), in addition to provisions with the same content as those in the trade agreements between Australia and Singapore, Australia and Thailand, and Thailand and New Zealand, there are also provisions that cite almost verbatim part of the wording of the OECD Guidelines for Consumer Protection in the Context of Electronic Commerce (Paragraphs 2 & 3. However, not all of the principles from the OECD Guidelines have been adopted). With regard to the provisions concerning online personal data protection (Article 16.8), the content is the same as in the trade agreements between Australia and Singapore, Australia and Thailand, and Thailand and New Zealand. The provisions regarding paperless trade (Article 16.9) have the same content as in the trade agreements of Thailand with Australia and New Zealand, with the addition of a provision that confirms that the similar provisions in the separate chapter on customs administration are also applicable to paperless trade in this chapter (Paragraph 2). Furthermore, with regard to cooperation between the two parties, regarding which no concrete actions were specified in Thailand’s trade agreements with Australia and New Zealand, the Australia – Chile FTA specifically incorporates content relating to cooperation focused on the development of a “single window” (Paragraph 3). There is a footnote providing a non-binding definition of the single window as “A facility that allows parties involved in trade and transport to lodge standardized information and documents with a single entry point to fulfill all import, export and transit related regulatory requirements”. The provisions regarding consultations (Article 16.10) prescribe the obligation to consult on matters such as those relating to electronic signatures, data protection, online consumer protection and any other matters agreed by the Parties (Paragraph 1). The consultation method is to be decided by
mutual agreement between the parties (Paragraph 2). There are no other individual provisions setting forth matters relating to cooperation.

ii) Japan

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

Chapter 8 of this agreement is the chapter on electronic commerce and this chapter consists of sections entitled Scope (Article 70), General Principles (Article 71), Definitions (Article 72), Non-Discriminatory Treatment of Digital Products (Article 73), Non-Discriminatory Treatment of Services (Article 74), Market Access (Article 75), Customs Duties (Article 76), Domestic Regulation (Article 77), Electronic Signatures and Certification Services (Article 78), Paperless Trade Administration (Article 79), Protection of Online Consumers (Article 80), Private Sector Participation (Article 81), Cooperation (Article 82) and Exceptions (Article 83). The content of the provisions is almost the same as the content detailed from section (2) i) above onwards; the content is summarized below. The scope of application is detailed in the articles regarding scope (Article 70), general principles (Article 71) and exceptions (Article 83), as well as being prescribed in individual regulations; it conforms to the content detailed in section (2) i) (c) above. Firstly, the provision regarding scope states that “This Chapter shall apply to measures by a Party affecting electronic commerce, including for goods and services, in the context of their bilateral trade.” In the clause regarding exceptions, it stipulates that the GATS/GATT general exclusions and security exclusions set forth in other chapters apply mutatis mutandis to the regulations in the chapter on electronic commerce. With regard to individual exceptions, firstly, government procurement, subsidies and taxation measures are excluded in the article concerning general principles (Paragraph 4), while the reservations set forth in the chapter on investment and the chapter on trade in services are incorporated into each provision that forms a legal obligation (non-discriminatory treatment of digital products (Article 73 Paragraph 1), non-discriminatory treatment of services (Article 74), and market access (Article 75)). Moreover, in the section on electronic signatures and certification services (Article 78 Paragraph 3), the regulation concerning technological neutrality prescribed in this article stipulates that “This Article shall not apply to any transactions or communications that have significant relevance to those transactions, if those transactions are not permitted to be made electronically under each Party’s laws and regulations.” With regard to provisions concerning coordination with other chapters, the section on general principles stipulates that “In the event of any inconsistency between this Chapter and the chapters on trade in goods, trade in services, investment, and intellectual property, the Chapter other than this Chapter shall prevail to the extent of the inconsistency.” The regulation concerning non-discriminatory treatment of digital products does not exist in any other agreement, as stated in (3) above. Firstly, with regard to the definition of digital products, it does not stipulate “other products” as in the agreements described in (3) above, but rather refers to “computer programs, texts, plans, designs, video, images, sound recordings or any combinations thereof”. In addition, as in the case of the United States – Chile FTA, digital products fixed on a carrier medium are not included in this definition, and it is restricted to content transferred electronically. At the same time, there is a note to the effect that the provisions of the chapter on trade in goods apply to digital products fixed on a carrier medium. Next, with regard to national treatment, it is structurally the same as the national treatment provision in GATT and GATS, stipulating that each party shall “not adopt measures that accord less favourable treatment to digital products of the other Party than it accords to its own like digital products.” In addition, with regard to the “adoption” of measures each party can prevent new measures being taken in the future, but with regard to
the “maintenance” of measures, there is an “endeavor” provision that stipulates that “When a Party identifies a measure of such nature that has been adopted before the entry into force of this Agreement and is maintained by the other Party, that other Party shall endeavor to eliminate it”. With regard to most-favored-nation treatment, there is an obligatory provision concerning the introduction and maintenance of measures, which stipulates that each party shall “not adopt or maintain measures that accord less favourable treatment to digital products of the other Party than it accords to like digital products of a non-Party.” In addition, with regard to accrediting the nationality – that is to say, the indigenous nature – of each digital product, the agreement stipulates that “in implementing the regulations concerning non-discriminatory treatment, the Parties shall determine whether a digital product is a digital product of a Party, of the other Party or of a non-Party. Such determination shall be made in a transparent, objective, reasonable and fair manner” (Paragraph 2). Moreover, it also stipulates that “Each Party shall, upon request by the other Party, explain how it determines the origin of a digital product in implementing its obligations under paragraph 1” (Paragraph 3).

Furthermore, it states that “The Parties shall cooperate in international organizations and fora to foster the development of criteria determining the origin of a digital product” (Paragraph 5). In addition, although the provisions regarding non-discriminatory treatment of digital products have some differences from the provisions in the agreements of other countries detailed in (3) above, they employ more or less the same provision for designating the nature of the discrimination (country of production, etc.) With regard to non-discriminatory treatment of services and market access, the respective provisions are as described in (2) iv) and (2) v) above. In addition, the principle of “neutrality as a regulation” relating to the trade in services described in (1) ii) (a) (ii) above is also prescribed in Paragraph 2 of the section on general principles (this wording is taken from document S/L/74 Paragraph 2 Item 2, which was adopted at the Service Council Meeting of the WTO in July 1999, as a progress report on deliberations in the Service Council as part of the WTO Electronic Commerce Action Plan).

With regard to customs tariffs, as described in (2) vii) above, there are no permanent legal obligations relating to the effective non-imposition of customs duties with regard to bilateral trade only, and the provision merely confirms the WTO moratorium; it stipulates that establishing legal obligations should only be done within the WTO framework, on the basis of cooperation between the two countries. Due to the stipulation of exceptions in the chapter on electronic commerce, domestic taxes are exempted from the scope of the non-imposition of customs tariffs, as in other bilateral agreements. As described in (2) vii) above, the same principle regarding domestic regulation is set forth as in the clause on national regulations in GATS (Article VI of GATS), which states that “the operation of measures relating to electronic commerce should be undertaken transparently, objectively, rationally and fairly, and they must not impose an unnecessarily heavy burden.” The provisions regarding electronic signatures and certification services are as described in (2) (viii) above, but an exception clause similar to the one in the Korea – United States FTA has been added, stating that the requirement to meet a particular standard should “serve a legitimate policy objective and be substantially related to achieving that objective” (Paragraph 2). Furthermore, the concept of a “transaction” as a forum for the application of the various regulations stipulated in this article is summarized and, it stipulates that the principle of technological neutrality shall be applied electronic signatures used in “communications that have significant relevance to those transactions”, because of the possibility that they may be used as part of the transaction. With regard to paperless trade administration, a provision concerning cooperation in international forums similar to the provision in the Australia – Singapore and Thailand – New Zealand agreements has been added to provisions similar to those in the agreements concluded by the United States with Australia and South Korea. As far as online consumer protection is concerned, in addition to the principle of “guaranteeing the transparency and
effectiveness of the adoption and maintenance of consumer protection measures”, as described in (2) x) above, this provision also incorporates a provision regarding the protection of privacy. The provisions regarding private sector participation are as described in (2) xi) above. Finally, the provisions regarding cooperation are as described in (2) xii) above.


As described in (2) viii) above, provisions relating to cooperation between the two countries regarding accreditation systems for electronic signature and certification services are incorporated into the Implementing Agreement relating to this agreement.
## Part III FTA/EPA and BIT

### <Figure 7 – 5> Specific content prescribed in bilateral agreements

<table>
<thead>
<tr>
<th>Agreement</th>
<th>USA - Colombia FTA</th>
<th>Korea - USA FTA</th>
<th>Australia - Chile FTA</th>
<th>Japan - Switzerland EPA</th>
</tr>
</thead>
<tbody>
<tr>
<td>Signed</td>
<td>Signed November 2006 Not yet effective</td>
<td>Signed June 2007 Not yet effective</td>
<td>Signed July 2008 Not yet effective</td>
<td>Signed February 2009 Not yet effective</td>
</tr>
</tbody>
</table>

### ① Scope
- **General (Article 15.1)**
- **Electronic supply of services (Article 15.2)**
- **Definitions (Article 15.8)**
- **GATS general exclusions applicable**
  (Exceptions chapter Article 22.1 Paragraph 2)
- **Financial prudential measures excluded**
  from scope of chapter on electronic commerce (Finance chapter Article 12.10 Paragraphs 1 & 2)
- **General provisions (Article 16.2)**
- **Electronic supply of services (Article 16.3)**
- **Definitions (Article 16.1)**
- **GATS general exclusions applicable**
  (Exceptions chapter Article 22.1 Paragraph 2)
- **Financial prudential measures excluded**
  from scope of chapter on electronic commerce (Finance chapter Article 13.10 Paragraphs 1 & 2)
- **Scope (Article 70)**
- **General principles (Article 71)**
- **Definitions (Article 72)**
- **Exceptions (Article 83)**
- **GATS/GATT general exclusions and security exclusions cited**
- **Subsidies, government services and special tax measures are also excluded**

### ② Provisions on consistency with other regulations
- **Provision regarding coordination with the chapters on trade in goods, trade in services, investment and intellectual property**
  (General principles (Article 71, Paragraph 3))

### ③ Non-discriminatory treatment of digital products
- **Digital products (Article 15.3 Paragraphs 2 & 3)**
- **- NT and MFN provisions including both carrier media and electronic transmissions**
- **- Consistency measures set forth in the chapters on cross-border services, finance and investment are also excluded**
  from the scope of application of the chapter on electronic commerce
- **Provision on striving to ensure symmetry in restrictions on bilateral electronic commerce and non-electronic bilateral trade**
  (Article 16.2 Paragraph 3)
- **Non-discriminatory treatment of digital products**
  (Article 73)
- **- NT and MFN provisions regarding electronic transmissions only (however, for NT it is a “best effort” provision)**
- **- Consistency measures set forth in the chapters on services and investment are also excluded**
  from the scope of application of the chapter on electronic commerce
- **- Sets forth provisions and principles on determining the nationality of digital products and also establishes an obligation to explain**
- **- Stipulation that consultations are to take place 5 years after the agreement becomes effective**

1122
<table>
<thead>
<tr>
<th>USA - Colombia FTA</th>
<th>Korea - USA FTA</th>
<th>Australia - Chile FTA</th>
<th>Japan - Switzerland EPA</th>
</tr>
</thead>
<tbody>
<tr>
<td>Signed November 2006</td>
<td>Signed June 2007</td>
<td>Signed July 2008</td>
<td>Signed February 2009</td>
</tr>
</tbody>
</table>

4. **Non-discriminatory treatment of services transferred electronically**

- Provision on striving to ensure symmetry in restrictions on bilateral electronic commerce and non-electronic bilateral trade (Article 16.2 Paragraph 3)
- Consistency measures set forth in the chapters on services and investment are also excluded from the scope of application of the chapter on electronic commerce

5. **Access to electronic commerce markets**

- Market access (Article 75)
- Consistency measures set forth in the chapters on services and investment are also excluded from the scope of application of the chapter on electronic commerce

6. **Customs**

- Digital products (Article 15.3 Paragraphs 1 & 2)
- Perpetual obligation not to impose customs duties on bilateral “electronic transmissions”
- Fixed obligation for conventional customs valuation of digital products stored on a carrier medium
- There is a consultation provision concerning differences in outlook relating to the operation of the regulations
- Non-discriminatory treatment of digital products (Article 15.3 Paragraph 1)
- Perpetual obligation not to impose customs duties on bilateral "electronic transmissions" (Article 16.4)
- Provision affirming the WTO moratorium on the imposition of customs duties (Article 76)
- Consistency measures set forth in the chapters on services and investment are also excluded from the scope of application of the chapter on electronic commerce

7. **Domestic regulations**

- Domestic electronic transactions frameworks (Article 16.5)
- Contains exceptions on the grounds of domestic laws
- Domestic regulation (Article 77)
- Partially invokes the principles of Article VI of GATS (domestic regulations)

8. **Electronic signatures and authentication services**

- Authentication and digital certificates (Article 15.6)
- Electronic authentication and electronic certificates (Article 15.4)
- There is an additional provision regarding the principle of technological neutrality in relation to electronic signatures
- There is an exception relating to “legitimate governmental objectives”
- Electronic authentication (Article 16.6)
- Electronic signatures and certification services (Article 78)
- There is an exception relating to specified transactions stipulated in domestic laws
- There is an exception relating to “legitimate governmental objectives”

9. **Paperless trade administration**

- Paperless trade administration (Article 15.7)
- Paperless trading (Article 15.6)
- Paperless trading (Article 16.9)
- Contains provisions referring to the chapter on customs administration
- Contains a provision concerning cooperation relating to the single window
- Paperless trade administration (Article 79)
<table>
<thead>
<tr>
<th>Part III FTA/EPA and BIT</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>USA - Colombia FTA</strong></td>
</tr>
<tr>
<td>Signed November 2006</td>
</tr>
<tr>
<td>Not yet effective</td>
</tr>
<tr>
<td><strong>Korea - USA FTA</strong></td>
</tr>
<tr>
<td>Signed June 2007</td>
</tr>
<tr>
<td>Not yet effective</td>
</tr>
<tr>
<td><strong>Australia - Chile FTA</strong></td>
</tr>
<tr>
<td>Signed July 2008</td>
</tr>
<tr>
<td>Not yet effective</td>
</tr>
<tr>
<td><strong>Japan - Switzerland EPA</strong></td>
</tr>
<tr>
<td>Signed February 2009</td>
</tr>
<tr>
<td>Not yet effective</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Online consumer protection</th>
</tr>
</thead>
<tbody>
<tr>
<td>- Online consumer protection (Article 15.5)</td>
</tr>
<tr>
<td>- Adopts the principles of the OECD Guidelines for Consumer Protection in the Context of Electronic Commerce</td>
</tr>
<tr>
<td>- Provision on cooperation between governmental authorities in both countries (national consumer protection agencies)</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Private sector participation</th>
</tr>
</thead>
<tbody>
<tr>
<td>- Domestic electronic transactions frameworks (Article 16.5)</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Cooperation</th>
</tr>
</thead>
<tbody>
<tr>
<td>- Private sector participation (Article 81)</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Other</th>
</tr>
</thead>
<tbody>
<tr>
<td>- Transparency (Article 15.4)</td>
</tr>
<tr>
<td>- &quot;Principle of access to and use of the internet for electronic commerce&quot; (Article 15.7)</td>
</tr>
<tr>
<td>- Consultation (Article 16.10)</td>
</tr>
</tbody>
</table>

- Protection of online consumers (Article 80) - Also includes provisions on the principles of the protection of privacy.
2. The Economic Significance of “Digital Content”

What is generally understood by the term “digital content” covers a wide range of meaning, but what often becomes a topic for discussion when it is used in contrast with “non-digital content” is content such as electronic books, digital audio, digital video and digital pictures. Furthermore, recently, documents such as share certificates, lottery tickets, air tickets and various certificates have become computerized. The OECD is conducting research into areas such as scientific publications, music, online computer games, content for mobile phones and user-created content, and the results of its research into the various industry structures and market sizes have been published. At the same time, as the focus of international transactions generally exists only in a purely digital format, there are various kinds of software. Naturally, software also includes that which previously had a non-digital role and that which took on the burden of work performed by people. In particular, there is a great deal of such software in the field of “application software”, such as that relating to games and that used in accounting, book-keeping and the creation of presentations. Software other than application software, particularly that which does not involve direct use by people, includes OS (Operating Systems) and “middleware”, which interacts with information systems such as computers or with other software, is beginning to appear in a purely digital form as the focus of international transactions. The digital content that is thought likely to have the greatest economic significance in international transactions is believed to be either application software for businesses or OS and middleware, which are barely influenced at all by cultural differences between countries. No statistics have been collated as yet, but most companies across the globe use OS and middleware, as well as application software for businesses, that has common characteristics to some degree, and trade between the countries producing such software and the countries using it is believed to be quite considerable. Furthermore, much of the software of today has established a global development system, and there is believed to be a considerable trade in software “components”, which are not directly consumed, but are traded between software developers. On the other hand, when it comes to electronic commerce relating to content such as books, music and video, which is subject to cultural influences, domestic transactions are estimated to be higher than international transactions. Naturally, one cannot say that there is no cultural content specific to a particular country that is achieving worldwide sales. In any event, the appearance of well-organized statistical information is awaited.