Chapter 5

INVESTMENT

(1) Background

1. Increase in Foreign Direct Investment

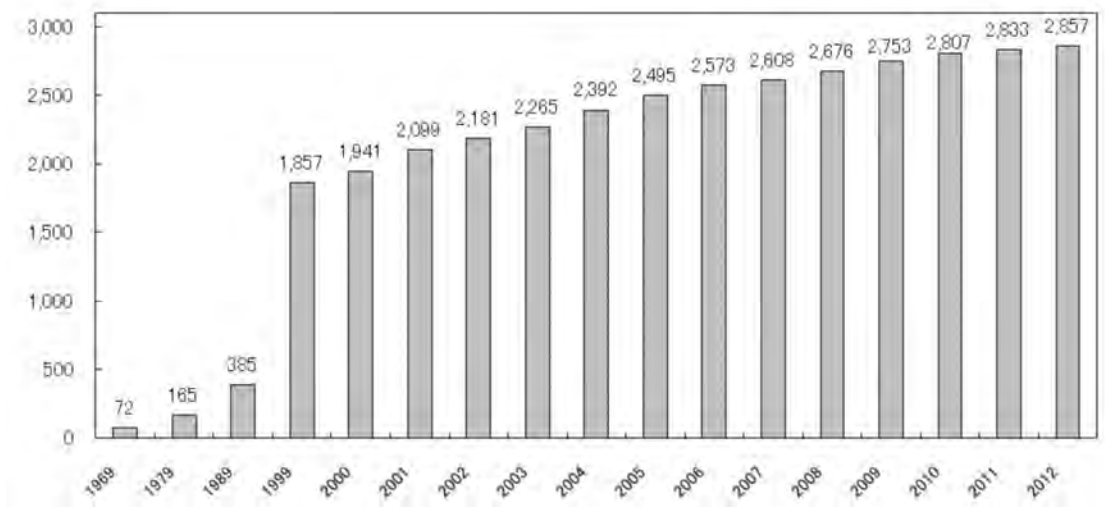
Since the 1980s, foreign direct investment has been growing rapidly worldwide and continues to play a significant role in leading worldwide economic growth. In 1980, the ratio of the foreign direct investment (on a cumulative basis) to GDP was 5.8% in respect of external direct investment and 5.3% in respect of inward direct investment. In 2012, the figures had grown to 31.8% and 32.9% respectively (source: UNCTAD "World Investment Report 2013").

With Japan's balance of payments, which reflects the increases of securities investment and of direct investment, the income balance of FY2012 was approximately 14.2 trillion yen, while the trade deficit is approximately 6.9 trillion yen; that is the income balance is supporting the current balance.

2. Trend in Conclusion of Bilateral Investment Treaties

Many countries have concluded a lot of Bilateral Investment Treaties (BITs) since the late 1950s, in order to protect investors and their investments from risks in the host country such as discriminatory treatment or sudden expropriation including nationalization. In 1990s, the number increased rapidly because of the expansion of the foreign direct investment. At the end of 2012, 2,857 BITs were in existence.

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



Source: UNCTAD "Recent developments in international investment agreements (2008-June 2009)"
「World Investment Report 2011」

3. Efforts at the OECD

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

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

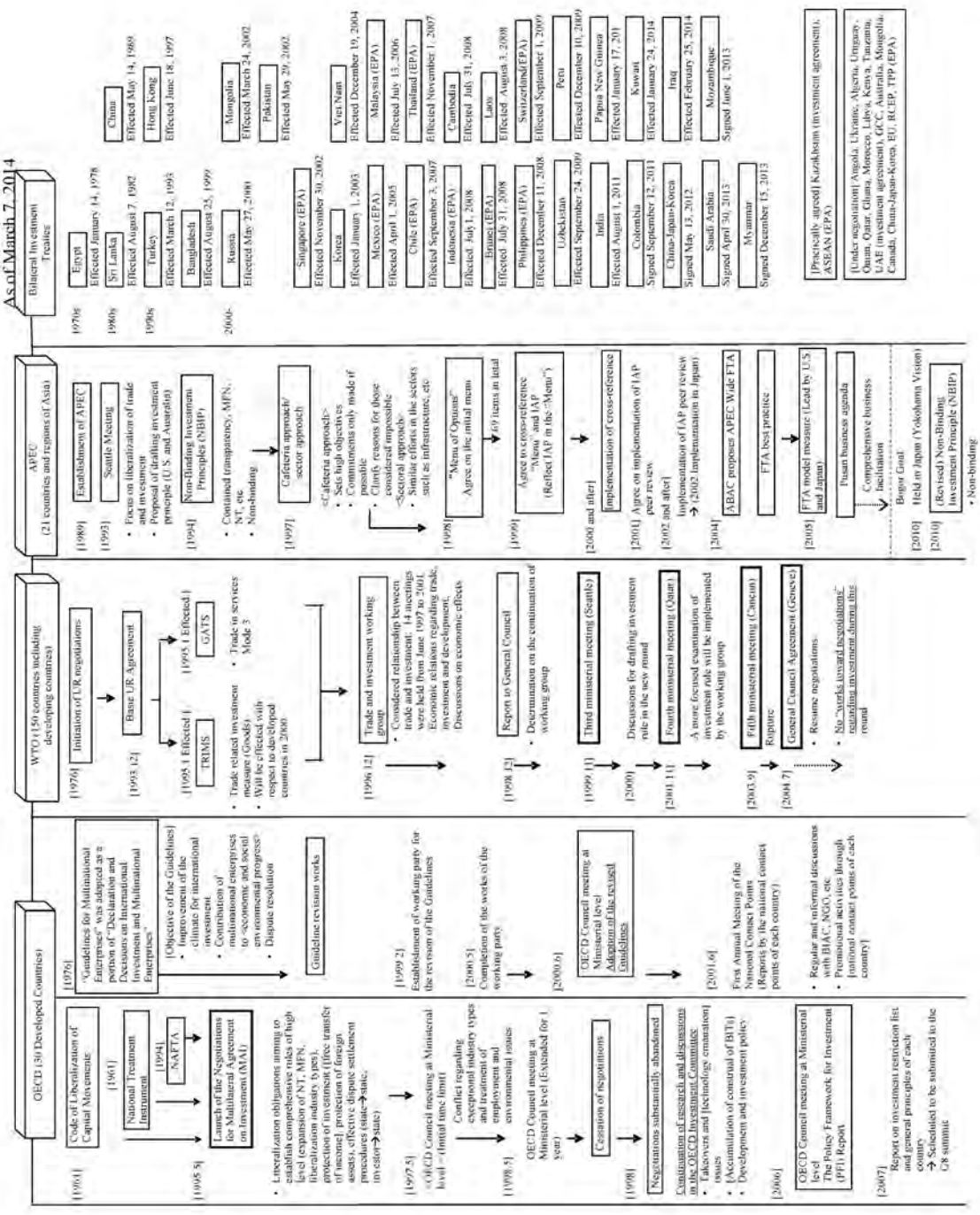
4. The Energy Charter Treaty (ECT)

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

5. Efforts at the WTO

At the WTO Singapore ministerial meeting in 1996, it was decided to consider whether investment should be included as an area for negotiation in the WTO framework, along with trade facilitation, transparency of governmental procurement and competition (the so-called "Singapore Issues"). Subsequently, discussions in the WTO on possible negotiations regarding "trade and investment" were made while the progress of discussions on the MAI at the OECD (which failed in 1998) was closely watched. It was agreed at the fourth ministerial meeting in 2001, which decided to start the Doha Development Agenda, to initiate negotiations if a clear consensus on negotiation modalities could be obtained at the fifth ministerial meeting. Starting in April 2002, the Working Group on trade and investment held meetings to discuss the elements (*e.g.*, scope and definitions, transparency) contained in the Doha Declaration. However, due to strong opposition from developing countries to establish rules regarding investments within the WTO framework, commencement of negotiations was not agreed upon at the fifth ministerial meeting held in Cancun, and investment was not included in the items to be negotiated in the Doha Development Agenda.

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



Column: Repatriation of foreign investment earnings and tax imposition issues in emerging countries

1. Introduction

With the outlook of Japan's domestic market decreasing with aging and depopulation as a background, in order for Japan to maintain sustainable growth, it is important to encourage Japanese companies to develop overseas business and facilitate them to repatriate the revenue they earn abroad back into Japan. Japanese companies have recently been expanding their business abroad in emerging countries like China and India.

Nevertheless, in these host countries, there are many reported cases of improper measures with the intention of fostering their own industries or acquiring foreign currency: such as aggressive administration of tax deviating from the actual situation being imposed on foreign companies, or requirement for the introduction of technology with conditions that are favorable to their countries' companies and the domestic reinvestment of revenues . As a result, multiple problems such as double taxation by unexpected back tax demands, etc. have occurred and in some cases making the continuation of business in host countries difficult. Such problems in emerging countries may possibly function as an obstacle for Japanese companies to extend their operations abroad, so the government should take measures immediately.

2. Issue of double taxation

When a company globally operates its business, the issue of double taxation may arise in the situation thatboth Japan and a host country impose taxation on the income from the same transaction. In some cases, this double taxation remains uncorrected, thus posing a significant risk to companies.

3. International taxation rules

(1) Tax treaties

Tax treaties aim to avoiddouble taxation, deal with issues related to tax evasion and tax breaks, and promote sound investment and economic exchange between two countries. As of the end of December 2013, Japan has concluded 60 treaties, which are applicable to 79 countries and regions. Content such as the following are generally included in those treaties.

1. Provisions for the scope of taxation rights of host country

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

.

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

2. Dispute resolution (mutual agreement procedure and arbitration)

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

Furthermore, an "arbitration provision" may be provided in some treaties that enables third-party (arbitrator) participation in the discussions between the tax authorities. In that case, the tax payer can request to submit the unsolved portion of such case to arbitration after a specified period of time

has passed since the mutual agreement procedure was commenced. Because the arbitration provision necessitates drawing a conclusion within a specified period of time, this system will lead to more smooth and effective discussions between the tax authorities and contribute to the avoidance of double taxation. Japan introduced an arbitration provision in the tax treaties concluded with Hong Kong (entered into force in August 2011), the Netherlands (entered into force in December 2011), Portugal (entered into force in July 2013), and New Zealand (entered into force in October 2013), and plans to include the provision in the tax treaties with the United States (signed in January 2013), the United Kingdom (signed in December 2013) and Sweden (signed in December 2013).

(2) Transfer pricing taxation

By arbitrarily manipulating the transaction price between affiliates (for example a parent company and its foreign subsidiaries), income of a company can be transferred to the other company which is located in low-tax state and thereby the group companies are able to reduce the taxation costs of the group as a whole. To prevent such tax avoidance, many countries including Japan maintain a transfer pricing taxation system. Transfer pricing taxation is a system that imposes tax based on income calculated on the presumption that transactions between a company and its overseas affiliates were carried out at a normal transaction price (Arm's Length Price (ALP)).

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

4. International taxation issue in emerging countries

(1) Transfer pricing taxation

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

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

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

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

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

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

(2) PE certification

The scope of PE tends to be broadly interpreted in emerging countries. As a result, the risk of unexpected imposition of tax on Japanese companies has increased.

a) PE certification of liaison office

Commonly, the tasks of liaison offices are to gather information and perform liaison works for their parent companies (Japanese companies). Therefore, it should not receive any PE certification since it does not conduct any business activities. However, in some emerging countries, the definition

of PE within the national law is not necessarily clarified and the scope is broadly interpreted, leading to cases where liaison offices that are not conducting business activities are PE certified (emerging countries in general).

b) PE certification of foreign subsidiary

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

(3) Royalty issues

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

(4) Others

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

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

5. Approaches to dealing with the issues

(1) Development and utilization of international rules

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

If regulations or administrative guidance on funds transfer or royalty are the root problems in the partner country, in order to solve the problems, rectifications will be requested from diverse perspectives such as the consistency with the provision in the investment agreements on the freedom of funds transfer and the obligation of national treatment as stipulated by the WTO/TRIPS treaty. In investment arbitrations, taxation measures are generally deemed legitimate exercise of government authority and not to constitute a violation to the Agreements, but in some cases taxation measures targeting specific companies, etc. were deemed to constitute a violation of the provisions of fair and equitable treatment or indirect expropriation (a series of Yukos-related cases such as *RosInvest v. Russia*, *Tza Yap Shum v. Peru*, and *Bogdanov v. Moldova*), taxation practically imposed only on foreign companies was deemed to constitute a violation of the national treatment obligation (*ADM v. Mexico*), unreasonably high taxation was deemed to constitute expropriation (*Burlington v. Ecuador*), and unjustifiable withdrawal of tax exemption measures based on domestic laws of host country was deemed to constitute a violation of the fair and equitable treatment obligation (*Goetz v. Burundi*).

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

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

(3) Japanese company's awareness of tax risks

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

(2) Overview of Legal Disciplines

1. Traditional Investment Protection Agreements and NAFTA Type Investment Liberalization Agreements

In the past, BITs were executed primarily with a view to protecting investors and their investments from legal and political risks including expropriation by the government of the country that receives the investments (also called the host country) or arbitrary operation of laws, thus securing proper treatment for the investors. These agreements are of the type usually referred to as "investment protection agreements," major elements of which are post-establishment national treatment and most-favored-nation treatment, conditions on expropriation and compensation, free transfer of funds relating to investment, dispute settlement between the contracting parties and between a contracting party and an investor. Most of the approximately 2,800 investment agreements currently existing in the world are "investment protection agreements."

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

2. Major Provisions in Investment Agreements

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

(i) Definition of Investments and Investors

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

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

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

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

(ii) National Treatment (NT) and Most-Favored-Nation Treatment (MFN)

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

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

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

(iii) Fair and Equitable Treatment

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

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

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

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

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

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

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

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

(v) Prohibition of Performance Requirements (PR)

This provision prohibits a contracting party from imposing performance requirements that hinder the free investment activities of investors, such as export requirements, local procurement requirements and technology transfer requirements, as conditions for investment and business activities of the investor in the other contracting party. The WTO TRIMs Agreement prohibits local content requirements (local content requirements for goods) and export/import balance requirements as being "investment measures that have a strong trade-distorting effect." In addition, domestic sale limit requirements, technology transfer requirements and the nationality requirements for managements are often prohibited in BITs as "performance requirements." This concept of prohibiting performance requirements emerged in the discussion of MAI Agreement at the OECD.

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

(vi) Approach to Liberalization Commitment

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

leave political leeway for foreign investment restrictions (*see e.g.*, the investment chapter in Australia-Thailand FTA, and "Schedule of India's Commitments" in the investment chapter in India-Singapore CECA).

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

Having the standstill obligation cover as many sectors as possible reduces risks to investors from changes of the legal system (*i.e.*, domestic systems are made less favorable). At the same time, the contracting parties can register especially sensitive sectors such as those relating to national security (arms and weapons industry; nuclear power industry) on the list "without standstill obligations," and those that are not so sensitive on the list "with standstill obligations," thereby leaving leeway for restrictions they consider necessary as well as securing legal stability in their foreign investment policies. Specifically, the negative list adopted in the investment chapter of NAFTA inscribes (i) the relevant sector (sub-sector); (ii) related obligations; (iii) legal grounds for the measure; and (iv) a summary of the measure, thereby helping ensure the transparency of the laws and regulations of the host country.

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

(With standstill obligations)

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

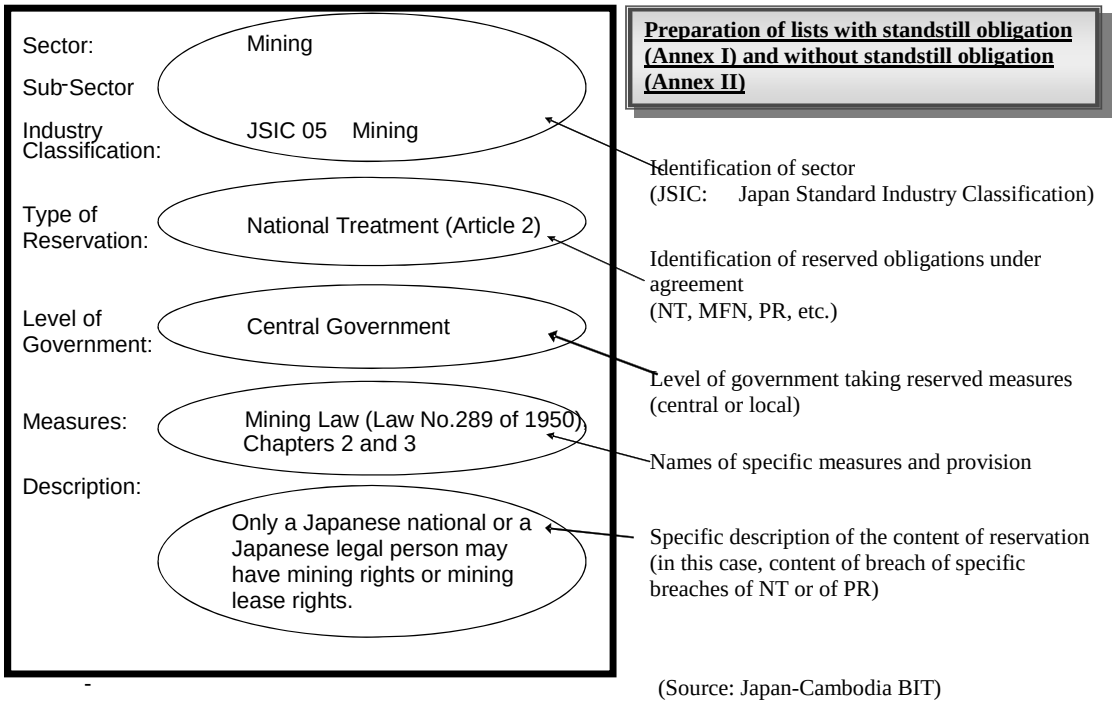
(Without standstill obligations)

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

(With standstill obligations)

Banking, Heat Supply, Information and Communications, Drugs and Medicines rvices etc., Subsidies, Aerospace Industry, Arms and Explosives Industry, Energy industry (i.e., Electricity Utility Industry, Gas Utility Industry, Nuclear Energy Industry), Fisheries,

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



(Source: Japan-Cambodia BIT)

(vii) Expropriation and Compensation

Provision on expropriation and compensation provides that when the contracting party expropriates the investment of the investor (including nationalization), it should do so in accordance with the following conditions: (i) for a public purpose, (ii) in a non-discriminatory manner, (iii) upon payment of prompt compensation, (iv) in accordance with due process of law, and (v) the compensation equivalent to the fair market value at the time of the expropriation .

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

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

(viii) Protection from Strife

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

(ix) Subrogation

This provision recognizes the assignment to the contracting party or its designated agency of investors' claims for suffered damages on their investments. For example, if investors suffer any damage due to a natural disaster or bankruptcy of local enterprises, such investor will receive a payment from the contracting party or its designated insurance agency under insurance contract etc.. This provision provides that, in such case, the contracting party country or such insurance agency may succeed and exercise the investors' rights. As for

Japan, this provision applies to guarantees and insurance contracts provided by Nippon Export and Investment Insurance (NEXI) and Japan Bank for International Cooperation (JBIC).

(x) Transfers

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

(xi) State-to-State Dispute Settlement

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

(xii) Investor-to-State Dispute Settlement

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

(xiii) General Exceptions and Security Exceptions

It is provided that contracting parties may take exceptional measures inconsistent with the agreement if doing so is necessary for maintaining public order, protecting human, animal or plant life or health, and defending such countries’ essential security interests. Arbitral tribunals have handled issues such as in what circumstances exceptional measures may be taken (for example, whether a government’s measures taken under an economic crisis fall under the category of exceptional measures). What is often controversial about this issue is the relationship between this provision and the principle of the state of necessity under customary international law (differences in the scope, requirements, legal nature, etc.).

3. Current Status of Japan’s Conclusion of Investment Agreements (including chapters on investment in EPAs)

As of January 2014, Japan has signed or entered into 23 BITs and 10 EPAs with chapters on investment. This means that Japan has signed or entered into 33 investment agreements.

		Date Signed	**Date Effected**
(i)	Egypt	January 1977	January 1978

		Date Signed	Date Effected
(ii)	Sri Lanka	March 1982	August 1982
(iii)	China	August 1988	May 1989
(iv)	Turkey	February 1992	March 1993
(v)	Hong Kong	May 1997	June 1997
(vi)	Pakistan	March 1998	May 2002
(vii)	Bangladesh	November 1998	August 1999
(viii)	Russia	November 1998	May 2000
(xi)	Mongolia	February 2001	March 2002
(x)	Korea	March 2002	January 2003
(xi)	Viet Nam	November 2003	December 2004
	* Incorporated in the Japan-Viet Nam EPA signed in December 2008.		
(xii)	Cambodia	June 2007	July 2008
(xiii)	Lao P.D.R.	January 2008	August 2008
(xiv)	Uzbekistan	August 2008	September 2009
(xv)	Peru	November 2008	December 2009
		* Incorporated in the Japan-Peru EPA, signed in May 2011.	
(xvi)	Papua New Guinea	April 2011	January 2014
(xvii)	Columbia	September 2011	
(xviii)	Kuwait	March 2012	January 2014
(xix)	China and Korea	May 2012	
(xx)	Iraq	June 2012	February 2014
(xxi)	Saudi Arabia	April 2013	
(xxii)	Mozambique	June 2013	
(xxiii)	Myanmar	December 2013	
*(i)	Japan-Singapore EPA	January 2002	November 2002
*(ii)	Japan-Mexico EPA	September 2004	April 2005
*(iii)	Japan-Malaysia EPA	December 2005	July 2006
*(iv)	Japan-Philippines EPA	September 2006	December 2008
*(v)	Japan-Chile EPA	March 2007	September 2007
*(vi)	Japan-Thailand EPA	April 2007	November 2007
*(vii)	Japan-Brunei EPA	June 2007	July 2008
*(viii)	Japan-Indonesia EPA	August 2007	July 2008
*(xi)	Japan-Switzerland EPA	February 2009	September 2009
*(x)	Japan-India CEPA	February 2011	August 2011

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

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

Name of the agreement (date of entry into force. effected)	Japan-Egypt BIT (Jan 1978)	Japan-Sri Lanka BIT (Aug 1982)	Japan-China BIT (May 1989)	Japan-Turkey BIT (Mar 1993)	Japan-Hong Kong BIT (Jun 1997)	Japan-Bangladesh BIT (Aug 1999)	Japan-Russia BIT (May 2000)	Japan-Mongolia BIT (Mar 2002)	Japan Pakistan BIT (May 2002)
－Local purchase requirement for goods & services	-	-	-	-	-	-	○	○	-
－Export & import balance requirement	-	-	-	-	-	-	○	○	-
－Export requirement	-	-	-	-	-	-	×	×	-
－Domestic sale restriction requirement	-	-	-	-	-	-	×	×	-
－Senior Management & Board of Directors	-	-	-	-	-	-	×	×	-
－Local citizen employment requirement	-	-	-	-	-	-	×	×	-
－Headquarter location requirement	-	-	-	-	-	-	×	×	-
－Research & development requirement	-	-	-	-	-	-	×	×	-
－Technology transfer requirement	-	-	-	-	-	-	×	×	-
－Specific region supply requirement	-	-	-	-	-	-	×	×	-
Reservation list （Negative list）	×	×	×	×	×	×	×	×	×
Fair and equitable treatment Full protection and security	△ （constant protection and security）	△ （constant protection and security）	△ （constant protection and security）	△ （constant protection and security）	○	△ （constant protection and security）	○	△ （constant protection and security）	△ （constant protection and security）

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

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

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

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

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

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

Note: ● is prescribed in other chapters

Name of the agreement (date effected)		Japan-Philippines EPA (Dec 2008)	Japan-Uzbekistan BIT (Sept 2009)	Japan-Switzerland EPA (Sept 2009)	Japan-Peru BIT (Dec 2009)	Japan-India EPA (Aug 2011)	Japan-Papua New Guinea BIT (signed on Apr 2011)	Japan-Columbia BIT (signed on Sept 2011)	Japan-Kuwait BIT (Signed on Mar 2012)	Japan-China-Korea BIT (Signed on May 2012)	Japan-Iraq BIT (Signed on Jun 2012)
Definition of investments		every kind of asset	every kind of asset	every kind of asset	every kind of asset (financial assets partly excluded)	every kind of asset (in General Provisions Chapter)	every kind of asset	every kind of asset (public debts excluded)	every kind of asset	every kind of asset	every kind of asset
National Treatment(NTT)	pre-establishment stage	○	○	○	○	○	×	○	○	×	×
	post-establishment stage	○	○	○	○	○	○	○	○	△ (Collective withholding of existing non-conforming measures)	○
Most-Favored-Nation Treatment(MFN)	pre-establishment stage	○	○	○ (FTA exception)	○	×	× (endeavor clause)	○	○	○ (FTA exception)	× (endeavor clause)
	post-establishment stage	○	○	○	○	○	○	○	○	○ (FTA exception)	○ (Dispute settlement procedures not applicable)
Prohibition of Performance Requirements (PR)		○(11)	○(12)	△ (TRIMs incorporated)	○(9)	○(9)	○(11) (post-establishment stage only)	○(9)	○	△ (In addition to compliance with TRIMS, discriminatory measures of relating to unfair requests on export and technology transfer are prohibited.)	△ (5) (only after entry and consultation)
	－Export restriction requirement	×	○	○	×	○	○	×	○	○	×

Name of the agreement (date effected)	Japan-Philippines EPA (Dec 2008)	Japan-Uzbekistan BIT (Sept 2009)	Japan-Switzerland EPA (Sept 2009)	Japan-Peru BIT (Dec 2009)	Japan-India EPA (Aug 2011)	Japan-Papua New Guinea BIT (signed on Apr 2011)	Japan-Columbia BIT (signed on Sept 2011)	Japan-Kuwait BIT (Signed on Mar 2012)	Japan-China-Korea BIT (Signed on May 2012)	Japan-Iraq BIT (Signed on Jun 2012)
－Local content requirement	○	○	○	○	○	○	○	○	○	○
－Local purchase requirement for goods & services	○	○	○	○	○	○	○	○	○	○
－Export & import balance requirement	○	○	○	○	○	○	○	○	○	○
－Export requirement	○	○	×	○	○	○	○	○	△ (Prohibition of unfair or discriminatory measures)	○
－Domestic sale restriction requirement	○	○	×	○	×	○	○	○	×	×
－Senior Management & Board of Directors	○	○	×	△ (reserved)	△ (reserved)	×	○	○	×	×
－Local citizen employment requirement	○	○	×	×	×	○	×	○	×	×
－	○	○	×	○	×	○	○	○	×	×

Name of the agreement (date effected)	Japan-Philippines EPA (Dec 2008)	Japan-Uzbekistan BIT (Sept 2009)	Japan-Switzerland EPA (Sept 2009)	Japan-Peru BIT (Dec 2009)	Japan-India EPA (Aug 2011)	Japan-Papua New Guinea BIT (signed on Apr 2011)	Japan-Columbia BIT (signed on Sept 2011)	Japan-Kuwait BIT (Signed on Mar 2012)	Japan-China-Korea BIT (Signed on May 2012)	Japan-Iraq BIT (Signed on Jun 2012)
Headquarter location requirement										
－Research & development requirement	○	○	×	×	×	○	×	○	×	×
－Technology transfer requirement	○	○	×	○	△ (reserved)	○	○	○	△ (Prohibition of unfair or discriminatory measures)	○
－Specific region supply requirement	○	○	×	○	○	○	○	○	×	×
Reservation List (Negative list)	○	○	○	○	○	×	○	○	×	×
Fair and equitable treatment Full protection and Security	○	○	○	○	○	○	○	○	○	○
Umbrella clause	×	○	○	△ (in preambles)	○	○	△ (prior consent is needed for submission of claims under this BIT and written agreements' dispute settlement mechanism shall prevail over ISDS)	○	○	△ (prior consent is needed for submission of claims under this BIT)
Expropriation and	○	○	○	○	○	○	○	○	○	○

Name of the agreement (date effected)	Japan-Philippines EPA (Dec 2008)	Japan-Uzbekistan BIT (Sept 2009)	Japan-Switzerland EPA (Sept 2009)	Japan-Peru BIT (Dec 2009)	Japan-India EPA (Aug 2011)	Japan-Papua New Guinea BIT (signed on Apr 2011)	Japan-Columbia BIT (signed on Sept 2011)	Japan-Kuwait BIT (Signed on Mar 2012)	Japan-China-Korea BIT (Signed on May 2012)	Japan-Iraq BIT (Signed on Jun 2012)
compensation										
Protection from strife	○	○	○	○	○	○	○	○	○	○
Transfer	○	○	○	○	○	○	○	○	○ (Approval period shall be about one month and shall not exceed two months)	○
Entry of investors	●	○	●	○	×	○	○	○	○	○
Transparency	●	○	●	○	●	○	○	○	○	○
Public comments	●	○	×	● (EPA)	×	○	○	×	○	×
Against corruption	○	○	×	○	●	○	○	○	×	○
ISDS	× (further discussion)	○	△ (consent needed for pre-establishment stage)	○	○	○	○	○	○	○
SSDS	●	○	●	○	●	○	○	○	○	○
Joint committee	○	○	●	○	●	○	○	○	○	○
Others				incorporated in Japan-Peru EPA	General Provisions Chapter has Security Exceptions	NT, MFN and PR shall not affect conditions for admission of investments.			Provision for a joint committee to discuss the scope of the existing non-conforming measures of NT after entry.	No complete ban on PR but conducted on the condition of a prior consultation.

Note 1: ● is prescribed in other chapters

4. Investment Agreements of Other Countries (including chapters on investment in EPAs/FTAs)

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

Name of treaty (Date of effect)		NAFTA (Jan 1994)	US-Australia NAFTA (Jan 2005)	US-Korea FTA (Jan 2012)	Singapore-India FTA (Aug 2005)	China-Korea Investment Agreement (Dec 2007)	ASEAN investment Agreement (signed Feb 2009)	Korea ASEANFTA (Investment chapter) (Sep 2009)	China-ASEAN Investment Agreement (Jan 2010)	Australia-NZ-ASEAN FTA (Investment chapter) (Jan 2010)
Definition of investment		every kind of asset	every kind of asset	every kind of asset	every kind of asset	every kind of asset (in accordance with laws and regulations)	every kind of asset	every kind of asset	every kind of asset	every kind of asset
National Treatment(NT)	pre-establishment stage	○	○	○	○	×	○	○ (Note 2)	×	× (Note 2)
	post-establishment stage	○	○	○	○	○	○	○ (Note 2)	○ (existing non-conforming measures are all reserved)	○
Most-Favored-Nation Treatment(MFN)	pre-establishment stage	○	○	○	×	○	○	○ (Note 2)	△ (a wide range of exception allowed)	× (succeeding negotiation)
	post-establishment stage	○	○	○	×	○	○	○ (Note 2)	△ (a wide range of exception allowed)	× (succeeding negotiation)
Prohibition of Performance Requirements (PR)		○ (8)	○ (8)	○ (8)	○ (TRIMs incorporated)	○ (illogical or discriminatory measures are prohibited)	○ (TRIMs incorporated)	○ (Note 2)	×	○ (Note 2)
	— Export restriction requirements	×	×	×	○	×	○	○	×	○

Name of treaty (Date of effect)	NAFTA (Jan 1994)	US-Australia NAFTA (Jan 2005)	US-Korea FTA (Jan 2012)	Singapore-India FTA (Aug 2005)	China-Korea Investment Agreement (Dec 2007)	ASEAN investment Agreement (signed Feb 2009)	Korea ASEANFTA (Investment chapter) (Sep 2009)	China-ASEAN Investment Agreement (Jan 2010)	Australia-NZ-ASEAN FTA (Investment chapter) (Jan 2010)
― Local content requirements	○	○	○	○	△ (illogical or discriminatory measures are prohibited)	○	○	×	○
― Local purchase requirements for goods & services	○	○	○	○	×	○	○	×	○
― Export & import balance requirements	○	○	○	○	×	○	○	×	○
― Export requirements	○	○	○	×	×	×	×	×	×
― Domestic sale restriction requirements	○	○	○	×	×	×	×	×	×
― Senior Management & Board of Directors	○	○	○	○	×	○	○	○	○
―Local citizen employment requirements	×	×	×	×	×	×	×	×	×
― Headquarter location requirements	×	×	×	×	×	×	×	×	×

Name of treaty (Date of effect)	NAFTA (Jan 1994)	US-Australia NAFTA (Jan 2005)	US-Korea FTA (Jan 2012)	Singapore-India FTA (Aug 2005)	China-Korea Investment Agreement (Dec 2007)	ASEAN investment Agreement (signed Feb 2009)	Korea ASEANFTA (Investment chapter) (Sep 2009)	China-ASEAN Investment Agreement (Jan 2010)	Australia-NZ-ASEAN FTA (Investment chapter) (Jan 2010)
― Research & development requirements	×	×	×	×	×	×	×	×	×
― Technology transfer requirements	○	○	○	×	△ (illogical or discriminatory measures are prohibited)	×	×	×	×
― Specific region supply requirements	○	○	○	×	×	×	×	×	×
Reservation List (Negative list)	○	○	○	△ (positive list)	-	(Note 1)	(Note 2)	-	(Note 2)
Fair and equitable treatment Full protection and Security	○	○	○	×	○	○	○	○	○
Umbrella clause	○ (similar stipulation to strife process procedure of external investments)	×	○ (similar stipulation to strife process procedure of external investments)	×	○	×	×	○	×

Name of treaty (Date of effect)	NAFTA (Jan 1994)	US-Australia NAFTA (Jan 2005)	US-Korea FTA (Jan 2012)	Singapore-India FTA (Aug 2005)	China-Korea Investment Agreement (Dec 2007)	ASEAN investment Agreement (signed Feb 2009)	Korea ASEANFTA (Investment chapter) (Sep 2009)	China-ASEAN Investment Agreement (Jan 2010)	Australia-NZ-ASEAN FTA (Investment chapter) (Jan 2010)
Expropriation and compensation	○	○	○	○	○	○	○	○	○
NT & MFN related to protection from strife	○	○	○	○	○	○	○	○	○
Free transfer of funds	○	○	○	○	○	○	○	○	○
ISDS	○	×	○	○	○	○	△ (PR excluded) (Note 3)	△ (PR excluded) (Note 3)	△ (PR excluded) (Note 3)
SSDS	○	○	○	○	○	○	○	○	○

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

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

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

5. Initiatives Related to EU Investment Agreements

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

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

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

With regard to the EPA between Japan and the EU, the work to determine the scope of negotiation ended in May 2012, and the European Commission obtained the authority to negotiate in November. The first Japan-EUEPA negotiation meeting was held in April 2013. The investment rules of EU-Canada FTA and EU-Singapore FTAin EU's FTAs with Canada and Singapore, in which negotiations are preceding, shall be observed regarding how the ambiguity of authority distribution between the EU and the member states can affect the investment negotiations.

Dispute Settlement Regarding Investment

1. Background of the Rules

Regional trade agreements (EPAs/FTAs) and bilateral investment treaties (BITs) provide procedures under which a party may request a decision from a dispute settlement body such as an arbitration board against the other party if any dispute arises in connection

with the application or interpretation of the agreement. However, it is rare that such procedures are used under EPAs/FTAs and BITs.

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

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

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

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

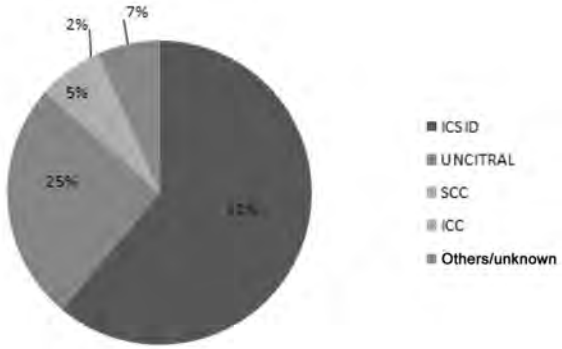
2. Use of the Rules

(i) Changes in the Number of Cases Submitted to Arbitration Procedures

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

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

Figure III-5-6 Percentage of Cases Submitted to Major Arbitration Procedures (as of the end of 2012, 514 cases in total)



(Source: UNCTAD Latest Development in Investor-State Dispute Settlement, IIA Issues Note No.1(2013)

(ii) Countries involved in Arbitration Cases

According to the summary prepared by UNCTAD, of the total 514 "investor- to-state" dispute cases by the end of 2012, 244 cases have been closed. Out of these, the nation's claim was accepted in approximately 42% cases, the investors' claims were accepted in approx. 31% cases, and approx. 27% cases were settled amiably. The summary shows that the country which was the "respondent" most frequently in "investor-to-state" dispute cases submitted in the past, was Argentina (52 cases), followed by Venezuela (34 cases), Ecuador (23 cases), Mexico (21 cases), the Czech Republic (20 cases), Canada (19 cases), Egypt and India (both

17 cases), and the United States (15 cases). A significant number of cases filed against Argentina were due to the political disruption relating to the financial crisis after the end of 2001. As for the Czech Republic, the non-performing loan issues in the financial sector, triggered by the currency crisis in 1997, caused the large number of disputes. The reason Mexico, the U.S., and Canada are respondents in many cases is assumed to be because cases based on Chapter 11 (Investment) of NAFTA have attracted considerable attention and that investors became aware of the effect of using the dispute settlement procedures of NAFTA.

Figure III-5-7 Number of claims, by defendants (as of the end of 2012)

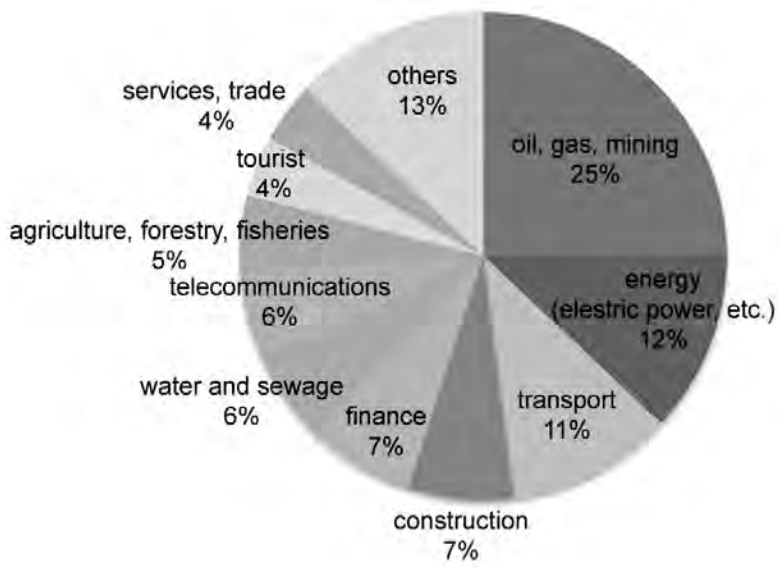
Rank	Country	Number of Cases
1	Argentina	52
2	Venezuela	34
3	Ecuador	23
4	Mexico	21
5	Czech Republic	20
6	Canada	19
7	Egypt India	17
9	United States	15
10	Poland Ukraine	14
12	Kazakhstan Slovakia	11
14	Hungary	10

(UNCTAD Latest Development in Investor-State Dispute Settlement, IIA Issues Note No.1 (2013)

(iii) Status of Use of Arbitration Procedures by Enterprises

According to the summary prepared by ICSID, the industry sector using arbitration procedures most frequently is the oil/gas/mining industry at 25%, followed by the energy industry (electric power, etc.) at 13%, transport industry at 11%, water and sewage / flood control industry at 7%, and finance industry at 7%.

Figure III-5-8 Proportion of claims, by industries (as of the end of June 2013)



(Source: ICSID, The ICSID Caseload – Statistics (2013-2)

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

3. Overview of Legal Disciplines

a) Framework of the Investor-to-State Dispute Settlement Procedures under EPAs/FTAs and BITs

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

(i) Investment Dispute Covered

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

(ii) Consultation between Investors and Counterparty Governments (Respondent Party)

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

(iii) Submission of a Claim to Arbitration

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

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

(iv) Selection of Arbitrators and Establishment of Arbitral Tribunal

After the selection of an arbitration body and the rules of the abritration, the arbitral tribunal is constituted by selecting the arbitrators. In most cases, arbitrations are conducted by three arbitrators. Both the respondent party (host country) and the investor select one arbitrator. The third member, who will serve as the presiding arbitrator, is appointed by agreement of both parties as a general rule. The arbitration is then conducted in accordance with the rules of individual arbitration procedures selected by investors. However, the relevant agreement may add amendments by providing additional provisions regarding the selection method of the arbitrator, information disclosure (among treaties signed in recent years are those that oblige to make public the documents that indicate the progress and the result of the arbitration, as well as to hold a public hearing), consolidation of claims, and offer of opportunity for third parties to state opinions (*see*, for example, the chapter on investment in NAFTA).

(v) Decision regarding Jurisdiction of Tribunal

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

(vi) Decision on Merits

If it is determined that the arbitral tribunal has jurisdiction, then the tribunal will judge the merits of the case and, if it finds there was a breach, determine the amount of damages.

(vii) Determination of Amount of Monetary Damages

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

(viii) Annulment of awards

With ICSID arbitrations, an disputing party can request annulment of the arbitration award (ICSID Convention Articles 51/52. As a case in which an annulment has actually been issued, *see* <Reference 2> 1) Decision related to jurisdiction, d) investment asset (viii) mentioned later). Furthermore, concerning arbitration award other than those under ICSID, it is possible that a court of a country in which arbitration was held annuls an arbitration award based on the country's legislation. In general, however, there is no system for appeal in international arbitration, since it aims to process the matter promptly by accepting the conclusion given that both parties were involved in procedures such as the selection of arbitrators.

(ix) Enforcement of Awards

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

Column: Utilization of Investment Agreement Arbitration

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

Comparing the characteristics of arbitration under the ICSID Convention and arbitration in accordance with the rules of the UNCITRAL, the former is rather convenient, as ICSID is established under the World Bank, with its high-availability of meeting rooms and lists of arbitrator candidates, as well as clearly defined standard charges (for example, the registration fee for ICSID arbitration submission is 25,000 dollars, the operation fee after commencing arbitration is 20,000 dollars, compensation per arbitrator is 3,000 dollars a day, and the like). Furthermore, when using ICSID, if the government of the host country refuses to enforce the arbitration award, it may face the suspension of World Bank loans, so the arbitration award has been enforced in almost all cases. Moreover, as mentioned above, the ICSID Convention provides the specific annulment procedures for the awards of ICSID arbitrations

In the case of arbitration in accordance with the rules of the UNCITRAL, domestic courts of the place of arbitration are supposed to intervene on the occasion of annulment, as in the case of ordinary commercial arbitration, and the selection of arbitrators can be more flexible than in the case of ICSID. Costs may be higher or lower depending on how procedures actually progress, but while the ICSID arbitration process is managed to some extent by the ICSID secretariat and meeting rooms are provided by the ICSID, UNCITRAL arbitration proceeds without a permanent secretariat and is apt to take longer and cost more. How to share arbitration costs among the disputing parties (investors and the respondent country) is to be determined by an arbitral tribunal unless the parties reach a special agreement. There has been a case where the losing party was made to bear all the costs.

Solution through Means Other than Investment Agreement Arbitration

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

a case that an U.S. energy company and Ecuador agreed on a settlement of nearly 80 million dollars.

Furthermore, EPAs that Japan has concluded recently often contain provisions to establish a Committee on the Improvement of the Business Environment, providing a framework for companies to have discussions regarding the improvement of the business environment in a host country prior to the occurrence of any dispute, without having to initiate an investment agreement arbitration (refer to Part III, Chapter 8 "Improvement of Business Environment" for details). A subcommittee brings together not only the government of a host country, but also other related parties from local industries, the government of the home country, JETRO and other organizations in charge of matters that will be consulted. Issues that are difficult for a single company to raise and those related to the overall industry or the investing companies as a whole can be discussed collectively. Matters to be consulted are not limited to those concerning the investment chapter, but cover a wide range of business-related issues, such as the development of industrial infrastructure, the simplification and enhancement of transparency in administrative procedures, and the protection of intellectual property. The government of the host country is required to take appropriate measures in response to a request made via a subcommittee based on the provisions of the EPA and other agreements. As of now, such subcommittees on the improvement of the business environment have been convened based on EPAs with Thailand, Malaysia, Mexico and Chile. Under the Japan-Peru Investment Agreement, a "sub-committee on improvement of investment environment" was established with a view to exchanging information and having discussions concerning investment-related matters within the scope of the agreement and relate to improvement of investment environment. Furthermore, the "Japan-Brazil Joint Committee on Promoting Trade and Investment" was established in Brazil in July 2008 as a framework not based on an intergovernmental agreement.

Column: Investor-state dispute settlement procedure options with focus on the issues on arbitration and the possibility of utilization of conciliation

I. Introduction

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

However, among the settlement methods for investor-state disputes, there is another way, conciliation, which ise inclined to resolve the case amicably. ICSID is starting to recommend the use of conciliation in light of issues relating to investment treaty arbitration and the

increasing number of requests for arbitrations[1]. It is said that many Japanese companies hesitate to confront a dispute directly; however, the amicable resolution through conciliation may suit the mentality of such companies. Therefore, in this column, an overview of issues faced by arbitrations as a method to settle investor-state disputes will be presented, along with the introduction of the mechanism of conciliation and its merits and demerits. However, amicable settlement may be sought in the process of arbitration, as there are a considerable number of cases solved peacefully during the arbitration process[2].

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

II. Issues and limitations on arbitration as an investor-state dispute settlement procedure

1. Issues on time and cost

ICSID indicated the time and cost required for arbitration, and recommended the utilization of conciliation in its annual report[3]. In their study the United Nations Conference on Trade and Development (UNCTAD) raised the problem of the significant cost needed for arbitration procedures and the fact that attorneys' fees accounts for 60% of the cost[4]. For instance, an investor paid 4.6 million dollars and the responding country paid 13.2 million dollars in one case of investment treaty arbitration, and 11 million and 4.3 million, respectively in another case. In the same study, UNCTAD indicated that arbitration requires an average of three to four years due to continuous conflicts of the parties about jurisdiction and the frequent request for annulment of awards once made[5]; it asserted that the prolonged periods are significant[6]. In addition, the average time period for ICSID arbitration was said to be 3.6 years excluding the annulment procedure[7]. The issues of time and cost of the arbitration have been recognized as a large burden to both parties, the investor and the respondent country.

2. Issues on the state violation of arbitration award

In addition to these issues, practical limitations have been recognized recently as the

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

[2] According to ICSID statistics (2013-2), 37% of arbitration cases have been finalized by settlement or other means.

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

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

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

[6] Refer to UNCTAD, *Investor–State Disputes: Prevention and Alternatives to Arbitration*（2010）, p18（http://unctad.org/en/docs/diaeia200911_en.pdf）.

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

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

In most of the cases, the nation paid compensation in the end; however, additional cost and labor were expended by the steps such as the seizure of the respondent party's property by the investor or the diplomatic intervention by the government of the home country. An example of an intervention by the investor's home country which attracted attention was the suspension of Generalized System of Preferences (GSP) for Argentina by the United States. Hence, the intervention by the investor's home country is not always advantageous for the investor. In order to secure compensation by the Russian government, a German investor filed a petition for seizure of the airplane that the Russian government brought to Germany for an air show. The German government requested the investor to withdraw the petition in fear of causing a diplomatic problem[10].

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

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

When a nation does not comply with an arbitration award to compensate, the investor can take legal actions such as seizing national property in order to enforce the award. From the perspective of ensuring the effectiveness of ICSID arbitration awards, the ICSID Convention stipulates that the award issued by ICSID arbitration on monetary compensation has validity equivalent to the final judgment of a court in each contracting state (ICSID Convention, Article 54 (1))[12]. An award is generally enforced in a third country other than the nation being ordered to compensate; however, the contracting states mentioned in the ICSID Convention

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

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

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

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

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

Article 54 (1) include not only the countries involved in the arbitration but also the third country executing the award. Therefore, arbitration awards issued based on the ICSID Convention are self-enforcing in ICSID member countries[13],[14].

Of course this does not mean that an investor can seize the assets of a nation immediately. Where national assets are exempt from enforcement as a part of sovereign immunity in customary international law, the ICSID Convention continues to affirm the validity of sovereign immunity principles based on effective laws in member countries (ICSID Convention, Article 55)[15]. Also, an arbitration agreement by a nation is not necessarily equivalent to a waiver of sovereign immunity in the enforcement stages. Hence, a nation that is ordered to compensate can invoke sovereign immunity and impede seizure of assets. Recently, the International Court of Justice (ICJ) ruled that sovereign immunity principles do not apply to certain cases such as when a national asset is not used for governmental (non-commercial) activities; however, the scope in which sovereign immunity is non-applicable is still limited[16]. If the asset that is petitioned for seizure is provided exclusively for commercial use, it may be subject to seizure, but government are not involved in many commercial activities. And even if public assets are provided for commercial use, they are often under the rule of an entity separate from the government: the addressee of the award. Seizure that is petitioned for may be rejected in these cases. Also, with regard to laws on sovereign immunity in the United States and the United Kingdom, where the global financial activities are centred, sovereign immunity is applied to assets of financial authorities including foreign central banks regardless of their use (for commercial use or not)[17]. In view of these hurdles, a valid seizure of national asset by an investor is difficult in practice, and seizures by investors often do not succeed. Of course the elimination of enforcement on assets by sovereign immunity does not change the legal obligations of the nation to comply with the arbitration award[18]. The ICSID Convention stipulates that diplomatic protection may be obtained from the investor's home country in case an arbitration award is violated (ICSID Convention, Article 27), and an appeal may be made to the International Court of Justice (ICSID Convention, Article 64).

4. Avoidance of investment treaty arbitration by the host country

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

As of the end of 2013, Bolivia, Ecuador, and Venezuela have denounced the ICSID

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

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

[15] Examples sovereign immunities stipulated by member states include the Foreign Sovereign Immunities Act of the United States and the State Immunity Act of the United Kingdom.

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

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

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

Convention based on Article 71 of the Convention. Also, Argentina is seeking legislation to denounce the ICSID Convention[19]. (Denunciations take effect sixty days after the date of notice (Article 71)). However, the validity of individual investment treaties is not affected by denunciation of the ICSID Convention, and in many cases the enforcement of arbitration awards is typically protected by the New York Convention.

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

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

III. The mechanism, merits and demerits of conciliation as an investor-state dispute settlement procedure

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

Articles 28 to 35 of the ICSID Convention and the ICSID Conciliation Rule stipulate the rules and procedures relating to ICSID conciliation. The conciliation proceeding begins when a disputing party, an ICSID Convention contracting state or any national of a contracting state, addresses to the ICSID Secretary General a request for initiation of conciliation, and the other party to the dispute cannot impede the initiation of conciliation proceedings (ICSID Convention, Article 28(1))[22]. Thereafter, conciliation commission that will conduct the conciliation is composed (ICSID Convention, Article 29)[23]. If the parties do not agree on the conciliators, the Secretary-General of the ICSID Administrative Council will constitute the conciliation commission (ICSID Convention, Article 30). The role of the conciliation commission is to clarify the issues in dispute between the parties and to endeavour to bring about agreement between them upon mutually acceptable terms (ICSID Convention, Article 34(1)). The conciliation commission does not necessarily confirm facts or define the application of law. Although conciliation proceedings are more flexible than arbitrations, the

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

[20] BIT of Legal Bother," Business Today, May 27, 2012（http://businesstoday.intoday.in/story/india-planning-to-exclude-arbitration-clauses-from-bits/1/24684.html）.

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

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

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

adversary structure of the dispute has been maintained to a certain extent. Arguments by the disputing parties are heard by the conciliation commission at oral proceedings (ICSID Conciliation Rule, Article 22). Dispute parties file a written statement within 30 days of constitution of the conciliation commission (ICSID Conciliation Rule, Article 25). Thereafter, either party may file statements as it deems useful and relevant at any stage of the proceeding (ICSID Conciliation Rule, Article 25 (1)). The conciliation commission may request oral explanations, documents and other information form a party, as well as evidence from other persons (ICSID Conciliation Rule, Article 22 (3)). The conciliation commission recommends to the parties terms of settlement with the reasons for them, and it may recommend refraining from specific actions that might aggravate the dispute (ICSID Conciliation Rule, Article 22 (2); also, ICSID Convention, Article 34 (1)). Although the recommendations are not binding, the parties are obliged to give their most serious consideration to the recommendations (ICSID Convention, Article 34 (1)). When the conciliation has concluded, the commission shall, regardless whether or not a settlement has been reached, draw up a report regarding the conciliation proceedings (ICSID Convention, Article 34 (2)). If the parties transition to arbitration proceedings, neither party is entitled to invoke or rely on anything expressed in the conciliation or the report or any recommendations made by the conciliation commission (ICSID Convention, Article 35). Consideration is given so that concessions made by parties in the course of conciliation do not affect the arbitration.

2. Number of conciliations

As of the end of 2012, nine cases had utilized ICSID conciliations, of which three are currently in progress[24]. Among the six cases of conciliation proceedings that have been finalized, at least three have reached a settlement[25]. There have been 381 cases utilizing ICSID arbitrations as of the end of 2012, which is significantly higher than conciliations[26].

3. Merits and demerits of ICSID conciliations

(1) Saving time and cost

The primary merit of ICSID conciliations is that it is time- and cost-saving compared to arbitrations. It has been mentioned that six cases of ICSID conciliations out of nine have been finalized, but the time periods from the initiation of conciliation to the end is from 8 to 27 months, which is 17 months on average. On the other hand, as aforementioned, the average period of time for ICSID arbitrations is 3.6 years excluding revocation procedures. In conciliation, conciliators take the initiative to clarify the issue and reach a settlement, and time and cost can be saved because the argument is focused on a particular point in this process. Also, in arbitration, time and cost swells due to the exchange of documents between the parties including a massive amount of evidence, which is a procedure close to discovery procedures in the United States. In contrast, conciliators restrict the scope of document exchange in conciliation. Naturally, the demerit is that time and money is wasted if the

[24] Including 2 cases which are conducted under the Additional Facility Rules. ICSID, Refer to the Lists of Concluded and Pending ICSID Cases (https://icsid.worldbank.org/ICSID/FrontServlet?requestType =CasesRH&actionVal=ListCases). The number of arbitrations and conciliations are published. The numbers can also be obtained from the dispute statistics published by the ICSID twice a year (https://icsid. worldbank.org/ICSID/FrontServlet?requestType=ICSIDDocRH&actionVal=CaseLoadStatistics).

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

[26] Including 37 cases which are conducted under the Additional Facility Rules. Refer to ICSID dispute statistics 2012-2(https://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDDocRH&actionVal= CaseLoadStatistics).

conciliation does not succeed, and the investor may have to start over by initiating arbitration.

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

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

However, the possibility of reaching a resolution by conciliation is low when the conflict between the investor and the host country is strong, and it may be a rational choice for the investor to resolve the case in arbitration from the beginning. Similarly, when a dispute is not settled despite the investor's every effort to use all kind of amicable measures including negotiations, it may be rational to transfer to arbitration. [29].

(3) Confidentiality

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

(4) Accountability to relevant parties

The reconciliation proposed by the conciliators is informal compared to an arbitration award, and it lacks explanatory reasons. Therefore, the use of the national budget cannot be justified if the reconciliation involves compensation, leading to hesitation by the host country to accept such reconciliation[32]. Furthermore, as investment disputes are often related to public

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

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

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

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

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

[32] Refer to Barton Legum, *The Difficulty of Conciliation in Investment Treaty Cases: A Comment on Professor Jack C. Coes' "Toward A Complementary Use of Conciliation in Investor-State Disputes- A Preliminary Sketch,"* MEALEY'S International Arbitration Report Vol. 21, #4 April 2006, at 2. Nevertheless, the

benefit or important economic or resources policies, host countries may hesitate to accept the decision because of consideration of public opinion. Investor companies also may have concerns regarding how to explain to their stockholders about accepting the settlement without objective decisions by an arbitral tribunal.

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

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

IV. Comparison with problem-solving by the Business Environment Development Subcommittee

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

b) Summary of Major Arbitral Bodies and Arbitration Rules

Figure III-5-9

	ICSID Convention (the "Convention") and the Arbitration Rules (the "Rules")	ICSID Additional Facility Rules
Authorizing Law, etc.	- The International Centre for Settlement of Investment Disputes (ICSID) is a permanent international arbitration institution and is one of the	- In 1978, the Administrative Council granted the ICSID Secretariat the authority to administer the settlement of disputes which are not covered by the

indications are made based on experience in the United States, where governance is relatively strict.

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

	ICSID Convention (the "Convention") and the Arbitration Rules (the "Rules")	ICSID Additional Facility Rules
	organizations of the World Bank Group. It is located in the U.S. (Washington D.C.). - The ICSID Convention came into force in 1966. There were 158 Contracting States and 150 effective as of 2013. - The ICSID Convention (totaling 75 Articles) provides for arbitration in Articles 36-55. - The "Arbitration Rules" provide the details regarding arbitration proceedings.	Convention, such as in cases where one party is not a Contracting State or a national of a Contracting State. - The ICSID Additional Facility Rules have three schedules. Schedule C provides for arbitration between a Contracting State and a Non-contracting State.
Subject Matter	- Investment disputes between the nationals of a Contracting State and other Contracting States.(Convention, Article 1 (2))	- Investment disputes in which either party is a Non-contracting State or national of a Non-contracting State. (Article 2)
Commencement of Arbitration Proceedings	- The date on which the Secretary-General notifies the parties that all the arbitrators have accepted their appointment. (Rules, Rule 6)	- Sending a request in writing to the Secretariat. (Schedule C, Article 2)
Appointment of Arbitrators	- Three arbitrators, in principle. (Convention, Article 37 (2) (b)) - Where the dispute will be resolved by three arbitrators, nationals of the States party to the dispute cannot be selected as arbitrators in principle. (Convention, Article 39) - If the parties do not appoint the arbitrators, the Chairperson of the Administrative Council shall appoint them from the Panel of Arbitrators. (Convention, Article 38, Article 40 (1)) - The Tribunal shall be the judge of its own competence. (Convention, Article 41 (1))	- Three arbitrators, in principle. (Schedule C, Article 6 (1)) - One or any uneven number is acceptable. (Schedule C, Article 6 (3)) - If the parties do not agree, the Chairperson of the Administrative Council shall appoint the arbitrators (Schedule C, Articles 9 and 10) - Where the dispute shall be resolved by three arbitrators, nationals of the States party to the dispute cannot be selected as arbitrators in principle. (Schedule C, Article 7)
Tribunal Proceedings	- Arbitration proceedings shall be held at the seat of the Centre, in principle. (Convention, Article 62, Rules, Rule 13) - In the absence of the parties' agreement on the applicable law, the Tribunal shall apply the law of the Contracting State party to the dispute and such rules of international law as may be applicable. (Convention, Article 42 (1))	- Arbitration proceedings may be held in any States that are parties to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards. (New York Convention) (Schedule C, Article 19) - The place of arbitration shall be determined by the Arbitral Tribunal. (Schedule C, Article 20)

	ICSID Convention (the "Convention") and the Arbitration Rules (the "Rules")	ICSID Additional Facility Rules
	- The parties are not allowed to institute in a court of the States an objection contrary to the award. (Convention, Article 53 (1)) - In accordance with the agreement between the parties, one or two languages may be used in the proceeding. If it is not agreed upon, it will be selected from the official languages of the ICSID. (Rules, Rule 22) - Provisional measures for the preservation of rights may be recommended by the Tribunal. (Rules, Rule 39) - An annulment of the award shall be tried by the Committee constituted by three persons appointed from the Panel of Arbitrators by the Chairperson of the Administrative Council. (Convention, Article 52)	- In accordance with the agreement between the parties, one or two languages may be used in the proceeding. If it is not agreed upon, it will be selected from the official languages of the ICSID. (Schedule C, Article 30) - Provisional measures for the preservation of rights may be ordered or recommended. (Schedule C, Article 46) - As to the applicable law, the rules of law designated by the parties as the law applicable to the substance of the dispute shall be applied. In the absence of such agreement, it shall be (a) the law determined by the conflict of laws rules which the Tribunal considers applicable and (b) such rules of international law as the Tribunal considers applicable. (Schedule C, Article 54)
Award	- Decided by a majority of the votes of all the Tribunal members. (Convention, Article 48) - The award shall be binding on the parties. (Convention, Article 53) - In certain circumstances, either party may request revision or annulment of the award. (Convention, Articles 51 and 52)	- Shall be made by a majority of the votes of all the Tribunal members. (Schedule C, Article 24) - The award shall be final and binding on the parties. (Schedule C, Article 52 (4))

	UNCITRAL Arbitration Rules	ICC Rules of Arbitration
Authorizing Law, etc.	- The United Nations Commission on International Trade Law (UNCITRAL) was established by the General Assembly in 1996. It is located in Austria (Vienna). - UNCITRAL itself is an organization which provides rules; it does not conduct arbitration proceedings. - The UNCITRAL Arbitration Rules were adopted in 1976. (The UNCITRAL Model Law on International Commercial Arbitration was adopted in 1985.) - Revised version was adopted in Oct 2010. - Rules on Transparency in Treaty-based Investor-State Arbitration were adopted in 2013 (effective in 2014).	- The International Chamber of Commerce (ICC) was founded in 1923. It is located in France (Paris). - Currently, 7,400 companies and associations from 130 countries have joined as members. - Revised version was adopted in Jan. 2012.
Subject Matter	Disputes arising in the context of international commercial relations, such as commercial contracts, etc. (Resolution)	No provision.
Commencement of Arbitration Proceedings	The date on which the notice of arbitration is received by the respondent. (Article 3 (2))	The date on which the Request is received by the Secretariat. (Article 4 (2))
Appointment of Arbitrators	- Three arbitrators, in principle. (Article 7) - If there is only one arbitrator, the arbitrator shall be appointed upon agreement between parties. (Article 6) - If the parties have not reached agreement on the choice of arbitrator(s), they shall be appointed by the appointing authority agreed by the parties or the appointing authority designated by the Secretary-General of the Permanent Court of Arbitration. (Article 8 (1)) - The appointing authority shall secure the appointment of an independent and impartial arbitrator and shall take into account the advisability of appointing an arbitrator of a nationality other than the nationalities of the parties. (Article 6 (7)) - Any circumstances likely to give rise	- A sole arbitrator, in principle. (Article 12 (2)) - Where the parties have agreed that the dispute shall be resolved by a sole arbitrator, they may, by agreement, nominate the sole arbitrator. If the parties fail to agree, the sole arbitrator shall be appointed by the International Court of Arbitration. (Article 12 (3)) - Where the parties have agreed that the dispute shall be resolved by three arbitrators, each party shall nominate one arbitrator and the third arbitrator shall be appointed by the Court. (Articles 12 (4) and 12 (5)) - Every arbitrator must be and remain impartial and independent of the parties involved in the arbitration. (Article 11 (1)) - Arbitrators are required to disclose any facts or circumstances which might be

	UNCITRAL Arbitration Rules	ICC Rules of Arbitration
	to justifiable doubts as to the arbitrator's impartiality or independence shall be disclosed. (Article 11)	of such a nature as to call into question their independence in the eyes of the parties. (Article 11 (2)) - The sole arbitrator or the president of the arbitral tribunal normally shall be of a nationality other than those of the parties. (Article 13 (5))
Tribunal Proceedings	- The place of arbitration shall be determined by the arbitral tribunal if the parties have not agreed upon it. (Article 18 (1)) - The place of arbitral proceedings shall be determined at the arbitral tribunal's discretion. (Articles 18 (2)) - The language to be used in the proceedings shall be determined by the arbitral tribunal if the parties have not agreed upon a language. (Article 19 (1)) - The arbitral tribunal shall determine its own jurisdiction. (Article 23 (1)) - The arbitral tribunal may grant interim measures. (Article 26 (1)) - If the parties have failed to designate the applicable law, the arbitral tribunal shall apply the law which it determines to be appropriate. (Article 35 (1))	- The place of arbitration shall be fixed by the Court unless agreed upon by the parties. (Article 18 (1)) - The Arbitral Tribunal may conduct hearings and meetings at any location it considers appropriate unless otherwise agreed by the parties. (Article 18 (2)) -The Arbitral Tribunal shall determine the language or languages of the arbitration unless the parties have agreed upon them. (Article 20) - The parties shall be free to agree upon the rules of law to be applied, but in the absence of any such agreement, the Arbitral Tribunal shall apply the rules of law which it determines to be appropriate. (Article 21) - Persons not involved in the proceedings normally shall not be admitted to hearings. (Article 26 (3)) - The Arbitral Tribunal may order any interim or conservatory measure it deems appropriate. (Article 28)
Award	- When there is more than one arbitrator, any award or other decision of the arbitral tribunal shall be made by a majority of the arbitrators. When there is no majority the presiding arbitrator may decide alone. (Article 33) - The award shall be final and binding on the parties. (Article 34 (2))	- The time limit within which the arbitral tribunal must render its final award is six months. (Article 30 (1)) - When the arbitral tribunal is composed of more than one arbitrator, an Award is made by a majority decision. If there is no majority, the Award shall be made by the president of the Arbitral Tribunal alone. (Article 31 (1)) - Before signing any award, the Arbitral Tribunal shall submit it in draft form to the Court. (Article 33)

	UNCITRAL Arbitration Rules	ICC Rules of Arbitration
		- The award shall be binding on the parties. (Article 34 (6))

	Arbitration Rules of the SCC Institute	KLRCA Arbitration Rules
Authorizing Law, etc.	- The Arbitration Institute of the Stockholm Chamber of Commerce (SCC Institute) was established in 1917 as an entity affiliated with the Stockholm Chamber of Commerce. - The current Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce came into force on January 1, 2010.	- The Kuala Lumpur Regional Centre for Arbitration (KLRCA) was founded in 1978 by the AALCO. It is wholly-owned by the Malaysian government. - The Asian-African Legal Consultative Organization (AALCO) was founded in 1956 as a result of the Asian-African Conference held in 1955. As of the end of September 2012, there are 47 member states including Japan. There are regional centers for arbitration in Cairo, Lagos, Teheran, and Nairobi in addition to the KLRCA. - The UNCITRAL arbitration rules have been applied to the KLRCA mutatis mutandis (revised in 2010). - It is one of the organizations that conciliations and arbitrations are submitted to pursuant to the Japan-Malaysia EPA (Chapter on Investment). (Article 85.4 (a) of the Agreement)
Subject Matter	- No particular provision.	- No particular provisions.
Commencement of Arbitration Proceedings	- Arbitration is commenced on the date when the SCC receives the Request for Arbitration. (Article 4)	- A demand that the dispute be referred to arbitration shall be made to the Registrar in writing. (Article 3 (3))
Appointment of Arbitrators	- The parties are free to agree on the number of arbitrators. Where the parties have not agreed on the number of arbitrators, the Arbitral Tribunal shall consist of three arbitrators, unless the Board decides that the dispute is to be decided by a sole arbitrator. (Article 12) - Where the Arbitral Tribunal is to consist of a sole arbitrator, the parties shall jointly appoint the arbitrator. If the parties fail to make the appointment, the arbitrator shall be appointed by the Board. (Article 13 (2)) - Where the Arbitral Tribunal is to consist of more than one arbitrator, each party shall appoint an equal number of arbitrators and the Chairperson shall be appointed by the Board. Where a party fails to appoint arbitrator(s), the Board shall make the appointment. (Article 13 (3)) - The sole arbitrator or the Chairperson	- If the arbitrator appointing authority stipulated in Article 6 of the UNCITRAL Arbitration Rules is not agreed upon, the KLRCA shall be the appointing authority. (Article 3 (1))

	Arbitration Rules of the SCC Institute	KLRCA Arbitration Rules
	of the Arbitral Tribunal shall be of a different nationality than the parties, in principle. (Article 13 (5)) - Every arbitrator must be impartial and independent. (Article 14 (1)) - Arbitrators are obligated to disclose any circumstances which may give rise to justifiable doubts as to her/his impartiality or independence. (Article 14 (2) and 14 (3))	
Tribunal Proceedings	- Unless agreed upon by the parties, the Board shall decide the seat of arbitration. (Article 20 (1)) - The Arbitral Tribunal may conduct hearings at any place which it considers appropriate. (Article 20 (2)) - Unless agreed upon by the parties, the Arbitral Tribunal shall determine the language(s) of the arbitration. (Article 21 (1)) - The Arbitral Tribunal shall apply the law or rules of law which it considers to be most appropriate in the absence of an agreement on the applicable law by the parties. (Article 22 (1)) - Hearings will be in private. (Article 27 (3)) - The Arbitral Tribunal may grant any interim measures it deems appropriate. (Article 32)	- Hearings will be in private. The ruling shall be rendered in private unless required for execution. (Article 10)
Award	- Shall be made by a majority of the arbitrators; if failing a majority, by the Chairperson. (Article 35 (1)) - An award shall be final and binding on the parties when rendered. (Article 40)	- The ruling shall be rendered within three months from the end of tribunal proceedings. (Article 6 (1))

	SIAC Arbitration Rules	HKIAC Arbitration Rules
Authorizing Law, etc.	- The Singapore International Arbitration Centre (SIAC) was established in 1991 jointly by the Trade Development Council and the Economic Development Board. - The SIAC Arbitration Rules were revised in 2013 (5th Edition) - The UNCITRAL Arbitration Rules can also be used.	- The Hong Kong International Arbitration Centre (HKIAC) was established in 1985 by volunteer legal and industrial circles. - The revised rules came into effect in2013. Complies with the UNCITRAL Arbitration Rules. - The choice of Arbitration Rules was completely liberalized by eliminating the difference in international and domestic arbitrations in the Arbitration Ordinance revised in June 2011.
Subject Matter	- No particular provisions.	- Domestic and international arbitral proceedings (preceding Arbitration Rule)
Commencement of Arbitration Proceedings	- The date of receipt of the complete Notice of Arbitration by the Registrar. (Article 3 (3))	- The date on which a copy of the Notice of Arbitration is received by HKIAC. (Article 4 (2))
Appointment of Arbitrators	- One arbitrator in principle. Three may be appointed when agreed by the parties or when the Registrar thinks it appropriate. (Article 6 (1)) - If there is only one arbitrator, the arbitrator shall be appointed upon agreement between parties, which then shall be confirmed by the SIAC. (Article 7) - If there are three arbitrators, the parties shall appoint one each, which then shall be confirmed by the SIAC. In principle, the third arbitrator shall be appointed by the SIAC. (Article 8) - The arbitrator's impartiality or independence shall be ensured. (Article 10 (1)) - Any circumstances that may give rise to justifiable doubts as to the arbitrator's impartiality or independence shall be disclosed. (Article 10 (4))	- If the parties do not agree, the HKIAC shall decide whether the case shall be referred to a sole or three arbitrator(s). (Article 6 (1)) -If there is only one arbitrator, the arbitrator shall be appointed upon agreement between parties. If the parties do not reach an agreement, the arbitrator shall be appointed by the HKIAC. (Article 7) - If there are three arbitrators, the parties shall appoint one each and these two shall appoint the third arbitrator. If the parties do not reach an agreement, the arbitrator shall be appointed by the HKIAC. (Article 8) - The appointed arbitrators shall be confirmed by the HKIAC. (Article 9) - The arbitrator's impartiality or independence shall be ensured. A single arbitrator and the third arbitrator shall be of a nationality other than the nationalities of the parties. (Article 11 (1) and (2)) - Any circumstances likely to give rise to justifiable doubts as to the arbitrator's impartiality or independence shall be disclosed. (Article 11 (4))

	SIAC Arbitration Rules	HKIAC Arbitration Rules
Tribunal Proceedings	- The seat of arbitration shall be determined upon agreement between the parties. If there is no agreement, the seat of arbitral proceedings shall be Singapore unless the arbitral tribunal specifies otherwise. (Article 18 (1)) - The place of arbitral proceedings shall be determined at the arbitral tribunal's discretion. (Article 18 (2)) - The arbitral tribunal determines the language unless agreed upon by the parties. (Article 19 (1)) - The arbitral tribunal shall determine its own jurisdiction. (Article 25 (2)) - An injunction or any other interim relief can be taken. (Article 26 (1)) - The arbitral tribunal shall apply the law which it determines to be appropriate in the absence of an agreement on the rules of law specified by the parties. (Article 27 (1)) - Hearings and rulings will be in private. (Article 35 (1)) - The award shall be made within six months, in principle, from the establishment of an arbitral tribunal. (Article 5 (2))	- The seat of arbitration will be Hong Kong unless agreed upon by the parties. (Article 14 (1)) - The place of arbitral proceedings shall be determined at the arbitral tribunal's discretion. (Article 14 (2)) - The arbitral tribunal determines the language(s) unless agreed upon be the parties. (Article 15 (1)) - The arbitral tribunal shall determine its own jurisdiction. (Article 19 (1)) - Interim measures can be taken. (Article 23) - The arbitral tribunal shall apply the rules or law which it determines to be appropriate in the absence of agreement on the rules of law by the parties. (Article 35 (1)) - The award shall be made within six months, in principle, from the date when HKIAC transmitted the file to the arbitral tribunal. (Article 41) - Hearings will be in private. Rulings will be open to the public unless the parties have any objections. (Article 42)
Award	- Decided by a majority of the votes of an arbitral tribunal that consists of several persons. If failing a majority, by the Chairperson. (Article 28 (5)) - The ruling is final and binding on the parties. (Article 28 (9))	- Decided by a majority of the votes for an arbitral tribunal that consists of more than one arbitrator. If failing a majority, by the Chairperson. (Article 32 (1)) - The award is final and binding on the parties. (Article 34 (1))

	VIAC Rules of Arbitration	CIETAC Arbitration Rules
Authorizing Law, etc.	- The Viet Nam International Arbitration Centre (VIAC) was established in 1993 by the Prime Minister's order. - The headquarters is located in Hanoi with a branch in Ho Chi Minh City. - The VIAC is a subordinate organization of the Chamber of Commerce and Industry. - Revised rules were adopted in January 2012.	- The China International Economic and Trade Arbitration Commission (CIETAC) was established in 1956. - Also known as the Arbitration Court of the China Chamber of International Commerce. - A subordinate organization of the China Council for the Promotion of International Trade and the China Chamber of International Commerce. - The secretariat is located in Beijing with branches in Shenzhen, Shanghai, Tianjin and Chongqing. - Revised rules were adopted in 2012. - Other Arbitration Rules can be used upon agreement between both parties.
Subject Matter	- Dispute of which the arbitral proceedings commence on or after 1 January 2012. (Article 1 (2))	- Cases involving economic, trade and other disputes of a contractual or non-contractual nature. - Dispute cases include international or foreign-related disputes, disputes related to the Hong Kong Special Administrative Region, the Macao Special Administrative Region and the Taiwan region, and domestic disputes. (Article 3)
Commencement of Arbitration Proceedings	- The date on which the VIAC receives the Request for Arbitration. (Article 5)	- The day on which the Secretariat of CIETAC receives a Request for Arbitration. (Article 11)
Appointment of Arbitrators	- Three arbitrators in principle. (Article 10) - If there are three arbitrators, the parties shall appoint one each and they shall appoint the third arbitrator. The VIAC President shall appoint the arbitrator unless agreed upon by the parties. (Article 11) -If there is only one arbitrator, the arbitrator shall be appointed upon agreement between parties. The VIAC President shall appoint the arbitrator if not agreed upon by the parties. (Article 12) - Any circumstances likely to give rise	- Three arbitrators in principle. One arbitrator if agreed upon by the parties. (Article 23) - To be appointed from the Panel of Arbitrators provided by CIETAC. An arbitrator can be selected outside of the Panel upon confirmation of the Chairperson of CIETAC if agreed upon by the parties. (Article 24) - If there are three arbitrators, the parties shall appoint one each and the third arbitrator shall be jointly appointed by both parties or by the Chairperson of CIETAC. (Article 25) - If there is only one arbitrator, the

	VIAC Rules of Arbitration	CIETAC Arbitration Rules
	to doubts as to the arbitrator's impartiality or independence shall be disclosed. (Article 14 (1))	arbitrator shall be jointly appointed by both parties or by the Chairperson of CIETAC. (Article 26) - The arbitrator's independence and impartiality. (Article 22) - Any circumstances likely to give rise to justifiable doubts as to the arbitrator's impartiality or independence shall be disclosed. (Article 29 (1))
Tribunal Proceedings	- The arbitral tribunal determines the place of arbitration unless agreed upon be the parties. (Article 20 (1)) - The place of arbitral proceedings shall be determined at the arbitral tribunal's discretion unless agreed upon be the parties. (Article 20 (2)) - For disputes without a foreign element, the language shall be Vietnamese. The language shall be determined by agreement between parties for disputes with a foreign element and disputes to which at least one party is an enterprise with foreign capital. The arbitral tribunal shall determine the language with consideration to the language of the contract unless agreed upon by the parties. (Article 21) - For disputes without a foreign element, the law of Vietnam shall be applied. For disputes with a foreign element, the Arbitral Tribunal shall apply the law agreed by the parties. If the parties do not have any agreement, the Arbitral Tribunal shall determine the law it considers the most appropriate. (Article 22) - The arbitral tribunal shall determine its own jurisdiction. (Article 26 (1)) - Interim measures can be taken. (Article 19) - The arbitral tribunal shall conduct a mediation upon request of both parties. (Article 27)	- Unless agreed upon by the parties, the place of arbitration shall be the domicile of CIETAC or its sub-commission/center administering the case. CIETAC may also determine other places. (Article 7) - Unless agreed upon by the parties, the place of arbitral proceedings shall be in Beijing for a case administered by the Secretariat of CIETAC or at the domicile of the sub-commission/center which administers the case. The arbitral tribunal can determine the place upon agreement by the arbitration committee. (Article 34) - CIETAC has the power to determine the jurisdiction. CIETAC may delegate such power to the arbitral tribunal. (Article 6 (1)) - The arbitral tribunal shall determine the applicable law in the absence of agreement by the parties. (Article 47 (2)) - Interim measures can be taken. (Article 21) - Hearings are generally conducted in private. (Article 36) - The language is Chinese or a language designated by CIETAC unless agreed upon by the parties. (Article 71) - The arbitral tribunal shall conciliate upon request of both parties. (Article 45) - Summary proceedings that will be finalized within three months, in principle, from the establishment of an

	VIAC Rules of Arbitration	CIETAC Arbitration Rules
		arbitral tribunal. (Article 54~62)
Award	- Decided by a majority of the votes for an arbitral tribunal that consists of three persons; if failing a majority, by the Chairperson. (Article 29) - The award is final and binding on the parties. (Article 30 (5))	- Decided by a majority of the votes in an arbitral tribunal that consists of three persons; if failing a majority, by the Chairperson. (Article 47 (5) and (6)) - The award is final and binding upon both parties. Neither party may bring a lawsuit before a court or make a request to any other organization for revision of the award. (Article 47 (9)) - In principle, an arbitration award shall be issued within six months of the establishment of an arbitral tribunal. (Article 46) - The arbitral tribunal shall submit its draft article to CIETAC for scrutiny before signing. (Article 49)

	JCAA Rules of Arbitration
Authorizing Law, etc.	- The International Commercial Arbitration Committee, the former body of the Japan Commercial Arbitration Association (JCAA), was established in 1950 within the Japan Chamber of Commerce and Industry. In 1953 the Arbitration Committee was reorganized to become independent from the Japan Chamber of Commerce and Industry, and changed its name to the present name in 2003. Its head office is located in Tokyo. - Revised version was adopted in Feb. 2014.
Subject Matter	- No particular provisions.
Commencement of Arbitration Proceedings	- The date on which the Request for Arbitration has been submitted to the JCAA. (Articles 14 (6))
Appointment of Arbitrators	- The number of arbitrators shall be one in principle. (Article 26 (1)) The number of arbitrators may be three if the Parties have agreed (Article 28). - If the Parties have agreed that there shall be one arbitrator, each Party shall agree on and appoint that arbitrator within two weeks from the respondent's receipt of the notice of the Request for Arbitration. (Article 27 (1)) If the Parties fail to make such appointment within the time limit, the JCAA shall appoint an arbitrator. (Article 27 (3)) - If the Parties have agreed that the number of arbitrators shall be three, each Party shall appoint one arbitrator within three weeks from the respondent's receipt of the notice of the Request for Arbitration. (Article 28 (1)) The two arbitrators shall agree on and appoint the third arbitrator. (Article 28 (4)) If the two arbitrators fail to make such appointment of the third arbitrator, the JCAA shall appoint the third arbitrator. (Article 28 (5)) - An arbitrator shall be, and remain at all times, impartial and independent. (Article 24 (1)) - Arbitrators shall fully disclose any circumstances likely to give rise to justifiable doubts as to his or her impartiality or independence. (Article 24 (2))
Tribunal Proceedings	- The place of arbitration shall be the city of the office of the JCAA, unless otherwise agreed by the Parties. (Article 36 (1)) - The Arbitral Tribunal may conduct the arbitral proceedings at any place it considers appropriate, unless otherwise agreed by the Parties. (Article 36 (2)) - Arbitral proceedings shall be held in private, and all records thereof shall be closed to the public. (Article 38 (1)) - Unless Parties have agreed on the language(s) to be used in the arbitral proceedings, the Arbitral Tribunal shall determine such language(s) taking into account the language of the contract containing the Arbitration Agreement, whether interpreting or translating will be required, and the cost thereof. (Article 11 (1)) - The Arbitral Tribunal shall decide the dispute in accordance with such rules of law agreed by the Parties to be applicable to the substance of the dispute. (Article 60 (1)) If the Parties fail to make such agreement, the Arbitral Tribunal shall apply the substantive law of the country or state to which the dispute referred to the arbitral proceedings is most closely connected. (Article 60 (2)) - The Arbitral Tribunal may order interim measures it considers appropriate. (Article 66)

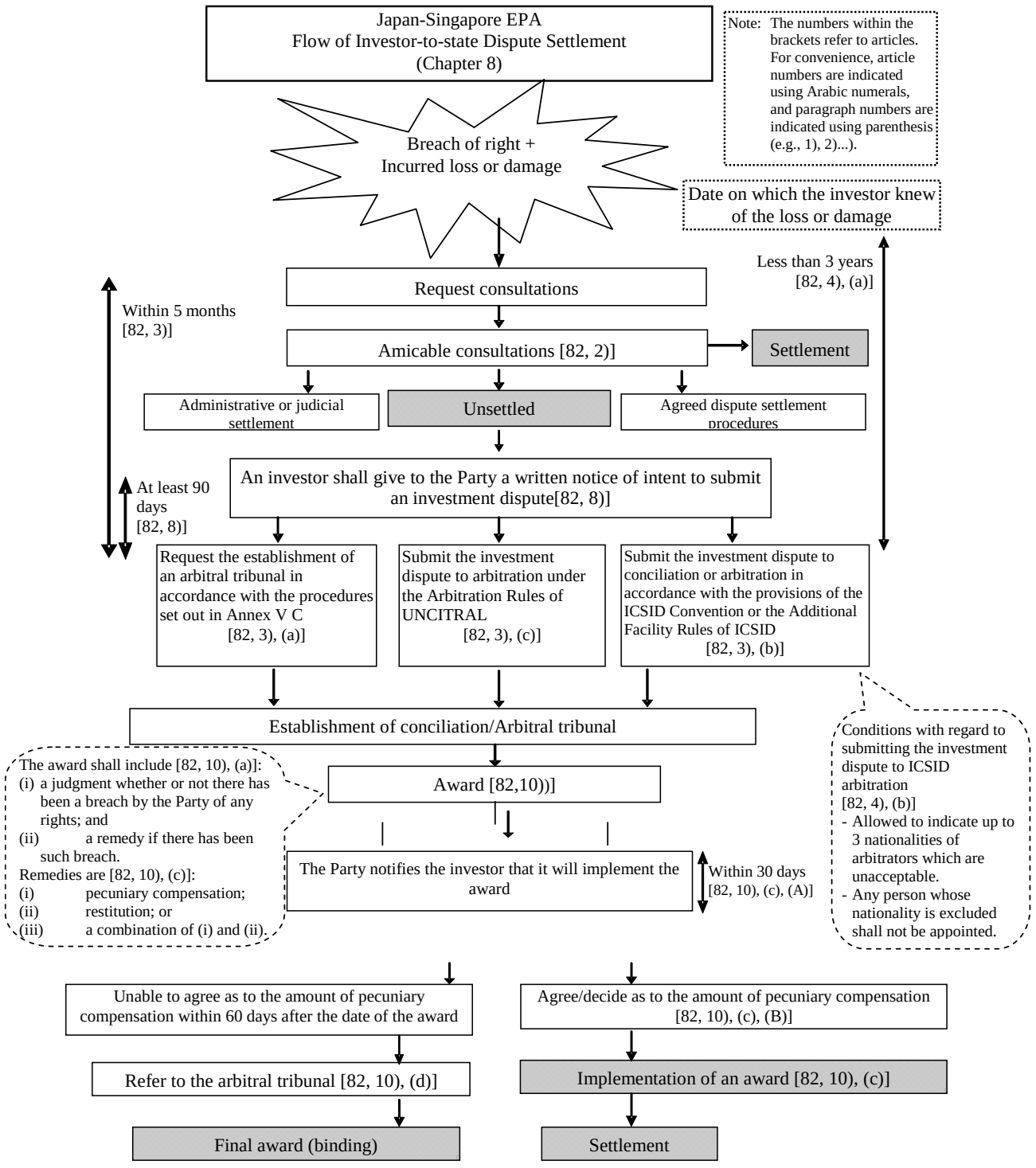
	JCAA Rules of Arbitration
Award	- An arbitral award shall be final and binding on the Parties. (Article 59)

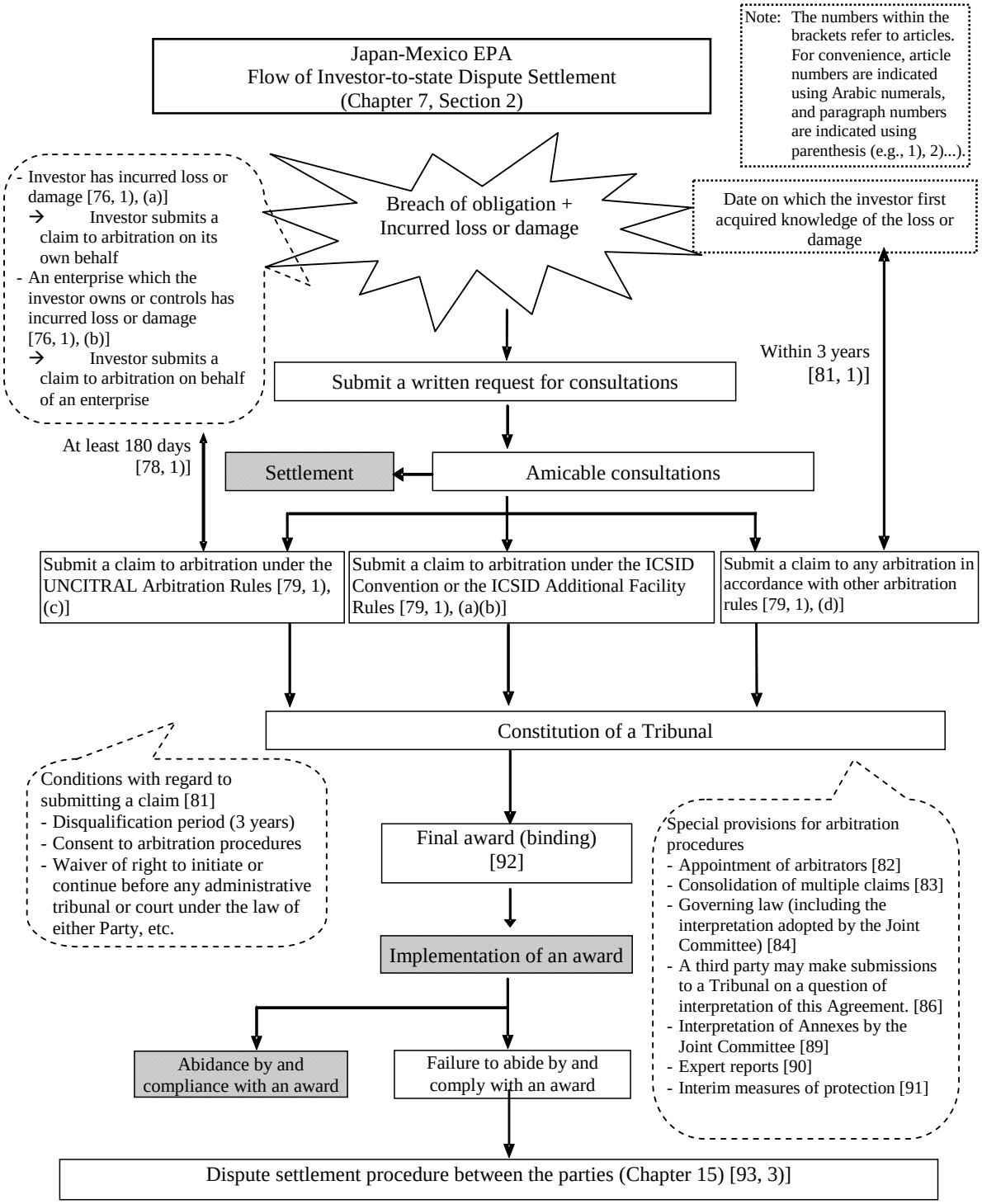
c) The Dispute Settlement Provisions for Investor-to-state Disputes which are provided in the Investment Chapter in the EPAs entered into by Japan.

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

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

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

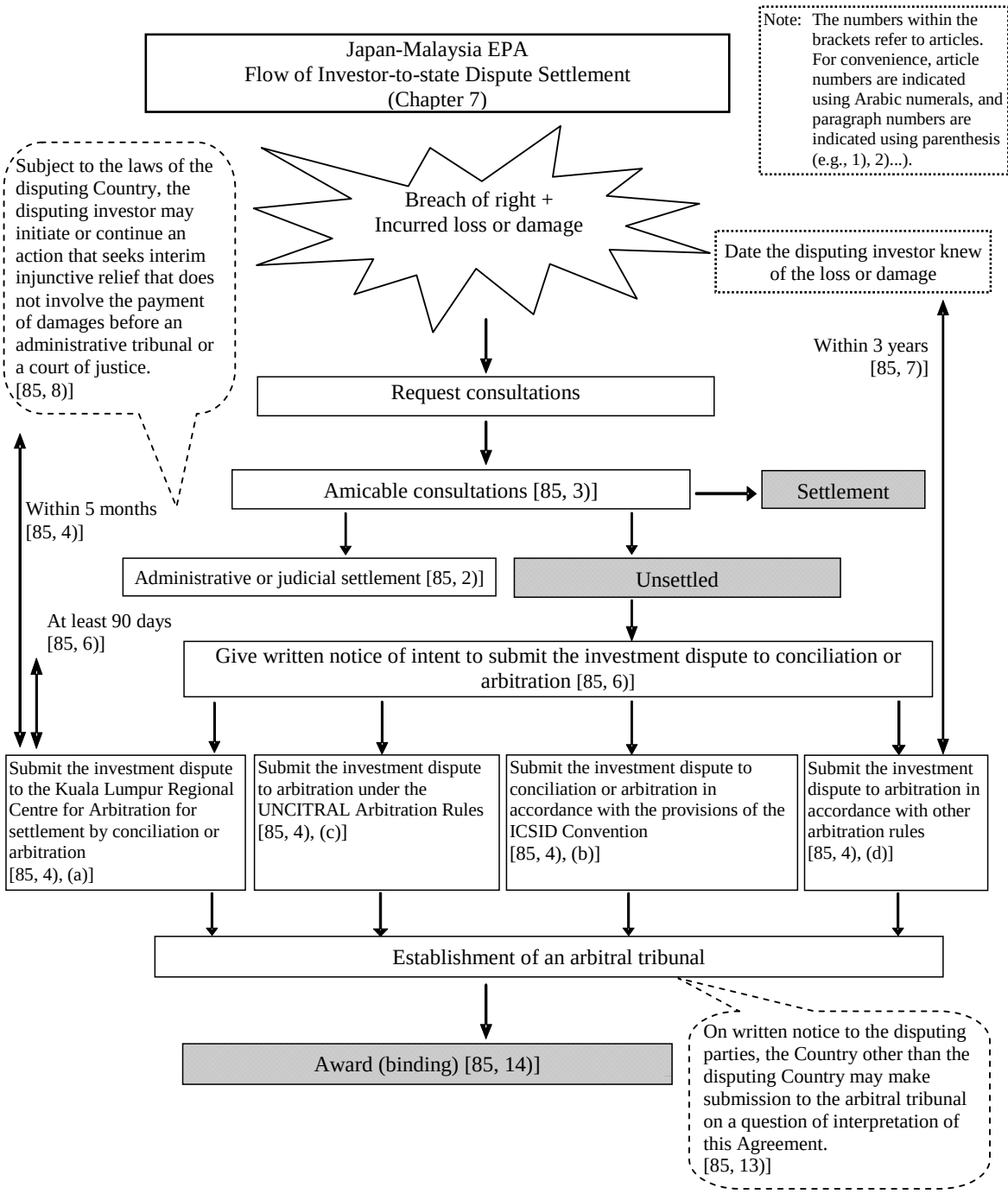

Japan-Singapore EPA
Flow of Investor-to-state Dispute Settlement
(Chapter 8)
Note: The numbers within the brackets refer to articles. For convenience, article numbers are indicated using Arabic numerals, and paragraph numbers are indicated using parenthesis (e.g., 1), 2)...).
Breach of right +
Incurred loss or damage
Date on which the investor knew of the loss or damage
Less than 3 years
[82, 4), (a)]
Request consultations
Within 5 months
[82, 3)]
Amicable consultations [82, 2)]
Settlement
Administrative or judicial settlement
Unsettled
Agreed dispute settlement procedures
At least 90 days
[82, 8)]
An investor shall give to the Party a written notice of intent to submit an investment dispute[82, 8)]
Request the establishment of an arbitral tribunal in accordance with the procedures set out in Annex V C
[82, 3), (a)]
Submit the investment dispute to arbitration under the Arbitration Rules of UNCITRAL
[82, 3), (c)]
Submit the investment dispute to conciliation or arbitration in accordance with the provisions of the ICSID Convention or the Additional Facility Rules of ICSID
[82, 3), (b)]
Establishment of conciliation/Arbitral tribunal
Conditions with regard to submitting the investment dispute to ICSID arbitration
[82, 4), (b)]
- Allowed to indicate up to 3 nationalities of arbitrators which are unacceptable.
- Any person whose nationality is excluded shall not be appointed.
The award shall include [82, 10), (a)]:
(i) a judgment whether or not there has been a breach by the Party of any rights; and
(ii) a remedy if there has been such breach.
Remedies are [82, 10), (c)]:
(i) pecuniary compensation;
(ii) restitution; or
(iii) a combination of (i) and (ii).
Award [82,10))]
The Party notifies the investor that it will implement the award
Within 30 days
[82, 10), (c), (A)]
Unable to agree as to the amount of pecuniary compensation within 60 days after the date of the award
Agree/decide as to the amount of pecuniary compensation
[82, 10), (c), (B)]
Refer to the arbitral tribunal [82, 10), (d)]
Implementation of an award [82, 10), (c)]
Final award (binding)
Settlement
・Nothing in this Article shall be construed to prevent an investor to an investment dispute from seeking administrative or judicial settlement within the territory of the Party that is a party to the investment dispute. [82, 11)]
・Either Party may give diplomatic protection, or bring an international claim, in respect of an investment dispute which one of its investors and the other Party shall have consented to submit or shall have submitted to arbitration, when such other Party shall have failed to abide by and comply with the award rendered in such dispute. [82, 12)]



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

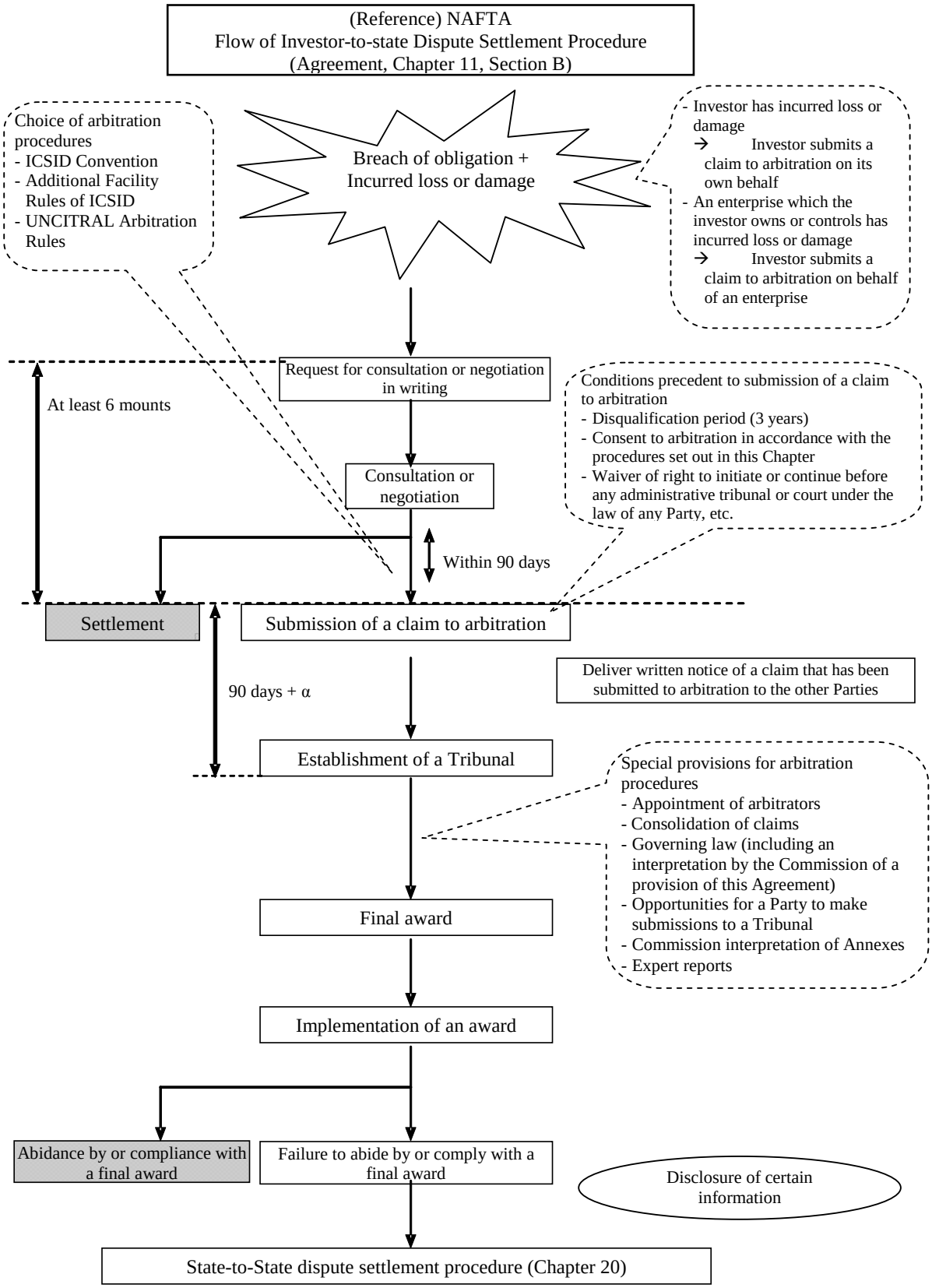
(a) a determination that the failure to abide by or comply with the final award is inconsistent with the obligations of this Agreement; and

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



- Nothing in this Article (Settlement of Investment Disputes between a Country and an Investor of the Other Country) shall be construed to prevent a disputing investor from seeking administrative or judicial settlement within the disputing Country. [85, 2)]

- Either Country may, in respect of an investment dispute which one of its investors shall have submitted to arbitration, give diplomatic protection, or bring an international claim before another forum, when the other Country shall have failed to abide by and comply with the award rendered in such investment dispute. [85, 16)]


(Reference) NAFTA
Flow of Investor-to-state Dispute Settlement Procedure
(Agreement, Chapter 11, Section B)
Choice of arbitration procedures
- ICSID Convention
- Additional Facility Rules of ICSID
- UNCITRAL Arbitration Rules
Breach of obligation + Incurred loss or damage
- Investor has incurred loss or damage
→ Investor submits a claim to arbitration on its own behalf
- An enterprise which the investor owns or controls has incurred loss or damage
→ Investor submits a claim to arbitration on behalf of an enterprise
At least 6 mounts
Request for consultation or negotiation in writing
Consultation or negotiation
Within 90 days
Conditions precedent to submission of a claim to arbitration
- Disqualification period (3 years)
- Consent to arbitration in accordance with the procedures set out in this Chapter
- Waiver of right to initiate or continue before any administrative tribunal or court under the law of any Party, etc.
Settlement
Submission of a claim to arbitration
90 days + α
Deliver written notice of a claim that has been submitted to arbitration to the other Parties
Establishment of a Tribunal
Special provisions for arbitration procedures
- Appointment of arbitrators
- Consolidation of claims
- Governing law (including an interpretation by the Commission of a provision of this Agreement)
- Opportunities for a Party to make submissions to a Tribunal
- Commission interpretation of Annexes
- Expert reports
Final award
Implementation of an award
Abidance by or compliance with a final award
Failure to abide by or comply with a final award
Disclosure of certain information
State-to-State dispute settlement procedure (Chapter 20)