

BITにおける最低基準及び「不当な又は差別的な措置の禁止」に関する規定

1. 一般待遇の一部として規定されたもの
 - (1) 該当する規定のないもの
 - (2) 独立した条文として規定されたもの
 - (3) 他の基準と併記されているもの
 - (4) 国内法令に関する限定句が付されているもの
 - (5) 日本が締結したBIT上の該当する規定
2. 特定の待遇や権限行使に関する規定されたもの
 - (1) PR に関する規定
 - (2) 送金に関する規定
 - (3) 例外に関する規定

1. 一般待遇として規定されたもの

- (1) 該当する規定のないもの

2004米＝チリFTA投資章

Article 10.4: Minimum Standard of Treatment²

1. Each Party shall accord to covered investments treatment in accordance with customary international law, including fair and equitable treatment and full protection and security.
2. For greater certainty, paragraph 1 prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to covered investments. The concepts of “fair and equitable treatment” and “full protection and security” do not require treatment in addition to or beyond that which is required by that standard, and do not create additional substantive rights. The obligation in paragraph 1 to provide:
 - a. “fair and equitable treatment” includes the obligation not to deny justice in criminal, civil, or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the world; and
 - b. “full protection and security” requires each Party to provide the level of police protection required under customary international law.
3. A determination that there has been a breach of another provision of this Agreement, or of a separate international agreement, does not establish that there has been a breach of this Article.
4. Notwithstanding Article 10.7(5)(b), each Party shall accord to investors of the other Party,

and to covered investments, non-discriminatory treatment with respect to measures it adopts or maintains relating to losses suffered by investments in its territory owing to armed conflict or civil strife.

*4.項は、NAFTA1105条2項とほぼ同文。

2004Canada Model BIT

Article 5 Minimum Standard of Treatment

1. Each Party shall accord to covered investments treatment in accordance with the customary international law minimum standard of treatment of aliens, including fair and equitable treatment and full protection and security.
2. The concepts of "fair and equitable treatment" and "full protection and security" in paragraph 1 do not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens.
3. A determination that there has been a breach of another provision of this Agreement, or of a separate international agreement, does not establish that there has been a breach of this Article.

* 不当又は差別的な措置の禁止への言及はない。

(2) 独立した条文として規定されたもの

1987 Bolivia-Germany BIT

Article 2

- (1) Each Contracting Party shall, in accordance with its legislation, permit in its territory investments of capital by nationals or companies of the other Contracting Party and promote such investments as far as possible. It shall in any case accord such investments fair and equitable treatment.
- (2) Neither Contracting Party shall, through arbitrary or discriminatory measures, prejudice the management, maintenance, use and enjoyment in its territory of the investments of nationals or companies of the other Contracting Party.

* 完全保護への言及なし。

1998 Bolivia-US BIT

ARTICLE II

3.

- a) Each Party shall at all times accord to covered investments fair and equitable treatment and full protection and security, and shall in no case accord treatment less favorable than that required by international law.

b) Neither Party shall in any way impair by unreasonable and discriminatory measures the management, conduct, operation, and sale or other disposition of covered investments.

4. ・ 5. 略

＊公正衡平待遇と完全保護は国際法上の最低基準とされるが、不当又は差別的な措置の禁止は別項に規定。

（３）他の基準と併記されているもの

1992 Bolivia-Netherlands BIT

Article 3

- 1) Each Contracting Party shall ensure fair and equitable treatment to the investments of nationals of the other Contracting Party and shall not impair, by unreasonable or discriminatory measures, the operation, management, maintenance, use, enjoyment or disposal thereof by those nationals.
- 2) More particularly, each Contracting Party shall accord to such investments full security and protection which in any case shall not be less than that accorded either to investments of its own nationals or to investments of nationals of any third State, whichever is more favourable to the investor.

3 ・ 4 ・ 5項 略

＊公正衡平待遇と不当又は差別的な措置の禁止が併記され、完全保護のみ別項。

1995 Netherland-South Africa BIT

Article 3

- 1) Each Contracting Party shall ensure fair and equitable treatment of the investments of investors of the other Contracting Party and shall not impair, by unreasonable or discriminatory measures, the operation, management, maintenance, use, enjoyment or disposal thereof by those investors. Each Contracting Party shall accord to such investments full physical security and protection.
- 2) Each Contracting Party shall accord to such investments treatment which in any case shall not be less favourable than that which it accords to investments of its own investors or to investments of investors of any third State, whichever is more favourable to the investor concerned.

3) ・ 4) ・ 5) 略

＊公正衡平待遇、完全保護、不当又は差別的な措置の禁止が規定されているが、国際法の最低基準に関する言及はない。

(4) 国内法令に関する限定句が付されているもの

2005ベルギー＝中国BIT

ARTICLE 2 PROMOTION AND PROTECTION OF INVESTMENTS.

1. Each Contracting Party shall promote investments in its territory by investors of the other Contracting Party and shall accept such investments in accordance with its legislation.
2. All investments made by investors of one Contracting Party shall enjoy a fair and equitable treatment in the territory of the other Contracting Party.
3. Investments of the investors of either Contracting Party shall enjoy the constant protection and security in the territory of the other Contracting Party.
4. *Without prejudice to its laws and regulations, neither Contracting Party shall take any unreasonable or discriminatory measures* against the management, maintenance, use, enjoyment and disposal of the investments by the investors of the other Contracting Party.

* 公正衡平待遇、完全保護、不当又は差別的な措置の禁止の全てを規定しているが、不当又は差別的な措置の禁止についてのみ制限を付す。

2004ラトビア＝中国BIT

Article 2 PROMOTION AND PROTECTION OF INVESTMENT

1. Each Contracting Party shall encourage investors of the other Contracting Party to make investments in its territory and admit such investments in accordance with its laws and regulations.
2. Investments of the investors of either Contracting Party shall enjoy the constant protection and security in the territory of the other Contracting Party.
3. *Without prejudice to its laws and regulations, neither Contracting Party shall take any unreasonable or discriminatory measures* against the management, maintenance, use, enjoyment and disposal of the investments by the investors of the other Contracting party.
4. Subject to its laws and regulations, one Contracting Party shall provide assistance in and facilities for obtaining visas and working permits to nationals of the other Contracting Party engaging in activities associated with investments made in the territory of that Contracting Party.

Article 3 TREATMENT OF INVESTMENT

1. Investments of investors of each Contracting Party shall all the time be accorded fair and equitable treatment in the territory of the other Contracting Party.
2. Without prejudice to its laws and regulations, each Contracting party shall accord to investments and activities with such investments by the investors of the other Contracting Party treatment not less favorable than that accorded to the investments and associated activities by its own investors.

1986イギリス＝中国BIT

Article 2

- (2) Investments of nationals or companies of either Contracting Party shall at all times be accorded fair and equitable treatment and shall enjoy the most constant protection and security in the territory of the other Contracting Party. Each Contracting Party agrees that *without prejudice to its laws and regulations it shall not take any unreasonable or discriminatory measures* against the management, maintenance, use, enjoyment or disposal of investments in its territory of nationals or companies of the other Contracting Party. Each Contracting Party shall observe any obligation it may have entered into with regard to investments of nationals or companies of the other Contracting Party.

＊その他1993スペイン＝中国BIT3条1項、2002コートジボワール＝中国BIT2条3項、
2007コスタリカ＝中国BIT2条3項

（５）日本が締結したBIT上の該当する規定

1997 日本香港 BIT

第2条

- 1 各締約政府は、他方の締約政府の投資家による投資が自己の地域内において行われるための良好な条件を醸成し、及び関係法令によって与えられた権限を行使する自己の権利を留保の上、これらの投資を許可する。
- 2 いずれの一方の締約政府の投資家も、他方の締約政府の地域内において、投資の許可及び投資の許可に関連する事項に関し、両締約政府以外の政府の投資家に与えられる待遇よりも不利でない待遇を与えられる。
- 3 各締約政府の投資家の投資財産及び収益は、他方の締約政府の地域内において、常に公正かつ衡平な待遇を与えられ、並びに完全な保護及び保障を享受する。いずれの締約政府も自己の地域内において、不当な又は差別的な措置により、他方の締約政府の投資家の投資に関連する事業活動をいかなる意味においても阻害してはならない。各締約政府は、他方の締約政府の投資家の投資に関して義務を負うこととなった場合には、当該義務を遵守する。

1998 日本ロシア BIT

第3条

- 1 いずれの一方の締約国の投資家も、他方の締約国の領域内において、投資財産、収益及び投資に関連する事業活動に関し、第三国の投資家に与えられる待遇よりも不利でない待遇を与えられる。
- 2 いずれの一方の締約国の投資家も、他方の締約国の領域内において、投資財産、

〔添付資料：参考条文〕

収益及び投資に関連する事業活動に関し、当該他方の締約国の投資家に与えられる待遇よりも不利でない待遇を与えられる。

- 3 各締約国の投資家の投資財産及び収益は、他方の締約国の領域内において、常に公正かつ衡平な待遇を与えられ、並びに不断の保護及び保障を享受する。いずれの締約国も、自国の領域内において、不当な又は差別的な措置により、他方の締約国の投資家の投資に関連する事業活動をいかなる意味においても阻害してはならない。各締約国は、他方の締約国の投資家が行う投資に関して義務を負うこととなった場合には、当該義務を遵守する。

2008 日本ウズベクキスタン BIT

第3条

- 1 一方の締約国は、他方の締約国の投資家の投資財産に対し、公正かつ衡平な待遇並びに十分な保護及び保障を与える。
- 2 いずれの一方の締約国も、自国の区域内において、恣意的な措置により、他方の締約国の投資家の投資財産の運営、経営、維持、使用、享有及び売却その他の処分をいかなる意味においても阻害してはならない。
- 3 一方の締約国は、他方の締約国の投資家の投資財産及び投資活動に関して義務を負うこととなった場合には、当該義務を遵守する。

2. 特定の待遇や権限行使について規定されたもの

(1) PR に関する規定

US 2004 Model BIT

Article 8: Performance Requirements

3. (a) Nothing in paragraph 2 shall be construed to prevent a Party from conditioning the receipt or continued receipt of an advantage, in connection with an investment in its territory of an investor of a Party or of a non-Party, on compliance with a requirement to locate production, supply a service, train or employ workers, construct or expand particular facilities, or carry out research and development, in its territory.
- (b) Paragraph 1(f) does not apply:
 - (i) when a Party authorizes use of an intellectual property right in accordance with Article 31 of the TRIPS Agreement, or to measures requiring the disclosure of proprietary information that fall within the scope of, and are consistent with, Article 39 of the TRIPS Agreement; or
 - (ii) when the requirement is imposed or the commitment or undertaking is enforced by a court, administrative tribunal, or competition authority to remedy a practice determined after judicial or administrative process to be anticompetitive under the

Party's competition laws.

- (c) Provided that such measures are not applied in an arbitrary or unjustifiable manner, and provided that such measures do not constitute a disguised restriction on international trade or investment, paragraphs 1(b), (c), and (f), and 2(a) and (b), shall not be construed to prevent a Party from adopting or maintaining measures, including environmental measures:
 - (i) necessary to secure compliance with laws and regulations that are not inconsistent with this Treaty;
 - (ii) necessary to protect human, animal, or plant life or health; or
 - (iii) related to the conservation of living or non-living exhaustible natural resources.
- (d) Paragraphs 1(a), (b), and (c), and 2(a) and (b), do not apply to qualification requirements for goods or services with respect to export promotion and foreign aid programs.
- (e) Paragraphs 1(b), (c), (f), and (g), and 2(a) and (b), do not apply to government procurement.
- (f) Paragraphs 2(a) and (b) do not apply to requirements imposed by an importing Party relating to the content of goods necessary to qualify for preferential tariffs or preferential quotas.

4・5 略

Draft Model Norway BIT 2007

ARTICLE [8] PERFORMANCE REQUIREMENTS

• • • • •

- 3. Performance requirements, other than those referred to in paragraph 1, shall only be applied in the public interest and shall be set forth in the national legislation of the Party imposing the requirement and published in the official gazette or otherwise be publicly available according to Article [Transparency] so that investors may become acquainted with them before the investment decision is made. All performance requirements shall be applied against all investors and their investments in a non-discriminatory, transparent and objective manner.

4.2.6 Performance Requirements¹

- • • In the model agreement's provision concerning performance requirements, this is indicated by placing all of the performance requirements in the provision in square brackets. The prohibitions in question can be removed according to how the specific economic and legal needs are assessed.
- • • It follows moreover from the model agreement's provision concerning performance

¹ COMMENTS ON THE MODEL FOR FUTURE INVESTMENT AGREEMENTS, English translation, pp. 24-26

requirements that such requirements may only be imposed on the basis of social considerations, that any such requirements must be known and be laid down in the host country's legislation, and that they must be applied in an open, objective and non-discriminatory manner.

（２）送金に関する規定

日韓投資協定(2002. 5.22/2003. 1. 1)

第十二条

- 1 各締約国は、自国の領域に向けた又はその領域からのすべての支払その他の資金の移転であって、自国の領域内にある他方の締約国の投資家の投資財産に関連するものが、遅滞なく、かつ、自由に行われることを確保する。この資金の移転には、特に次のものの移転を含む。
 - (a) 投資財産を維持し又は増大させるための当初の及び追加的な資金
 - (b) 利益、利子、配当、資本利得、使用料又は手数料
 - (c) 返済金その他契約に基づいて行われる支払
 - (d) 投資財産の全部又は一部の売却又は清算によって得られる収入
 - (e) 前二条の規定に従って行われる支払
 - (f) 第十五条の規定に基づく紛争の処理から生ずる支払
 - (g) 当該他方の締約国から来訪した者であって、投資財産に関連する活動に従事するものの収入その他の報酬
- 2 いずれの締約国も、資金の移転が遅滞なく、かつ、自由交換可能通貨により移転の日の市場における為替相場で行われることを妨げてはならない。
- 3 1 及び 2 の規定にかかわらず、各締約国は、次の事項に関する自国の法律を衡平、無差別かつ善意に適用する場合には、資金の移転を遅らせ又は妨げることができる。
 - (a) 破産、債務不履行又は債権者の権利の保護
 - (b) 証券の発行、交換又は取引
 - (c) 刑事犯罪
 - (d) 裁決手続における命令又は判決の履行の確保

日・ベトナム投資協定(2003.11.14/2004.12.19)

日韓投資協定と同様。

* Canadian 2004 Model BIT、Draft Model Norway BIT 2007、US 2004 Model BIT も
ほぼ同様の規定

（３）例外に関する規定

2004 Canada Model BIT

Article 10 General Exceptions

1. Subject to the requirement that such measures are not applied in a manner that would constitute arbitrary or unjustifiable discrimination between investments or between investors, or a disguised restriction on international trade or investment, nothing in this Agreement shall be construed to prevent a Party from adopting or enforcing measures necessary:

- (a) to protect human, animal or plant life or health;
- (b) to ensure compliance with laws and regulations that are not inconsistent with the provisions of this Agreement; or
- (c) for the conservation of living or non-living exhaustible natural resources.

2-7 略

Draft Model Norway BIT 2007

ARTICLE [24] GENERAL EXCEPTIONS

Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between investments or between investors, or a disguised restriction on international [trade or] investment, nothing in this Agreement shall be construed to prevent a Party from adopting or enforcing measures necessary:

- i. to protect public morals or to maintain public order;
- ii. to protect human, animal or plant life or health;
- iii. to secure compliance with laws and regulations that are not inconsistent with the provisions of this Agreement;
- iv. for the protection of national treasures of artistic, historic or archaeological value; or
- v. for the protection of the environment

＜参考事例＞

Lauder v Czech Republic, Final Award, Ad hoc UNCITRAL Arbitration Rules(2001), 3 September 2001（引用中の下線は、仲裁廷によるもの）

216. Article II(2)(b) of the Treaty provides:

“Neither Party shall in any way impair by arbitrary and discriminatory measures the management, operation, maintenance, use, enjoyment, acquisition, expansion, or disposal of investment. For the purpose of dispute resolution under Articles VI and VII, a measure may be arbitrary and discriminatory notwithstanding the fact that a party has had or has exercised the opportunity to review such measure in the courts or administrative tribunals of a Party”.

中略

219. The Arbitral Tribunal considers that a violation of Article II (2) (b) of the Treaty requires both an arbitrary and a discriminatory measure by the State. It first results from the plain wording of the provision, which uses the word “and” instead of the word “or”. It then results from the existence of Article II (1) of the Treaty, which sets forth the prohibition of any discriminatory treatment of investment, except in the sectors or matters expressly listed in the Annex to the Treaty. If Article II (2)(b) prohibited only arbitrary or discriminatory measures, it would be partially redundant to the prohibition of discriminatory measure set forth in Article II(1).

1991チェコ＝アメリカBIT（引用中の下線は報告者によるもの）²

Article 2

1. 略

2. (a) Investment shall at all times be accorded fair and equitable treatment, shall enjoy full protection and security and shall in no case be accorded treatment less than that required by international law.

(b) Neither Party shall in any way impair by arbitrary or discriminatory measures the management, operation, maintenance, use, enjoyment, acquisition, expansion, or disposal of investments. For purposes of dispute resolution under Article 3 VI and VII, a measure may be arbitrary or discriminatory notwithstanding the fact that a Party has had or has exercised the opportunity to review such measure in the courts or administrative tribunals of a Party.

(c) Each Party shall observe any obligation it may have entered into with regard to investments.

² UNCTAD, U.S. State Department の HP より取得 091215