



[Articles]

INVESTOR STATE SETTLEMENT OF DISPUTES UNDER THE CHILE JAPAN AGREEMENT

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1. Introduction.

Chile and Japan signed in Tokyo, on 27 March, 2007, an Agreement for a Strategic Economic Partnership which established a Free Trade Area (hereinafter "the Agreement" or "Chile-Japan FTA").

On September 2007, on the 110th anniversary of their diplomatic and commercial relations and after its ratification by both legislatures, representatives of both governments met in Tokyo and put into effect this Agreement.

Among its seven objectives is:

- "To increase investment opportunities and strengthen protection for investments and investment activities in the Parties" (article 2(c)); and
- "To create effective procedures to prevent and resolve disputes" (article 2(h)).

The Agreement is a positive foreign policy development which should boost bilateral trade and investments between both countries. After its Economic Partnership Agreement with Mexico, of September 17, 2004, it is Japan's second such agreement with a Latin American country. For Chile, it is the continuation of a long standing policy of bilateral free trade agreements with its major trading partners; in this case with the world's second largest economy after the United States.

Chilean exports to Japan amounted in 2006 to US\$7.138 billion whilst those from Japan to Chile reached US\$1.069 billion². On the other hand, Chilean portfolio investments in Japanese securities amount to US\$3 billion³ and Japanese direct investments in Chile represented US\$1.8 billion in 2006.⁴

Chapter Eight applies to investments and consists of three sections:

- Section 1: Investment;
- Section 2: Settlement of Investment Disputes between a Party and an Investor of

the other Party; and

Section 3: Definitions.

The above structure followed Chapter Eleven of the 1994 North American FTA ("NAFTA") between Canada, Mexico and the United States the 2004 US Model Bilateral Investment Treaty -"BIT", and Chapter Ten of the 2004 FTA between Chile and the United States ("Chile-US FTA"). Without prejudice to the changes described ahead and, that NAFTA is a trilateral agreement, the latter has been the model for the Chile-US and Chile-Japan FTAs.

This article describes the policy background of the Agreement and the evolution of the investor state dispute rules first established by NAFTA and continued, thereafter, with changes, by the Chile-US and Chile-Japan FTAs.

2. Policy Background.

As from the 1980s, Chile has executed profound macroeconomic structural reforms which have included the privatization of state enterprises, the liberalization of trade and opening of its markets to foreign investments. In addition, since 1990 the country has enjoyed a solid political stability. These accomplishments have distinguished our country within the Latin American region and increased the flow of foreign investments and, with our country as a platform, from Chile to other markets⁵. In addition, its FTAs with the major world economies and Latin American neighbours⁶, attracts investments from third countries which, after complying with the corresponding rules of origin, can benefit from the export preferences given to Chile by those FTAs.

The soundness of these policies has been repeatedly confirmed. The World Bank's Governance Indicator of 2006 placed Chile ahead of the rest of the countries of Latin America with regard to accountability, political stability, absence of violence, gov-

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² www.laverdenews.com.ar/content

³ Chilean Social Security Fund. Table N8.f. "Investments Overseas" Superintendency of AFP. Government of Chile, June 2007.

⁴ Investments under Decree Law 600. www.foreigninvestment.cl

⁵ President of Mitsubishi, Osamu Sasaki, in a recent visit stated, "Mitsubishi is extremely interested in using Chile as an Investment Platform". www.foreigninvestment.cl

⁶ www.minrel.cl

ernment effectiveness, quality of its regulations, rule of law and control of corruption⁷. This qualification was consistent with Transparency International's Index of Perception of Corruption, of September 2007, which placed Chile as the country with the least level of corruption in Latin America. Out of 179 countries, with 7.0 points it was ranked N°22. Yet, below Japan which, with 7.5 points, was ranked N°17. With 9.4 points each, New Zealand, Denmark and Finland were ranked N° 1⁸.

3. Arbitration Institutions and Regulatory Mechanisms.

The arbitration institutions and regulatory mechanisms most commonly designated by FTAs for settling investor state disputes are:

- The International Centre for the Settlement of Investments Disputes (ICSID) of 1965;
- ICSID's Additional Facility Rules of 1978; and
- The 1976 UNCITRAL⁹ Arbitration Rules

The ICSID Convention was adopted by the members of the World Bank of which both Chile and Japan are members.

As of this writing, no investment claims have ever been made under ICSID against Japan or, of Japanese investors, against an ICSID member.

By contrast, Chile has been subject to three investment claims and four Chilean investors have made claims against two ICSID members.¹⁰

Of the investment claims against Chile, two were from Spanish investors and the third from a Malaysian investor. The first Spanish claim is that of Victor Pey Casado & the President Allende Foundation¹¹ and is still pending. The second claim - which was rejected - was that of Eduardo Vieira¹². The Malaysian claim, of MTD Equity, was resolved against Chile.¹³

Of the Chilean investor claims, one was against

Peru (Lucchetti) and was rejected for lack of jurisdiction¹⁴. The other three have been against Argentina. One was withdrawn, CGE - Electricity¹⁵; the others are pending: Metalpar S.A.¹⁶ and Enersis.¹⁷

ICSID's Additional Facility Rules were established by ICSID to resolve investment disputes between states and nationals of other States that fell outside the ICSID Convention. This is the case of World Bank members which have not joined ICSID such as Brazil, Canada and Mexico. Consequently, these Facility Rules do not apply to ICSID members such as Japan and Chile.

UNCITRAL was established in 1966 by the General Assembly of the UN. In 1976, it approved its Arbitration Rules which have received world wide acceptance and application.

4. Description.

NAFTA, the Chile-US FTA and Chile-Japan FTA, treat, respectively, in separate Sections of a same Chapter, the substantive obligations on investments and the procedural rules on settlement of investor State disputes.¹⁸

We describe and compare ahead, in that same order, the above Sections of these agreements. In this regard, we note that the impact of NAFTA arbitrations has been instrumental to the changes introduced by the US in the Chile-US FTA which, in turn, are largely reflected in the Chile-Japan FTA.

Pursuant to the above, Section A below addresses the following Investment obligations: scope and coverage, definition of investments, national treatment, temporary safeguard measures, most-favored nation treatment, standard of treatment, minimum standard of treatment, performance requirements, transfers, expropriation and compensation, protection from civil strife, and environmental exception.

Section B ahead addresses investor-State disputes.

SECTION A INVESTMENT OBLIGATIONS

5. Scope and Coverage.

NAFTA.

Chapter A "applies to measures adopted or maintained by a Party relating to: a) investors of another

Party; b) investments of investors of another Party in the territory of the Party; and c) with respect to article 1106 ("performance requirements"), all investments in the territory of the Party" (article 1101).¹⁹

⁷ web.worldbank.org/wbi/governance

⁸ www.transparency.org

⁹ UNCITRAL is the acronym for the United Nations Commission on International Trade Law.

¹⁰ www.worldbank.org/icsid/cases

¹¹ ICSID ARB/98/2

¹² ICSID ARB/4/7

¹³ ICSID ARB/01/7

¹⁴ ICSID ARB/03/4

¹⁵ ICSID ARB/05/2

¹⁶ ICSID ARB/03/5

¹⁷ ICSID ARB/03/2

¹⁸ NAFTA Chapter 11, Section A on Investments, Section B on Settlements of Investor State Disputes; the Chile-US FTA Chapter 10, Sections A and B, and Chile-Japan FTA Chapter 8, Sections A and B have the same headings

¹⁹ "Investor of a Party means "a Party or state enterprise thereof, or a national or an enterprise of such Party, that seeks to make, is making or has made an investment " "Investments of an investor of a Party" means an investment owned or controlled directly or indirectly by an investor of such Party that seeks to make, is making or has made an investment" (article 1139).

Chile-US FTA.

Its Investment Chapter applies to measures adopted or maintained by a Party relating, among other subjects, to “covered investments”,²⁰ which are defined as follows:

“With respect to a Party, an investment in its territory of an investor of the other Party in existence as of the date of entry into force of this Agreement or established, acquired, or expanded thereafter”. (article 2.1)

Aside from other consequences, the above change in NAFTA, from “investments” to “covered investments”, means that investors whose investments were made prior to the entry into force of the Chile-US FTA can invoke and benefit of its provisions.²¹

Chile-Japan FTA.

Article 72 is basically consistent with NAFTA and does not refer to covered investments.

However, Annex 5 establishes that the investment obligations of Chapter 8 do not apply to Japanese investments made under Decree Law 600 (Chilean Foreign Investment Statute), and Law 18.657 (Foreign Capital Investment Law), to the continuation or prompt renewal of such laws or any special and voluntary investment regime that may be adopted in Chile.

The latter notwithstanding, Chile must accord to Japanese investors or their investments who are a party to an investment contract under DL 600, the better of the treatment required by the Investment Section of Chapter 8 or under an investment contract.

In addition, Chile must permit Japanese investors or their investments that have entered into an investment contract under DL 600 to amend the investment contract to make it consistent with the above referred obligation.

6. Definition of Investments.

NAFTA.

Instead of a definition, a long list is given of those activities which constitute and those which do not constitute an investment.²²

Chile-US and Chile-Japan FTAs.

In contrast with NAFTA, they give an all-inclusive definition (cited below) and a listing of the various forms of an investment.

“Investment means every asset that an investor owns or controls, directly or indirectly, that has the characteristics of an investment, including such characteristics as the commit-

ment of capital or other resources, the expectation of gain or profit, or the assumption or risk”.²³

7. National Treatment.

NAFTA.

Each Party must accord to investors and investments of investors of another Party treatment no less favorable than that it accords, in like circumstances, to its own investors and investments of its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation and the sale or disposition of investments (Article 1102).

Chile-US and Chile-Japan FTAs.

The same NAFTA principle is stated in different terms²⁴. However, the Chile-US provision applies to covered investments whilst that of Chile-Japan does not.

8. Temporary Safeguard Measures.

NAFTA & CHILE-US FTA.

Do not contemplate such measures.

Chile-Japan FTA.

Parties are allowed, as an exception, to adopt or maintain measures which do not conform to its rules on national treatment and transfers relating to investments.

Their justification would be serious balance of payment difficulties or exceptional circumstances threatening to cause macroeconomic serious management difficulties in particular, monetary and exchange rate policies. In addition, they must conform to various requirements including, among others, consistency with the Articles of the International Monetary Fund (article 85).

9. Most Favored Nation (“MFN”) Treatment.

NAFTA.

Each Party must accord to investors and investments of investors of another Party treatment no less favorable than that it accords, in like circumstances, to investors and investments of investors of another Party or of a non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation and sale or disposition of investments (article 1103).

²⁰ Article 10.1.

²¹ Articles 10.2 N°2 of the Chile-Korea FTA, 9.02(2) of the Chile- Mexico FTA and Chapter G, footnote 1, of the Chile Canada FTA, express the same concept in the following terms : “This Chapter covers investments existing on the date of entry into force of this Agreement as well as investments made or acquired thereafter”.

²² Article 1139

²³ Articles 10.27 and 105(h) of the Chile-US and Chile-Japan FTAs, respectively

²⁴ Articles 10.2 of the Chile-US and 73 of the Chile-Japan FTAs.

Chile-US and Chile-Japan FTAs.

State in different terms the same NAFTA principle²⁵. However, the Chile-US provision applies to covered investments whilst that of Chile-Japan does not.

COMMENT.

The MFN clause continues to be controversial as a result of conflicting decisions of ICSID tribunals, triggered by the Maffezini ICSID award²⁶. As Chile has FTAs and BITs with multiple countries, in a dispute with Japanese investors, the latter could reasonably request, in certain circumstances, the more favorable treatment accorded by Chile to third investors under those FTAs or BITs.

10. Standard of Treatment.

NAFTA

Each Party must accord to investors of another Party and to investments of investors of another Party the better of the treatment provided by its provisions on national treatment and MFN (article 1104).

Chile-US and Chile-Japan FTAs.

Do not include the above provision.

MINIMUM STANDARD OF TREATMENT

NAFTA.

Article 1105 (1) states:

“Each Party shall accord to investments of investors of another Party **treatment in accordance with international law**, including fair and equitable treatment and full protection and security” (emphasis added).

Chile-US FTA.

Article 10.4(1) substituted the above as follows:

“Each Party shall accord to covered investments **treatment in accordance with customary international law**, including fair and equitable treatment and full protection and security” (emphasis added)

ANTECEDENTS.

The recognition of a minimum international standard as opposed to a national standard has been highly controversial in international law.²⁷

The following developments explain the change introduced by the Chile-US FTA:

- i) various NAFTA arbitral awards, notably Pope

& Talbot vs Canada²⁸;

- ii) NAFTA’s Free Trade Commission’s binding interpretation²⁹; and
- iii) the terms of the 2002 US Congress fast-track authority for an FTA with Chile³⁰.

The US initiative to substitute international by customary international law was prompted by the fact there was no treaty law which recognized an international minimum standard. By contrast, the Neer case of 1926³¹ was reputed to have recognized that standard. However, because Neer was found to be outdated and there was no current customary international law recognizing that standard, the drafters of Annex 10-A included the following:

“The Parties confirm their shared understanding that “customary international law” generally and as specifically referenced in Articles 10.4 and 10.9 (on expropriation and compensation) results from a general and consistent practice of States that they follow from a sense of legal obligation. With regard to article 10.4, the customary international law minimum standard of treatment of aliens refers to customary international law principles that protect the economic rights and interests of aliens”.

Chile-Japan FTA.

Article 75 and its explanatory notes reproduce and are basically consistent with article 10.4 of the Chile-US FTA.

However, the following provisions of the Chile-US FTA are absent in the Chile-Japan FTA:

- i) that “fair and equitable treatment” and “full protection and security” do not create “additional substantive rights”³²;
- ii) that “fair and equitable treatment” includes the obligation not to deny justice “in accordance with the principle of due process embodied in the principal legal systems of the world”³³. Instead, note 3 states that “Each Party shall accord to investors of the other Party, non-discriminatory treatment with regard to access to the courts of justice and administrative tribunals and agencies of the former Party in pursuit and in defense of the rights of such investors”; and
- iii) that “full protection and security” “require each Party to provide the level of police pro-

²⁵ Articles 10.3 of the Chile-US and 74 of the Chile-Japan FTA

²⁶ Dana H. Freyer and David Herlihy, “Most Favored-Nation Treatment and Dispute Settlement in Investment Arbitration: Just How Favored is “Most Favored”?, ICSID Review, Volume 20 Number 1, Spring 2005.

²⁷ “Since the beginning of the present century legal doctrine has opposed an “international minimum standard”, “a moral standard for civilized states”, to the principle of national treatment” Ian Brownlie, “Principles of Public International Law”. Oxford, fifth edition, pages 440-531.

²⁸ David Gantz (“Gantz”), AJIL, vol. 97, 2003, pgs.937-950.

²⁹ Notes of Interpretation of Chapter 11 provisions of July 31, 2001

³⁰ Gonzalo Biggs, ICSID Review, volume 19, No 1, 2004, page 73

³¹ Gantz, *ibid*, page 946 cites US (Neer) vs Mexico, General Claims Commission, October 15, 1926.

³² Article 10.4(20).

4 ³³ Article 10.4(2)(a)

tection required under customary international law".³⁴

11. Performance Requirements.

NAFTA.

Article 1106 prohibits the imposition or enforcement of a long list of performance requirements related to the various stages between the establishment and sale or disposition of an investment of an investor of a Party or a non-Party in its territory. Its purpose is to prevent impediments which may have the effect of distorting or preventing the free flow of international trade and investments.

The above provision can be considered a response to the restrictive past policies of certain groups of countries.³⁵

Chile-US and Chile-Japan FTAs.

Both confirm NAFTA's performance requirements, with the following differences:

- i) The Chile-US FTA establishes a general exception to the above rule (absent in the Chile-Japan Agreement) and allows commitments, undertakings or requirements between private parties, "where a Party did not impose the commitment, undertaking or requirement."³⁶
- ii) Both confirm the performance prohibition on transfer of technology³⁷ but the Chile-Japan FTA does not include an exception for: "measures requiring the disclosure of proprietary information that fall within the scope of, and are consistent with article 39 of the TRIPS Agreement"³⁸.
- iii) The Chile-Japan FTA does not include the exception of articles 1106(6) of NAFTA and 10. 5(3) (c) of the Chile-US FTA which, under certain conditions, allows a Party to adopt or maintain measures, including environmental measures: i) necessary to secure compliance with laws and regulations that are not inconsistent with the Agreement; 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.

12. Transfers.

NAFTA.

Each Party must permit all transfers relating to an investment of an investor of another Party in the terri-

tory of the Party be made freely and without delay. Such transfers include proceeds from the sale of investments, profits, dividends, capital gains, and royalty payments. Transfers may be made in a freely usable currency at the market rate of exchange (article 1109).

Chile-US FTA.

The Chile- US and Chile-Japan FTAs permit transfers relating to investments by an investor of the other Party to be made freely and without delay in and out of their territory.³⁹

Chile-Japan FTA.

Without prejudice to the above, the following provisions of the Chile-US FTA are not included: on returns in kind⁴⁰, on non-penalization for failure to transfer⁴¹ or on processing claims alleging Chile has breached its obligations arising from the imposition of restrictive measures with regard to payments and transfers.⁴²

Aside from other differences, the Central Bank of Chile can adopt, under its legislation, restrictions on the transfer of capital and to subject deposits, investments or credits to a reserve requirement not above 30 percent of the amount transferred for a two year period.⁴³

13. Expropriation and Compensation.

NAFTA.

"No Party may directly or indirectly nationalize or expropriate an investment of an investor of another Party in its territory or take a measure tantamount to nationalization or expropriation of such investment, except: a) for a public purpose; b) on a non-discriminatory basis; c) in accordance with due process of law and article 1105(1)(which establishes a minimum standard of treatment); and on payment of compensation in accordance with paragraphs 2 through 6" (article 1110).

Chile-US FTA.

Together with the already noted substitution of investments by "covered investments" and applying to expropriations customary instead of international law, this FTA:

- Defines and differentiates direct from indirect expropriation (Annex 10-D, articles 3 & 4),
- Refers to regulatory expropriation (Annex 10-

³⁴ Article 10.4(2)(b)

³⁵ See Decision 24, of 1970, which adopted the Andean Foreign Investment Code.

³⁶ Article 10.5(5)

³⁷ Article 10.5(1)(f)(i) of the Chile-US and 77(1) of the Chile-Japan FTA

³⁸ Article 10.5(3)(b)(i)

³⁹ Articles 10.8 of the Chile-US and 81 (1) of the Chile/Japan FTA

⁴⁰ Article 10.8(2) and (4) of the Chile-US FTA

⁴¹ Article 10.8(4)

⁴² Annex 10-C.

⁴³ Annex 8 of the Chile-Japan FTA

D, article 4(b).

- Adds as a condition to expropriation, compliance with the amended rules on minimum standard of treatment referred earlier (article 10.9 (d)).

Chile-Japan FTA.

Its rules are basically similar to those of the Chile-US FTA with two exceptions:

- i) The expropriation and compensation rules of the Chile-US FTA do not apply to the issuance, revocation, limitation or creation of compulsory licenses in relation to intellectual property rights in accordance with the TRIPS Agreement. In the Chile-Japan FTA this exception is limited to the creation of those licenses or rights;⁴⁴
- ii) Annex 10 D of the Chile-US FTA and Annex 9 of the Chile-Japan FTA list the Parties respective understandings of what constitute direct and indirect expropriations. However, the latter does not include the former's public welfare exception under which "except in rare circumstances, nondiscriminatory regulatory action 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".⁴⁵

14. Protection from Civil Strife. NAFTA.

Does not address the subject

Chile-US and Chile-Japan FTAs

Both protect investors that suffer losses from civil

strife on their investments in the territory of the other Party. However, the events which prompt this protection are broader in the Chile-Japan FTA and include "armed conflict, revolution, insurrection, civil disturbance or any other similar event"⁴⁶. In the Chile-US FTA they are limited to "conflict or civil strife".⁴⁷

Compensation rules are also different. The Chile-US FTA provides that when losses result from the requisitioning or destruction of investment or part thereof, not required by the necessity of the situation, the other Party must provide restitution or compensation which must be prompt, adequate and effective.

The Chile-Japan FTA does not equate the amount or payment of compensation to its rules on expropriation. Instead, "restitution, indemnification, compensation and any other settlement" shall not be less favorable than that which the Party accords to its own investors or the investors of a non-Party.⁴⁸

15. Environmental Exception. NAFTA & THE CHILE-US FTA.

Both provide that nothing shall be construed to prevent a Party from adopting, maintaining or enforcing measures otherwise consistent with the respective agreements, that are considered appropriate to ensure that investment activity is undertaken in a manner sensitive to environmental concerns.⁴⁹

Chile-Japan FTA.

Ratifies the rule that Parties should not relax their environmental measures in order to encourage investments by investors of the other Party,⁵⁰ but does not include the environmental exception described above.

SECTION B INVESTOR STATE DISPUTES

16. Procedure.

NAFTA (summary)

Section B of Chapter Eleven regulates investor state disputes arising from a breach of the investment obligations listed in its Section A. It is based in the model developed by the United States in its bilateral investment treaties.⁵¹

An investor of a Party may raise a claim, on its own behalf or of an enterprise of the other Party that is a juridical person that the investor owns or controls directly or indirectly, that another Party has breached an investment obligation under Section A and has

incurred a loss or damage by reason of, or arising out of, that breach.⁵²

The above is without prejudice to the Parties' right to have recourse to the general dispute settlement mechanism between Parties established in Chapter 20 (Article 1115).

Each Party consents to the submission of a claim to arbitration, in accordance with the procedures set out in the Treaty. This consent, and the submission by a disputing investor of a claim to arbitration, satisfies the jurisdiction requirements of ICSID, and its Additional Facility for written consent, and New York and

⁴⁴ Article 10.9(5)

⁴⁵ Article 4(b) of Annex 10 D

⁴⁶ Article 76(1)

⁴⁷ Article 10.4(4)

⁴⁸ Article 76(1)

⁴⁹ NAFTA Article 1114(1) and article 10.12 of the Chile-US FTA.

⁵⁰ Article 87

⁵¹ UNCTAD. Course on Dispute Settlement. 6.1 NAFTA, page 24.

⁵² NAFTA Article 1116 (1)

Panama Conventions for an agreement in writing (Article 1122).

Before an investor submits a claim it must consent in writing to arbitration and both the investor and enterprise of the other Party, that is a juridical person that the investor owns or controls directly or indirectly, must waive their right to initiate or continue before any administrative tribunal or court under the law of any Party any proceedings with respect to the measure of the disputing Party that is alleged to be a breach, except for proceedings for injunctive, declaratory or other extraordinary relief, not involving the payment of damages before an administrative tribunal or court under the law of the disputing Party (article 1121(1)).

An investor may not make a claim if more than three years have elapsed from the date on which the investor first acquired, or should have first acquired, knowledge of the alleged breach and knowledge that the investor incurred loss or damage. The same applies to claims of an investor on behalf of an enterprise which it owns or controls directly or indirectly (Article 1116(2) and 1117(2)).

If a dispute is not settled through consultation and negotiation, a written notice of the intention to submit a claim must be delivered by the disputing investor to the disputing Party at least 90 days before the claim is submitted (Article 1119) and, provided that six months have elapsed since the events giving rise to a claim, a disputing investor may submit the claim to arbitration under the rules of: i) ICSID; ii) ICSID's Additional Facility; or iii) UNCITRAL (Article 1120)

Unless otherwise agreed, a tribunal is composed of three arbitrators. One appointed by each of the parties and the third by their consensus (article 1123).

An award has binding force for the disputing parties but only in respect to the particular case and each Party must provide for the enforcement of an award in its territory (article 1136(1) and (4)). However, in practice, arbitral awards have significant influence on subsequent cases and are subject to exhaustive reviews by the international community at large.

Chile-US and Chile-Japan FTAs.

Without prejudice to the special provisions described below, the investor state dispute procedures of these two agreements are basically similar to those of the NAFTA described above.

17. Special Provisions.

The subjects addressed below refer to: claimant's causes of action, preliminary questions, institutions, amicus curiae, transparency, governing law, subrogation, and forfeiture of investment claims.

18. Causes of Action.

NAFTA.

An investor on its own behalf or enterprise of the other Party that is a juridical person it owns or controls directly or indirectly may make a claim that the Party has breached an obligation under section A of the Investment Chapter and has suffered loss or damage as a result of that breach (article 1116(1)).

Chile-US FTA.

Article 10.15 (1)(a) has added two new causes of action: i) breach of the Party's obligations under Annex 10-F (which lists Chile's obligations under its Foreign Investment Statute); and ii) breach of an investment authorization or investment agreement as defined in that agreement.⁵³

Chile-Japan FTA.

Article 89(1) through (3) is basically consistent with the NAFTA rule referred above, with the following clarification:

"An investor of a Party may not submit a claim to arbitration under this Section in relation to any act or fact that took place or any situation that ceased to exist before the date of entry into force of this Agreement" (Article 89(3)(b)).

19. Preliminary Questions.

NAFTA.

Does not address the subject.

Chile-US FTA.

Article 10.19 (4), (5) and 6 regulate the tribunal's power to decide as a preliminary question, any objection by the respondent Party that, as a matter of law, a claim submitted is not a claim for which an award may be made under article 10.25. According to the latter, a tribunal may award, separately or in combination, only: a) monetary damages and any applicable interest; b) restitution of property, in which case the award shall provide that the respondent may pay monetary damages and applicable interest in lieu of restitution.

Chile-Japan FTA.

The rules of Article 97 (1) through (4) are basically similar to those of the Chile-US FTA.

20. Institutions.

NAFTA.

Provided six months have elapsed since the events giving rise to a claim, a disputing investor may submit its claim to arbitration under the rules of: i) ICSID; ii) ICSID's. Additional Facility; or iii) UNCITRAL (Article 1120).

⁵³ Section C, article 10.27

Chile-US and Chile-Japan FTAs.

In addition to the institutions cited by NAFTA, if the parties so agree, they have the option to submit their claims, to “any other arbitration institution or under any other arbitration rules” (articles 10.15 (5) and 89, respectively).

21. Amicus Curiae. (“Friends of the Court”)

NAFTA & Chile-Japan FTA.

This subject is not addressed.

Chile-US FTA.

Tribunals have the authority to accept and consider amicus curiae submissions from a person or entity that is not a disputing party; they must identify the submitter and any Party, other government, person, or organization, other than the submitter, that has provided, or will provide, any financial or other assistance in preparing the submission (Article 10.19(3)).

22. Transparency.

NAFTA & Chile-Japan FTA.

This subject is not addressed.

Chile-US FTA.

With the exception of confidential business or privileged information, article 10.20 requires that respondents, after receiving the arbitral documents listed in subparagraph (1), should promptly transmit them to the non-disputing Party and make them available to the public. In addition, arbitral tribunals must conduct hearings open to the public, in consultation with the disputing parties.

23. Governing Law.

NAFTA.

Arbitral tribunals decide the issues in dispute in accordance with the Agreement and applicable rules of international law (article 1131).

Chile-US FTA.

- i) Subject to paragraph iii), tribunals apply the NAFTA rule when the claim is for breach of an investment obligation.
- ii) When the claim is for breach of Chile’s obligations under its Foreign Investment Statute or investment authorization or agreement, the rule is more complex.⁵⁴
- iii) A decision of the Free Trade Commission declaring its interpretation of a provision of the agreement is binding, and arbitral awards must be consistent with that decision (article 10.21).

Chile-Japan FTA.

Its rule is the same as that of NAFTA with the pro-

viso that an interpretation by the Commission (established by the Parties and co-chaired by Ministers of senior officials of the Parties under Chapter 17) shall be binding on a tribunal and any award must be consistent with that interpretation (article 93).

24. Subrogation.

NAFTA & CHILE-US FTA.

Do not contemplate subrogation.

Chile-Japan FTA.

Article 83 gives a Party or its designated agency, the right to subrogate the rights of its investor to the extent of the payments made under an indemnity, guarantee or insurance contract pertaining to the investment made by that investor. In that situation, the other Party must recognize the above assignment of the investor’s original rights to that Party or its agency.

However, the above rule would be incompatible with ICSID whose main objective was and is to prevent investor state disputes from escalating into conflicts between states. This was achieved by excluding the state of the investor from such disputes and denying jurisdiction to ICSID tribunals over the same.⁵⁵

The possibility rights of a national (foreign investor) of a Contracting State could be subrogated by that State or by any public international institution which compensated such national for its claim was largely debated and finally rejected in the ICSID Convention. In the end, “experts felt that since the Convention was intended to deal with disputes between States on the one hand, and investors on the other, it would be inconsistent to open the possibility that the Centre would deal with a dispute both parties to which were States”.⁵⁶

Consequently, if an investor state dispute arises and the rights of that investor are subrogated to the Contracting State, the rules of ICSID would not apply. In that event, the dispute would have to be resolved in accordance with Chapter 16 which applies to the “avoidance or settlement of disputes between the Parties concerning the implementation, interpretation or operation of this Agreement”. (article 175)

25. Forfeiture of Investment Claims.

NAFTA.

Has no rule on forfeiture of investment claims.

Chile-US FTA.

Under Annex 10-E, if an investor of the United States elects to submit a claim, to a court or administrative tribunal of Chile, on its own behalf or of an enterprise of Chile, that is a juridical person that the investor owns or controls directly or indirectly, that

⁵⁴ Article 10.21 in relation with article 10.15(1)

⁵⁵ ICSID’s original draft included subrogation but was eliminated at the request of the Latin American countries. Paul C. Szasz, “The Investment Disputes Convention and Latin America”, 11 VA J.Int’ L.259(1971)

8 ⁵⁶ Report of the Chairman of the Legal Committee on Settlement of Investment Disputes, December 23, 1964, History of the ICSID Convention, vol.II-2, page 937, Washington D.C. 1970.

Chile has breached an investment obligation under Section A or Annex 10- F (obligations under DL 600), that election shall be definitive and the investor may not thereafter submit the claim to arbitration under section B.

Chile-Japan FTA.

Article 91 states the same rule of the CHILE-US FTA but extends it to all investors, Chilean and Japanese. Thus, if an investor (Chilean or Japanese) on its

own behalf or of an enterprise of the other Party, initiates proceedings before any administrative tribunal or court under the law of either Party or other dispute settlement procedures with respect to any measure alleged to constitute a breach of an investment obligation, from which the investor has incurred loss or damage, that election is definitive and the investor may not thereafter submit a claim to arbitration under Section B of Chapter 8.⁵⁷

SECTION C CONCLUSIONS

Chapter 8 and its Section on Investments and Investor State Disputes is central to the Chile-Japan FTA. A careful analysis of its provisions should, therefore, induce the Parties to always resolve their disputes or differences through consultations and negotiations. This conclusion is supported by the

respective records of Chile and Japan. Indeed, no investment disputes have yet arisen under Chile's FTA's with third countries nor has Japan or Japanese investors ever been parties to investment disputes before ICSID tribunals.

PRIVATE "SETTLEMENT CONSULTATION": SEIZING THE OPPORTUNITY TO RESOLVE DOMESTIC JAPANESE DISPUTES BEFORE DIVING INTO IRREVERSIBLE LITIGATION

Robert M. Ashen *

BACKGROUND

I came to Japan interested in the role of arbitration and mediation in the Japanese legal system. I have been listening to lawyers actively practicing law in Japan, to law professors at Japanese universities, and to Japanese judges. What came into focus was an opportunity for a private dispute resolution mechanism to intervene before the Japanese parties to a domestic dispute take that final regrettable leap to litigation.

International disputes involving a non-Japanese party are often settled through arbitration or other alternate dispute resolution mechanisms. I am not discussing them here. My discussion is limited to *domestic* Japanese disputes between Japanese parties.

THE OPPORTUNITY

Historically when two Japanese parties are in a dispute, they will go to great lengths to resolve the dispute between themselves. I am told that Japanese parties are very reluctant to bring lawsuits. They will do everything humanly possible to reach a negotiated settlement. Sometimes, however, they are unable to settle and then someone commences a lawsuit.

That final step to pursue litigation is seen as a failure. This is particularly true for middle management as viewed by their superiors. That final step has serious and dire consequences for a Japanese party: the relationship with the other party will in all likelihood

change drastically, and the change will be for the worse. The dispute becomes public. Even after a settlement of the lawsuit the parties will no longer have an ongoing friendly relationship or do business together, and the animosity and hard feelings tend to be permanent rather than transitory. The impact may go further, spreading like the ripples in a pond when a stone is dropped into it. Future business may be cut off from, not only the party, but from their associates, business partners, and others in the industry.

Japan does have a court supervised "mediation" system that can be utilized prior to filing a lawsuit. However, the Japanese reluctance to file a lawsuit may also extend to this governmental mediation system, which may be seen as another form of "taking the dispute to court" with its attendant undesirable consequences. Further, as these mediators normally hear the case and offer their proposed resolution, it is a third party solution rather than one negotiated between the parties.

Once litigation is begun, I am also told that the Japanese general public and the business community have great faith in the Japanese courts and the Japanese judges. Japanese judges do provide mediation in a very active and serious way to the parties in a lawsuit. Cases very often do settle under the firm prodding of the judge. Parties respect the courts and the judges, and even an adverse decision by a Japanese court is generally accepted and respected by the los-

⁵⁷ Article 91(2)(ii) and (iii) of the Chile/Japan Agreement

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ing party as a reasonable and just result. In this atmosphere, once the litigation has begun, parties may be reluctant to turn to arbitration or mediation as an alternative to the court proceeding. This is especially true in the case of middle management who would not be faulted for an adverse court decision in the same way that they would be faulted for losing in an arbitration. However, once litigation is begun, it may be too late to mitigate some of the adverse consequences of having filed the suit. Even when settled by the court, much damage has already been done, including exposing the dispute to the public.

In the United States when settlement negotiations break down, the parties often pursue private, confidential, alternate dispute resolution such as arbitration or mediation to resolve their dispute before going to court. This generally does not happen in Japan. The usual next step is to file a lawsuit -- a very bad thing in Japan. However, at present there does not appear to be a satisfactory alternative in use. As a result, there is an opportunity for appropriate private, confidential, dispute resolution intervention *before* going to court.

THE SOLUTION

It is my belief that an appropriate private dispute resolution mechanism, that I have named "Settlement Consultation," can be interjected when the parties themselves have reached an impasse in their settlement negotiations, but before litigation is started.

It envisions the parties agreeing to bring in an impartial, experienced, knowledgeable and trusted person (the "Settlement Consultant"). The Settlement Consultant's role is to assist the parties to move past the stumbling block and to move forward in their negotiations to a mutually satisfactory settlement. The negotiations continue to be confidential. The Settlement Consultant would bring a fresh perspective to the negotiations, while the negotiations continue to be the property of the parties. The parties continue to have all the power and control to craft a settlement, or to decline to do so...but with a little help from a trusted friend. Hopefully the parties will see Settlement Consultation as merely a useful extension or continuation of their inter-party negotiation, and not as a hostile action by either party against the other.

Where Will Settlement Consultants Come From?

Settlement Consultants will come from the pool of experienced, capable, trusted *attorneys* in Japan. Their primary function, at least in the early stages of introducing "Settlement Consultation" in Japan, will be to bring a new and fresh perspective to the settlement negotiation. That is key and critical, and if that is the only thing that they bring, it will still be

extremely useful for clearing roadblocks to settlement. I am certain that each of you to have had the experience of discussing a problem with colleagues and having them come up with a good fresh approach that you had not yet thought of, even though you are clearly much smarter than they are. Thus, the Settlement Consultant does not need to be better or smarter or even more creative (although that would help) than the parties and their attorneys who are already involved in the ongoing settlement negotiation; he or she simply needs to have a fresh and uncluttered perspective of the situation, not hindered by being too close to it as are the current participants. At the same time, any attorney who had training as a mediator could readily apply those skills to being a Settlement Consultant.

This approach, serves a dual purpose of circumventing the absence in Japan of a sufficient pool of experienced mediators, while providing a new source of work for attorneys. Competent, experienced and trusted attorneys can go right to work on these stalled settlements without added training or certification.

Why the New Name "Settlement Consultation" Rather Than "Mediation" or "Arbitration?"

I selected the term "Consultant" because, in my experience, attorneys often do act as consultants to other attorneys, using their expertise in a particular area of the law. Here their expertise is to see the forest and not just the trees. Also, the term carries certain prestige and weight.

So why not use "Arbitration"? I believe that arbitration is a useful alternate dispute resolution mechanism that has been very successful around the world. It will continue to be used successfully in disputes involving a non-Japanese party. But in the current social and legal climate in Japan, arbitration is not favored. There appears to be a strong Japanese cultural aversion to a stranger, the arbitrator, deciding the parties' fate. While I may not agree with that opinion, it is a fact of life in the Japanese legal environment.

So why not use "Mediation"? Initially, mediation is not well known or understood in Japan. It is often confused with arbitration. Thus, adverse views toward arbitration tend to rub off onto mediation. Another reason often highlighted in discussions of the use of mediation in Japan, is the absence of a sufficient pool of experienced and trusted mediators.

HOW TO INTRODUCE AND IMPLEMENT SETTLEMENT CONSULTATION

Japanese mediators, and their organizations, need to do everything they can to make people, particularly business people and their attorneys, fully aware of the advantages of private, confidential, pre-litigation

Settlement Consultation before taking the momentous step of starting a lawsuit. This is a matter of education.

Practicing attorneys can advise their clients on choosing between litigation and alternative dispute resolution mechanisms. Attorneys should be provided with materials and the opportunity to hear informed speakers on the topic. To this end, law firms can provide seminars and training to their attorneys.

But one need not stop there. Attorneys are accustomed to using the courts and may be hesitant to change. Thus, it is important that business groups such as the Chamber of Commerce and trade organizations also be provided with materials and informed speakers. As the clients are the ones that bear the burden and cost of litigation, they should have the

opportunity to instruct their attorneys to pursue pre-litigation Settlement Consultation.

There is also an opportunity here for Japanese law schools to take a leading role in teaching their students, the Japanese lawyers of the future, the skills and techniques useful for practicing Settlement Consultation. Private entrepreneurs surely will also begin courses and seminars for practicing attorneys to learn and refine such skills.

I am hopeful that the Japanese alternate dispute resolution community, providers as well as mediators, will find this analysis helpful in convincing potential Japanese litigants and their attorneys of the usefulness of private Settlement Consultation *prior* to resort to litigation.

EIGHT WAYS TO IRRITATE AN ARBITRATOR

Haig Oghigian*

1. Come to the hearing unprepared.

The golden rule is to be prepared. Preparation is the most important factor affecting the outcome of a case. Know your file, the facts, the law, your strategy – and maybe most important of all, where to find things. It's obvious that counsel haven't prepared when they spend a lot of time looking for documents and going through their notes. Really good counsel are prepared. They don't waste their client's time or money.

2. Carry on a debate directly with opposing counsel.

The role of a lawyer is to bring information to the Tribunal not to try to debate with opposing counsel. Forgetting that the arbitrators are there is a bad move. It is not appropriate for counsel to break into conversation. The worst situation is two aggressive lawyers who dislike each other for whatever reason, and have decided to use the proceedings as a way to settle the score.

3. Argue with an arbitrator after a ruling.

You win some, you lose some. Counsel should accept a ruling with good grace and carry on. This means accepting a decision during a hearing and not trying to re-try a decision after it has been made. The matter is closed. Move on.

4. Badger a witness.

It's acceptable, of course, to make a fair attack on the credibility of a witness; it is offensive, to badger or berate a witness. The media perpetuate the image of lawyers who seem to be successful by being belligerent and bullying.

5. Bluff.

Here's a good career-limiting move: give the Tribunal incomplete information about the evidence. Believe it or not, some counsel panic under pressure and fudge the facts. It might seem obvious that this really isn't a great idea. Arbitrators prefer counsel who are straightforward about the facts and don't try to twist them to suit their purpose. Arbitrators want all the relevant information, not just the best cases from one point of view. Honesty remains the best policy.

6. Come up with as many arguments as possible, regardless of their worth.

Arbitrators value counsel who are brief and to the point. They don't want to hear arguments on six different points when only two have merit. I believe that lawyers are becoming too careful, leaving no stone unturned. But the downside of that approach is that when some of the arguments are clearly borderline, the arbitrators may start to question the worth of all the arguments put forward. Far better to face boldly the difficulties in the case. There's no point in burying your problem and hoping that no one will notice. The most effective counsel come up with an answer to problem, rather than trying to avoid it.

7. Contact an arbitrator about a case in progress.

Follow the rules: don't communicate with an arbitrator while a case is underway. Another complaint is correspondence sent to an arbitrator that has not been copied to opposing counsel.

8. Show disrespect to the process.

In many ways, this category covers all the points

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already listed. If you want to really test an arbitrator's patience:

- Whisper with colleagues or witnesses when other people are speaking.
- Make faces or gestures in reaction to testimony or counsel's questions.
- Remain seated while you're speaking.
- Interrupt people.
- Offer no explanation for being late.

- Never extend a professional courtesy.
- Never apologize.
- Treat staff rudely.

To conclude, arbitrators try hard to overlook personal quirks and nervous habits, unless they interfere with the orderly running of the process. They do care, however, about counsel who are rude to staff or disrespectful of the process and particularly counsel who stretch the truth and play games.

[JCAA Activities]

Research Study Project Launched to Activate International Commercial Arbitration in Japan

This September the JCAA commenced a research study project into the activation of international commercial arbitration in Japan, consigned by the Japan Economic Foundation. A committee has been set up to research and study the Japanese corporate perspective. The issue of how to activate international commercial arbitration in Japan is not new and has been discussed before, but this is the first time for it to be taken up from the user's point of view. The committee consists of 15 members, including scholars in the field of international commercial arbitration and 10 businesspersons in the legal section of major Japanese corporations. In this research and study project, a questionnaire survey of a few thousand corporations in Japan is being carried out, including a few hundred Japanese-affiliated corporations in Europe; some will also be surveyed by interview. In order to hear opinions from the public, the JCAA will hold a symposium in Tokyo on December 12, 2007. In the symposium, the JCAA will invite four prominent experts in this field to speak about this theme and then a panel discussion will be held based on the research results. The final report will be submitted to the Japan Economic Foundation by the end of March 2008.

Research Study Project on International Commercial Arbitration and ADR in China

Under the consignment of the Ministry of Economy, Trade and Industry, the JCAA has started a research study project on International Commercial Arbitration and ADR in China. The members of this project are: Professor Yukio Kajita, Reitaku University; Professor Akira Sawai, Osaka Prefecture University; Mr. Fang Xin, Chinese attorney and foreign attorney registered in Japan; and Mr. Masaharu Onuki, Director of the JCAA.

We are planning to carry out research in this project by investigating the awareness and realities of international arbitration among Japanese and Chinese businesspeople and others in China. In Beijing in November and in Shanghai in December of this year we will also hold half-day International Arbitration Seminars featuring lectures and panel discussions, with speakers invited from the China International Economic and Trade Arbitration Commission, Beijing Arbitration Commission, Shanghai Arbitration Commission and other organizations. The Seminars are designed to introduce, mainly for businesspeople from Japanese companies who are active in China, arbitration and other ADR for resolving commercial disputes between Japanese companies and Chinese companies as well as the arbitration systems of arbitration and ADR institutions in Japan and China. The final report on this project will be made by the end of March 2008.

Notes to Contributors for Article Submissions

The Editor welcomes submissions of articles and essays on international arbitrations. Articles should not normally exceed 2500 words in length including notes. Manuscripts must be submitted in the format of MS Word together with CV. Material accepted for publication becomes the property of JCAA. However, author may use the article without permission from JCAA. Submission must be sent via E-mail: nishimura@jcaa.or.jp

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