



## [Articles]

### **The JCAA Arbitration Rules 2014 – One Step Forward In the Modernization of Japanese Arbitration**

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It has recently been pointed out that while Japan seems to possess the necessary modern arbitration infrastructure, further measures are necessary to make Japan a popular place of arbitration.<sup>1</sup> The 2014 modernization of the commercial arbitration rules of the Japan Commercial Arbitration Association (“JCAA”), the main arbitral body of Japan, was certainly a step in this direction. This article will assess the main changes to the JCAA Commercial Arbitration Rules (“Rules”) and consider whether, and if so which, further steps seem recommendable to increase the popularity of Japan as a destination for (international) arbitrations.

In July 2012, the JCAA established a Rules Amendment Committee composed of 9 practitioners and academics, many with significant practical international arbitration experience.<sup>2</sup> By August 2013, the Rules Amendment Committee came up with a draft of the new Rules and published them for public comment,<sup>3</sup> stating in its call for comments that “*the JCAA has determined to amend its Rules to better reflect its practice and to comport with current trends such as the 2010 amendments to the UNCITRAL Arbitration Rules and those of other arbitral institutions.*”<sup>4</sup> Having received comments from various constituents, the Rules Amendment Committee prepared a final draft which was reviewed and approved by the JCAA’s Board of Directors in December 2013. The amended Rules came into effect on February 1, 2014.

The JCAA’s stated goal was to take into account trends evolving from the modernization of arbitration rules of other arbitral institutions<sup>5</sup> and of the UNCITRAL Arbitration Rules. Such trends can be roughly grouped into dealing with multi-party and multiple claim situations, on the one hand, and the increase in efficiency and expediency of arbitral proceedings on the other hand. Furthermore, some amendments to the Rules were made in order to reflect the JCAA’s, and presumably general, modern arbitral practice.

#### ***1. Multiple claims and multi-party situations***

While the previous 2008 version of the Rules (“Old Rules”) already covered aspects of multi-party issues and multiple claims to a certain extent, the new Rules have added important clarity and detail. This is highly commendable as today’s complex global business interactions makes such situations more and more common in modern arbitrations.

#### **Multiple Claims**

In what could be called a “preliminary *ex ante* consolidation”, Rule 15 allows a claimant to submit a single request for arbitration containing multiple claims. This requires that either (1) all parties have agreed in writing that the multiple claims shall be heard together, (2) all claims arise under the same

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1 Mark Goodrich/Joel Greer, *The Modernization Of Japan’s International Arbitration Infrastructure*, 25(12) *Mealey’s International Arbitration Report* 2010, pp. 31, 38; Damian Watkin, *Arbitration In Japan: Grasping The Nettle?*, available at <http://www.jonesday.com/arbitration-in-japan-grasping-the-nettle-03-05-2014>.

2 For a detailed description of the process, see JCAA, *The Key Points of the 2014 Amendment to the Commercial Arbitration Rules*, 31 JCAA Newsletter 2014 (“Key Points of the 2014 Amendments”), p. 1, available at <http://www.jcaa.or.jp/e/arbitration/docs/news31.pdf>.

3 Available at [http://www.jcaa.or.jp/new/docs/jobun\\_an2e.pdf](http://www.jcaa.or.jp/new/docs/jobun_an2e.pdf). The author participated in the public commenting process.

4 Available at <http://www.jcaa.or.jp/new/docs/kaiseiten2e.pdf>.

5 *Key Points of the 2014 Amendments*, supra note 2, p. 1, specifically lists “institutional rules such as ICC Rules 2012, Swiss Rules of International Arbitration 2012, SIAC 2010 and 2013 and HKIAC 2013”, which shall occasionally be referred to for comparison purposes.

arbitration agreement, or, in the alternative, that (3) all claims arise between the same parties, are mutually related, and the particulars of the – potentially multiple – arbitration agreements are compatible. Given the level of detail of the provision, which is unparalleled in other institutional arbitration rules, it seems to encompass all kinds of multi-party and multi contract situations, going beyond the obvious possibility to raise multiple claims under a particular contract and arbitration agreement. It thus allows for a welcome concentration of closely related disputes. The respondent has the right to object to such “*ex ante* consolidation”, in which case it will be up to the arbitral tribunal, once constituted, to decide pursuant to Rule 42(2) whether the requirements of Rule 15 are satisfied, and if not, to separate the arbitral proceedings again. In the latter case, the mandate of the arbitral tribunal is terminated pursuant to Rule 42(3), unless the respondent requests the continuation with respect to a particular claim. Other claims have to be dealt with by separate arbitrations.

#### Consolidations

Furthermore, Rule 53 now addresses ongoing proceedings and provides that a tribunal that has already been constituted may consolidate pending claims with later claims for which an arbitral tribunal has not yet been constituted.<sup>6</sup> This will basically occur under the same requirements as pointed out above for the “*preliminary ex ante* consolidation” under Rule 15. However, a party to the later claim that is not also a party to the pending claim will have to consent in writing to the consolidation given that it did not participate in the appointment of the arbitrators.<sup>7</sup> The decision on consolidation by an arbitral tribunal under the Rules can be contrasted with the ICC Arbitration Rules 2012 (“ICC Rules”) and the HKIAC Administered Arbitration Rules 2013 (“HKIAC Rules”), in which the ICC Court and the HKIAC decide on the consolidation, thus allowing a broader consolidation of also such proceedings in which arbitral tribunals have already been constituted.<sup>8</sup>

#### Joinder

Apart from dealing with multiple claims, the Rules

also address multi-party situations. In particular, Rule 52 allows for a third party to join the arbitral proceedings either as a claimant or to be joined as a respondent if all parties concerned agree in writing, or if all claims are made under the same arbitration agreement. However, in the latter case a third party to be joined as respondent after the arbitral tribunal has been constituted has to consent in writing. This takes into account that such respondent would not have participated in the appointment of the arbitrators and that pursuant to Rule 52(3) the joinder will not affect the composition of a constituted arbitral tribunal. Under Rule 52(4), the arbitral tribunal retains wide discretion to deny the joinder, even if the above requirements are satisfied, if it finds that it will delay the proceedings or on the basis of “*any other reasonable grounds*”. The level of detail of Rule 52 is similar to Article 7 ICC Rules and seems to strike an adequate balance between the elaborate joinder provision of the HKIAC, and the much shorter provisions in the Swiss Rules of International Arbitration 2012 (“Swiss Rules”) and the SIAC Arbitration Rules 2013 (“SIAC Rules”).<sup>9</sup>

#### Arbitrator Appointment in Multi-Party Situation

For multi-party situations, inspired by the seminal *Dutco* decision,<sup>10</sup> the JCAA has introduced improvements to the method of appointment of arbitrators, avoiding a situation where multiple claimants or respondents might be seen to be unfairly prejudiced by an inability to equally appoint the arbitrator of their choice.<sup>11</sup> If either multiple claimants or respondents fail to appoint “their” arbitrator within the applicable time limit, in the interests of party equality the JCAA proceeds to appoint all three arbitrators pursuant to Rule 29(7). In a twist not found in other institutional rules, the JCAA however may re-appoint a previously appointed arbitrator if none of the parties object. This seems to achieve a middle-ground between fair treatment of all parties and the possibility of multiple parties to “waive” such treatment. However, in practice it will require a great deal of caution to ensure that later claims of unequal treatment are effectively precluded.

As can be seen from the above, with respect to multiple claims and multi-party situations, the Rules have

<sup>6</sup> While a limited consolidation was already possible under the Old Rules, it only referred to requests for arbitration and required the written consent of all parties involved unless all claims arose out of the same arbitration agreement.

<sup>7</sup> See Key Points of the 2014 Amendments, *supra* note 2, p. 4.

<sup>8</sup> See Article 10 ICC Rules, Article 28 HKIAC Rules. The SIAC Arbitration Rules 2013 do not contain a provision on consolidation.

<sup>9</sup> See Article 27 HKIAC Rules in contrast to Article 4(2) Swiss Rules, Article 10 ICC Rules and 24.1(b) SIAC Rules.

<sup>10</sup> See French Cour de Cassation *Siemens AG and BKMI Industrieanlagen GmbH v Dutco Construction Co*, 1992 *Revue de l'Arbitrage*, p. 470.

<sup>11</sup> Old Rule 2(3) treated multiple claimants or respondents as “a party” for purposes of arbitrator nomination. However, multiple respondents had the right to request a separation of arbitral proceedings.

reached their goal of addressing current trends. Far from simply copying established approaches, the Rules address users' expectations and provide unique details. That being said, it might have been more user-friendly to group the particular provisions where appropriate in order to provide an easier overview on the handling of multiple claims and multi-party situations.<sup>12</sup>

## II. Procedural Efficiency and Expediency

While the above changes certainly contribute to improved procedural efficiency and expediency, there are additional changes to the Rules that are even more closely associated with these concepts. Among those are provisions on the use of an "emergency arbitrator" and for expedited proceedings.

### Interim Measures

Chapter V of the Rules deals with interim measures ordered by the arbitral tribunal and, now, by an emergency arbitrator. As for interim measures ordered by an arbitral tribunal, the Rules take into account the 2006 amendments to the UNCITRAL Model Law and expand the very brief Old Rule 48 by listing examples for interim measures and the conditions for granting them. For example, under Rule 66(2), in order to obtain interim relief, the requesting party must now satisfy the arbitral tribunal that (1) the harm caused by an order not being granted "*substantially outweighs*" the harm caused by the requested measure, and (2) that the party has a "*reasonable possibility*" of succeeding on the merits of the claim.

### Emergency Arbitrators

New are Rules 70 to 74, allowing for interim measures ordered through an emergency arbitrator before the establishment of the arbitral tribunal, or when any arbitrator has ceased to perform his or her duties. The JCAA thereby picks up a trend that has influenced practically all of the recently modernized arbitration rules. Rule 71(4) requires the JCAA to make reasonable efforts to appoint an emergency arbitrator within two business days from receipt of the application for emergency measures, who then shall render a

decision within two weeks. This time frame may only be prolonged by agreement of the parties or if the JCAA finds the case sufficiently complex or sees other compelling reasons. Unlike the HKIAC and SIAC Rules, and similar to the Swiss and ICC Rules, Rule 70(7) allows for this procedure even before a request for arbitration has been filed, provided such request is filed within ten days from the application.<sup>13</sup> As *Godwin/Wong/Allsop* point out, it remains questionable whether emergency measures ordered by an emergency arbitrator would be enforceable under the current Japanese arbitration law, an issue which could lessen the significance of the useful new Rules.<sup>14</sup>

### Expedited Procedures

In a further push for efficiency, the JCAA has now opened its rules for expedited procedures to encompass claims going beyond the former value threshold of JPY 20 Million (roughly USD 200,000 in September 2014) if the parties so agree. Probably owing to practical realities, the JCAA also gave up its very strict criteria for extending the 3 month deadline by which an award in expedited proceedings shall be rendered,<sup>15</sup> and under Rule 81(2) now can extend the deadline by an appropriate time (previously only by 3 months) if the case is sufficiently complex or other compelling reasons exist.<sup>16</sup> Thus, parties are free to choose expedited procedures even for a larger case where this seems adequate, without having to be afraid of potentially harmful constraints if a case turns out to be more complex than initially assumed.

### Procedural Improvements

Some procedural changes to the Rules serve to further streamline proceedings, e.g. by providing for a reasonable efforts obligation for the arbitral tribunal to render an award within six months from its constitution, and by requiring a procedural schedule to be established to this effect. In what can be considered "a nod" to the ICC Rules, Rule 40 provides for an early identification of issues and the option to prepare terms of reference "*[i]f the arbitral tribunal considers it appropriate for promoting efficient arbitral proceedings*".

<sup>12</sup> Articles 7-10 ICC Rules and Articles 27-29 HKIAC Rules may serve as examples, it being understood that the appointment of arbitrators in multi-party situations is best placed among the other rules on arbitrator appointments.

<sup>13</sup> See Schedule 4(1) HKIAC; Schedule 1(1) SIAC Rules; compare to Article 43(3) Swiss Rules; Appendix V, Article 1(6) ICC Rules.

<sup>14</sup> Peter Godwin/Elaine Wong/James Allsop, *JCAA Introduces New Commercial Arbitration Rules*, *Kluwer Arbitration Blog* 2014, available at <http://kluwerarbitrationblog.com/blog/2014/03/03/jcaa-introduces-new-commercial-arbitration-rules>.

<sup>15</sup> See Old Rule 65(2).

<sup>16</sup> See *Key Points of the 2014 Amendments*, *supra* note 2, pp. 11-12.

## Arbitration-Mediation

Another novelty in the Rules that can be grouped under increased efficiency is the inclusion of specific mediation provisions allowing the parties to potentially save costs and time by choosing a procedural framework facilitating the settlement of their dispute. While many other arbitral institutions offer sets of rules similar to the JCAA's International Commercial Mediation Rules, the JCAA is pioneering insofar as it incorporates the notion of mediation into its (arbitration) Rules and allows for an "arb-med" procedure under certain circumstances. Rule 54 allows for a stay of arbitral proceedings in order to refer the dispute to mediation. While it is generally provided that an arbitrator should not also serve as a mediator, Rule 55 makes an exception if the parties so agree in writing and waive their right to challenge the arbitrator on that basis.<sup>17</sup> At the same time, it builds in procedural safeguards, prohibiting separate consultations with only one party unless agreed by the parties in writing, and requiring disclosure of the fact that such consultations have occurred. This preempts later challenges that an arbitrator might have treated one party unfairly, but it might also raise doubts about the effectiveness of a mediation without such "caucusing" (which the parties, however, remain free to agree to). Although not expressly alluded to in the Rules, an upside of the "arb-med" proceedings could be that a mediator switching back into the role as arbitrator should be able to issue a consent award based on a successful mediation outcome (Rule 58(3)), thus making it easier to enforce. Given that certain forms of "arb-med" are not uncommon in Asia, particularly in China, it will be interesting to see whether the JCAA's new Rules will in turn influence other major arbitral institutions in the future. As with the Rules on multiple claims and multi-party situations, the JCAA has managed to pick up the latest trends for efficiency and effective proceedings, while at the same time giving them distinct characteristics and, in the case of its mediation provision, even setting potential future standards.

### III. Further Amendments

The Rules have been updated in various further

instances, e.g. repealing the in writing requirement for arbitration agreements, leaving this requirement to national arbitration laws. Where communications under the Rules have to be "in writing", Rule 2 clarifies that this can be done electronically, which would include e-mails.<sup>18</sup> The new in writing requirement also applies to the request for arbitration. The amendments eliminate an earlier concept of a "Basic Date", which effectively was able to prolong proceedings by three weeks, and instead in Rule 12 introduce new provisions for the calculation of time periods, with flexibility for the arbitral tribunal or the JCAA to extend those.<sup>19</sup> Aiming to expedite the proceedings, new Rule 7(3) provides for the option to have procedural matters decided solely by the presiding arbitrator, if either the members of the tribunal or the parties so agree. In line with other leading arbitral institutions, the JCAA now has to confirm party-appointed arbitrators under Rule 25, which it will refuse if the appointment is "*clearly inappropriate*". This criterion allows the JCAA a high degree of discretion, which, absent unusual circumstances, probably should not be exercised beyond the well-accepted criteria of impartiality, independence, availability and capacity.

Further amendments are neatly summarized in the *Key Points of the 2014 Amendments*.<sup>20</sup> Taken together, the new Rules certainly reach the JCAA's stated goal of taking up the latest arbitral trends and at the same time taking into account current arbitral practice. The Rules clarify procedural issues, while at the same time aiming to expedite arbitral proceedings and to make them more efficient.

### IV. Outlook

The new Rules can certainly be considered a success. But are there issues to address for a potential future revision? It could be noted that the Rules comprise 86 individual provisions and thereby about twice as many as those of the peer arbitration rules that served as orientation points. Certainly, other rules may only be shorter because they address particular issues, e.g. the emergency arbitrator proceedings, in schedules or appendices, or contain generally very long and detailed provisions. Nevertheless, sometimes it is the first impression that matters and a next iteration of the

<sup>17</sup> This "waiver", if it can be considered a waiver at all, might have been formulated more clearly, as Rule 55(1) only states that parties "shall not" challenge the arbitrator based on their agreement to have the arbitrator conduct the mediation procedure. In a future revision of the Rules it might make sense to extend the in writing requirement for the agreement on "arb-med" procedures in Rule 55(1), sentence 1, to the "waiver" in sentence 2.

<sup>18</sup> See also *Key Points of the 2014 Amendments*, supra note 2, p. 8.

<sup>19</sup> Any deadline which may be set by the arbitral tribunal under Rule 12(4) (which does not extend to such time limits which the Rules set forth for the tribunal, or to those fixed by the JCAA) is subject to change in the discretion of the JCAA pursuant to Rule 12(5), if the JCAA considers it necessary. It remains to be seen how the JCAA exercises this discretion and whether the users and arbitrators will appreciate it.

<sup>20</sup> *Key Points of the 2014 Amendments*, supra note 2, pp. 1-12.

Rules might want to ensure that no user hesitates using the Rules just on account of the sheer number of provisions. Similarly, while the many cross- and *mutatis mutandis* references in the Rules display the drafting mastery of the Rules Amendment Committee, first time users might prefer a less intricate approach.<sup>21</sup>

Ultimately, the direction of the Rules will much depend on how the JCAA perceives and pursues its future role in the global arbitration market. The recent revisions ensure a position as a leading national institution for years to come and the Rules provide more than ample guidance to (Japanese) users. However, should the JCAA aim to significantly increase its

current caseload of 20 to 30 cases a year and seek to bring it closer to the range of its (Asian) competitors,<sup>22</sup> it might consider following their path by further “internationalizing” its Rules<sup>23</sup> and institutional set-up, for example by creating an advisory board composed of leading international experts.<sup>24</sup>

What can already be said at this stage is that the 2014 Rules are a welcome step forward in the modernization of Japanese arbitration,<sup>25</sup> that should assist the reliable and efficient resolution of disputes to come and might even influence other arbitral institutions in the region when revising their arbitration rules.

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## METI RESEARCH PROJECT ON INVESTMENT TREATY ARBITRATION <sup>1</sup>

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### 1. Japanese Policies on Free Trade Agreements (“FTAs”)

#### a. New Policy on Bilateral Investment Treaties (“BITs”) and Free Trade Agreements (“FTAs”)

The Japanese economy is finally picking up after suffering from the Lost Two Decades since the bubble economy collapsed in the early 1990s. One of the key economic policies for the Japanese government to boost the economy is to tap into the growth of emerging markets by promoting FTAs and BITs with emerging countries<sup>2</sup>. Japan is currently aiming to raise its FTA ratio (i.e., the ratio of trading countries that have an FTA with Japan among all trading countries) from 19% to 70% by 2018. As part of this effort,

on 8 July 2014, Japan entered into an Economic Partnership Agreement (“EPA”) with Australia<sup>3</sup>. On 22 July 2014, Japan also came to a basic agreement with Mongolia on major issues in EPA negotiations<sup>4</sup>. The government considers that the protection of Japanese investors in host states offered by FTAs is critical not only to promote trade, but also to secure a stable supply of mineral and energy resources to Japan. As such, the importance of BITs and FTAs continues to rise in Japan.

#### b. Investment Treaty Arbitration

Japan is a relative latecomer in the area of FTAs and BITs. Protection of certain sectors, such as agriculture, hindered Japanese FTA policies for

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<sup>21</sup> This, however, could lead to the conundrum that without cross-references additional provisions might become necessary.

<sup>22</sup> See, e.g., Watkin, *supra* note 1: “Given the quality of the economic and legislative arbitral infrastructure already at Japan’s disposal, it is surprising that its arbitration system is one of the least utilised in Asia. In statistical perspective, its leading arbitral body, the Japan Commercial Arbitration Association (“JCAA”), carries a modest caseload amounting to less than 10 percent of the respective SIAC and HKIAC caseloads.”

<sup>23</sup> This refers less to the substance of the Rules, which can be deemed to have reached international standard, but more to their form. Future revisions might be made by an even more internationally composed Rules Amendment Committee, might be less oriented on the Japanese Code of Civil Procedure or Japanese legal concepts (i.e. not having a separate provision on the set-off defense in Rule 20, which usually is incorporated into the general defenses in other institutional rules), and might use English as the first drafting language.

<sup>24</sup> See, e.g., the international composition of the members of the International Advisory Board of the HKIAC (<http://www.hkiac.org/en/hkiac/organisation-structure/council-members-and-committees#2>) or the SIAC Court of Arbitration (<http://www.siac.org.sg/about-us/court-of-arbitration>). The emphasis is on “international”, as the JCAA already has established a so-called Procedure Consultative Committee consisting of six eminent jurists. This Committee is to submit views on the procedural issues on which it has been consulted by the JCAA. In some instances, such consultation is mandatory in the course of arbitral proceedings (e.g. with respect to a decision of the JCAA on an arbitrator challenge under Rule 31.5) pursuant to the Regulations of Procedure Consultative Committee – which brings its functions closer to that of the “Courts” of the ICC or SIAC, or the “Council” and its committees of the HKIAC. Neither the Rules nor the English version of JCAA’s website seem to contain specific information on this. Reference is, however, made in the JCAA publication “Key Points of the 2014 Amendments”, *supra* note 2, p. 12. Not least to increase (foreign) user confidence, the JCAA might want to consider making this information more accessible and disclosing which items during an arbitration will require the mandatory involvement of the Committee.

<sup>25</sup> Watkin, *supra* note 1, points out which further steps might be necessary “to propel Japan to the forefront of Asian arbitration” – should this be the goal of the Japanese arbitration community.

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<sup>1</sup> While this article introduces the research project commissioned by the Ministry of Economy, Trade and Industry to the Japan Association of Arbitrators, this article does not represent the views or positions of either the METI, the JAA, or any individuals involved in this project other than the author.

<sup>2</sup> “Japan Revitalization Strategy,” 14 June 2013. [http://www.kantei.go.jp/jp/singi/keizaisaisei/pdf/en\\_saikou\\_jpn\\_hon.pdf](http://www.kantei.go.jp/jp/singi/keizaisaisei/pdf/en_saikou_jpn_hon.pdf)

<sup>3</sup> [http://www.mofa.go.jp/ecm/ep/page22e\\_000430.html](http://www.mofa.go.jp/ecm/ep/page22e_000430.html)

<sup>4</sup> <http://www.mofa.go.jp/mofaj/files/000045892.pdf> (Japanese only as of the date of this article.) Detailed information on the concluded EPAs and the ongoing negotiation of EPAs to which Japan is a party can be found at the website of the Ministry of Foreign Affairs. <http://www.mofa.go.jp/policy/economy/fta/index.html>

years. However, expansive growth of FTAs and BITs has become a global phenomenon. Not only developed countries but also emerging countries have recognized the benefit of BITs and FTAs; and it is reported that as of the end of 2012, there have been 2,857 BITs and 339 Multinational Investment Treaties entered into. Many of those BITs and FTAs, including those to which Japan is a party<sup>5</sup>, provide not only substantive protection of foreign investors against host states, but also procedural protection where foreign investors may settle disputes with host states in international arbitration; that is, the “ISDS provision.” Based on the ISDS provision, a significant amount of international investment arbitration cases have accumulated since 1990, when the very first published award of an ICSID case was rendered.<sup>6</sup> Most FTAs and BITs only provide similar standards of protection of foreign investment in general terms, and the interpretation of the standards and application thereof to actual investments rests in the hands of each arbitral tribunal. While a dramatic increase in investment treaty arbitration precedents substantially contributed to the development of international investment quasi-case law, investment treaty arbitration itself has been questioned from both its substantive and procedural perspectives. One of the challenges against its legitimacy from a procedural perspective is that international investment case law has been established by a small group of arbitrators, mostly from developed countries, repeatedly appointed in investment treaty arbitration cases. This challenge must not be overlooked, because similar interpretation issues have been consistently recurring in many cases, and the de-facto case law has potential legal implications for all FTAs and BITs offering similar protections to foreign investors. The ICSID Statistics of 2014-1 has confirmed this

phenomenon, revealing that 56% of arbitrators, conciliators and *ad hoc* Committee Members appointed in ICSID cases are from Western Europe, and 14% are from North America (Canada, Mexico, and the United States)<sup>7</sup>.

## 2. METI Research Project

### a. ICSID Panel

Japan, a signatory to the ICSID Convention, has designated four persons each to the Panel of Conciliators and the Panel of Arbitrators, whose designation was about to expire on 8 September 2014.<sup>8</sup> In light of the increasingly important implications of investment treaty arbitration in the area of international investment law and the limited involvement of the Japanese panel members in ICSID cases in the past, the Ministry of Economy, Trade and Industry (“METI”) commissioned a research project from the Japan Association of Arbitrators (“JAA”) on four subject matters: (i) investment treaty arbitrators - required qualities and trends; (ii) investment treaty arbitration decisions – trends; (iii) evolution of arbitration centers/institutions in Asia; and (iv) recommended criteria in selecting ICSID panel members to be designated by the Japanese government. The JAA formed a special project team for this assignment<sup>9</sup> and sought advice from four experts: Prof. Masato Dogauchi<sup>10</sup>, Prof. Akira Kotera<sup>11</sup>, Prof. Yasuhei Taniguchi<sup>12</sup> and Mr. Hiroshi Yokokawa<sup>13</sup>. Prof. Shotaro Hamamoto<sup>14</sup> and his students also made a tremendous contribution to this project by providing a detailed analysis of all published investment treaty arbitration decisions and qualifications, professional backgrounds, publications and decision trends of each arbitrator in those cases. After six months of research and analysis, the JAA submitted the report to METI on 31 March 2014.<sup>15</sup> This article briefly introduces the gist of the research

<sup>5</sup> Most of the FTAs and BITs that Japan has entered into have an ISDS provision. One of the recent exceptions to this basic approach is the EPA with Australia, which does not contain an ISDS provision. Instead, the two countries have agreed, among other things, to revisit the dispute resolution mechanism between an investor and a host country if Australia enters into any multilateral or bilateral international agreement providing for a mechanism for the settlement of an investment dispute between Australia and an investor of another country or the other party to that agreement, with a view to establishing an equivalent mechanism under this Agreement.

<sup>6</sup> *Asian Agricultural Products Ltd. vs. Republic of Sri Lanka (ICSID, ARB/87/3), Final Award, June 27, 1990.*

<sup>7</sup> <https://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDDocRH&actionVal=CaseLoadStatistics>

<sup>8</sup> Art. 13 of the ICSID Convention.

<sup>9</sup> The project team was lead by Mr. Isomi Suzuki. The team members were: Mr. Hiroki Aoki, Mr. Shunsuke Doman, Mr. Yoshimasa Furuta, Mr. Yoshihisa Hayakawa, Mr. Naoki Idei, Mr. Naoki Iguchi, Mr. Aoi Inoue, Mr. Kohei Karasawa, Mr. Masafumi Kodama, Ms. Yoshimi Ohara, Mr. Masaharu Onuki, Mr. Seizaburo Taira, Mr. Yoshihiro Takatori, Mr. Hiroyuki Tezuka, Mr. Junichi Tobimatsu and Ms. Hiroe Toyoshima.

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<sup>15</sup> The report is available at [http://www.meti.go.jp/meti\\_lib/report/2014fy/E004267.pdf](http://www.meti.go.jp/meti_lib/report/2014fy/E004267.pdf) (Japanese only).

results on items (i) and (ii) above.

### 3. WHO DECIDES INVESTMENT TREATY ARBITRATION

#### a. Familiar faces

Our ultimate task was to put together a recommendation on the criteria for selecting ICSID Panel candidates who will likely be actively involved in investment treaty arbitration. In this respect, the JAA first examined the arbitrators currently actively involved in investment treaty arbitration to identify their common qualities and professional background, particularly at the time when, according to publicly-available data, they were first tapped as investment treaty arbitrators (“Initial Appointment”). We also reviewed their decisions to see if there was any trends, as frequently debated. As of the end of 2013, there have been 335 arbitrators and *ad hoc* committee members who served in published investment treaty arbitration and annulment cases. Remarkably, while most were appointed five times or less, there were approximately 20 arbitrators who were appointed on more than 10 occasions, with some appointed on almost 30 occasions. This data illustrates that the decision-makers in investment treaty arbitration are indeed concentrated into a small group of selected professionals mostly from Western Europe, the United States, and Canada. Among the 335 investment treaty arbitrators, we identified the top 20 arbitrators who have been most frequently appointed to the extent discernable by publicly available data (the “Top 20<sup>16</sup>”), and studied their qualifications and professional backgrounds as of their Initial Appointment.

#### b. TOP 20

The Top 20 are among the most eminent in the area of investment treaty arbitration, whose impeccable qualities and background even at the time of the Initial Appointment are easily understood. This was indeed confirmed by research. Experts in the field of international law or arbitration practice, numerous publications in relevant fields, multiple language skills, and vast international experience are commonly found qualities. The active engagement of academics in practice is also noteworthy.

- Language skills: English and French (plus a mother tongue other than English or French, if any) (some also speak Spanish.)
- Fields: public international law (11), interna-

tional commercial law/arbitration (9)

- Main professions: scholars (7), practicing lawyer (8), judge (1), politician (1), adviser to government ministries (4)
- Publications: Both scholars and practitioners had published a number of books and articles in related field.
- Ages: late 50s
- Other notable points: Those in academia were actively involved in international practice, either as counsel in state-to-state arbitration, arbitrators in international arbitration, or as representatives of states in international organizations.

#### c. Investment treaty arbitrators from Asia and Sub-Saharan Africa regions

We identified 12 investment treaty arbitrators/*ad hoc* committee members who were from Asia and Sub-Saharan Africa regions (“Asia/SS Africa Arbitrators”), most of whom were appointed by the ICSID Chairman. We reviewed the same qualifications of the Asia/SS Africa Arbitrators at the time of their Initial Appointment based on publicly available data to see if there was any notable difference between them and those in the Top 20. Interestingly, there were fewer scholars and fewer publications in their related fields. This is not surprising, given that the origin of international law is in Europe, and study and practice in this field is relatively new in the Asian and Sub-Sahara region.

- Languages: English (plus a mother tongue other than English if any)
- Fields: public international law (4), international commercial law/arbitration (7)
- Main professions: scholar (1), practicing lawyer (8), judge (2), politician (1)
- Publications: Fewer publications were found in the related field.
- Ages: Mid-60s

#### d. “Trends”

We reviewed the jurisdictional decisions and awards of the Top 20 to see if there were any trends in those decisions, such as whether each of the Top 20 took a consistent position on certain issues recurring in investment treaty arbitrations and whether they voted in favor of either the subject investor(s) or the state overall. Of course, the facts, issues and sophistication of arguments extensively vary from case to case; and, therefore, the actual tendencies of each arbitrator with respect to not only specific issues,

<sup>16</sup> To be more precise, we reviewed 21 arbitrators’ qualifications and decisions trends, as there are two arbitrators who were appointed on the same number of occasions.

but his or her overall attitude towards the protection of foreign investors in particular, cannot be grasped by a mere comparison of the outcome of the decisions. However, it is interesting to see that the publicly-available data does show some sort of general trend on particular issues among the Top 20. This could raise an interesting question, given that those Top 20 frequently serve as arbitrators/*ad hoc* committee members in deciding investment treaty cases.

#### 4. ANY TRENDS IN INVESTMENT TREATY ARBITRATION?

a. One of the most frequently invoked standards of protection in investment treaty arbitration is fair and equitable treatment (FET) of foreign investors. While most investment treaties provide FET, and FET is indeed one of the most popular subject matters in investment treaty arbitration, the scope and elements of FET remain unclear due to its abstract concept. As the tribunal in *TECMED* held that FET is an “expression and part of the bona fide principle recognized in international law,<sup>17</sup>” just like a good faith principle in private law, the principle has been applied flexibly to all sorts of different circumstances and to provide redress to those who have suffered from conduct of host states. Such flexibility and vagueness of the concept may be convenient and helpful for foreign investors; however, from the host states’ perspective, the concept itself does not give much guidance as to how to protect foreign investors. As such, the JAA attempted to find if states’ conduct found to be in violation of FET could be categorized, in order to better understand the concept of FET.

##### b. Types of State Conduct in Violation of FET

States’ treatment of foreign investments in a manner that is inconsistent and lacks transparency and due process has been typically found to breach FET standards. Inconsistent treatment in breach of FET was recognized not only within the same or different branches of the host state, but also in the context of inconsistency between central government policies and local government policies. For example, some cases found a violation of FET standards when (i) the host state repealed its legal framework that induced investments after investors had formed legitimate expectations based on the legal framework at the time of the investment; (ii) a judicial branch revoked incentive plans for investment imple-

mented by an administrative branch without any relief measures to investors; and (iii) municipal offices without authority hampered investment granted by a state. Lack of transparency and due process is also another key element in finding FET violations. For example, the cases revealed an FET violation when the state refused to grant a license without disclosing the grounds therefor, or terminated or failed to renew a license without giving investors an opportunity to be heard.

##### c. Purposes of State Conduct

Some criticize the ISDS provision, contending that the ISDS restricts states’ ability to introduce laws and regulations to protect consumers and the environment. Philip Morris’ recent claims against Australia under the Australia-HK BIT with respect to the Tobacco Plain Packaging Act has nurtured strong skepticism towards the ISDS provision not only among NPOs and activists, but also among the general public. While the decision of Philip Morris is yet to come, the published investment treaty awards do not necessarily suggest that the ISDS deprives states’ ability to enact laws to protect the environment and consumers. The arbitral tribunal in *Methanex* dismissed a FET claim made by Methanex, a Canadian investor, holding that “a non-discriminatory regulation for a public purpose which is enacted in accordance with due process and which affects, *inter alios*, a foreign investor or investment is not deemed expropriatory and compensable unless specific commitments had been given by the regulating government to the then putative foreign investor contemplating investment that the government would refrain from such regulation<sup>18</sup>”. On the other hand, the arbitral tribunal found breaches in BIT when the host states failed to establish that the regulations were enacted for public purposes in a non-discriminatory manner, in spite of their claims that those regulations were enacted out of environmental concerns. As such, the real motivation of states behind regulations or lack of due process in implementing regulations could be dispositive for FET claims. For a similar reason, taxation frequently becomes the subject matter of investment treaty arbitration. Certain taxation has been found to be in breach of BIT when, by way of taxation, the states aimed to practically shut down foreign investment or to protect domestic industries that are competing with foreign invest-

<sup>17</sup> Technical Medioambientales *TECMED S.A. v. Mexico*, ARB (AF)/00/2, Award, 29 May 2003, para. 153.

<sup>18</sup> Final Award in *Methanex Corporation v. USA*, 3 August 2005, para 7, Part IV - Chapter D.

ment, or a tax was imposed in a discriminatory manner without giving the taxpayer an opportunity to be heard.

### **5. Tribute to Prof. Kotera**

The JAA research confirms that there are certain trends by arbitrators and their decisions in investment treaty arbitration. Given the rapid growth of FTAs, which has further increased the important implications of investment treaty arbitration, it is extremely important to have a broader group of investment treaty arbitrators in order to achieve a more balanced set of decisions and ensure the legitimacy of the

investment treaty arbitration system. We hope Japan will contribute to creating a more balanced body of investment treaty arbitrators. Sadly, Prof. Kotera, one of the advisers of the JAA in this project, passed away before the JAA put together a draft report. He encouraged us to be more committed to international dispute resolution, not only in the business-to-business setting but also the business-to-state and state-to-state settings. We hope that the JAA report and our commitment to be more engaged in international settings will be a tribute to Prof. Kotera and what he left to both academia and practitioners in the field of international law.

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## **[JCAA Activities]**

### **Commercial and Investment Arbitration Seminar in Osaka**

The arbitration seminar entitled “International Commercial Arbitration and Investment Arbitration from a Business Perspective,” co-organized by the Japan Commercial Arbitration Association Osaka Office, the Japan Association of Arbitrators Kansai-Branch, and the Osaka Chamber of Commerce and Industry, was held on July 4, 2014 in Osaka. This seminar focused on the differences between commercial arbitration and investment treaty arbitration, especially through taking up ICSID arbitration proceedings. There were about 100 participants at the seminar, spanning from legal practitioners and business-people to academics.

#### [Speakers]

Masaharu Onuki, Executive Director, JCAA  
Guide to International Commercial Arbitration

Naoki Iguchi, Nagashima Ohno & Tsunematsu,  
Tokyo

International Commercial Arbitration and  
Investment Arbitration from an Asian Perspective

Janet M. Whittaker, Simpson Thacher & Bartlett  
LLP, Washington, D.C.

Investment Arbitration and ICSID proceedings

#### [Panelists]

The above speakers and Masafumi Kodama,  
Kitahama & Partners, Osaka

#### [Moderator]

Hiroe Toyoshima, Nakamoto & Partners, Osaka

## **Standard Arbitration Clause**

All disputes, controversies or differences which may arise between the parties hereto, out of or in relation to or in connection with this Agreement shall be finally settled by arbitration in (name of city) in accordance with the Commercial Arbitration Rules of the Japan Commercial Arbitration Association.

## **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: [arbitration@jcaa.or.jp](mailto:arbitration@jcaa.or.jp)

