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Reaching the Asian Tiger: A New Mexico-Japan International Framework for Investment

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I. Overview

On 17 September 2004, in Mexico City’s National Palace, Mexican President Vicente Fox and Japanese Prime Minister Junichiro Koizumi signed, on behalf of their two countries, an Economic Partnership Agreement (EPA). The EPA is not only a commercial treaty but also an international instrument which encompasses many other elements of economic integration and co-operation. Chapter Seven (the “Investment Chapter”) is a fine example of the EPA’s comprehensive nature. On 18 November 2004, having recognized the benefits of the EPA, the Mexican Senate approved the Agreement in accordance with the corresponding constitutional procedure.

Back in 1994, the North American Free Trade Agreement (NAFTA) was the first regional commercial treaty which incorporated a specific chapter dealing with investment matters. Since then, Mexico has negotiated a number of international investment instruments, basically bilateral investment treaties (the so-called Agreements on the Promotion and Reciprocal Protection of Investments, better known in Mexico as APPRIS), and commercial treaties or free trade agreements that have an investment chapter. The latter are intended not only to build and enhance a “friendly environment” for productive foreign direct investment but also to complement and foster foreign trade activities, in particular exports, a current pivotal element of the Mexican economy.

Having said the foregoing, the Investment Chapter of the Mexico–Japan EPA is a clear mirror of a Mexican policy on international economic negotiations. Although nothing entirely new for Mexico, it is still highly interesting to see how the Investment

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1 The full text of the EPA and its Annexes is available at: <www.sic.eas.org/Trade/JPN_MEXDraftEPA_c/JPN_MEXInd_c.asp>.

2 To date, Mexico has eighteen APPRIS in force, mainly with Western European countries.

3 There is an interesting direct relationship between foreign direct investment and foreign trade, for instance, arising out of the exporting activities of multinational enterprises.
Chapter was oriented and structured, particularly because:

- the EPA was the second commercial treaty signed by Japan;
- it has a broad effect and an important impact on investment activities; and
- it adopts certain new trends regarding international law of foreign investment.

The EPA's Investment Chapter, as any other similar treaty or instrument, will not by itself trigger investment flows, as it does not liberalize restricted sectors or otherwise pave the way for the privatization of specific public assets (nor does it contain any other similar measure with that effect or purpose). Nevertheless, by setting forth legal protection at international levels for foreign investors, it certainly provides higher levels of certainty than those already established by domestic laws and diminishes the perceived levels of non-commercial risks. Instruments such as these not only create more favorable conditions for foreign investments and encourage individuals and companies to do business but they also reflect the commitment of the State towards a pro-business-oriented policy, a crucial element for investors to take into account in their decision-making process.

What then are these rules? What is their purpose? How are they to positively affect businesses? The EPA's Investment Chapter, as we shall see, is highly technical in content. Nonetheless, the answers to these questions are considerably simpler. It is important to mention that the Investment Chapter does not provide specific rules which apply to ordinary business activities nor does it offer tax or administrative incentives or other kinds of grants of economic value. Even more important to highlight is that the Investment Chapter is not some sort of policy guaranteeing that the investment project will be commercially successful in the host State. Actually, international instruments of investments do not do that, and they certainly should not. Instead, the real function and objective of the EPA's Investment Chapter is to prevent and constrain the State from performing a number of acts considered to be highly malicious or distorting to trade and investment (not applying to ordinary governmental flaws or irregularities).

II. Scope

An analysis of any legal instrument starts necessarily by defining its scope. Putting it in simple words, it must address to whom and with respect to what the instrument applies. In this regard, the Mexico–Japan EPA's Investment Chapter applies "to measures adopted or maintained by a Party relating to investors and investments of investors of the other Party". Obviously, the exercise here focuses on the meaning of the concepts "measures", "investments" and "investors".

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4 With respect to the obligations of "Performance Requirements" and "Environmental Measures", it is worth noting that such obligations apply to "all investments", whether or not from either of the Parties. The latter, because the imposition of a performance requirement, as a consequence of its distorting nature, or a relaxation of domestic, health, safety or environmental measures in order to encourage investments, may ultimately affect an investor of a Party, even if applied to an investor of a non-Party. The same approach was used in the NAFTA.
A. MEASURES

According to the EPA’s Chapter Two (“General Definitions”), the term “measure” means “any measure by a Party, whether in the form of a law, regulation, rule, procedure, decision, administrative action or any other form”. The concept is clearly broad enough to cover any governmental action, whether arising from the executive, legislative or judiciary.

B. INVESTMENT

Article 96 (“Definitions”) of the Investment Chapter, instead of giving a general definition of “investment” per se, sets forth a comprehensive list so as to indicate what the term encompasses. Four aspects of this definition are worthy of special note.

The definition includes classical categories of investment, namely, movable property, intangible property (intellectual property rights, for instance), equity participation (including enterprises) and certain loans and claims to money.

Although quite broad, the definition is exhaustive as opposed to illustrative, as is the case in many bilateral investment treaties. Even though some favor the use of illustrative lists, with the argument that they are flexible and would eventually cover future and evolving concepts of investments, we consider that an exhaustive but broad list serves such purposes and, in addition, provides legal certainty to both the investor and the State as to what specific categories of investment are covered. When it comes to the scope of the Agreement, the less ambiguity, the better.5

There are important exclusions, such as loans of short maturity (in order not to favor speculation), public debts (in order not to harm the capacity of the State to manage the public finances) and ordinary sales operations. A concept not included in the list, such as the mere contractual performance of the State pursuant to an investment contract,6 should not be considered as an investment.

The list, NAFTA-style, is asset- and enterprise-oriented, so it focuses on the economic and business nature of the investment. For instance, sub-paragraph (GG) sets forth a very ample category of investment when referring to real estate “or other property, tangible or intangible”, but also links such concept to “the economic benefit or other business purposes” of such property.7

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5 In some arbitration cases, there have been allegations of losses in respect to concepts that hardly could be considered “investment”. In the NAFTA framework, see, for example, Poole & Telford Inc. and The Government of Canada, NAFTA UNCITRAL Investor State Claim, initiated 24 December 1998; all relevant documents available at: www.naftalaw.org.


7 For instance, real estate acquired for residential purposes would not be an investment.
C. INVESTOR

Finally, the same Article referred to above defines “investor” as “a Party or state enterprise thereof, or a national or an enterprise of such Party”. It is clear that Japan or Mexico, directly or indirectly, may be investors for the purposes of the EPA and therefore be granted protection. Nonetheless, the typical investors would in most if not all cases be in the second and third categories, that is, natural persons or enterprises.

Again, we need to look back to the EPA’s Chapter Two in order to obtain the content of such concepts. A “natural person” means “a person possessing the nationality of a Party under its domestic laws”, and the term “enterprise” means “any entity constituted or organized under applicable law, whether or not for profit, and whether privately-owned or governmentally-owned, including any corporation, trust, partnership, joint venture, or other association or sole proprietorship”.

As we can see, the concept of enterprise is broadly defined, because it includes “any entity”, regardless of its denomination, organization or lucrative nature; consequently, there would be as many “enterprises” as the Mexican or Japanese laws allow. Another outstanding feature is that there is not a requirement that nationals of a Party own or control the enterprise, hence potentially benefiting investors of third countries. So, for instance, if a Mexican subsidiary of a U.S. firm invests in Japan (or vice versa), it would be granted the same protection pursuant to the EPA’s Investment Chapter as if it were completely owned by Mexican stockholders.  

Finally, an investor is qualified as such when it “seeks to make, is making or has made an investment”, so it gets protection of its right of access as well as for actual and existing investments. In any case, however, there has to be a link between the investor and its investment in the host State. This clearly prevents frivolous allegations from investors that were somehow affected but never made, or that never had the intention to make, a cross-border investment.

With the above-mentioned elements, it becomes easier to define the scope of the EPA’s Investment Chapter in any given situation. The Investment Chapter applies regardless of the economic activity in which the investment is made, but it does not apply to financial services nor does it impose any obligation on the Parties pursuant to immigration laws and regulations. It is worth mentioning that certain (not all) provisions of the Investment Chapter shall not apply to specific economic activities as long as there is a reservation for each case in either Annex 6, 7, 8 or 9.

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8 Subject to Article 70 (“Denial of Benefits”).
9 Annex 6 (the most elaborated Annex) refers to existing non-conforming measures, specifically to exceptions to the obligations of national treatment, most-favored-nation treatment, senior management and board of directors, and performance requirements. In the case of Mexico, it basically sets forth restrictions to foreign equity participation pursuant to the Foreign Investment Law; that is, exceptions to the national treatment obligation. In the case of Japan, it basically prescribes the obligation for Mexican investors to carry out the prior notification procedure pursuant to Japanese law before investing in certain activities, which amounts also to national treatment exceptions. Annex 7 refers to specific sectors in which the Parties may maintain or adopt future measures. Annex 8, applicable just for the case of Mexico, specifies the economic activities reserved to the State pursuant to the Mexican Political Constitution and other applicable laws and, finally, Annex 9 sets forth exceptions to the obligations of most-favored-nation treatment.
III. PROTECTION OF INVESTMENT

Having defined the scope of the Mexico–Japan EPA’s Investment Chapter, it is the turn to analyze its substantive content: the obligations of each State towards the investors and their investments or, in other words, the protection accorded. We will make reference to the main disciplines, namely, national and most-favored-nation treatment, general treatment and expropriation. In addition, brief but special reference is made to other outstanding provisions of the EPA’s Investment Chapter.

A. NATIONAL TREATMENT (NT) AND MOST-FAVORED-NATION TREATMENT (MFN)

The NT (Article 58) obligation prescribes that:

“... each Party shall accord to investors of the other Party and to their investments treatment no less favorable than the treatment it accords, in like circumstances, to its own investors and to their investments with respect to the establishment, acquisition, expansion, management, conduct, operation, maintenance, use, enjoyment and sale or other disposition of investments.”

Similarly, the MFN (Article 59) obligation establishes that:

“... each Party shall accord to investors of the other Party and to their investments, treatment no less favorable than the treatment it accords, in like circumstances, to investors of a non-Party and to their investments with respect to investment activities.”

Although different in nature, both obligations share substantial similarities. Both attempt to diminish anti-competitive and harmful distortions to the business environment by placing foreign investors on the same level playing field on which nationals (NT) and investors from third countries (MFN) operate. Important to highlight is that NT refers to discriminatory measures taken exclusively by reason of nationality and not for other reasons, such as geographical location or economic industry. Also, both are relative standards, because the compliance with each obligation, or the assessment of any possible violation thereto, necessarily requires looking at the treatment granted to nationals, in the case of NT, or to investors of third countries, in the case of MFN. Finally, both NT and MFN apply:

- in like circumstances; that is, in similar situations, facts or contexts;
- to investors as to their investments; and
- to both the pre-establishment (right of access or entry) and post-establishment (actual management of the investment) phases.

Of course, there are limits. Indirect clauses must be treated carefully, especially when dealing with investment matters. First, NT and MFN obligations are not a blank check, since they refer exclusively to the establishment, acquisition, expansion, management, conduct, operation, maintenance, use, enjoyment and sale or other disposition of investments. Hence, attracting more favourable provisions from other
treaties related to matters of procedure, or even of substantive treatment not clearly related to the elements referred to above, would not be correct; and legally speaking, attracting matters of scope would be simply impossible, since the investor has first to be placed in the legal hypothesis of the instrument so it may use the benefits deriving therefrom. Second, the MFN clause has to stick to the ejusdem principle; that is, it may only attract matters belonging to the same subject-matter or to the same category of subject to which the clause relates. Finally, any allegation of breach of the NT or the MFN obligation has to be proven so as to show an actual disparity in a like circumstance and not just in a merely hypothetical one.

B. GENERAL TREATMENT

Article 60, NAFTA-style, accords to investments “treatment in accordance with international law, including fair and equitable treatment and full protection and security”. This is the so-called minimum standard of treatment.

Similar provisions, although with wording variations, are contained in investment agreements worldwide. Depending on the specific wording, some argue that this standard of treatment refers to the minimum standard of treatment of aliens in accordance with customary international law; that is, to such rules of conduct (related to the treatment of aliens) forged over time and generally followed by States with a sense of their compulsory nature. Others have taken the view that the minimum standard could be assessed in light of all sources of international law (including conventional international law) or even that it may refer to an autonomous and self-contained concept of fairness and equity.

In the context of the NAFTA, arbitral cases have shown the inappropriateness of these two latter interpretations and triggered the Interpretation of the NAFTA Joint Commission dated 31 July 2001, meant to construe the original will of the Parties on the real meaning of Article 1105 of the NAFTA ("Minimum Standard of Treatment").

Therefore, an outstanding feature of Article 60 of the Mexico-Japan EPA is the incorporation of a “Note” as an integral part of the Investment Chapter, rendering it

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10 In Emilio Augustín Mafferzini v. Kingdom of Spain, ICSID Case No. ARB/97/7, Award of the Tribunal of 13 November 2000, 16 ICSID Rev.-F.I.L.J. 248 (2001); 5 ICSID Rep. 419 (2002); 124 I.L.R. 35 (2003); the Arbitral Tribunal applied a more favourable procedural provision contained in a third treaty regarding the exhaustion of local remedies. This conclusion has to be disregarded in many respects; besides being highly criticized, it was based on an MFN clause worded in very wide terms, since it applied to “all matters subject to the Agreement”.

11 In Pope & Talbot, supra, footnote 5, and S.D. Myers (S.D. Meyers, Inc. (Claimant) and Government of Canada (Respondent), A NAFTA Arbitration under the UNCITRAL Rules, initiated 30 October 1998), the Tribunals stated that a violation of national treatment established a violation of the minimum standard, when in fact the two standards are completely different. Moreover, in Pope & Talbot, the Tribunal incorrectly stated that the concepts “fair and equitable treatment” and “full protection and security” were elements additive to the “minimum standard of treatment”.

thereby by no means of less value, a mirror of the referred Interpretation, ruling that:

(i) Article 60 “...prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to investments of investors of the other Party”;

(ii) “the concepts of ‘fair and equitable treatment’ and ‘full protection and security’ do not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens”; and

(iii) “a determination that there has been a breach of another provision of this Agreement, or of a separate international agreement, does not establish that there has been a breach of Article 60.”

Hence, it is clear that Article 60 refers to the minimum standard pursuant to “customary international law”. Also, it is set forth that the concepts “fair and equitable treatment” and “full protection and security” are part of such standard and that Article 60 contains an absolute standard whose violation does not necessarily depend on the breach of separate and independent provisions.

The threshold is certainly not easy to pass. As stated in Neer, a landmark case concerning injury to aliens:

“...an international delinquency should amount to an outrage, bad faith, willful neglect, or to an insufficiency of governmental action so far short of international standards that every reasonable and impartial man would readily recognize its insufficiency.”14

Or, as expressed in ADF Group, a much more recent case under the NAFTA:

“...something more than a simple illegality or lack of authority under the domestic law of the State is necessary to render an act or measure inconsistent with the customary law requirement.”15

It remains clear that an international tribunal cannot constitute itself as a sort of *cour de cassation*, assessing if the governmental acts under a particular legal system were conducted as they were supposed to have been. Neither should those tribunals pronounce on matters of purely domestic law or on the appropriateness of a specific judgment. Instead, they are to assess the failure of an entire system of justice and to find violations to international law standards which are widely different from those of

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13 The elements of the minimum standard according to customary international law are not absolutely defined because they are based on the general practice of States. Nonetheless, rules such as “denial of justice”, “due process of law” and “lack of arbitrariness” (for this latter concept, see the International Court of Justice cases Elettronica Sicula S.p.A. (ELSI) (United States of America v. Italy), Judgment of 20 July 1989; and Asylum (Colombia/Peru), Judgment of 20 November 1950; both available at: www.icj-cij.org/cjwww/idecisions.htm) appear to be part of such minimum standard.

14 *Neer v. United Mexican States*, United States–Mexico General Claims Commission, 1926.

domestic nature. As S.D. Myers, 16 Mondev, 17 ADF Group 18 and Loewen 19 suggest (all NAFTA cases), the standard might be breached by a conduct attributable to the State and harmful to the claimant only if the conduct is arbitrary, grossly unfair, unjust or idiosyncratic, discriminatory and exposes the claimant to sectional or racial prejudice or involves a lack of due process leading to an outcome which offends judicial propriety.

It has been recognized that the concept of “minimum standards of treatment”, as qualified by customary international law, is an evolving concept that is not “frozen in time”. However, in any case, any allegation has to be duly proven to constitute a breach of a rule deriving from State practice by means of appropriate evidence, and it is worth noting that even though case-law may provide useful guidance in this regard, it does not per se constitute a source of international law.

C. EXPROPRIATION

Article 61 of the Mexico–Japan EPA prescribes that:

“... neither Party shall expropriate or nationalize an investment of an investor of the other Party in its Area either directly or indirectly through measures tantamount to expropriation or nationalization except: (a) for a public purpose; (b) on a non-discriminatory basis; (c) in accordance with due process of law and Article 60; and (d) on payment of compensation.”

In any case, the compensation would be equivalent to the fair market value of the investment and be freely transferable.

It has also been recognized that investment instruments are not policies against wrong business judgments and decisions and that it is not the objective of expropriation provisions to eliminate or otherwise diminish commercial risks for the investor. In this regard, as stated in Waste Management II under the NAFTA: “... the mere non-performance of contractual obligation is not to be equated with a taking of property, nor is it tantamount to expropriation”. 20 In that case, the failure by the municipality of Acapulco to pay certain installments under a concession agreement for waste disposal and street cleaning services was deemed to be an ordinary risk that could be addressed in the appropriate forum (chosen contractually by the parties) and not a destruction of contractual rights per se. It was necessary to show an effective and outright repudiation of the contractual rights, unredressed by any remedies available to the claimant, having the effect of preventing their exercise entirely or to a substantial extent.

16 Supra, footnote 11.
17 Mondev International Ltd. v. United States of America, ICSID Case No. ARB(AF)/99/2, Award of 11 October 2002, 42 I.L.M. 85 (2003); 6 ICSID Rep. 192 (2004); 128 I.L.R. 110 (2004); the text of the Award is also available online at: www.state.gov/documents/organization/14442.pdf.
18 Supra, footnote 15.
19 The Loewen Group Inc. and Raymond L. Loewen (Claimants) and United States of America (Respondent), Final Award of 26 June 2003, 4 J.W.L. 4, August 2003, pp. 675–731.
20 Supra, footnote 6.
In Gami,21 the latest NAFTA expropriation case, the Tribunal concluded that it could only act in light of objective evidence on whether the Mexican enterprise in which the claimant had an equity interest was indeed destroyed or damaged. Considering that the Mexican enterprise succeeded in domestic proceedings (and therefore was afforded “substantive protection by the Mexican legal system”) against certain expropriatory measures taken by the Mexican government, and that it had better business perspectives, there was not a finding of indirect expropriation.

As in many other international investment agreements, there is a distinction between direct expropriation, i.e. direct transfer or outright seizure of property, and indirect expropriation, i.e. a deprivation of the substantial rights of an investment without any actual formal transfer of property having taken place. This latter concept has drawn great attention because it may relate in some cases to the regulatory powers of the State.22 When it comes time to determine whether there has been an indirect expropriation, elements such as the degree of interference, the economic impact of the measure, or its regulatory purpose have been taken into account.23

At the end of the day, however, the analysis has to be based mainly on the specific particularities of each case. What is certain is that the upcoming years and the emerging rules of international law on this matter will give more content to this legal concept. However, there has to be a presumption that any regulatory act undertaken in a non-discriminatory manner is valid and does not require compensation regardless of whether it inflicted an economic damage on the investor.

D. **OTHER OUTSTANDING PROVISIONS**

1. **Article 63 (“Transfers”)**

The Parties shall allow all transfers relating to an investment to be made freely and without delay. A transfer may be prevented only in the following cases: bankruptcy; insolvency or the protection of rights of creditors; issuing, trading and dealing in securities; criminal or penal offenses; reports of transfers of currency or other monetary instruments; or when ensuring the compliance with orders or judgments in adjudicatory proceedings.

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21 In Proceedings Pursuant to NAFTA Chapter 11 and the UNCITRAL Arbitration Rules: Between GAMI Investments Inc. (Claimant) and The Government of the United Mexican States (Respondent), Final Award, 15 November 2004; available at: www.naftalaw.org

22 The first case on expropriation under the NAFTA (Metalclad Corporation (Claimant) and United Mexican States (Respondent), ICSID Case No. ARB(AF)/97/1, Final Award of 2 September 2000, ICSID Rev.--F.L.L.J., Vol. 16, No. 1, 2001) raised serious concerns because of the ample and vague interpretations issued by the Arbitral Tribunal. For instance, it was stated that expropriation included “covert or incidental interference” with the use of property. Moreover, that expropriation did not only include the deprivation of use of property but equally deprivation of the reasonably-to-be-expected economic benefit thereon, “even if not necessarily to the obvious benefit of the host State”. Thereafter, arbitral tribunals have taken more conservative approaches.

23 See cases such as Metalclad, ibid.; S.D. Myers, supra, footnote 11; and Pope & Talbot, supra, footnote 5, under the NAFTA. See also Técnicas Medioambientales Técnicas, S.A. v. United Mexican States, ICSID Case No. ARB(AF)/00/2, Award of 29 May 2003, 43 I.L.M. 143, 2004, under the bilateral investment treaty between Mexico and Spain; and other awards related to takings of property issued by the Iran–United States Claims Tribunal and the European Court of Human Rights.
Similarly, the right of transfers is subject to the so-called BOP (balance-of-payments) clause, in the sense that a party may prevent a transfer being made in the event of serious balance-of-payments and external financial difficulties or imminent threat thereof. Likewise, transfers may be prevented if movements of capital cause or threaten to cause serious difficulties for macroeconomic management, in particular, monetary and exchange rate policies. Needless to say, clauses of this type are quite common, whether in bilateral or multilateral instruments.24

2. Article 64 ("Senior Management")

Neither Party may require that an enterprise appoint individuals of any particular nationality in senior management positions. There could be a requirement that a majority of the board of directors or any committee thereof be of a particular nationality or residents of a Party but only provided that such requirement does not materially impair the ability of the investor to exercise control over its investment.

3. Article 65 ("Performance Requirements")

Neither Party may impose or enforce so-called performance requirements, such as requiring an investor or investment to export a given level or percentage of goods or services or to achieve a given level or percentage of domestic content. Actually, this provision is consistent with one of the shifts adopted in many legal regimes of developing countries during the 1990s which abandoned the use of performance requirements that in practice were more a disincentive to investment than a development tool. Article 65 of the Mexico–Japan EPA, in order to provide legal certainty, provides an exhaustive list of the specific prohibitions. In addition, and subject to certain exceptions, there is also a prohibition of conditioning the receipt (or continued receipt) of an advantage in connection with an investment on compliance with certain performance requirements.

4. Article 71 ("Investment Support")

The Parties allow and foster the cross-border operation of investment agencies so that they may provide support to investment projects in the form of equity investment, investment guarantees and investment insurance or reinsurance. With this Article, similar to certain provisions contained in the treaty signed between the United States and Mexico that allows the operation of the Overseas Private Investment Corporation (better known as OPIC) in Mexico, the Japanese agency JETRO will be able to fully operate (in a cross-border manner) in Mexico, supporting investment projects carried out there. It is worthy of mention that this Article contains provisions that regulate the legal concept of

24 For instance, Article XII of the General Agreement on Trade in Services.
subrogation in a much more liberal way than previous bilateral investment treaties executed by Mexico, consistent with current financial realities and necessities.

E. STANDSTILL

One of the foremost features of the Investment Chapter is the so-called standstill obligation, by virtue of which the Parties may not adopt more restrictive measures relating to investment than those existing at the time the EPA was signed (and duly reflected in the corresponding Annexes). Therefore, any amendment to a non-conforming measure as set out in the Annexes cannot decrease the conformity of the measure as it existed immediately before the amendment or modification occurred. This obviously provides an additional degree of protection and certainty to the foreign investor.

IV. PROCEDURAL MATTERS

A substantive provision is meaningless if not accompanied by the means to provide for its effective application. Therefore, the Investment Chapter of the Mexico-Japan EPA, in its Section Two, contains a scheme for the settlement of investment disputes between a Party and an investor of the other Party. In the case of Mexico, this system was first used in the NAFTA, and, thereafter, in almost all its investment treaties.

The purpose of such provisions is to avoid an investment dispute turning into an inter-State conflict by giving the foreign investor direct access to arbitration as an alternative forum to settle any conflict that may arise with respect to its investment in the host State. In addition, arbitration offers other advantages in certain cases, such as promptness and flexibility in the proceedings and neutrality and expertise of the arbitral panel. Section Two of the Investment Chapter resembles Section B of NAFTA Chapter Eleven, and the most outstanding features of it are the following:

- An investor of either Party may submit a claim to arbitration because of a breach of an obligation of the host State pursuant to Section One of the Investment Chapter and a damage deriving therefrom. Consequently, there has to be a link between the breach and the damage, i.e. a causality relationship (Article 76).

- The claim may be submitted in two ways: (i) by an investor on its own right for a direct damage; or (ii) by an investor on behalf of an enterprise for a damage inflicted to that enterprise, provided that the investor owns or controls such enterprise (Article 76). Pursuant to this rule, minority shareholders may not take legal action to seek remedies for damages inflicted on assets owned by a Mexican enterprise in which they participate; otherwise, serious practical problems would immediately arise (double recovery, rights of legitimate creditors, etc.).
As a prerequisite for arbitration, the investor has to submit a written request for consultations, with the view of settling the claim amicably, 180 days before the claim is submitted to arbitration (a sort of cooling off period). However, no claim may be submitted to arbitration if more than three years have elapsed from the date on which the investor (or its enterprise) first acquired, or should have first acquired, knowledge of the breach and knowledge that the investor (or its enterprise) had incurred loss or damage (Articles 77, 78 and 81).

The arbitration will be regulated by the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention), the ICSID Additional Facility Rules or the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL), as appropriate.25

There is no fork in the road rule or absolute exclusion of legal fora, so the investor may initiate proceedings in domestic courts (even finalize them there) and afterwards request an arbitration (as long as there are not allegations of breaches of the EPA in such domestic procedures). Nonetheless, and in order to avoid parallel proceedings and contradictory judgments, before entering into arbitration, the investor has to waive its right to initiate or continue any proceedings before domestic courts with respect to the measure alleged to constitute a breach of the Investment Chapter (Article 81).

The arbitral tribunal will comprise three arbitrators (Article 82).

There are provisions for the consolidation of multiple claims, when two or more claims submitted to arbitration pursuant to Section Two of the Investment Chapter have a question of law or fact in common.26

The disputes are to be settled pursuant to the EPA and the applicable rules and principles of international law. Nonetheless, the Parties retain the power to issue joint interpretations which would be binding on any arbitral tribunal.27

Any award is final and binding, and it may only award monetary damages or restitution of property (in the latter case, monetary damages may be paid in lieu of restitution) (Articles 92 and 93).

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25 Article 79. Mexico is not a Party to the ICSID Convention; therefore, until that happens, an arbitration under the Investment Chapter can only be undertaken under either the ICSID Additional Facility Rules (Japan is a Party to the ICSID Convention) or the UNCITRAL Arbitration Rules.


27 Article 84. This scheme has been quite useful in the context of the NAFTA where the NAFTA Free Trade Commission has issued a number of Interpretations and Declarations on key substantive and procedural issues.
In terms of transparency, either party to a dispute may make available to the public all documents related to the dispute, including the final award (Article 94(4)). The latter is important because mixed arbitration, as opposed ordinary commercial arbitration, deals with matters of public interest (by virtue of the involvement of the State). In addition, certain doses of transparency help to legitimize the process and to build a coherent jurisprudence.

V. Final Remarks

The Mexico–Japan EPA, in its Investment Chapter, offers an important degree of protection to foreign investors and their investments. In the light of the above explanations, however, investors have to realize the real purpose of the instrument, which is to guarantee that the host State shall not discriminate, arbitrarily frustrate investments or commit gross violations of international law against them. Of course, the commercial, financial, administrative and other ordinary risks remain with the investor, as is the case of any business venture, especially if carried about abroad.

By getting an assurance at treaty level that the host State will act pursuant to certain standards, however, the investor certainly will see the non-commercial risks diminished and its confidence to invest heightened. The latter, in addition to other factors of mainly economic nature, may certainly lead to a boost in investment and a strengthening of the economic relationship between Mexico and Japan.

Upon its entry into force in April 2005, and given its scope and nature, the EPA and its Investment Chapter will surely improve Mexico’s investment and business environment for the benefit of both Mexico’s economy and foreign investors.