Investor-State Dispute Settlement

Summary reports by experts at 16th Freedom of Information Roundtable - 20 March 2012

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THE SELECTION AND REGULATION OF ARBITRATORS IN INVESTMENT ARBITRATION

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I. The Importance of Arbitrator Selection

Selecting an arbitrator is the ultimate "forum shopping." Its importance cannot be overstated. The right arbitrator can, in the absence of party agreement, affect such pivotal issues as the seat of the arbitration (in the absence of party agreement), the choice and interpretation of substantive law, the availability of particular procedures (such as interim relief, joinder of third parties, and document exchange), the nature and extent of hearings, and the allocation of costs.

In the words of Rusty Park, "Just as in real estate the three key elements are 'location, location, location,' so in arbitration the applicable trinity is 'arbitrator, arbitrator, arbitrator.'"[1] Parties routinely echo this sentiment. They consistently verify in empirical studies that the ability to select arbitrators as one of the primary reasons for selecting arbitration at all. They also vote with their feet by rejecting various methods that have "appointing authorities" select arbitrators on behalf of parties.

Despite its importance, the process of selecting arbitrators is more like a secret ritual or a gray-market transaction that privileges the most elite firms and parties than a transparent process that occurs in an open marketplace for dispute resolution services.

II. The Arbitrator Selection and Market for International Arbitrator Services

Arbitrators are selected from a market, specifically the market for international arbitrator services. It is a relatively closed market that is difficult for newcomers to penetrate, and involves significant information asymmetries. There are high barriers to entry to the market for arbitrator services, and appointing newcomers or those who are "outsiders" of the generally tight-knit group of investment arbitrators can entail risks for parties.

One of the most essential features of arbitrator selection is the gathering of anecdotal information about possible candidates. The most important information sought is about the arbitrator's case management skills, approach to particular procedural or substantive issues and general professional style, information that published awards and law review articles are unlikely to reveal.

In selecting an arbitrator, the elite international law firms and large corporations with extensive experience in international arbitration typically have a significant advantage. They can circulate general emails inquiring about potential candidates.[2] Initial blanket inquiries are often supplemented by phone calls to other members of the international arbitration community, or to practitioners in other fields, to obtain opinions on the same topics. To give a sense of the importance of these sources in the selection process, in a recent survey, 90% of respondents designated "reputation" as the single most important factor in selecting an arbitrator.

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1 William W. Park, *Income Tax Treaty Arbitration*, 10 GEO. MASON L. REV. 803, 813 (2002).

2 *See* Claude R. Thomson & Annie M.K. Finn, *Managing an International Arbitration*, 60-JUL DISP. RESOL. J. 74 (May-July 2005) (advising that finding the right arbitrator "means talking to other users of international arbitration to find out about their experiences and to other international arbitrators to find out whether a proposed arbitrator has a reputation for managing the process efficiently….").

There are several problems with these informal methods relied on to determine an arbitrator's reputation. The quality of information generated by any particular inquiry varies depending on the identity of the person asking the question, the person responding, and the arbitral candidate. Opinions about arbitrators are based on individual perceptions and experiences in particular cases. They are necessarily subjective, but can also be incomplete or outdated. More importantly, individuals' willingness to share candidly may also depend on how well they know or trust the person making the inquiry. An attorney might well be reluctant to disclose that an arbitrator has a habit of falling asleep in hearings or took more than a year to render a final award if there was not some confidence that the information would not be conveyed directly to the arbitrator, or otherwise embarrass the source of the information.[3]

The ultimate effect is that, even if both counsel for opposing sides in the same arbitration pose the same inquiry about the same candidate to the same person, they may receive different information. The largest, most elite insiders can access more detailed and sophisticated information about potential arbitrators than newcomers or smaller, less sophisticated law firms and parties, particularly States that may manage investment arbitration cases in-house.[4]

The problem of information asymmetry is compounded if an unsophisticated party nominates a co-arbitrator who similarly lacks knowledge about the field of arbitrators or about the various considerations for selecting arbitrators.[5] If one co-arbitrator lacks knowledge and sophistication, the other co-arbitrator may have an advantage in influencing the selection of a chairperson who is optimal for the party that appointed that more sophisticated co-arbitrator. In other words, one party's lack of sophistication might not only affect their own selection of a co-arbitrator, but the overall composition of the tribunal.

The negative effects of imprudent arbitrator appointments, and perceived distortions in the arbitrator selection process, have generated perceptions, particularly with regard to investment arbitration, that arbitrators and the arbitration process more generally are biased against States, and particularly against States with emerging economies.[6]

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[3] *See* Michael McIlwrath, *Grading the Arbitrator*, 72 INT'L J. ARB., MED. & DISP. MGNT. 224 (2007) (arguing that more feedback on arbitrators is needed); Catherine A. Rogers, *The Vocation of the International Arbitrator*, 20 AM. J. INT'L L. 959 (2005) (describing information asymmetries in the market for arbitrator services and their effect on the selection process).

[4] As one commentator explains:

> Not surprisingly, there are potential difficulties in obtaining anecdotal information about arbitrator candidates. Some individuals and firms regard this information as confidential or proprietary; some limit the availability of this type of intelligence to a circle of close, professional friends or colleagues; and in a day when everyone is bombarded by unwanted inquiries, there may be resistance to the effort involved in digging out and forwarding such information, even when there is no other reason to withhold it.
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> Francis O. Spalding, *Selecting the Arbitrator, What Counsel Can Do*, ADR CURRENTS, Fall 1997, at 8, *reprinted in* WHAT THE BUSINESS LAWYER NEEDS TO KNOW ABOUT ADR 351, 355 (PLI Litig. & Admin. Practice, Course Handbook Series No. 578, 1998).

[5] This problem has in fact been documented in investment arbitration cases involving developing nations. *See* Catherine A. Rogers, *The Arrival of the Have-Nots in International Commercial Arbitration*, 8 NEV. L. J. 341, 358 (2007) (documenting sources that describe how representatives from developing nations have resorted to relatively random selection criteria, such as nominating an academic they happened to encounter at a conference on investment arbitration, and the inability of parties from developing nations to obtain reliable information about arbitrator candidates). This problem is sometimes traced back certain parties not being able to afford elite legal counsel. *See* Barry Leon & John Terry, *Special Considerations When a State Is a Party to International Arbitration*, Disp. Resol. J., Feb.-Apr. 2006, at 68, 75 ("Sometimes financial resources may make a state unable to employ counsel who is experienced in international arbitration," which can "lead to the retention of counsel without the necessary expertise in international arbitration.").

[6] *See* Amr A. Shalakany, *Arbitration and the Third World: A Plea for Reassessing Bias Under the Specter of Neoliberalism*, 41 HARV. INT'L L.J. 419 (2000).

III. Arbitrator Regulation

After arbitrators are nominated, parties have an opportunity to challenge them. The standards and procedures for ruling on challenges are determined by the arbitral rules, though there are also some independently promulgated rules (non-binding guidelines) that are also often referenced. Investment arbitration presents some unique challenges in defining arbitrator impartiality, including issue conflicts, alleged ideological partisanship among party-appointed arbitrators, and relations among arbitrators.

A. Issue Conflict

One type of challenge to arbitrator impartiality that is relatively unique to investment arbitrators is so-called "issue conflict." These challenges are based on the fact that the arbitrator has previously expressed an opinion on an issue in dispute, either in a scholarly article or in another arbitral award. Concern about issue conflict is also sometimes extended to concerns about the "revolving door" between arbitrators and counsel (also sometimes referred to as the "multiple hat" problem) in the field of investment treaty arbitration. The concern in this latter situation is that an arbitrator may be tempted to rule on an issue in a manner that is helpful to the same arbitrator's position when acting as counsel in a subsequent case. While this concern arguably also arises in commercial arbitration, it is more acute in investment arbitration because investment arbitral awards are published and are regarded as having some at least persuasive precedential value.[7]

One possible response to issue conflicts, and related to the general critique about partisanship among party-appointed arbitrators (discussed in more detail below), is to have lawyers active in the field of investment arbitration choose between acting either as arbitrator or as counsel, but that they not be allowed to act as both. This proposal would essentially mean a closed set of "professional" arbitrators whose livelihood derives exclusively from serving as an arbitrator. It would have the benefit of limiting various conflicts, since arbitrators would have less interactions if serving exclusively as an arbitrator, most particularly "issue conflicts."

These proposals have been criticized as problematic in that they would prevent newcomers from becoming arbitrators if they had to do it either full-time or not at all. To establish a reputation as an arbitrator necessarily requires arbitration practitioners to maintain their counsel practice for an extended period of time before they can aspire to a full-time career as an arbitrator. Because it is difficult to ensure a steady stream of arbitration appointments, and because arbitration practitioners earn significantly more money as counsel than as arbitrator, there are concerns that the small pool may become stagnant and not necessarily include the greatest talents.

There is also an argument to be made that the rotation between counsel and arbitrator keeps fresh and innovative ideas and techniques coming in to arbitrators. In a field in which procedures, norms, and legal frameworks are rapidly evolving, new and multiple perspectives are arguably especially valuable. One way to address these concerns would be to allow continued function as counsel in *commercial* arbitrations, but not in *investment* arbitrations.

B. Party-Appointed Arbitrators

Recently, several commentators have questioned the practice of party-appointed arbitrators. These critiques have special implications for investment arbitration. As an initial matter, there are questions about repeat appointments by either the same party, or the same "side" of the dispute, meaning by States or by Investors. This latter form of repeat appoints reflects perhaps the most

[7] Anthony C. Sinclair & Matthew Gearing, *Partiality & Issue Conflicts*, 5:4 Transnat'l Disp. Mgmt. (July 2008); Judith Levine, *Dealing with Arbitrator "Issue Conflicts" in International Arbitration*, Disp. Resol. J. 60 (Feb./April 2006).

significant critique of party-appointed arbitrators in investment arbitrator impartiality, namely they come to disputes with a strong ideological or political orientation, which affects how they view disputes. A variant of this critique is that most arbitrators come to investment arbitration from experience as commercial arbitration, as opposed to public international law backgrounds, which skews their intellectual orientation toward investors' commercial claims.[8]

As a proposed solution to these concerns about the perceived partisanship of co-arbitrators, some commentators have argued that the selection of co-arbitrators by parties should be abolished altogether in favour of appointment of all three members of the tribunal by the institution. This proposal would redress some of the concerns. The proposal may not be practicable and, if it were, it would some potential problems.

First, parties have a strong preference for participating in the selection of arbitrators, which is demonstrated by the disuse of the option of institutional appointment in many institutions. The presumed reason is that party participation in the selection process provides a degree of reassurance and ultimately legitimacy in a tribunal in which the party has participated in selecting. Many commentators and practitioners doubt that parties would ever agree to arbitration in which they could not appoint a member of the tribunal.

Second, the proposal is based on an assumption that competing viewpoints on a tribunal that reflect the parties' competing viewpoints can only be disruptive or counterproductive. A compelling argument can be made, however, that having a "watchdog" on the tribunal can force a majority to consider arguments that may more easily be breezed over if "groupthink" takes over. Anecdotal and empirical evidence in other fields evidence suggests that if arbitrators were to agree quickly regarding the outcome, they would unlikely to engage in a meaningful review of the record and arguments that are contrary to their position.

Finally, the threat or a draft of a dissent can force the majority to re-examine issues, or step back from more extreme positions. Publication of a dissent can affect the weight a decision is given in the future. In a legal system in which existing norms are vague and evolving, and in which there is no formal system of precedent, this added dialogue within a tribunal can be a meaningful source for development of legal reasoning.

C. Special Procedure in ICSID Arbitrator Challenges

Challenges under the ICSID Rules are unique among arbitral institutions. Under the ICSID Rules, the other members of the tribunal initially rule on arbitrator challenges, with the potential for an Annulment Committee to later revisit the challenge. Under most other institutional rules, the institution rules on whether to reject the challenge, or accept the challenge and disqualify the arbitrator. Basic common sense and human intuition suggest it is would be more difficult even for a scrupulous and diligent arbitrator to conclude that particular conduct of a colleague and co-arbitrator with whom the arbitrator is sitting, and will likely sit with in the future, was an improper and a basis for disqualification than it would be for an administrator in an arbitral institution.[9]

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[8] While there may be truth to this critique, it is worth noting that some arbitrators who are regarded as the most ideologically pro-investor in fact come from experience as judges on public international law tribunals.

[9] Catherine A. Rogers, *Regulating International Arbitrators: A Functional Approach to Developing Standards of Conduct*, 41 STAN. J. INT'L L. 53, 71-73 (2005) (describing how asking arbitrators to rule on their own conflicts creates a "conflict within a conflict").

THE INTERACTION OF REMEDIES BETWEEN NATIONAL JUDICIAL SYSTEMS AND ICSID: AN OPTIMIZATION PROBLEM

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International investment law creates an international level of review for (illegal) national regulations and laws and the conduct of administrative entities for foreign investors. It is state liability law for foreign investors. In spite of the similarities of factual circumstances (see e.g. the reaction of Vattenfall on the one hand and E.ON on the other concerning the German phasing out of nuclear energy), the legal environment for dealing with national investors or citizens and the one for foreign investors varies considerably (ECT claim under ICSID or property rights claim to the constitutional court respectively). Whereas in national law, a right holder usually needs to take all (usual administrative and judicial) steps to have the illegality of an act reviewed (damages as last resort), in investment law, the investor often has immediate access to international tribunals without the exhaustion of local remedies and may immediately claim damages.

This puzzling difference justifies a functional comparison of the rationales of national state liability regimes with international investment law. The paper takes a functional view on remedies and proposes a differentiated interaction between national and international remedies. It outlines the advantages and disadvantages of primary and secondary remedies from the viewpoint of states and investors and attempts to show that it is possible to design an interaction which allows for safeguarding the advantages for both sides. This undertaking also seems urgent since states are, although reluctant to grant primary remedies in Investor-State-Dispute-Settlement (ISDS) due to sovereignty concerns (e.g. Enron v. Argentina), also ever more reluctant to grant ISDS with pecuniary awards (Australia or the withdrawal from ICSID by Latin American States). This endangers the system as a whole and therefore also the advantages of ISDS.

Once a functional view is taken on remedies, this allows discovering functional equivalents to primary remedies. In principle, one can think of several possibilities of combining primary and secondary remedies. The talk proposes possible interpretations of investment treaties concerning waiting periods, local-court-first-requirements, and fork-in-the-road provisions to find an optimal mix of national and international remedies on the one hand and primary and secondary remedies on the other hand. It also deals with primary remedies in ISDS. Those are possible in principle, though almost not used. A partial substitute has recently been growing in importance: preliminary measures by international investment tribunals. Although tribunals take pains to stress that those are not meant to infringe sovereignty of states (by e.g. prohibiting the enforcement of national judicial decisions or by invalidating legislative acts), this can be seen as a temporary primary remedies.

From a functional point of view, a mix of primary and secondary remedies on the national and international plane seems adequate. First, primary remedies on the national plane like waiting periods

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and local-court-first requirements should be taken seriously (and in treaty design it should be made clear that those are an indispensable requirement for jurisdiction in ISDS, unless there is denial of justice or a legislative act in question). They are not only the more protective remedies from the viewpoint of investors; they also allow the state to reconsider its measure: the reason why we find administrative and judicial review of executive measures in the first place. Adjudication in the shadow of ISDS might also be a good governance tool for developing states. Second, if there is no exhaustion of local remedies at all required in the treaty, another possibility is to use primary remedies on the international plane. Here, a two-tier approach seems appropriate: the tribunal may order primary remedies (e.g. grant the illegally revoked license) and only if the state does not comply in a certain period of time, secondary remedies are automatically used, that is damages granted to the investor (as in Goetz v Burundi). Those solutions safeguard sovereignty concerns of states on the one hand and the interest of investors in quick proceedings, in a protective and in an enforceable remedy.

Remedies found de lege lata in ISDS	**National proceedings** (negotiation/administrative or judicial proceedings)	**International proceedings**
Primary remedies Action of recission/ injunctions	**I** waiting period, local-courts-first requirements, fork in the road (mostly dispensed with by Investment Tribunals)	**II** very seldom, but growing preliminary measures (injunctions)
Secondary remedies Damage claims	**III** only for direct expropriation	**IV** most often, until recently disregarding national proceedings as a jurisdictional requirement

REMEDIES IN JAPAN'S TREATIES AND JAPANESE LAW THAT MAY BE RELEVANT TO THE PROTECTION OF INVESTMENTS OR INVESTORS

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Introduction

Most of Japan's recent investment treaties provide that the remedies that may be provided by the arbitral tribunal are limited to one or both of "monetary damages and applicable interest" and "restitution of property" and interest or damages in lieu thereof if the host State so wishes.

In Japanese law, primary as well as secondary remedies may be provided. Although there appear to be no case involving foreign investments or investors, the case law indicates that it is more difficult to obtain secondary (pecuniary) remedies than the primary remedies.

I. Treaties

Japan started, in 2002, to conclude "new generation" bilateral investment treaties and economic partnership agreements (free trade agreements) including a chapter on investment[1]. These treaties[2] contain far detailed rules in comparison to "old generation" bilateral investment treaties concluded until then[3].

None of the "old generation" treaties specifies the mode of remedies to be granted by the arbitral tribunal. For example, Art. 12(4) of the 2001 Japan-Mongolia BIT simply provides:

> "The arbitration board shall within a reasonable period of time reach its decisions by a majority of votes. Such decisions shall be final and binding."

Many of the "new generation" treaties - all but those concluded with Uzbekistan, Switzerland and Papua New Guinea - contain provisions limiting remedies to be granted by the arbitral tribunal to monetary compensation and restitution in kind. For example, Art. 96(18) provides:

"The award rendered by the arbitral tribunal shall include:

(b) a remedy if there has been such breach. The remedy shall be limited to one or both of the following:

(i) payment of monetary damages and applicable interest; and

(ii) restitution of property, in which case the award shall provide that the disputing Party may pay monetary damages and any applicable interest in lieu of restitution. […]"

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1 For Japanese treaty practice, *see* Shotaro Hamamoto & Luke Nottage, "Foreign Investment in and out of Japan", *Transnational Dispute Management*, 2011; Shotaro Hamamoto & Luke Nottage, "Japan" *in* Chester Brown ed., *Commentaries on Slected Model Investment Treaties*, Oxford, Oxford University Press, 2012 (forthcoming).

2 18 such treaties have been signed as of 19 March 2012: eight BITs (with the Republic of Korea, Viet Nam, Cambodia, Laos, Uzbekistan, Peru, Papua New Guinea and Colombia) and ten EPAs (with Singapore, Mexico, Malaysia, Philippines, Chile, Thailand, Brunei, Indonesia, Switzerland and India). BITs with Viet Nam and Peru are now incorporated into EPAs concluded later with each of the two States.

3 There are nine such BITs concluded with Egypt, Sri Lanka, China, Turkey, Hong Kong, Pakistan, Bangladesh, Russia and Mongolia.

No arbitration has been instituted so far on the basis of an investment treaty that Japan has concluded[4].

II. Legislation

The Constitution of Japan recognizes the right of every person to seek remedies when he/she has suffered damage through illegal act of any public official (Art. 17)[5].

As for the pecuniary or secondary remedies, the State Redress Act (Act No. 125 of 1947) provides, in its Article 1(1), as follows:

> When a public officer who exercises the public authority of the State or of a public entity has, in the course of his/her duties, unlawfully inflicted damage on another person intentionally or negligently, the State or public entity shall assume the responsibility to compensate therefor.

Regarding the non-pecuniary or primary remedies, the Administrative Case Litigation Act (Act No. 139 of 1962, last amended in 2007) provides for judicial review of administrative dispositions.

> Art. 3: Actions for the Judicial Review of Administrative Dispositions
>
> (1) The term "action for the judicial review of an administrative disposition" as used in this Act means an action to appeal against the exercise of public authority by an administrative agency.
>
> (2) The term "action for the revocation of the original administrative disposition" as used in this Act means an action seeking the revocation of an original administrative disposition and any other act constituting the exercise of public authority by an administrative agency […].
>
> Art. 30: Revocation of Discretionary Disposition
>
> The court may revoke an original administrative disposition made by an administrative agency at its discretion only in cases where the disposition has been made beyond the bounds of the agency's discretionary power or through an abuse of such power.
>
> Art. 32: Effect of Judgment of Revocation, etc.
>
> (1) A judgment to revoke an original administrative disposition or administrative disposition on appeal may also be effective against a third party.
>
> Art. 33
>
> (1) A judgment to revoke an original administrative disposition or administrative disposition on appeal shall be binding on the administrative agency that has made the original administrative disposition or administrative disposition on appeal and any other relevant administrative agency with regard to the case.

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[4] For the absence of arbitration instituted on the basis of Japan's treaties, *see* Shotaro Hamamoto, "A Passive Player in International Investment Law: Typically Japanese?", *in* Vivienne Bath & Luke Nottage eds., *Foreign Investment and Dispute Resolution Law and Practice in Asia*, London, Routledge, 2011, p. 53, pp. 59-61.

[5] For an overview of Japanese domestic law on the protection of foreign investment, *see* Shotaro Hamamoto, "Japan", *in* Wenhua Shan ed., *The Legal Protection of Foreign Investment*, Oxford, Hart, 2012 (forthcoming).

III. Judicial Cases

There appear to be no case brought by foreign investors for judicial review or damages against the Japanese Government[6]. However, there are several interesting cases.

A. Subject Matters Relevant to Investments or Investors

Although no case has dealt with the protection or promotion of foreign investments or investors, there are several cases that may be of interest from the standpoint of international investment law. In the following cases, the Supreme Court found that the Government may be held liable under Art. 1(1) of the State Redress Act for its acts and measures that may be taken with regard to investments or investors.

1. Revocation of Licence

Supreme Court, Judgment of 24 November 1989, *Minshu*, vol. 43, p. 1169.

Facts: A licenced real estate company in Kyoto repeatedly carried out frauds, causing damages to a number of clients. One of them demanded that the Governor of Kyoto, in charge of the licence for real estate business, should pay compensation under Art. 1(1) of the State Redress Act, alleging that damages had been caused because of the non-revocation of the licence of this fraudulent licensee.

Held: Under Art. 66(9) of the Building Lots and Buildings Transaction Business Act (Act No. 176 of 1952), the Governor exercises due discretion to decide whether to revoke of the licence or not. Unless the exercise of the discretion is patently unreasonable, the Governor is not held liable under Art. 1(1) of the State Redress Act.

2. Tax Measures

Supreme Court, Judgment of 11 March 1993, *Minshu*, vol. 47, p. 2863.

Facts: A local tax office found anomalies in the tax declaration of a paper company. The tax office requested the company to allow tax officers to examine the company's accounting documents, which the company refused. The tax office thus re-evaluated the tax to be imposed upon the company, which requested the revocation of the allegedly incorrect re-evaluation. The Osaka High Court partly accepted the company's claim and the company obtained a refund. This judgment became final, since the tax office did not appeal to the Supreme Court. The company then instituted another suit against the tax office, demanding compensation for the damages caused by the incorrect re-evaluation by the tax office.

Held: A re-evaluation of the income tax carried out by the tax office, even if it is based on a wrong calculation of the income of the person in question, cannot be held to be unlawful under Art. 1(1) of the State Redress Act, unless the re-evaluation is heedlessly carried out in a manner incompatible with the duty of care. In the present case, since the company did not cooperate with the tax office, the re-evaluation in question is not unlawful under Art. 1(1) of the State Redress Act.

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[66] The Children's Investment Fund (TCI), a UK-based fund, which then held 9.9% stake in J-Power (an electricity company), submitted to the Japanese Government, in conformity with the Foreign Exchange and Foreign Trade Act (FEFTA), a prior notification that it intended to increase its shareholding to 20%. After six rounds of hearings, the Government reached the conclusion that the TCI's planned investment fell under Article 27(3)(i)(a) FEFTA ("National security is impaired, the maintenance of public order is disturbed, or the protection of public safety is hindered.") and thus recommended TCI to discontinue the investment on 16 April 2008. Following TCI's rejection of the recommendation, the Government ordered TCI to discontinue its investment on 13 May 2008. Although TCI was reported to be planning to contest the order before the Japanese court, it announced on 14 July 2008 that it would accept the order because it was "not in the interests of any of the parties to pursue an appeal or a lengthy judicial process". *See* Hamamoto, *supra* note 5.

3. Performance Requirements

Supreme Court, Judgment of 26 October 2006, *Saibanshu Minji*, vol. 221, p. 627.

Facts: A construction company was refused to participate in biddings solicited by a village in the Tokushima Prefecture for the reason that its headquarters (*siège social*) was not situated in the village. The head of the village office argued that it was because those public works were carried out to ensure the economic survival of the underpopulated village.

Held: Although it is legitimate to carry out public works to ensure the economic survival of the village, such a purpose does not necessarily lead to the total exclusion of companies not headquartered in the village. The measure in question may thus constitute an *abus de pouvoir* and thus an unlawful act under Art. 1(1) of the State Redress Act. The case shall be remanded to the Takamatsu High Court to examine whether there were any justifications.

Takamatsu High Court, Judgment of 29 May 2008, *Hanrei Jiho*, No. 2014, p. 71.

Held: Until the judgment of the Supreme Court, most of the local public entities (cities, villages, etc.) of the Tokushima Prefecture limited bid participants to companies headquartered in the local public entity soliciting the bid. Moreover, the judgment of the Supreme Court was not adopted unanimously and two dissenting opinions are appended. Under such circumstances, it is impossible to find negligence of the head of the village office under Art. 1(1) of the State Redress Act.

Note: See B.1.

B. Reasoning Adopted by the Court that May Be Relevant to the Protection of Investments or Investors

In the following cases, the subject matters of the disputes have nothing to do with the investment or investors. However, the reasoning adopted by the Supreme Court may be relevant.

1. (Lack of) Relationship between the Primary and Secondary Remedies

Supreme Court, Judgment of 15 January 2004, *Minshu*, vol. 58, p. 226.

Facts: A non-Japanese born in Korea from parents of Taiwanese origin was staying in Japan with no visa status for more than 20 years. He repeatedly addressed the immigration office to obtain a visa but his request was not accepted since he was not able to establish his nationality with documentary evidence. When his son contracted with a serious disease (cerebral tumour), he applied for national health insurance but the application was rejected for the reason that he had no visa status.

Held: The National Health Insurance Act (Act No. 192 of 1958) does not exclude those who have no visa status. The rejection of the application in question is thus unlawful. However, when the application was rejected, opinions as well as practice were divided as to whether those who had no visa status were eligible under the National Health Insurance Act and it is understandable that the national health insurance officer considered that the claimant was ineligible. Although the rejection was unlawful under the National Health Insurance Act, it is impossible to find negligence of the public officer in charge of the issue.

Note: It is interesting that the Court considers the unlawfulness of an act leading to the grant of primary remedies does not necessarily entail secondary remedies. This (lack of) relationship between the primary and secondary remedies is repeatedly reaffirmed by the Supreme Court: *see e.g.* Judgment of 19 February 2008, *Minshu*, vol. 62, p. 445.

2. Limit of Discretion: Administrative Branch

Supreme Court, Judgment of 27 April 2004, *Minshu*, vo. 58, p. 34.

Facts: It was well known already in the beginning of the 20th century that miners tended to suffer from pneumoconiosis. The Government took various regulatory measures to oblige mining companies to take necessary measures to prevent or reduce dust that causes pneumoconiosis. One of the effective measures was to use so-called "wet" drills, equipped with water sprinklers. Although the Government obliged to use such wet drills in most of mines, it did not do so as regards coal mines until 1986. A number of coal miners who suffered from pneumoconiosis demanded that the Government should pay compensation.

Held: It was scientifically and medically evident already in the beginning of the 1960s that the use of wet drills was necessary to prevent pneumoconiosis. The inaction of the Government is patently unreasonable in light of the object and purpose of the Mine Safety Act (Act No. 70 of 1949). The Government is required to pay compensation to the claimants.

Note: This is the very first case in which the Supreme Court held the Government to be liable in the exercise of its discretion. The amount of compensation varies up to 25 million yen (approx. 250,000 euros), depending on the state of the disease.

3. Limit of Discretion: Legislative Branch

Supreme Court, Judgment of 14 September 2005, *Minshu*, vol. 59, p. 2087.

Facts: Since 1998, Japanese nationals residing abroad can vote for national elections. However, they were only able to vote in the proportional representation constituency and not in a local electoral district (for example, for the district in which the eligible voter last resided in Japan). A number of Japanese residing abroad demanded that the Diet should legislate so as for them to vote in local electoral districts and that the State should pay compensation for past elections in which they had not been able to vote in local electoral districts.

Held: Such a limitation is unconstitutional and they should be made able to vote in local electoral districts starting from the next election of either House of the Diet. As for compensation, since the Diet failed to legislate, for more than a decade following the introduction of a relevant bill, so as to make it possible for Japanese residing abroad to vote in local electoral districts, the Court considers that the compensation under Art. 1(1) of the State Redress Act is required. The State shall pay 5,000 yen (approx. 50 euros) to each of the claimants.

Note: This is the very first case in which the State is required to pay compensation for the lack of legislation.

4. Limit of Discretion: Judicial Branch

Supreme Court, Judgment of 12 March 1982, *Minshu*, vol. 36, p. 329.

Facts: The claimant lost in a commercial litigation but did not appeal. He however noticed afterwards that the judgment was clearly wrong in failing to apply the applicable law and demanded that the State should pay compensation under Art. 1(1) of the State Redress Act.

Held: Even if there were errors in the original judgment that would certainly have been rectified if the case had been appealed, the State shall not be held liable under Art. 1(1) of the State Redress Act, except in extraordinary circumstances, such as the one in which a judge intentionally renders a wrong judgment.

Note: There has been no case in which the State is required to pay compensation for a wrong judgment of a court.

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